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International protection of human rights

Urfan Khaliq

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This is one of a series of module guides published by the University. We regret that owing to pressure of work the author is unable to enter into any correspondence relating to, or arising from, the guide.

University of London
Publications Office
Stewart House
32 Russell Square
London WC1B 5DN
United Kingdom

london.ac.uk

Published by: University of London

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Module descriptor

GENERAL INFORMATION

Module title

International protection of human rights

Module code

LA2029

Module level

5

Enquiries

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk/

Credit

30

Courses on which this module is offered

LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

International protection of human rights is offered as an optional module to students studying on the Standard Entry and Graduate Entry LLB courses. It is also offered as an Individual Module. Credits from an Individual Module will not count towards the requirements of the LLB.

This module concerns the protection afforded to individuals under international law and examines fundamental concepts, principles, theories and philosophies underpinning the law of international human rights, as well as the mechanisms installing/enforcing and monitoring these rights.

MODULE AIM

The first part of the module aims to impart an understanding of the context in which international human rights laws operate and to understand that their nature is not uncontested. The second part of the module aims to scrutinise the manner in which rights are protected and the institutions and machinery that have been established at the United Nations level to that end. The next part of the module aims to examine the regional machinery which exists for the protection of rights in Europe, Africa and the Americas. The final part of the module examines a number of key issues and rights, such as the rights of women and children, the right to religion and freedom from torture, and the extent and limits of effectively realising such rights in the broader context studied earlier.

LEARNING OUTCOMES: KNOWLEDGE

Students completing this module are expected to have knowledge and understanding of the main concepts and principles of the protection of human rights at the international level. In particular they should be able to:

1. Explain and analyse the mechanisms and machinery by which rights are protected within the UN system and by certain universal and regional human rights treaties;
2. Demonstrate understanding of the legal, moral, political and economic context of the module;
3. Comprehend the distinction between 'universalism' and 'cultural relativism' and the implications for understanding this field of law.

LEARNING OUTCOMES: SKILLS

Students completing this module should be able to:

4. Apply their knowledge to analyse complex legal questions;
5. Critique a range of legal materials and arguments.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

(a) *Human rights and international law*. The nature of international law. The relationship between international law, human rights and domestic law. The status of the Universal Declaration. The sovereign state and international law. The individual in international law.

(b) *Philosophies of human rights*. The nature of human rights. Universalism. Cultural relativism and other theories. Rights in Islam. The Bangkok Declaration. Rights and social transformation. Rights and identity.

(c) *Human rights and the international legal and economic order*. Human rights and the United Nations. The transformation of human rights in the post-war period. Human rights and the IMF, the World Bank and the WTO. The New International Economic Order and the right to development. International Civil Society.

(d) *The UN system for the Protection and Enforcement of Human Rights*. The UN Charter and the institutions of the UN. The Universal Declaration. Enforcement mechanisms in the UN system. The treaty bodies. The International Covenant on Civil and Political Rights. The Optional Protocols. The International Covenant on Economic, Social and Cultural Rights. The reporting system relating to the Covenants.

(e) *The Council of Europe system*. Examining the European Convention on Human Rights and the European Social Charter system.

(f) *The Inter-American system*. The American Convention on Human Rights. The jurisprudence of the Inter American Court. Country Reports and the Human Rights Commission.

(g) *The African system*. The Organization of African Unity. The African Charter on Human and Peoples' Rights. The Protocol on the Rights of Women. The African Charter on the Rights and Welfare of the Child. The protection of refugees' rights.

(h) *The human rights of women*. The nature of women's rights. The Convention on the Elimination of All Forms of Discrimination Against Women. The Optional Protocol. The Declaration on the Elimination of Violence Against Women. The Special Rapporteur on Violence Against Women.

(i) *The Elimination of Racial Discrimination*. The International Convention on the Elimination of All Forms of Racial Discrimination and the rights of indigenous peoples.

(j) *The prohibition of torture.* Examining the 1984 UNCAT and Optional Protocol and 'Torture in Action'.

(k) *The human rights of children*. The Convention on the Rights of the Child. Child labour. Child soldiers. Children in the criminal justice system.

(l) *The Right to Religious Freedom*. Universal documents and approaches, regional approaches and the right in action.

(m) *The rights of the refugee.* The nature of refugee rights. The recent history of the refugee. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. Women and girls as refugees. The Convention and national law.

(n) *Dealing with Gross Atrocities: International Humanitarian Law*. International humanitarian law, the International Criminal Court and the trial of Saddam Hussain.

LEARNING AND TEACHING

Module guide

Module guides are the students' primary learning resource. The module guide covers the topics in the syllabus and provides the student with the grounding to complete the module successfully. It contains the Module Descriptor, which sets out the learning outcomes that must be achieved. It also includes the core, essential and further reading and a series of activities designed to enable students to test their understanding and develop the relevant skills. The module guide is supplemented each year with the pre-exam update, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students.

The Online Library

The Online Library provides access to:

- the professional legal databases LexisLibrary and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core reading

Students should refer to the following core texts. Specific reading references are provided for these or another text in each chapter of the module guide.

- **De Schutter, O. *International human rights law: cases, materials, commentary*. (Cambridge: Cambridge University Press, 2019) third edition [ISBN 9781108463560].**
- **Bantekas, I. and L. Oette *International human rights: law and practice*. (Cambridge: Cambridge University Press, 2020) third edition [ISBN 9781108711753].**

ASSESSMENT

Learning is supported through formative activities and tasks in the module guide, including self-assessment activities, with feedback. These formative activities will prepare students to reach the module learning outcomes tested in the summative assessment.

Summative assessment is through a three hour and fifteen minute examination. Students are required to answer three essay or problem-type questions out of seven.

Please be aware that the format and mode of assessment may need to change in light of extraordinary events beyond our control, for example, an outbreak such as the coronavirus (COVID-19) pandemic. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

Students are permitted to bring into the examination room the following specified document:

- ***Hart core documents on European and international human rights 2022–23*** **(Bloomsbury).**

1 Introduction

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Introduction

This module guide acts as a focal point for the study of International protection of human rights (IPHR) on the University of London LLB. It is intended to aid your comprehension by taking you carefully through each aspect of the subject. Each chapter also provides an opportunity to **digest** and **review** what you have learned by allowing a pause to think and complete activities. At the end of each chapter there are **sample examination questions** to attempt once you have completed the Further reading.

You will find that the legal discussion on this module ties in closely with numerous social, political and economic issues that are occurring throughout the world, and keeping in touch with these is obviously essential. The initial learning period will be greatly eased if you understand the context within which international events that are relevant to human rights take place. All of the major national and international newspapers as well as organisations with a global news presence, such as the BBC, CNN and Al Jazeera, address international human rights issues – although you must always be careful of bias in reporting. Many, if not all, of these organisations have an online presence and are easily accessible. However, it is imperative that you rely on sources that are reputable and trustworthy. A knowledge of these events is certain to stimulate your enjoyment of human rights law!

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **approach the study of IPHR in a systematic way**
- **understand what the various elements of the text are designed to do**
- **begin your study of IPHR with confidence.**

1.1 Studying the international protection of human rights

Human rights can be the most exciting and inspiring of all areas of law to study. It can also be the most frustrating. The inspiring quality of human rights comes from their promise to protect individuals from arbitrary and tyrannical power. Human rights can also be disappointing because the reality of rights routinely falls so far from the ideal. In fact, the more one engages with human rights, the more it becomes clear that commitments made to human rights by governments are often rhetoric. It is always easier to accuse one's opponents of human rights abuses than it is to put one's own house in order – human rights are often used as an ideological weapon in global politics. This has long been the case and continues to be so. The international institutions dedicated to promoting and protecting human rights offer some source of hope – but they can also appear bureaucratic, overly politicised and feeble against those governments that have the political will and power to flout them.

Another issue worth confronting from the very beginning is the fundamental paradox of the international system that seeks to protect human rights. The present mechanisms rely on the will of sovereign states. However, sovereign states are precisely those bodies that human rights seek to limit. International human rights law works on the premise that the body ultimately responsible for violating individual rights – the state – is also the very entity that is seen as the protector of those rights and is to be held accountable by mechanisms that the state itself has agreed to. Indeed, we will see that in the early years of the United Nations (UN), the commitment of many governments to the idea of international human rights was somewhat lukewarm for this reason. They did not want to be subject to international scrutiny with regard to their own internal and external affairs. The fundamental problem of international human rights, then, is in demanding that sovereign states limit their own power in the interests of human rights.

Although there has been a marked degree of success in securing a commitment to the 1948 Universal Declaration of Human Rights and the covenants and treaties that we will examine, the suspicion remains that nations either 'opt out' of those rights that they find inconvenient, or simply enter into 'paper' commitments without putting the resources and measures in place to achieve the necessary reforms. The issue of how nations are required to honour their human rights commitments is complex and relates to broader issues in global politics. During the Cold War, human rights were often an ideological weapon used by both sides to highlight the superiority of each system. Thus, the Western states highlighted abuses only in those nations that were aligned with the Soviet bloc rather than the 'Free World', notwithstanding the very serious human rights abuses in some of the latter states. The thawing (and perhaps ending) of the Cold War may have redrawn the political map of the world, but the sense in which human rights are often at the mercy of political and ideological processes remains. We will examine this as a theme, among a number of others, but key here is the political power and (ab)use of that power by States toward the 'other': individuals who are portrayed as not part of society – so minorities in some way. This can be seen in terms of those seeking asylum, racial or religious minorities, those with dissident political views or whose sexuality is not seen as 'normal'.

If we move from the politics of human rights to the nature of the subject itself, there are also issues that need to be confronted from the beginning. What can often seem difficult when studying human rights is the proliferation and duplication between different treaties within the UN system. There are also distinctions between the UN system and the regional systems, such as those relating to Africa, Europe and the Americas. This, in part, reflects the incremental development of human rights law.

1.2 Approaching your study

It cannot be stressed enough that the module guide takes a broader historical perspective on events. To be accurate, events must be considered in a historical context. Current and on-going developments very rarely change the course of events

but must be seen as part of broader trends. This guide thus specifically ensures that events are considered more holistically.

This guide is designed to be your first reference point for each topic covered on the module. Read through each chapter and the Core readings carefully. The activities occur at points in each chapter where you need to pause and digest the information you have just covered. That means you should stop and think about what you have just learned. Use the activity at that point to aid your reflection. Read it and think generally about the issues it is trying to address.

Feedback on most of these activities is provided at the end of the guide, but try not to read the feedback immediately. Do this throughout the chapter, and when you have completed the chapter, move to the Essential reading. After this, give yourself some time to think about what you have learned or, if things are unclear, you may need to read over certain points again. Now attempt the activities. Use them as an opportunity to test your understanding of the area. At that point, read the feedback provided to see if you are on the right track. Once you have completed this, move to the Further reading. Again, after completing the Further reading, give yourself time to think and re-read. Finally, you should attempt the sample examination questions at the end of each chapter.

Go through the guide in this way, covering each chapter in turn. Each chapter builds up your knowledge of the subject and so dipping into the guide as you feel like it will not work. Later chapters presume you have covered and understood the earlier ones. As we explain below, you will also have to monitor case developments and reform initiatives, and seek out new IPHR writing to flesh out your understanding of the subject and develop your independent thought.

1.2.1 Sources

Core texts

There are a number of textbooks which cover the topics to be discussed very well. The textbooks have different approaches as well as different strengths and weaknesses. These have been set out below. Not every textbook covers everything on the module in detail, so do be aware of this when making a decision as to which book(s) to buy. You are strongly advised to buy the following **two** books:

- **De Schutter, O. *International human rights law: cases, materials, commentary*. (Cambridge: Cambridge University Press, 2019) third edition [ISBN 9781108463560].**

This is a very good book. It covers most things very well.

AND

- **Bantekas, I. and L. Oette *International human rights: law and practice*. (Cambridge: Cambridge University Press, 2020) third edition [ISBN 9781108711753].**

This is an interesting book which considers most issues well but does not cover all of the module.

Recommended texts

Regular reference is also made throughout the module guide to:

- **Alston, P. and R. Goodman *International human rights*. (Oxford: Oxford University Press, 2012) [ISBN 9780199578726].**

This is a superb book – it is thought-provoking and comprehensive. It is, however, now dated for some purposes and some students find it occasionally goes off on a tangent. Alston and Goodman is broader and more reflective than the two core texts. You are strongly advised to have access to this book. An idea may be for you to buy a copy between a few of you. A new edition has been promised for some years; hopefully, it will appear soon.

In addition, you will need to buy or have access to:

- **Moeckli, D., S. Shah, S. Sivakumuran and D. Harris (eds) *International human rights law*. (Oxford: Oxford University Press, 2022) fourth edition [ISBN 9780198860112].**

This is a superb collection of essays drawing out various issues. Written by numerous authors, it is an excellent book and we will be using many of the chapters to supplement the readings from your textbook of choice.

In addition we will be referring extensively to two more books:

- **Shelton, D. (ed.) *The Oxford handbook of international human rights law*. (Oxford: Oxford University Press, 2015) [ISBN 9780198748298] (available in Oxford Handbooks Online via the Online Library).**

This is not a textbook but contains some superb essays – you will need to read some of the discussions in it, which will be made available to you.

- **Sheeran, S. and N. Rodley (eds) *The Routledge handbook of international human rights law*. (Abingdon: Routledge, 2016) [ISBN 9781138203976] (available in VLeBooks via the Online Library).**

This book contains some superb discussions – again, you will need to read some of the discussions in it, which will be made available to you.

Sometimes, the sheer volume of materials may, for some students, seem overwhelming. This guide does its best to break matters up and introduce materials and concepts to you in a clear and coherent way. However, books you may find useful to supplement it are:

- **Shelton, D.L. *Advanced introduction to international human rights law*. (Cheltenham: Edward Elgar, 2020) second edition [ISBN 978183910 3209].**

This text does not cover materials in the same depth, using a similar method or in the same order as this guide. However, for those parts of the guide that do not deal with substantive rights, it is a very useful additional resource. One advantage of this book is that it helps to build up knowledge and understanding, which you can then add to with the other readings. It is text only so it is descriptive and that is both its strength and weakness. It only gives one perspective but it is fair, even-handed and accurate – all important qualities.

- **Kälin, W. and J. Künzli *The law of international human rights protection*. (Oxford: Oxford University Press, 2019) second edition [ISBN 9780198825692] (available in Oxford Scholarly authorities in International Law via the Online Library).**

This is a more substantial volume than Shelton and has many of the same qualities. It is also written in a style that is perhaps a little dry and less inspiring but that does not detract from its other qualities.

- **Donnelly, J. and D. Whelan *International human rights*. (Abingdon: Routledge, 2020) sixth edition [ISBN 9780367217853].**

This is a very good book about human rights and their history as well as some key contemporary challenges. It has been through several editions and is well worth your time.

Documents books

It will be very useful for you to have easy access to the key treaties and documents the module will be referring you to. All documents can be accessed for free online if you use your internet search engines.

There are various collections published by *inter alia* Oxford University Press and Cambridge University Press (called *International human rights law documents* or a variation thereof), which are more useable. It is strongly advisable for you to obtain such a published collection as you will learn your way around the treaties, their approaches and structures, and you can flick through them and familiarise yourself with the wealth of documents related to the issues you will be studying.

Online human rights resources

- **The UN Audiovisual Library.**

The UN Audiovisual Library of International Law is an outstanding resource – the lectures and documents on human rights and refugees, for example, are quite superb. Please explore it and return to it as we examine various topics.

- **The Office of the High Commissioner for Human Rights.**

A super resource through which you can link to all the key UN bodies related to human rights matters as well as key documents and treaties. Please consult this regularly and use the materials there as you work through this module guide.

FURTHER READING ON INTERNATIONAL HUMAN RIGHTS LAW

There are numerous very good books on aspects of international human rights law. It will be worth you trying to consult some of these from time to time. Some will be reproduced for you as needed or will be available to you via the Online Library of the University of London.

- **Gearty, C. and C. Douzinas (eds) *The Cambridge companion to human rights law*. (Cambridge: Cambridge University Press, 2012) [ISBN 9781107602359].**
- **Mégret, F. and P. Alston (eds) *The United Nations and human rights: a critical appraisal*. (Oxford: Oxford University Press, 2020) second edition [ISBN 9780198298380] (available in Oxford Scholarly authorities in International Law via the Online Library).**

Not textbooks but collections of mostly excellent essays that draw out numerous themes of this module. The latter is only focused on the UN and human rights but covers all dimensions and is recent. Both are well worth consulting if you can.

- **Harris, D., M. O'Boyle, E. Bates and C. Buckley *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*. (Oxford: Oxford University Press, 2018) fourth edition [ISBN 9780198785163].**
- **Rainey, B, P. McCormick and C. Ovey *Jacobs, White, and Ovey: The European Convention on Human Rights*. (Oxford: Oxford University Press, 2020) eighth edition [ISBN 9780198847137].**

Classic black-letter treatises on the European Convention; comprehensive and doctrinal. The best at what they do.

- **Joseph, S. and J. Castan *The International Covenant on Civil and Political Rights: cases, materials, and commentary*. (Oxford: Oxford University Press, 2014) third edition [ISBN 9780198733744] (available in Oxford Scholarly authorities in International Law via the Online Library).**

A very good collection on the ICCPR, very legalistic but covers the issues well and accurately. Equally excellent is:

- **Taylor, P.M. *A commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's monitoring of ICCPR rights*. (Cambridge: Cambridge University Press, 2020) [ISBN 9781108498852].**
- **Saul, B., D. Kinley and J. Mowbray *The International Covenant on Economic, Social and Cultural Rights: commentary, cases, and materials*. (Oxford: Oxford University Press, 2016) [ISBN 9780198790464] (available in Oxford Scholarly authorities in International Law via the Online Library).**

A super collection on the ICESCR. Available in paperback.

FURTHER READING ON PUBLIC INTERNATIONAL LAW

The law of international human rights is a specialism of public international law. Understanding the context and background of international human rights law requires an understanding of public international law. It is not necessary to understand all or indeed much of public international law, but it is important to understand certain

aspects of it. The module guide will cover aspects of public international law to provide this context, but if you wish to further your knowledge and understanding, you will benefit from consulting either:

- **Shaw, M.N. *International law*. (Cambridge: Cambridge University Press, 2021) ninth edition [ISBN 9781108733052], OR**
- **Klabbers, J. *International law*. (Cambridge: Cambridge University Press, 2020) third edition [ISBN 9781108732826].**

Legal journals

A good student is expected to be familiar and up to date with the latest articles and books on this subject. International protection of human rights articles often appear in the key law journals. It is essential that you keep up to date with developments reported in these journals. Specific dedicated international law or human rights journals are the most useful, for example:

- ***European Journal of International Law (EJIL)***
- ***European Human Rights Law Review (EHRLR)***
- ***International and Comparative Law Quarterly (ICLQ)***
- ***American Journal of International Law (AJIL)***
- ***Human Rights Quarterly (HRQ).***

1.3 The examination

Important: the information and advice given in the following section are based on the examination structure used at the time this guide was written. However, the University can alter the format, style or requirements of an examination paper **without notice**. Because of this, you are strongly advised to check the instructions on the paper you actually sit.

Although there are many ways to achieve examination success, the following is my advice on how to deal with IPHR law examinations.

1.3.1 Preparation

No amount of last-minute study will solve the problem of a lack of preparation. You must begin your examination preparation from **the first day the module begins**. Using this guide as a starting point, take careful condensed notes of everything you read. When you have finished a section, identify and write down a list of the key points that will act as a memory trigger for you when you return to that section. While the sample examination questions in this guide are a good way to practise, you should go beyond this and practise answering old LLB examination questions. Be disciplined about this exercise by pretending you are doing it under examination conditions. Give yourself the correct amount of time to answer **each** question, including reading and planning time.

You should plan out **each week of study** in advance using a diary. You should also allow time for a review of the week's work, and at the end of the month, allow some time for a wider review of what you have achieved in the preceding month. Remember that examinations are not intended to be an accurate assessment of your knowledge of IPHR law. They are a test of your ability to answer certain questions on IPHR on one particular day in one particular year. As such, you need to revise constantly over that year to give yourself the best chance of performing on the day. You also need to be physically and mentally well, so make sure you do not overwork; eat well and include social and physical activities in your weekly schedule.

Three months before the examination you should draw up an examination revision schedule. At this point you should have been working consistently and have a good set of notes to revise from. You will now need to decide what subjects you will revise for the examination. This needs careful thought; many students only revise the bare

minimum number of questions, which leaves them vulnerable to one or more of these areas not being on the examination or one or more of the areas being combined in one question. It also means the student has little choice. For these reasons, if you are well prepared at this point, you should plan to revise a minimum of six areas. Do include time in your examination revision schedule for practising old examination questions under examination conditions.

1.3.2 On the day of the examination

If you can, take the night before the examination off and do something relaxing. If you have to revise the night before, make sure you finish at a reasonable time and get a good night's sleep. On the morning of the examination go over your revision notes briefly then put them away and go to the examination without them. You don't need them now if you have done the work, so just try to relax before the examination. Give yourself plenty of time to travel to the examination as you do not need any extra stress on the day.

When the examination starts you will have to answer a set number of questions. Read the whole paper question-by-question very carefully and then decide which questions to attempt. Do not just pick your favourite topic: try to evaluate whether another question is easier for you to answer even if it is not your favourite topic. Remember, you are trying to maximise your marks. When you have decided which questions to do, draw up a brief plan of how you will answer each question. Then once you have done this you should begin answering the first question.

Timing is very important here: divide up the total allowable examination time into time for reading and planning (five minutes for each question) and time to actually write the answer and finally time to review each question (about 5 minutes). Remember to stick rigidly to this – that means you stop writing immediately when the writing time you have allotted is up. If you do not, you are throwing marks away. Few students understand this but it is much harder to squeeze marks out of a question you have been answering for 40 minutes or so than from a new question. By the time 40 minutes or so are up you will have probably got all the easy marks, and all that will be left are the difficult marks. It is much better to stop and start on a new question from which there are still lots of easy marks to pick up.

1.3.3 Answering the question

You will by now be sick of being told that your number-one aim in the examination is to answer the question. You are told this constantly both because it is true and because failing to abide by this simple rule is the main cause of failure in examinations. So take this advice seriously – at every point in the examination you must ask yourself whether you are answering the question. Remember, you are almost never asked in an examination to provide a general description of an area of law or provide an overview of the various arguments for or against a particular point of view. Lawyers **argue** and that is what it is about – not unsubstantiated opinion but reasoned argument recognising weakness and strength in your own and the opposing argument but nevertheless arguing consistently for a particular point. The examination format seems to make students forget this.

In general, you will encounter two distinct types of questions, problem and essay. Problem questions are relatively straightforward – you simply apply the law to the facts of the question. To do this you look to see what you are being asked in the question – this will help you decide what facts are relevant. For example, if you are asked to 'advise the rapporteur', then only information which impacts on the rapporteur will be relevant. You then go through each line of the question, drawing out the relevant facts, applying the law to it and answering the question. Essay questions cause more difficulty as they provide more scope for a general discussion that fails to answer the question. Never, ever read an examination question, identify it as a particular area – for example, torture or cultural relativism – and then simply write an essay covering all you know about that topic. You will fail. Read the question, identify the area and analyse the question. Break it down into its constituent parts, and

really think 'what am I being asked here?' and 'how can I best answer it?' When you decide this, try using the words of the question in your first sentence as a discipline to focus yourself on answering the question.

For example, let us take a hypothetical question.

'Before one assesses the effectiveness of the UN system for the enforcement of Human Rights, one has to be clear about the meaning of "enforcement".'

Discuss.

You should note that it is not actually a question; rather it is a challenging statement followed by an invitation to discuss it. The challenge is in the difficult question of **enforcement**. This type of question is often interpreted by students as an invitation to generally discuss the principle of the UN system for human rights – but it is not. You are being asked to argue for or against this statement, which focuses on enforcement. It does not matter whether you argue for or against it as long as you substantiate your argument with cases, treaties, actions of states, UN resolutions, academic commentary and so forth, and you are consistent. You must follow the argument through to the end, identifying weaknesses and strengths but holding firm to your argument. If things are uncertain, as international law often is, then identify the uncertainty and give your substantiated opinion as to which course the law should take, all the time asking yourself: 'am I answering the question?' Remember as well that an essay question has a **beginning** (where you introduce your argument), a **middle** (where you set out the detail of your argument) and an **end** (where you conclude by repeating briefly your argument). If you follow this format, it will help you focus on your argument.

Reminder of learning outcomes

By this stage you should be able to:

- **approach the study of IPHR in a systematic way**
- **understand what the various elements of the text are designed to do**
- **begin your study of IPHR with confidence.**

Good luck!

NOTES

2 International law and human rights

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Introduction

International human rights law is broadly a subdivision of public international law. It is analogous to contract or tort being a part of the law of a certain jurisdiction, be it England and Wales or the USA. The legal system of which the specialism is a part bears all the hallmarks of the broader system but has its own peculiarities as well. In public international law there has recently been discussion of the 'fragmentation' of international law into various specialisms, such as international human rights law, international environmental law, international humanitarian law and the international law on the use of force. Although each of these labels is convenient shorthand for an area of public international law, they are also misleading in that they do not refer to a completely separate area of law. Each of these 'specialisms' is part of public international law as a system and they have many common features: for example, how the law is made and enforced. Human rights law is not just 'international'; it is also a part of domestic law. This may be due to how the particular state relates to international law – which will be discussed below. Additionally or in the alternative, the state may seek to protect human rights in its domestic law, such as the provisions of a written constitution, which will be a distinct source of norms for the protection of such rights. 'Human rights law' is thus not a straightforward term but one that has one meaning for academic study and a slightly different meaning in practice, where it may be an amalgam of general international law, a specific treaty, the relationship between international law and domestic law in that country, and the provisions of domestic law relating to the issue at hand.

A study of 'international human rights law' thus has to be in the context of public international law and requires an understanding of the general principles of international law. To this end, we will identify the peculiarities of international law, identify its sources and show how they relate to the protection of human rights.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **identify the sources of international law**
- **explain the relationship between international law and domestic law**
- **understand the relationship between international law, domestic law and the international law of human rights.**

Core text

- **De Schutter, Chapter 1 'The rise of international human rights'. This is very lengthy and goes beyond what we need to discuss at this point but do try to read it all.**

Essential reading

- **Shaw, Chapter 3 'Sources' and Chapter 4 'International and municipal law' (available on the VLE and in the Online Library) OR**
- **Klabbers, Chapter 2 'The making of international law' (available on the VLE and in the Online Library).**

Further reading

- **Alston and Goodman, Chapter 1 'Human rights concepts and discourse' and Chapter 2 'The human rights regime: background and birth'. Read these as soon as you can.**

You can also supplement the readings on international law by consulting:

- **Thirlway, H. *The sources of international law*. (Oxford: Oxford University Press, 2019) second edition [ISBN 9780198841821] Chapter 2 'Treaties and conventions as a source of law', Chapter 3 'Custom as a source of international law', Chapter 4 'General principles of law as a source of law' and Chapter 5 'The subsidiary sources' – these will give you a level of detail you may not need but may be useful for context.**

Activity 2.1

Examine a selection of the week's newspapers and pick out three reports which demonstrate the nature of the international legal system. What questions do they raise?

2.1 A brief history of international law

International law is as old as society itself. It is worth breaking the term 'international' down: inter-nation-al. It is the law between nations – indeed, an earlier term for what we now call 'international law' was the 'law of nations'. Political entities – be they city states in Europe, empires in what is now China and Egypt or tribes and nations in North America – have existed for millennia. These entities of course had to interact with others, most usually those near them – be it for trade or conflict – and thus some basic rules had to be established. Messages had to be exchanged, for example, if one political entity wished to trade with another. It is no surprise that the norms on diplomatic relations are the oldest rules of international law. States also often engaged in conflict and rules were required to regulate behaviour and conduct. Whatever states agreed between themselves, for example, not killing children or priests, was what became international law. Thus, the earliest expressions of international law were norms that reflected the practices of states. These became known as customary international law, which is the oldest of the sources of international law.

Modern international law stems from the consequences of European history and associated political developments. Central to its development is the Treaty of Westphalia (1648), also known as the Peace of Westphalia. This was one of a series of treaties agreed at the end of the religious wars in Europe and it created a network of sovereign states with formal equal standing. Each state was responsible for its internal affairs and others could not and should not interfere in such matters. International law in this form – which is the basis for international law as it still exists now – was born out of a need for states to cooperate with each other. As states have become increasingly integrated and have greater and more regular contact, the need for cooperation has increased. Globalisation as we now experience it has led to a proliferation of rules that are the product of international law.

International law in its classic 'European form', however, is a reflection of the culture and values of European states – thus Christianity was a major influence in its formative era. It is no coincidence that the state system we now have is based on the European model of statehood, as it is European powers which one way or another colonised all of the globe (except Antarctica); post-colonial states (the majority of the world's states) have emerged from their colonial experience, replicating the European model of statehood. This universalism of what was a system of 'European' international law necessitated evolution and transition. The genesis of this transition from a European Christian tradition to a more secular and legal one can be traced to the defeat of the French Emperor Napoleon and the settlement reached at the end of those conflicts – known as the Congress of Vienna, 1814–15. At this juncture, relations between European powers sought to maintain a balance of power, guaranteed by complicated legal procedures and alliances. As Martti Koskenniemi notes, 'Contemporaries increasingly saw Europe as a "system" of independent and equal political communities (instead of a *res publica Christiana*); they began to assume that the governing principles needed to become neutral and objective – that is, legal.' (See Koskenniemi, M. 'The politics of international law', *EJIL* 1(1) 1990, p.4. http://ejil.org/pdfs/1/1/1144.pdf)

As has been alluded to above in passing, international society has undergone an enormous transformation in the last 75 or so years and international law expanded massively in terms of both content and participants during the second half of the 20th century and the first two decades of this century. Technology and innovation are behind many such legal developments. For example, letters being sent abroad necessitated the establishment of the Universal Postal Union (UPU) in 1874 – which still forms the basis of how we send items abroad in the post. The invention of the telephone, aircraft, the internet and so forth have all necessitated regulation at the

international level. International law thus also slowly started to recognise participants that went beyond states. One only has to think in contemporary society of the UN, the World Trade Organization (WTO), the European Union (EU), the World Bank and the International Monetary Fund (IMF) as major participants – and the proliferation of such organisations is also important to note. In a similar vein, we can observe that the number of states has increased exponentially since the latter half of the 20th century. This can be seen in membership of the UN. To be a member of the UN an entity must be a state. Since the UN was established in 1945, membership has increased approximately fourfold.

The events behind this transformation relate to the liberation struggles against European empires, and the polarisation of power blocs brought about rival ideologies which manifested itself as the Cold War. The 'end' of the Cold War (1989–90) has led to some new issues and tensions arising in geopolitics but numerous other older issues continue to have relevance. For example, events in Syria since 2011 highlight many differing tensions: those brought about between Russian interests, on the one hand, and other states, on the other. The presence of militant forms of Islamic extremism, tensions between rival Muslim states and issues concerning the use of force all coincide. International law is currently undergoing a period of change but it is worth bearing in mind that normative change in international law occurs due to the existence of crisis – this is not the same as it being a discipline in crisis, which some (see, for example, Goldsmith J.L. and E.A. Posner, *The limits of international law.* (Oxford: Oxford University Press, 2007)) have provocatively and erroneously argued.

Activities 2.2–2.4

2.2 Why is the history of international law important to understanding its development?

2.3 How do you think international law changed between 1648 and the start of the 20th century?

2.4 What recent events are having an impact on the development of international law?

2.2 What is international law?

To understand international human rights law, it is important to understand international law. This is not straightforward as international law differs significantly from domestic legal systems. At its simplest, international law is a horizontal legal system, with states and very few other legal persons as the participants. States are all formally and legally equal – even though there is enormous disparity in their power, influence and wealth. This is in contrast to domestic legal systems, which are vertical in the sense that the state exists in a vertically superior position to individuals in their internal (domestic law) legal relationship. International law is also primarily but not entirely consensual in nature. We will return to this issue later when we look at *jus cogens* (peremptory or higher norms) and obligations *erga omnes* (binding upon all). But the issue of consent means that the manner in which the law is enforced will also differ from that in a domestic legal system.

In domestic legal systems we rely on the police to uphold the law, where it is being broken, and courts to enforce the law by punishing those who transgress it. This, however, only applies to domestic criminal law. A better analogy with international law is contract or tort, where there are courts but not anything analogous to an 'international police force'. A breach of contract in domestic law does not usually involve the police. It is possible, however, to take another to court for a breach of contract in the domestic context. In international law the difference is marked. The International Court of Justice (ICJ), based at The Hague, does act as a world court of sorts (indeed, it is sometimes incorrectly called the World Court) but it is not a compulsory court as such. The Court was originally established in the aftermath of the First World War (as the Permanent Court of International Justice) and in its current incarnation it has been established by the Charter of the UN, with the Statute of the Court an integral part of the Charter. The

UN Charter states that the ICJ is the principal judicial organ of the UN. The Court has the jurisdiction under Article 36 of its Statute to decide disputes of a legal nature submitted to it by states. It can also deliver Advisory Opinions when requested by certain organs of the United Nations, primarily the General Assembly and the Security Council. The jurisdiction of the Court is, however, based upon consent – a state cannot be taken to the ICJ against its wishes; it must have agreed with regard to the issue at hand to the ICJ having jurisdiction over it at some point or other and in some form or other.

It is important to bear in mind, however, that if the ICJ gives a judgment which a state that is party to a dispute does not find acceptable, there is often little that can realistically be done to compel the state in question to comply with the judgment. Under Article 94 of the Charter, the Security Council can decide on appropriate measures to give effect to an ICJ judgment but the problem is easy to see if the state in question is, for example, a permanent member of the Security Council with a veto power, or a close ally of such a state. The more powerful and influential a state, the less that can be done, and this is despite the fact that, under Article 59 of the ICJ's Statute, the ICJ's judgments are legally binding. By and large, however, states do comply with the judgments of the ICJ.

Activities 2.5 and 2.6

2.5 Characterise international human rights law.

2.6 How is international law different from domestic law?

Self-assessment question

Compare the role and function of the ICJ with that of a domestic court.

2.2.1 The sources of international law

Having discussed what international law is, it is important to turn to where it comes from. The most common starting place is Article 38, paragraph 1 of the Statute of the ICJ which, in declaring the Court's function to decide disputes 'in accordance with international law', goes on to detail the sources of international law as:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states

b. international custom, as evidence of a general practice accepted as law

c. the general principles of law recognised by civilised nations

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This list is far from complete and it was never meant to be. It simply refers to the sources (in practical order) that the Court will refer to when trying to determine a matter before it. The Court over time has recognised a number of other sources, and further other sources are now universally recognised. Other sources of international law include unilateral acts of international law by states and the decisions of certain international organisations – although both of these can also be considered to come within the list in Article 38. An important source of obligation in international human rights law (and also international environmental law) is **soft law**. The term is of course a misnomer – law is 'hard' but it is also flexible as it can be used as a term to describe a plethora of international instruments where there is no kernel of formally binding or identifiable obligation. It can encompass treaties (which are formal law) but which contain loose obligations or voluntary resolutions. It can also cover codes of conduct produced by organisations established by states. The term may also include statements issued by eminent international lawyers setting out various principles. Each of these will differ in the extent to which states may pay attention to them and the extent to which the ICJ will refer to them. Soft law can thus be seen as norms that are embryonic at the time of adoption but which may crystallise into an identifiable and definable legal obligation. (See further: Thirlway, Chapter 7 'Specialities: *jus cogens*, obligations *erga omnes*, soft law', Part II.)

The next part of this chapter will examine in more detail the sources of international law described above. It will also show how these sources include human rights material.

ACTIVITY 2.7

What are the sources of international law? Why is this an important issue for the international protection of human rights?

2.2.2 Treaties

The law that regulates treaties (a source of law in their own right) is neatly encapsulated in the 1969 Vienna Convention on the Law of Treaties. Thus, the law of treaties can be found in a treaty. In many senses this highlights some of the issues concerning sources of international law and their relationship, as the Vienna Convention is binding upon those who are party to it, as a treaty, and upon others as customary international law. This relationship between sources is one we will come back to but treaties provide the classic paradigm of nations committing themselves to binding obligations. Due to the primarily consensual nature of international law, it is important to bear in mind that the provisions of a treaty are only binding upon a state if it is party to that treaty.

The principal human rights treaties

The main treaties for our purposes are:

- the Convention on the Prevention and Punishment of the Crime of Genocide 1948
- the Convention on the Elimination of All Forms of Racial Discrimination 1965
- the International Covenant on Civil and Political Rights 1966
- the International Covenant on Economic, Social and Cultural Rights 1966
- the Convention on the Elimination of all Forms of Discrimination against Women 1979
- the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment 1984
- the UN Convention on the Rights of the Child 1989
- the UN Convention on the Rights of Persons with Disabilities 2006
- the Foundational Statute of the International Criminal Court
- the Hague and Geneva Conventions
- the African Charter
- the European Convention on Human Rights
- the American Convention on Human Rights.

It is important to note that there are a number of other human rights treaties but we do not examine them in this module. They include UN treaties such as the International Convention for the Protection of All Persons from Enforced Disappearance 2006 and regional treaties such as the Inter-American Convention on Forced Disappearance of Persons 1994.

Definition of a treaty

A treaty is defined in the Vienna Convention on the Law of Treaties (VCLT) 1969 as 'an international agreement concluded between states in written form and governed by international law…' (Article 2(1)(a)). The Vienna Convention is regarded as reflecting customary international law, and the definition contained therein of a treaty is accepted as referring to those agreements which are:

- in written form (treaties can be unwritten, but in this case the Vienna Convention would not apply)

- between states
- governed by international law.

It should be noted that treaties can be either between two states or parties (bipartite or bilateral) or between a number of states or parties (multipartite or multilateral).

States that are party to a treaty are referred to as Contracting Parties. States not party to a treaty are referred to as non-Contracting Parties.

The relationship between treaties and customary law

As alluded to above, treaties and custom have a clear relationship between them. The same obligation can extend to the same state from either source. The source of the obligation can be a treaty or custom and sometimes both. There is thus a complex relationship between treaties and customary law; the two sources tend in practice to overlap. If not, they may leave an intermediate area between them. The act of drafting and debating the provisions of a treaty often leads to clarity as to what is the content of the customary rule. Sometimes, states accept that the existing customary position needs to evolve and thus agree in the provision of a treaty to adapt it between themselves with an eye to the law evolving. Over time, the treaty provision that was progressive at the time of adoption may start to reflect the customary position as the customary rule and state practice evolve and come into line with the treaty provision.

Treaty law will normally supersede previous contrary customary international law. Generally, it can be said that in the event of inconsistency, whichever is the most recent – be it custom or treaty – prevails between the same parties. This, however, needs to take into account the fact that more specialised rules tend to prevail over more general ones in the event of a conflict. Article 53 of the Vienna Convention on the Law of Treaties does, however, void and terminate an existing treaty if a new peremptory norm of general international law emerges. A **peremptory norm** is one that is considered normatively superior to other rules of international law. The formal definition of a peremptory norm can be found in Article 64 VCLT, which defines it as:

> a norm accepted and recognised by the international community of states as a whole. As a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

To take an (extreme hypothetical) example, suppose in 1825, Britain and France agree in a treaty to trade in slaves. Subsequently, a peremptory norm develops (which it has) that slavery in all forms is to be prohibited and eradicated. Once such a peremptory norm is accepted as having developed, then the 1825 treaty becomes void and terminates. Article 64 VCLT is important in another regard as it takes Article 53 to its logical conclusion. Article 64 states that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Thus, a treaty now being agreed that regulated trade in slaves, for example, would simply be void and of no legal significance.

2.2.3 Reservations

A reservation is indicative of the consensual nature of international law. Reservations also highlight the pragmatism of international law in light of its now universal nature. A reservation is where a state seeks to exclude the application to it of certain provisions of a treaty which it is otherwise willing to accept. As Article 2(1)(d) VCLT defines it, a reservation is:

> [a] unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

The traditional approach was that a state could only insert a reservation if all other states to the party consented. In a diverse, interrelated and increasingly complex world this would make meaningful law-making virtually impossible. The 'common' level of agreement on many issues would be so low, it would make little or no positive

difference. Furthermore, any state which was not an original party to a treaty would require the agreement of all other states parties to that treaty. It would also mean that 'later' states could not express a view on the reservations of other states who were already party to the treaty. Both such consequences are iniquitous.

The ICJ had the opportunity to tackle the issue of the validity of reservations relatively early on in its current incarnation, when it was requested to provide an Advisory Opinion on the matter and did so in 1951. The timing was serendipitous as it was at a time when the Cold War had entered a deep freeze, and thus there were two clearly defined ideological blocs, but it was also early enough in the decolonisation process for the vast majority of new states not to have achieved independence. It was clear at the time that the global geopolitical situation was transforming and the ICJ's approach anticipated an increasingly diverse and divisive globe. In its Advisory Opinion the Court adopted a more flexible and realistic approach, an approach which was attractive to states and which can now be seen in Article 19 VCLT. Article 19 stipulates that a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made, or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

A reservation that does not fall foul of the above is deemed acceptable although of course there is much scope for disagreement as to whether a reservation, for example, is compatible with the object and purpose of a treaty. This is a real problem in the human rights field and is something we will return to later in the guide. It is also important to bear in mind that the VCLT sets out a number of principles that are relevant here: indeed, the foundational principle of the law of treaties is that of acting in good faith.

ACTIVITIES 2.8–2.10

2.8 Read the Vienna Convention on the Law of Treaties 1969, especially Articles 1–3, 17–36, 53 and 64.
No feedback provided.

2.9 Why are treaties an important source of human rights law?

2.10 What is the relationship between customary law and law stated in a treaty? Why could this be an important question for a human rights lawyer?

2.2.4 Customary law

What is custom?

Professor Brierly in his 1963 classic, *The law of nations*, defined custom as '[s]omething more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one'. Thus, at its simplest, customary law is how states behave because they feel they are legally obliged to do so. An example will help. One of the oldest rules of international law is the protection of envoys and diplomats. Each state both sends envoys and receives them. A state can be confident its envoys will not be harmed in another state and will not harm envoys of other states who are present in its territory. Over time, this practice was perceived as not just what states did but as how they were obliged to behave. At its simplest, that is customary international law. Article 38 (1)(b) stipulates two essential elements of customary law: (i) a 'general practice', and (ii) that practice is accepted as law – this is the 'mental' element, which is known as *opinio juris*. But *opinio juris* appears paradoxical. How can a practice develop into a rule if states have to believe the rule already exists before their acts of practice can be significant for the creation of the rule? In reality, the two elements – state practice and *opinio juris* – are closely intertwined. Thus, they cannot be seen in isolation but as overlapping considerations. Nevertheless there are still issues to be considered. For example, the

following things may need to be considered in determining if a customary rule exists.

a. For how long must states have behaved this way?

b. Which states must have behaved in the manner in question – is the practice of some states more important than that of others?

c. What is actually evidence of the practice or behaviour in question?

d. How do you determine the belief that the behaviour is obligatory?

e. When did that belief crystallise?

All of these questions are important and each one may affect the outcome of a dispute – it is important to bear in mind, however, that determining whether a rule is customary is not entirely scientific – it is relative. This was summed up very well by Judge Tanaka in his dissenting opinion in the *North Sea Continental Shelf Case* (1969) ICJ Reports 3 where he stated:

> the process of generation of a customary law is relative in its manner…The time factor, namely the duration of custom is relative; the same with…state practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinise formalistically the conditions required for customary law and forget the social necessity…

Returning to the questions above as to what is needed for a rule of customary international law to exist, with regard to practice the judgment of the majority of the ICJ in the *North Sea Continental Shelf* case is illustrative. At para.74 it noted:

> Although the passage of only a short period of time is not necessarily, of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked.

It would appear from the reasoning of the court that practice is established by those states whose interests are most affected and by uniformity of practice – the period of time is not the key factor. Thus, for example, the practice of states who have a coastline is more important than the views of land-locked states when it comes to determining a state's powers over the water adjacent to its land territories. So long as that practice is extensive and uniform, even if for a relatively short time, that will be sufficient.

That still leaves us with the questions related to why states behave the way they do: how do we prove the sense of obligation? It is not easy and we return to some of the discussion above concerning the relationship between practice and obligation. States behave in many ways – public statements by diplomats and ministers, arguments made before courts, national laws and how states have reacted to what other states do are all examples of state practice. In the very famous *Nicaragua* case *(Military and Paramilitary Activities in and against Nicaragua* (1986) ICJ Rep 14) the ICJ stated that:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, and not as indications of the recognition of a new rule…

This is very useful. We can evidence the sense of obligation states feel by considering how they react to the behaviour of other states. If states consider the behaviour of another state to be contrary to the existing rule – by stating this is so – that reinforces the existence of the rule as this is further practice believing the rule is law. If, however, a state accepts a breach of a customary rule then that undermines the existing rule and may lead to the establishment of a new rule – which reflects the more recent behaviour. However, there may and often will be a period when two rules exist, one binding some states, and the other rule binding others.

2.2.5 Resolutions and customary law

An issue that often confuses matters is the status of resolutions of the General Assembly of the UN. The most important thing to bear in mind is that General Assembly resolutions are not formally legally binding. Furthermore, the instruments adopted by the General Assembly that relate to human rights matters are adopted as 'declarations' and 'resolutions'. Neither of these suggest legally binding content. Notwithstanding this, it is without doubt that in some (very few in numerical terms) cases General Assembly Resolutions can be important in the development of customary rules. Each resolution is different, and it is important to examine the wording of the resolution in question and not to generalise.

2.2.6 General principles

What are 'general principles'?

Professor Crawford provides a useful general description of this source of international law:

> ...a rigid categorisation of sources is inappropriate. Examples of this type of general principle of international law are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas.
>
> (See Crawford, J. *Brownlie's principles of international law.* (Oxford: Oxford University Press, 2019) ninth edition, p.34.)

It would appear, then, that general principles describe a number of different concepts. Judge Ammoun in the *North Sea Continental Shelf* case described these principles as 'nothing other than the norms common to the different legislations of the world… transposed to the international legal system'. They can thus be procedural and also substantive. The ICJ in practice uses general principles – such as equity and good faith – but rarely specifically states that it is using them as a source of law.

2.2.7 Judicial decisions

The above are primary sources of international law. Judicial decisions are a subsidiary means for the Court to determine the law on a matter. The decisions of the numerous international courts and tribunals and the supreme domestic courts can be used by the ICJ to develop the content of international law. They are indicative as to what the law on a matter may be. In human rights law this is important as the number of international and regional bodies dealing with human rights issues has increased significantly. Likewise, domestic courts frequently deal with the application and interpretation of human rights instruments.

The ICJ is also competent to deliver Advisory Opinions on any legal question at the request of the General Assembly of the United Nations, the Security Council and other bodies so authorised. Advisory Opinions are, as the term suggests, only advisory. They are not legally binding, but the Court has delivered a number of opinions which have contributed to the growth of substantive international law.

Advisory Opinions which have been influential in the development of international law include:

- *Reparations for Injuries Suffered in the Service of the United Nations* (1949)
- *Advisory Opinion on the Genocide Convention* (1951)
- *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* 35 ILM 809 (1996)
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2003–04)
- *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (2019).

2.2.8 The principles *ex aequo et bono* and equity

Article 38 paragraph 2 of the Statue of the ICJ states that paragraph 1 of that Article 'shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'. To date, this provision has not been applied but it determines that the Court may decide a dispute according to the justice of the case providing the parties consent to this approach. This goes beyond the power of the Court to look to the equity of any given case, and allows the Court to 'go beyond the limits of the existing law'. Thus, as the ICJ commented, 'it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law'. (See *Fisheries Jurisdiction*, ICJ Rep 1974, p.33, para.78.)

2.2.9 *Jus cogens* and *erga omnes*

As was noted above, *jus cogens* describes certain normatively superior rules of international law, that is, rules that are so important that all states have an interest in their breach by others; and further, even if some are breaching it, the rule still continues to apply to all others. *Jus cogens* are rules of overriding obligation – they cannot be limited or suspended and apply to all so long as the international community of states as a whole does not develop a new rule. As was also noted above – the VCLT in Article 53 refers to them – if rules are *jus cogens*, they can void any act that is not in accordance with them. These rules thus express fundamental values.

Related to *jus cogens* but legally distinct, there are certain international legal norms in whose violation all states have a legal interest. These are the obligations *erga omnes*. These were first identified by the ICJ in its dictum in the *Barcelona Traction* case (*Belgium* v *Spain – Barcelona Traction, Light and Power Company, Limited, Second Phase* (1970) ICJ Reports, 3). At paragraphs 33–34 the Court stated:

> an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state… By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*…Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

The Court only gave an illustrative list of such obligations. Beyond those norms referred to by the ICJ in the *Barcelona Traction* case, there is disagreement over which others can be considered to be obligations *erga omnes*. At the very least, however, certain obligations under international humanitarian law and torture are now also universally accepted as having achieved that status.

This means that certain human rights are considered to be superior to other human rights norms and other norms of international law. This also means that there is clearly a hierarchy of human rights – some are arguably more fundamental than others. This hierarchy, where certain norms are more fundamental than others, is reflected in various treaties and is something we will come back to. The final point to be made relates to consent. International law is primarily a consensual system but obligations *erga omnes* have not expressly been consented to by states as such, they were first referred to by the ICJ. The ICJ would not, however, have articulated such a concept unless there was clear evidence that the majority, if not all states, accepted the legal prohibitions in question, such as torture, slavery and systematic racial discrimination. This does not mean that violations of these rights do not occur – slavery and torture are endemic throughout many, if not all, parts of the world – it simply means that all states have accepted that such activity should be prohibited and thus have consented to the development of such rules in some form or other.

2.2.10 The work of eminent jurists

Juristic writings are of value in that they may be referred to as a means of settling a dispute. Such work can assist in identifying what the law is at a particular time. International courts, especially the ICJ, rarely if ever expressly refer to such work; however, we know it is relevant and important. This is especially so if we consider that the ICJ does routinely refer to the work of the International Law Commission (ILC), a body set up by the General Assembly of the UN. The ILC is primarily composed of eminent international law professors, and its work has been incredibly important in clarifying aspects of international law, for example, the law of treaties and the issue of state responsibility. Thus, although the work of the ILC and the writings of jurists are not a source of law, they are important in the development and articulation of international law.

ACTIVITY 2.11

How could human rights issues raise concerns about sources of law?

2.3 International law, human rights and domestic law

2.3.1 Monism and dualism

The way in which a state accepts international law is a matter of domestic law. The traditional way in which this is considered is to draw a contrast between approaches, which are labelled monist and dualist. As the term suggests, a monist approach considers there is one legal order of which international law is a part. By definition, a dualist approach considers two separate legal systems – domestic law that applies internally and international law that binds the state in its relations with other states but has little role automatically in the internal legal system. In reality, there is a spectrum of approaches. States often adopt different approaches in respect of different types of international law. Thus customary international law may automatically be considered part of the domestic legal order but a treaty may only have effect internally if there is a specific legislative measure giving effect to it. In other states, custom and treaties to which the state is party are automatically part of the internal legal system. The essence of monism is that international law and domestic law are inherently part of one coherent system. The Netherlands is often considered a classic monist state.

The dualist theory holds that international law and domestic law exist in different spheres. There is no clash between them; each is supreme within its own area. The United Kingdom is a classic dualist state. A useful statement of the approach adopted can be seen in Lord Hoffmann's judgment in *R* v *Lyons* [2003] 1 AC 976. He stated:

> …it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them…Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation.

2.4 The Universal Declaration of Human Rights, 1948

In the sections above, we have been thinking about the sources of international law. We now turn to consider whether or not the 1948 Universal Declaration of Human Rights (UDHR) is legally binding. Whereas the drafters of the Declaration, and those who studied it in the early years of its operation, doubted whether the Declaration stated legally binding duties, the present position is arguably different.

In the final session of the Grand Assembly of the UN, the chair of the Assembly and representative of the United States, Eleanor Roosevelt stated:

> [the Declaration] might well become the international Magna Carta of all mankind…its proclamation by the General Assembly would be of importance comparable to the 1789 proclamation of the Declaration of the Rights of Man, the proclamation of the rights of man in the Declaration of Independence of the United States of America, and similar declarations made in other countries.

We will consider the Declaration in outline, and then address the question of its binding nature.

2.4.1 Outline of the Declaration

Article 1 articulates the underlying principles of the Declaration: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

This is clearly not legal language; rather, it is the statement of a philosophical or ethical principle. To be human is to have inherent qualities of reason and conscience; qualities that make one more than simply an individual: one is compelled to act towards others in a spirit of community. As the notes to the Declaration outline, this is what makes man different from animals: this is presumably why we can speak of human rights but not animal rights.

Article 2 puts forward two basic principles: equality and non-discrimination. These principles apply to the enjoyment of human rights and fundamental freedoms, and thus forbid 'distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Article 3 has been described as 'the first cornerstone of the Declaration'. It states the right to life, liberty and security of persons. This is a fundamental right, essential to the operation of the other rights of the Declaration. Article 3 introduces Articles 4–21. These articles detail civil and political rights and include freedom from slavery and servitude; freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; the right to a fair trial and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and residence; the right of asylum; the right to a nationality; the right to marry and to found a family; the right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; the right to peaceful assembly and association; and the right to take part in the government of one's country and to equal access to public service in one's country.

Article 22 has been called 'the second cornerstone of the Declaration'. This article can be read as an introduction to Articles 23–27, which enumerate economic, social and cultural rights. These rights include the right to social security; the right to work; the right to equal pay for equal work; the right to rest and leisure; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life of the community. Economic, social and cultural rights are predicated on the membership of a political community. Echoing Article 1, these rights are linked to the realisation of human dignity. Rather than legal claims, they are to be realised 'through national effort and international cooperation'. But, one must allow that acknowledgements must be made of the limited capacity of some states and thus the realisation of these rights is dependent on the resources of different states.

Articles 28–30 stress that **duties** complement **rights**. Article 29 states that 'in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements

of morality, public order and the general welfare in a democratic society'. It adds that in no case may human rights and fundamental freedoms be exercised contrary to the purposes and principles of the United Nations. Article 30 emphasises that no state, group or person may claim any right, under the Declaration, 'to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth' in the Declaration.

2.4.2 The legal value of the Declaration

At the time the Declaration was adopted in 1948, the consensus among those involved in drafting it and adopting it was that it was not meant to be legally binding. It was not drafted as a treaty; indeed, it was adopted as a declaration as there was no agreement at all that it should be legally binding, and so it was adopted with a view to subsequently being able to draft the principles and ideals in the UDHR in legally binding form. This is why what became the 1966 Covenants (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights) were adopted as treaties and it took the best part of 20 years of negotiation and compromise to reach legal agreement on the principles and rights set out in the 1948 Declaration.

However, might there be an alternative way of understanding the Declaration? It can be argued that the Declaration stated binding rules of customary law – after all, the principles were agreed over a number of years by representatives of the global community as it then existed. This, however, seems far-fetched as far as the position in 1948 is concerned. The Declaration was adopted by 48 states but eight states abstained from voting for it. Although it has been argued that this was due to politics, this is simply not nuanced enough and is far too dismissive of the opposition of some states. Furthermore, the states adopting the UDHR were hardly representative of the global community – and the opening statement 'all human beings are born free and equal in dignity and rights' was hardly credible when supported by numerous European colonial powers and the USA, which still had deeply segregated communities and systematically discriminated against populations who were primarily African-American.

There is, however, another way to consider the UDHR. The provisions of the UDHR were not customary international law at the time of the UDHR's adoption. However, the adoption of the UDHR led to a process over time, through the repeated adoption of other declarations and resolutions and treaties, whereby many but certainly not all of the provisions of the UDHR now represent customary international law. But recall the vagueness of the terms and the lack of articulation. The prohibition of torture and slavery are good examples. Other fundamental rights, however, which are undeniably customary are not mentioned in the UDHR – self-determination being an example. Thus, the UDHR has been of significant importance in the crystallisation of customary international law for some human rights but not all.

2.4.3 Remedies for breaches of human rights

Some human rights treaties stipulate that contracting states provide a remedy under domestic law for any breaches of the substantive rights entailed therein. This may be in addition to any enforcement mechanisms that may be established by the treaty itself. It is important to bear in mind, however, that certainly not all treaties require domestic remedies nor do they set up an enforcement mechanism. The 1951 Geneva Convention on the Rights of Refugees, a major treaty related to human rights matters, is a good example of a treaty that neither establishes an enforcement mechanism nor requires states to provide remedies, nor is it even implemented into the domestic law of states parties. It is certainly discernible that every recent major global human rights treaty adopted in recent years does establish an enforcement body. We will be examining this issue in great detail later in the guide. Not all treaties, however, require that a state party to the treaty provides for remedies of breaches of that treaty within the domestic law of the state party. An example of this sort of provision is Article 13 of the European Convention on Human Rights, which states:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

This needs to be read alongside those provisions of the Convention which establish a permanent specialised international human rights court that has the power to award damages to those whose rights, as protected by the substantive provisions of the Convention, have been violated.

In some cases, it may be possible to seek damages from perpetrators of breaches of human rights in domestic courts, either when an international agreement has been incorporated into domestic law, or where the rights in question are recognised as being part of customary international law, or the rights are recognised under the general principles of domestic law. Whether or not a particular domestic court can provide a remedy for a human rights violation is a complex question regarding the relationship between domestic law in that state and international law.

2.5 A note on the individual in international law

The protection of human rights under international law raises the problem of the status of the individual in international law. What follows is a cursory discussion of an issue that is dealt with in much more detail in later chapters.

At first glance, one might think that the various systems set up to protect human rights under international law would be able to function like a domestic legal system. An individual would be able to petition a court and obtain a legal remedy if the court found that the individual's human rights had been violated. This model does not apply to that part of international law that deals with human rights. In part, this is because, in international law, the state and not the individual is seen as having legal personality. International legal personality means that a body is 'capable of possessing international rights and duties and has the capacity to maintain its rights by bringing international claims'. (*Reparation for injuries suffered in the service of the UN*, Advisory Opinion, ICJ Rep, 1949, p.174.) Only states have the totality of rights and duties under international law. This effectively means that states, not individuals, are the subjects of international law. Indeed, individuals have no standing before the International Court of Justice. This poses a particular problem for human rights law. If human rights law affirms the rights of the individual then an international legal system that is predicated on the rights and duties of states is not the best way to protect individual rights. As was noted in the introduction, this is the central paradox of human rights law; the body that violates individual rights, the state, is the body made responsible for protecting individual rights as defined by the state and the method of enforcement is designed by the state in conjunction with other states.

It is, however, clear that international law now recognises in very limited contexts (human rights treaties) the rights of individuals. It is also clear that international law has since 1945 also recognised the duties and responsibilities of individuals for the perpetration of certain crimes. This relates to war crimes and crimes against humanity – which occur during situations of armed conflict. International law has developed enormously in both regards but it is important to bear in mind that both apply in limited contexts. Within these contexts, however, individuals now have standing. But as states design and agree the mechanisms, they rarely provide the sort of remedy that can be witnessed in domestic legal orders. The issue of the standing of the individual in international law raises the whole problem of the enforcement of human rights standards. It begs the question: 'what do we mean by enforcement?' As suggested above, lawyers tend to think of enforcement in terms of the remedies of courts. Understanding human rights law demands that one has a much broader 'political' grasp of when human rights standards might be enforced and when they might not.

Summary

International law, as the foundation for the international protection of human rights, tends to recognise states as the holders of rights and duties, not individuals. This has influenced the development of human rights law. We cannot think of the model of domestic law. Rather, we need to appreciate that enforcement mechanisms rarely depend on procedures that involve a court issuing a remedy.

Further reading

- **Bates, E. 'History' in Moeckli et al. (eds).**
- **Chinkin, C. 'Sources' in Moeckli et al. (eds).**
- **Sheeran, S. Chapter 6 'The relationship of international human rights law and general international law' in Sheeran and Rodley (eds) (available in VLeBooks via the Online Library).**
- **You should also consult the section on the UDHR available at the UN Audiovisual Library.**

Reminder of learning outcomes

By this stage you should be able to:

- **identify the sources of international law**
- **explain the relationship between international law and domestic law**
- **understand the relationship between international law, domestic law and the international law of human rights.**

Sample examination question

'Human rights problems occur in specific legal contexts. The issue may arise in domestic law, or within the framework of a standard-setting convention or within general international law.'

Discuss.

Advice on answering the question

This question asks for a discussion of what is international human rights law – namely the different types of law that seek to protect individual rights. One should begin by affirming the general accuracy of the statement. It suggests that the protection of human rights takes us either to provisions of domestic law, to provisions of international law, or indeed to a question of the relationship between domestic and international law.

Thus, a human rights issue may mean that one has to clarify the terms of the right by reference to the sources of international law. Does the right exist in a treaty? If not, could one find a source for the right in customary law? There is also a distinction to be drawn between 'standard-setting convention[s]' and 'general international law'. It may thus be necessary to address the issue of the binding nature of human rights agreements. As far as the UDHR is concerned, one can trace a shift from an interpretation of the Declaration as a standard of achievement with no legal effects, to a more nuanced understanding. At the domestic level, there may also be municipal law that defines the terms of the rights, or the remedies for their breach. In conclusion, the quotation accurately suggests the dynamic of 'international human rights law'. Human rights law makes use of the general provisions and framework of international law.

3 The nature of human rights

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Introduction

This chapter addresses two related issues: the nature of human rights and how new norms evolve. This will alert you to the essential complexity of the idea of an international law of human rights. This chapter attempts to highlight that any articulation of an international law of human rights has to contend with contention and confusion over the very meaning of the term 'human rights'.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **approach international human rights as a potentially problematic field of dispute rather than an obvious set of legal entitlement claims that should automatically be pursued**
- **identify the distinctive features of the universalist approach**
- **identify the distinctive features of the critique of the universalist approach (i.e. that it is a mode of imposing cultural, economic and/or social norms on other jurisdictions)**
- **describe the main features of the alternative human rights traditions**
- **discuss the concept that rights are expressions of political and cultural identity**
- **understand how the above issues are characterised via the categories of 'universalism versus cultural relativism' and be prepared to take a critical stance on this characterisation and (ultimately) on this way of understanding the issues.**

It is important to note here that none of the other textbooks addresses cultural relativism. This is important to reflect on. International human rights are presented as an uncontested good, which are universally accepted. This is far from true and it is important to engage with this head on and ensure we understand that this is simply not the case.

Further reading

- **'Perspectives on human rights', Office of the High Commissioner for Human Rights, United Nations, World Conference on Human Rights, 14–25 June 1993, Vienna, Austria. www.ohchr.org/EN/AboutUs/Pages/ViennaWC.aspx**
- **Tharoor, S. 'Are human rights universal?', *World Policy Journal* 16(4) 1999/2000. http://tembusu.nus.edu.sg/docs/Shashi%20Tharoor.pdf**
- **Shelton (ed.), Chapters 1 and 2, pp.9–53.**
- **Bates, E. 'History' and Dembour, M-B. 'Critiques' in Moeckli et al. (eds) .**
- **Alston and Goodman, Chapter 3 'Civil and political rights', Section C 'Evolution of human rights: sexual orientation discrimination'; Chapter 7 'Conflict in culture, tradition and practices: challenges to universalism' (to p.604 only) and Chapter 8 'The United Nations human rights system', beginning of chapter to end of Section A 'Overview of the UN human rights machinery'.**
- **Alston, P. 'Conjuring up new human rights: a proposal for quality control', *American Journal of International Law* 78 1984, p.607.**
- **Alston, P. 'The populist challenge to human rights', *Journal of Human Rights Practice* 9 2017, p.1.**
- **Neuman, G. 'Populist threats to the international human rights system' in *Human rights in a time of populism: challenges and responses*. (Cambridge: Cambridge University Press, 2020) [ISBN 9781108485494] pp.1–19.**
- **You should also consult the section on the UDHR available at the UN Audiovisual Library. Also watch the lecture by Judge Buergenthal entitled 'A Brief History of International Human Rights Law' – you will need to link to Lecture Series and then the 'Human Rights' tab on the left-hand side and then 'history', and you will find it there.**

3.1 The contested nature of human rights

In this chapter we will provide context for the debate over the supposedly universal nature of human rights. Some of the discussion we commence in this chapter will serve as a launch pad for further discussion later in the guide – this is especially so with regard to human rights, culture and religion.

A useful starting point for the discussion on the contested nature of rights is the Universal Declaration of Human Rights 1948. In its preamble it notes:

> …**recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family** is the foundation of freedom, justice and peace in the world.

Article 1 then notes:

> **All human beings are born free and equal in dignity and rights**. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

On reading these provisions it is clear that all human beings are considered to be born **free and equal** and alongside recognition of **their inherent dignity**, these form the central tenets that are the very foundation of the UDHR. The UDHR was far from novel in adopting the language it did. The United States Declaration of Independence as adopted by the (then 13) states of the United States of America in 1776 asserts:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The later French Declaration of the Rights of Man, adopted in 1789 in the aftermath of the French Revolution, similarly asserts in Article 1: 'Men are born and remain free and equal in rights', and then in Article 4: '…the exercise of **the natural rights of each man** has no limits except those which assure to the other members of the society the same rights.'

Thus, rights apparently extend to all by virtue of their being human – although in some cases the reference is to 'men' only. The UDHR is more inclusive than the US and French Declarations, however, in that it specifically extends to '**all** human beings'. The subsequent legal human rights edifice that has been created through a network of treaties is similarly inclusive in that it extends to all persons. On this basis, human rights are considered universal as they extend to **all** humans. In the next section we will examine the universality of human rights and the key assertions and strengths of this position. In the second section, we identify criticisms of universalist accounts of human rights. This leads to the question of whether it would be preferable to have more culturally variable understandings of human rights – this is known as the 'relativist' position. We will examine these claims and look in detail at the so-called Asian, Chinese and Islamic human rights and also critical accounts of human rights in order to assess the degree to which these alternative statements of rights are compatible with, or diverge from, the Universal Declaration of Human Rights (UDHR).

3.2 The nature of rights

3.2.1 The meaning of human rights

It is self-evident that if we discuss the concept of 'human rights' we are discussing the notion that these are rights that belong to all so long as they are considered as being human. Being human is the reason for rights to exist and thus is their source. They extend to all regardless of whether an individual is considered, for example, a criminal or terrorist. They are rights that cannot be forfeited or denounced; you are endowed with them regardless – in human rights language this is referred to as your rights being inalienable. Human rights by definition extend to all humans but this does not mean that all benefit from them equally. If we go back to the above three declarations, the three state that all (in two cases men only) are born or created equal – which implies that they are not equal in reality but as all are born, they are entitled to the

same rights. This raises several questions. On what basis are these rights enjoyed, and second, who enjoys them? In other words, who is human?

A biological definition would seem to be the easiest way to identify who is human but that only gets you so far. On what basis should only humans enjoy such rights? Great apes and other highly intelligent and sentient animals exist and if humans are to enjoy rights on the basis of, for example, their intelligence, ability to feel emotions and empathise, to communicate and to create elaborate and complex social structures, then actually great apes among others should also be entitled to certain basic rights. There is, however, absolutely no consensus that such rights should extend to other intelligent sentient beings, even though some have forcefully argued that. There is, however, among humans at least an agreement that human beings (or at least some of them) should enjoy rights. This distinction between humans is due to the fact that societies are rarely if ever organised on the basis of a member being human but rather on distinctions within societies, be it race, religion, gender, caste and so forth.

Even if we can agree that only humans are entitled to rights, some fundamental questions follow. First, what are the basic needs of a human and thus what rights should exist? And second, on what basis: religion, morality, level of economic development or something else? Agreement upon such questions is difficult, even if approached in a strictly empirical manner. Perhaps there cannot even be a scientific statement of basic human nature because human nature depends on qualities that are not suitable for scientific measurement: faith or morality, for instance. No doubt, though, the social sciences can provide a definition of humanity, and hence a grounding for a theory of human rights: indeed, anthropology sets out to achieve this end. However, there is also a problem with this approach. Societies have not always been organised around notions of human dignity. Historical and cross-cultural examples show that societies organise themselves around a class or grouping of 'inferiors' who are deprived of the privileges enjoyed by others.

There are of course philosophical accounts of human rights. These come from a variety of perspectives and provide different theoretical foundations for human rights. Again, if we return to the three declarations above, it is clear they all believe in the inherent or natural qualities of men: **inherent dignity** (UDHR); **all men are endowed by their Creator with certain unalienable Rights** (US Declaration); and **the exercise of the natural rights of each man** (French Declaration). What is there to say that men are indeed endowed with rights by a Creator? One may believe that as a matter of faith and belief but is it verifiable? Indeed, if we believe we have a Creator and are all God's creatures, why is only man endowed with rights and why not women and other animals? Do we as humans have rights naturally? The US Declaration regards certain truths to be self-evident. On what basis can we prove that? Just stating something does not make it true and many do not accept this approach as to why humans should have rights.

Philosophical accounts of human rights, be they religious, moral or other, adopt such a broad range of approaches that their diversity militates against any overarching or detailed consensus but would perhaps stress that the nature of the human being is related to language, the ability to reason and rational action. Indeed, when the UDHR was being adopted, the Chinese representative, Peng-Chun Chang, was asked on what basis there had been agreement on the rights in question. His answer was in essence that while all delegates could agree on the rights in question, they could not agree on what basis they should be identified.

We could suggest, then, that although a universal definition of the human is elusive, there is a tendency, in different areas of study, to continue to try and posit a universal value. To some extent, we can avoid these difficulties because – at least as far as the law is concerned – the universality of human rights is founded on the UDHR, and the treaties that have subsequently been adopted articulate some of the rights within it. This does not resolve the debate but it does at least allow us to see that the debate around human rights is of continuing importance for a culture of human rights.

3.2.2 The legal nature of human rights

How can we understand the 'legal' nature of human rights? We need to think through some difficult issues.

We could ask about the semantics of rights. In the English language, 'right' has two senses: one is moral and the other is political or legal. In the moral sense, right refers to what it is right to do from a moral perspective: for instance, to assert that it is wrong to steal is to assert, in part, that it is morally wrong to deprive people of their property without a compelling reason. The second sense of the word refers to a relationship between right and duty or obligation in the context of the law. In this second sense, the meaning of right is stronger than in the former, in that a right-holder can compel a duty-bearer to honour that right by calling on the court to compel respect for the right. It is possible to speak of rights in a number of legal contexts. For instance, a right derived from a contract, in a private law sense, creates an obligation through an exchange for value. If a party to the contract refuses to undertake the obligations in the contract, the court may enforce it through various remedies. Likewise, and again in a private law sense, a beneficiary has certain rights under a trust that can be enforced against the trustee. These do not rest in contract but in the equitable nature of the trust. Again, the court will enforce these equitable rights. In other words, the distinction between the two senses of the word moves from a statement of what is morally desirable to a statement of an entitlement that can be enforced.

Public law rights are somewhat different in that they do not originate in private law agreements. Although this is a complex point, we could perhaps suggest that public law rights are derived either from a constitution, which states the rights of citizens, or from general principles of law that state civil liberties.

The 'paramount' nature of human rights is either recognised by domestic law or it is not. For example, you cannot speak of legally enforceable human rights in English law, as Parliament is sovereign and could legislate against human rights. In constitutions that entrench human rights, or make it either difficult or impossible to override human rights provisions (for example, in Germany), you can speak of fundamental human rights.

We could return to our definition of human rights with which we opened this section. Human rights may be explicable as rights that we have by virtue of our humanity but this does not necessarily make them legally enforceable or fundamental. Unless a positive legal source states that they are fundamental, human rights fall short of legal claims and can perhaps be thought of as political claims about the desirability of a certain state of affairs. In this sense, human rights relate to a moral standard and are related to claims about political legitimacy. This is easy to witness. Human rights have become the basis upon which to demonise other states in global politics. In the past states demonised others on the basis of faith – be it intra-faith conflict (e.g. Catholic–Protestant) or one faith against another (e.g. Islam–Christianity). During the Cold War it became ideological, Communist/Socialist, on the one hand, and the 'free World' (i.e. Capitalist) on the other. Now, one can see human rights violations as the basis of, for example, US/EU objection to the political situation in China or Zimbabwe. Human rights have become a moral yardstick and are used selectively. States will use human rights violations to highlight the shortcomings of their adversaries but rarely in public those of their key allies. The USA, for example, rarely publicly criticises systematic human rights violations in certain oil-rich states around the Arabian peninsula.

Again, we have to make a distinction between the fundamental legal nature of human rights and the political nature of human rights in international law. The extent to which a human right is binding is the extent to which it is internationally recognised and legally enforceable. Although some rights may indeed be both recognised and enforceable by a court, others cannot be so enforced – or at least cannot be enforced by a court.

Activity 3.1

Does the legal account of human rights provide an adequate statement of the nature of human rights?

3.3 The Vienna Conference 1993

On the 45th anniversary of the UDHR (1948), the UN held a World Conference on Human Rights in Vienna (known as the Vienna Conference) on 14–25 June 1993, attended by representatives of 171 states as well as many NGOs (non-governmental organisations). This Conference was a follow-up of sorts to the 1968 Proclamation of Teheran, the first UN International Human Rights Conference. (On the Proclamation of Teheran, see http://legal.un.org/avl/pdf/ha/fatchr/fatchr_e.pdf For the complete text of the Vienna Declaration and Programme of Action, see www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx at the UN AVL. For the text of the Vienna Conference, see either www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx or your documents book.) Although numerous human rights-related conferences have been held since 1993, the Vienna Conference is still probably the clearest espousement of the issues we are concerned with. By the time of the Vienna Conference, those who wanted to drive the global 'human rights project' forward were frustrated by the limitations of the legal mechanisms available to promote and enforce human rights internationally. Forty-five years on from the UDHR, they argued little progress had been made. However, first the whole issue of universal human rights had to be reargued and refined – even redefined. A significant wave of dissent from the universal human rights project had developed and was strongly articulated at the Conference. There were different strands to this dissent. These could be analysed as presenting two main themes. The first theme presented economic, social and cultural rights as downplayed in favour of the 'luxuries' of civil and political rights. Here, the universality of human rights itself was not contested; rather, it was the content and priorities of implementation involved in the project. A key issue at Vienna was that the 'right to development' should be recognised as a universal human right. In subsequent years, the arguments about the right to development have mutated in some ways to the debate about eradicating 'global poverty', something we will be addressing later.

A second theme at Vienna was that human rights were not universal but rather historically, socially and politically contextual and contingent. So-called 'universal' human rights were just modern Western values in disguise, and non-Western values, culture and community should be respected. 'Asian values' were invoked as one example of alternative cultural and/or social ordering. It was equally important to recognise that the so-called 'Western values of freedom and liberty', often depicted as an ancient Western inheritance, are not particularly ancient. Many have only become dominant in the West over the last few centuries – and they are not exclusively Western in their formation. This stance was labelled 'cultural relativism' – but this term is also often used to encompass the first theme as well.

This joint labelling was partly justified in that these dissenting perspectives were supported by the same nations – China, Singapore, Malaysia, Cuba and the former USSR. There is also a common scepticism (some would say cynicism) about the universal human rights project as an exercise in international law-making and whether it was merely another exercise of power by the West, always working to its own advantage.

To summarise:

- In practice, are human rights demanded and enforced universally or does the insistence on applying internal international human rights conventions depend on the strategic interests of Western powers?
- Similarly, which human rights are prioritised? Are they the ones that would genuinely be helpful for 'developing' countries? Why is there such reluctance to recognise a 'right to development'?
- Is the whole concept of universal human rights ethnocentric – an abstraction from one specific concrete cultural location (the West) that is inappropriately applied elsewhere? Is the universal human rights project actually functioning to erode key cultural values that hold non-Western communities together?
- Alternatively, are non-Western human rights traditions (e.g. in Islam or China) completely ignored?

We will return to these questions throughout this chapter.

Self-assessment questions

1. **At the time of the Vienna Conference, which international instruments were already in effect in the world human rights system?**
2. **What powers went with these instruments?**

The dissenting point of view was largely unsuccessful at the Conference, although it made an important impact on some of the key formulations, and the volume of the dissent was notable. Thus, the Vienna Conference reaffirmed the universality of human rights, characterising such rights as 'universal, indivisible and interdependent and interrelated' and sought to give them a more effective legal reality. At the conclusion of the Conference, the Vienna Declaration and Programme of Action (1993) was adopted on 25 June 1993 and was endorsed by the UN General Assembly on 20 December 1993 in Resolution 48/121. The Declaration stated that the 'promotion and protection of all human rights is a legitimate concern of the international community' and is arguably a significant erosion of the sovereign power of states to have sole control over their internal affairs. The basic principle is articulated in Article 2(7) of the United Nations Charter – a state's internal affairs are its sole concern. At Vienna it was stated that the way a state treats its people was the concern of all. To argue, however, that the 'internal affairs' argument is now redundant, as some have, is simply incorrect.

The Vienna Declaration, while emphasising 'the universal nature of these rights and freedoms [set out in international instruments] is beyond question' (Part 1, para.1), also states:

> The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. (Part 1, para.5)

Cultural and relativist diversity has been a constant issue in the adoption of all major human rights instruments within the context of the United Nations. When the UDHR was adopted, for example, the delegates were from the USA, France, China, Lebanon, the Soviet Union, Australia, the United Kingdom, Canada and Chile. This was seen at the time as being representative of the global community although the broad Western bias is evident in the background of the delegates. As subsequent human rights instruments have been negotiated and adopted, it is clear that an increasingly diverse body of states has been present and that they not only participated in the preparatory sessions but their influence has at times also been reflected in the final texts. Where states object to the premise of a treaty, they do not have to ratify or accede to it, or they have the option to enter reservations to parts of it if they object to certain provisions. In other words, when the final product is based on consensus among the drafters, it can encompass cultural diversity and may counter contentions that international human rights instruments simply give expression to Western capitalists' values disguised as universal rights. What should not be lost sight of, however, is that in certain areas the basis for contention and disagreement has become more entrenched. A good example is religious freedom, which will be discussed later in the guide.

Activity 3.2

The point of this activity is to see if you can work out for yourself, on the basis of the quoted segments of the text, where the dissenting point of view made an impact in the formulations produced by the Vienna Conference and what kind of impact this was.

a. **What importance is assigned to 'national and regional particularities and various historical, cultural and religious backgrounds'?**
b. **Still considering the same text, do you agree that religion, to take a key example, is a 'particularity' to be contrasted to universal human rights?**

c. From what you know so far about the international system of human rights, what might the implications be of the statement that human rights are 'universal, indivisible and interdependent and interrelated'?

No feedback provided.

At this point in the chapter we will examine in more detail the distinction between universalism and relativism. Universalist and relativist positions are not single points of view but contain many differences of emphasis and opinion within them. After identifying these tendencies, we will argue that – although a sophisticated version of the two positions can help identify certain features of the debate over international human rights – it is necessary to consider the distinction as somewhat limited and even potentially confusing.

3.4 'Universalism versus cultural relativism'

Since the Vienna Conference, the phrase 'universalism versus cultural relativism' has become a routine way of understanding the disagreement over the nature of human rights. The current debate takes place, most vocally, within what are routinely described as the West–Islamic framework and the North–South/developed–developing countries' dialogues. Such labels, however, lack nuance and verge on the inaccurate. Many Muslim-majority states, for example, are also developing states. Is their objection or opposition to the human rights edifice and its nature based on culture, faith or economics? Is there even an 'Islamic' approach to human rights which is shared by sovereign states where there is a Muslim majority? Do Turkey and Kuwait share a broadly similar approach to such matters? More often than not, they simply do not. Notwithstanding the lack of accuracy and nuance, these labels are still routinely used. Indeed, more broadly, how well are the different approaches to human rights captured by the labels 'universalism' and 'cultural relativism'? In particular, can the different strands of dissent that were exhibited at the Vienna Conference and subsequently elsewhere all be labelled as 'cultural relativism'?

The Universal Declaration of Human Rights is called the **Universal** Declaration and this underlies its global application. Subsequent documents, such as the 1966 International Covenants or the 1984 Torture Convention, underline the universal application of human rights treaties. But universality here is simply about the fact that all states can be party to such documents. This is distinct from so-called regional human rights treaties, which are adopted under the auspices of geographically limited inter-state organisations, where the membership of such organisations is limited to states (usually) from a particular geographic region, such as the Council of Europe or the African Union. In either case, a state can only be a member of such an organisation (and thus any human rights treaties adopted under its auspices) if it is eligible to become a member of the organisation, which will be limited. Membership of the Council of Europe, for example, is limited to 'European states' in the same manner that membership of the African Union is limited to any 'African state'. South Africa thus cannot become a member of the Council of Europe, which is a prerequisite of becoming party to the European Convention on Human Rights. So a key thing to note is that not all human rights treaties are universal in their application although they do apply to **all** within those states who are party to them. A second key thing to note here is that each regional human rights treaty, while having common themes and approaches to many issues, displays diversity. A good example of this is the approach of numerous human rights treaties to the 'right to life' and how this relates to issues such as abortion, euthanasia and the use of the death penalty. On such matters it is clear that states that share many cultural and religious similarities and broadly similar levels of economic development may have very different perspectives. It is important to bear in mind that there is significant diversity on certain matters between what are often referred to as 'like-minded' states. Relativism is thus relative. It is not all or nothing with regard to human rights as sometimes asserted but rather about finding a core of agreement.

Returning to the Vienna Conference, those at the Conference were cognisant of the importance and role of relativism but the majority also wished to reassert the universality of human rights, in the sense that they globally extended to all humans. However, merely asserting that rights are universal in scope and are to be applied in a 'fair and equal manner' is not necessarily the same as having a developed underlying theory of universal human rights – the universalist perspective seeks this broader account of the nature of human rights.

What universalist positions broadly have in common is the underlying presumption that human rights exist 'objectively'. They extend to all, independent of differences in culture, religion, ideology or value systems. Human rights are based on human attributes that are shared by all and thus are universally applicable. Law gives these (natural) rights positive existence, but the rights pre-exist positive law. Hence arguing the law 'recognises' human rights is based on the perspective that rights pre-exist the law, and positive law (treaties and conventions) merely articulates these rights in a specific form and makes it easier to ensure that such rights are universally respected. From this perspective, international human rights law thus has a double validity: as positive law it comes from the appropriate sources of authority yet, at the same time, this positive law also rests on an independent foundation in humanity itself that is both descriptive and normative. (Universalism in human rights is often described as modern natural law or natural rights.)

Self-assessment questions

Please read the above paragraph very carefully.

1. **Does it imply that human nature exists independently of culture or society, religion or ideology?**
2. **Does it see humans as specifically 'individuals'?**
3. **Does it favour civil and political rights over economic and social rights?**

However, the universalist position is often put in more specific terms that differ both logically and rhetorically from the above formulation. Consider the statement below by Dame Rosalyn Higgins. Dame Higgins was formerly Professor of International Law at the London School of Economics and subsequently became President of the International Court of Justice. In her General Course on International Law at the Hague Academy (the highest honour that the Academy can bestow on an international lawyer) she discussed relativism and asserted that objections to universalism are typically voiced:

> …mostly by states, and by liberal scholars, anxious not to impose the Western view of things on others. [They are] rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards.

She then contends:

> The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.
>
> I believe profoundly in the universality of the human spirit. Individuals everywhere want the same things; to have sufficient food and shelter; to be able to speak freely, to practise their own religion or to abstain from religious belief; to know that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that if charged, they will have a fair trial.
>
> I believe there is nothing in these aspirations that is dependent on culture, religion, or stage of development. They are as keenly felt by the African tribesman as by the European city dweller, by the inhabitant of a Latin American shanty town as by the resident of a Manhattan apartment.
>
> (Higgins, R. *Problems and process: international law and we use it*. (Oxford: Oxford University Press, 1995) p.97.)

Dame Higgins' approach is understandable but it is arguably also rather misplaced. Although it was made quite a few years ago now, it articulates perfectly the attitude and approach of many in educated, Western 'liberal' circles. On the basis of what experience and exposure can she discuss the views of the inhabitants of a Latin American shanty town – although she may be rather better placed to discuss the views of a certain echelon of Manhattan society? How does she know that 'individuals everywhere want the same things' and on what possible basis can one assert that? It can be argued that the approach speaks of assumptions of knowing what is best for others and comes with cultural baggage – i.e. we know what others want and need. Indeed, it can be argued to be a culturally imperialistic approach.

Activity 3.3

These questions are about Dame Higgins' statement – but no special knowledge is required to consider them.

a. **How would you describe the effect of 'I believe' as a way of prefacing this statement? For example, can it be neatly classified as objective or subjective?**

b. **Is there any difference between 'the universality of the human spirit' and 'individuals everywhere want the same things'? List the items that Dame Higgins holds to be universal. Is there anything interesting about the sequencing of these items, that is, the movement from one to another?**

c. **On the basis of what Dame Higgins asserts, what would you understand 'cultural relativism' to mean? Also, what do you think of the contrasts that she makes?**

d. **Is Dame Higgins' view any more valid than the argument of someone propounding a relativist point of view?**

A key question that arises is: are human rights necessarily individualist? Seen from a cultural relativist perspective, individualism is strongly associated with the historical changes that led to the formation of modernity in the West, in which people became less defined by reference to membership of larger groups, be they clan or family or land-based identity, and more able to determine their life chances by relying on their own resources. In this historical sense, individualism is associated with emancipation from the 'traditional' forms of domination based on assigned 'natural' hierarchies of birth: rank, age and gender. This break was strongly expressed in the discourse of 'rights of man' in the 17th and 18th centuries, as discussed above, and was accompanied by the spread of the industrial revolution. The industrial revolution and the increasing break from serfdom as well as the rise of freedom of contract, in various societies, contributed to a significant increase in the material prosperity of some. Industrialising societies, primarily in north-western Europe and what is now the USA, could thus emphasise the importance of certain values, in particular, freedom of speech and freedom of belief. The emphasis on these issues is not accidental and should be noted as they reflect the particular European historical experience. Therefore, so the critique continues, to seek to universalise human rights is indeed to seek to globally impose on all a modern Western social norm and a reflection of what was a uniquely Western (namely European) historical experience.

However, let us consider the arguments more methodically. What are the implications of seeing individualism as culturally specific? Most obviously, it undermines any version of universalism that equates the human with the individual, especially where the individual is presented as pre-existing society. However, not all universalist positions argue this. More sophisticated universalist perspectives argue that human beings develop core social needs and capabilities wherever societies develop. In other words, human rights arise from society, not from some supposed pre-social state. One key exemplar of this second version of universalism is the political philosopher Martha Nussbaum. Her work belongs in the tradition of liberal political philosophy that goes back to Immanuel Kant but takes its more immediate inspiration from John Rawls. Here the emphasis is centrally on human dignity and thus echoes the UDHR, which declares that human rights flow from 'the inherent dignity of the human person'. Nussbaum states:

> At the heart of this tradition [of liberal political thought] is a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is a power of moral choice within them, a power that consists in the ability to plan a life in accordance with one's own evaluation of ends.
>
> (Nussbaum, M. *Sex and social justice*. (Oxford: Oxford University Press, 1999) p.57.)

Nussbaum's more recent work draws on the 'capabilities approach' derived from the work of Professor Amartya Sen, who was awarded the Nobel Prize for Economics for his work in the field. Sen's work, which also draws from the work of John Rawls, has been instrumental in recent years in developing an understanding of what human needs are. The central question posed by the capabilities approach is what are people actually able to do and to be – it is in essence about human dignity. Capabilities are understood to be 'substantial freedoms', such as the ability to live to old age, engage in economic transactions, seek an education and participate in political activities. (See, for example, Sen, A. *Development as freedom*. (Oxford: Oxford University Press, 2001) and Sen, A. *The idea of justice* (London: Penguin, 2010).) Nussbaum, using Sen's work, has developed the most extensive list of 'capabilities', including life (which relates to quality as well as length); bodily health; bodily integrity; senses, imagination and thought; emotions; and (practical) reason. (See Nussbaum, M. *Creating capabilities: the human development approach*. (Cambridge: Harvard University Press, 2013) *passim*.) These labels cover numerous rights, which are to be found in the UDHR and numerous treaties adopted under the auspices of the UN.

The dignity/capabilities approach, most closely associated with Sen's work, has been immensely influential and is widely espoused among liberal scholars and also human rights activists. While it has been subject to critique in its own right, it is important to stress that the approach has constituted a key and influential critique of the international human rights project and such an approach is universalist in orientation. In other words, some of the dissent at Vienna and subsequently has come from those who subscribe to a universalist perspective of human rights. This underlines something alluded to above: the opposition to international human rights law comes not only from those who subscribe to some form or other of relativism but also many who subscribe to the universalism of such rights. One of the most confusing aspects of the 'universalism versus cultural relativism' debate is the way that it suggests that all opposition and critique to international human rights is based on cultural relativism; it simply is not.

This leads us on to examining what exactly cultural relativism is. Put in logical abstract terms, it is the claim that there are no universal human values or practices or even needs. Taken to its logical conclusion, 'relativism' carries the connotation that, morally speaking, any activity must be seen in the context of the society in which it occurs, thus there is no basis for criticism, let alone intervention, of any one individual, culture, social order or state by another.

Let us briefly examine the issue in the context of the practice of what is now widely referred to in the English language as female genital mutilation (FGM) – previously usually referred to as female circumcision or female genital cutting. Although this is a hugely complex issue, it is worth briefly discussing this in the context of relativism. The practice in question is clearly severely injurious to the health of women and often carried out in unhygienic conditions, thus causing multiple health complications for women both at the time of the practice and subsequently, especially during childbirth. In those societies in which it is practised, it is justified on the basis of culture, long-standing practice and religion. This is notwithstanding the case that in some states where it is prevalent (e.g. Ethiopia) it is a criminal activity, although rarely prosecuted. Opposition to the practice is widespread in many societies in which it is not culturally prevalent; indeed, it is considered abhorrent and is criminalised in some states, such as the UK – this is whether the practice is carried out in the UK or a female UK national is taken abroad (e.g. to Somalia or Sudan) for the practice to be carried out. (See the Prohibition of Female Circumcision Act 1985, and the Female

Genital Mutilation Act 2003 as amended by the Serious Crime Act 2015.) The fact that the practice is now widely referred to in the English language as female genital mutilation is indicative of a value judgement as to its acceptability; mutilation is not a neutral term and the language has been adopted to express opposition to the practice. Relativism taken to its logical extreme requires that such practices not be subject to intervention from others, and whether it is acceptable or not would be for the societies, communities or states in question to decide. Thus, it is for Ethiopia, for example, to do as it determines in terms of criminalising or not the practice and not for others to intervene. Some have adopted such an approach in practice with regard to other issues. For example, representatives of Saudi Arabia, which has adopted an extremely austere form of Islam (which is far removed from Islam as it had evolved over more than a millennium) known as Wahabism, routinely argue that the forms of corporal and capital punishment it administers, such as stoning, amputation and whipping, are beyond reproach as the Saudi state is giving effect to God's law as it understands it. Such a relativist approach is not particularly common, equally, it is not so rare either.

More frequently, opposition between universalism and cultural relativism is 'translated' into a contrast between 'individualism' and 'collectivism'. Do rights, by definition, attach to individuals only? Does the human dignity approach allow recognition of collective rights? Are non-Western societies helpfully understood as more 'collective' in orientation?

Sometimes, where the Cold War background is obvious, 'individualism versus collectivism' is equated also with 'democracy versus socialism/communism', thus drawing out the idea that the individual is absorbed within the political collective.

As we have already noted, competing versions of universalism are often put together with cultural relativism at the level of identifying dissenting states – everything from the new economies of Singapore, Malaysia and Hong Kong to rural agronomy in mainland China to all varieties of Islam as practised worldwide to the whole of Africa to Latin America can be put together as cultural relativists. We can also see in this that rights may be deemed by some to be subservient to belief. Rights must respect beliefs.

There are some serious problems with cultural relativism. Centrally, cultures are presented as if they were mutually exclusive, non-interactive and stagnant. There is no representation of how far interaction has formed the entire world. Religions, especially, are prone to be presented as enduring and unchanged, and homogeneous entities, which they very simply are not.

We will now turn to examine various alternative accounts of human rights. We will see that relativist positions in fact conceal elements of universalism. The point is not so much that there is a tension between universalism and relativism, but that there are different versions of universalism. Our concern with so-called Islamic accounts of human rights is to isolate this theme. Islamic accounts of human rights can make a claim to universalism that is different from that of Western accounts.

To what extent do catalogues of Islamic rights provide a rival universalism to those catalogues that come out of Western political traditions? Perhaps it is possible to find a tension between secular and divine accounts of rights; in other words, a tension between secular and religious universalism? This is not to suggest that there are irreconcilable divisions between the West and Islam. For a start, this very opposition dissolves the complex and diverse traditions that such reductive labelling can only summarise crudely. It would also distort the very real history of the movement of ideas between religious traditions and their influences on each other. At the same time, there are clashes between Islamic ideas of rights and those contained in the UDHR. It is to these issues that we now turn. Before doing so, however, it is important to stress that almost every major religious tradition, be it Islam, Hinduism, Judaism, Confucianism, Buddhism or Sikhism, is trawled by commentators seeking to justify the current legal human rights framework within it. The argument that is routinely made is that human rights are not a Western (that is a euphemism for Christian) tradition but rather can be justified by reference to any number of religious traditions. (For a good example, see Green, M. and J. Witte Jr 'Religion' in Shelton (ed.), p.9 – one of the Further

readings for this topic.) Such an approach is, however, retrospective and in many senses avoids the fundamental issue as it does not seek to challenge the foundation, construction and formation of the current legal framework but rather seeks to argue that the values and principles are common ones. While there is some value in that, it does not challenge effectively the argument, which has some merit, that the current international legal instruments do primarily reflect a particular Western historical experience. Islam, rightly or wrongly, is widely perceived as presenting a competing, in part conflicting, version of human rights and it is to that we now turn.

Activity 3.4

It is acknowledged that there are occasions when there is a conflict between what universal human rights standards demand and what is expected by local cultural norms. Such conflicts have to be satisfied in favour of universal standards.

What is your view on this?

This is a matter that you may like to debate with fellow students, family or friends.

No feedback provided.

3.5 Rights in Islam

The concept of rights in Islam is a hugely contentious and complex issue which has been subject to an enormous literature and a myriad of views. It is impossible here to reflect the full scope of this discussion – either from a historical perspective or from a theological one. Indeed, there is a credible argument that it is exceptionally difficult to identify what Islam is and that it is more accurate to discuss 'Islams' (on this, see the ground-breaking Ahmed, S. *What is Islam? The importance of being Islamic*. (Princeton: Princeton University Press, 2015); it is not possible to discuss rights in Islam as there is not one Islam. Notwithstanding this, the issue can be addressed if our central concern is to show that there is a tradition of rights thinking that, in some ways, contrasts with that which is prevalent in Western discourses.

The fundamental issue with human rights in the 'Islamic tradition', however, is the lack of an authoritative and universally accepted view of what is the Islamic position on a particular matter related to human rights. This issue is not unique to Islam: can one say with any degree of confidence what is, for example, the Jewish or Christian position on the right to life, including the use of the death penalty or on abortion? Some influential scholarship has sought to 'search for common ground' (see Emon, A., M. Ellis and B. Glahn (eds) *Islamic law and international human rights law: searching for common ground?* (Oxford: Oxford University Press, 2012)), but again the discussion highlighted the diversity and plurality of positions argued to be Islamic. It is thus essentially futile to seek to define an 'Islamic position' on matters such as the right to life, but the 'Islamic defence' is routinely used by states who have a Muslim majority to seek to justify their position on international human rights matters, so it becomes essential to confront this. Although it should be stressed that, during the drafting of various human rights treaties, Muslim-majority states have taken completely contrasting views on an issue, with both sides arguing their position is justified by reference to Islam. This Islamic pluralism is evidenced by the fact that there is no treaty in force that reflects the agreed view of Muslim-majority states on human rights matters where those rights are articulated in a manner that seeks to root them specifically in Islam. This is a critical point – every single Muslim-majority state, whether it identifies itself as an Islamic theocracy (e.g. Saudi Arabia and Iran), secular (e.g. Turkey and Azerbaijan) or somewhere between these two points on the spectrum (i.e. the majority of such states), is a party to at least some of the United Nations human rights treaties and these are not identified (expressly at least) with any particular religious or cultural tradition. As a consequence of the lack of a treaty in force that reflects the agreed view of Muslim-majority states on human rights matters in Islam, we will examine a number of documents that seek to articulate an Islamic approach to rights, but each lacks credibility in different ways.

3.5.1 The Universal Islamic Declaration of Human Rights

UIDHR was drawn up by a private organisation, the Islamic Council of Europe, and is not, therefore, an intergovernmental document. Self-appointed scholars, jurists and 'representatives' of Islam compiled the Declaration. The document has not received very much attention outside of the work of certain academics who have accorded it far greater importance than it merits. (See, for example, Brems, E. *Human rights: universality and diversity.* (The Hague: Martinus Nijhoff Publishers, 2001).) The UIDHR is, however, useful for us as it seeks to specifically articulate rights in the context of Islamic concepts and principles. The foreword to the Universal Islamic Declaration of Human Rights reads as follows:

> 'This is a declaration for mankind, a guidance and instruction to those who fear God.' (Al Qur'an, Al-Imran 3:138)
>
> **Foreword**
>
> Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice.
>
> Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights. Due to their Divine origin, no ruler, government, assembly or authority can curtail or violate in any way the human rights conferred by God, nor can they be surrendered.
>
> Human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.
>
> It is unfortunate that human rights are being trampled upon with impunity in many countries of the world, including some Muslim countries. Such violations are a matter of serious concern and are arousing the conscience of more and more people throughout the world.

A number of points can be made. The Universal Islamic Declaration of Human Rights is expressly based on sacred sources: the Qur'an and the Sunna. These are argued to be the foundation of rights in Islam. This is formally different from the UDHR but, if we reflect more broadly, the UDHR is heavily influenced by natural law theory and natural law is often, although not always, argued to be derived from the law of God. So while there is an express difference between the sources of the UDHR and UIDHR, there is also some commonality.

The fact that the Qur'an and the Sunna are seen as the sources of rights means that, for Islam, according to the UIDHR, 'an ideal code of human rights' existed 'fourteen centuries ago'. That, according to the UIDHR, rights in Islam emanate from a divine source means that rights are binding on both individuals and governments. In this sense, there is no great difference between rights in Islam and the West; Islamic rights are aimed at 'conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice'. This also means that there is a similar sense in which rights limit government and lay down normative standards. However, the essential difference can perhaps be glimpsed in the following paragraph.

As a religious order, Islam, in common with all faiths, has its own norms and principles.

> Human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.

Although there may be profound disagreements over the precise terms of these religious norms, there is undeniably an identity that is separate and distinct from other faith communities. As such, an 'Islamic statement of rights' will make a distinction between Muslims and non-Muslims. This has raised some complicated issues. Are Islamic rights universal? To the extent that they only apply to Muslims, and thus not all, Islamic rights are not universal in application. But Islam is an evangelical faith; non-Muslims can convert to Islam and 'Islamic human rights' are potentially capable of universality. A number of further themes emerge in the next document we will examine, the Cairo Declaration.

3.5.2 The Cairo Declaration on Human Rights in Islam

As pointed out above, Islamic claims to human rights do not operate in the same way as the UN system or even other regional systems. There is no international, overarching body that supervises or protects 'Islamic rights'. However, as we have seen, there are declarations of Islamic human rights. In reviewing these rights, we will return to a number of concerns outlined above. The distinction between universalism and cultural relativism is only of some use in understanding non-Western rights arguments. Perhaps of more importance is the affirmation of the political and cultural differences that underlie these arguments. This is linked to the next point. Islamic particularism is associated with arguments about the centrality of Sharia. Certain provisions of Sharia as historically understood (and as manifested in some contemporary Muslim-majority states) are in opposition to rights in the UDHR. This can be understood as both a 'clash' between different traditions and an assertion of Sharia as a symbol of political identity.

We will now look in detail at the Cairo Declaration on Human Rights in Islam. The Cairo Declaration is a much more credible document than the UIDHR above. The Cairo Declaration was adopted under the auspices of the Organisation of the Islamic Conference (OIC). The OIC is an international organisation and 56 Muslim-majority states are full members of it. Under the terms of the OIC Charter, the 'Islamic' orientation of the organisation is clear.

The Cairo Declaration contains 25 articles. **Article 1** affirms that 'all human beings form one family whose members are united by submission to God and descent from Adam and are thus equal in dignity, and the obligations they owe to others'.

'Islamic human rights' are thus based not on the being of the individual but on a foundation of religious faith: the status of the person as 'God's vicegerent in this world'. Rights are seen as measures that allow the individual Muslim to better serve God.

The Declaration goes on to state a right to life (**Article 2**); various rights in times of conflict (**Article 3**); rights that protect good honour and burial rights after death (**Article 4**); marriage rights (**Article 5**); women's rights (**Article 6**); and children's rights (**Article 7**). The Declaration goes on to state that the human being has a right to legal capacity (**Article 8**); a right to education and religious instruction (**Article 9**); and a right not to be forcibly converted to a religion through poverty or ignorance (**Article 10**). **Article 11** is interesting as it reflects the fact that many nations who are signatories to the Declaration were, earlier in their history, colonised territories:

> **Article 11**
>
> Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.
>
> Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all states and peoples to support the struggle of colonised peoples for the liquidation of all forms of colonialism and occupation, and all states and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

Further rights detailed are: a right to work (**Article 13**); to legitimate gains and a prohibition of usury (**Article 14**); to property (**Article 15**); to enjoy 'the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom' (**Article 16**); the right to a clean environment and to social and medical care (**Article 17**); a right to security and privacy (**Article 18**); equality before the law and due process (**Articles 19** and **20**); a prohibition on hostage taking (**Article 21**); a right to free expression (**Article 22**); and a right to participate in public affairs (**Article 23**). But note:

> **Article 24**
>
> All the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia.

Article 25

The Islamic Sharia is the only source of reference for the explanation or clarification to any of the Articles of this Declaration.

3.5.3 How can we assess the Cairo Declaration?

The Cairo Declaration is of course in part a response to the UDHR, which very few Muslim-majority states participated in drafting. What is also interesting is that by the time the Cairo Declaration was adopted, numerous UN human rights treaties with enforcement and supervisory mechanisms had been adopted. The UN human rights treaty bodies (to be discussed later in the guide) were fully functioning and numerous Muslim-majority states were already party to such treaties. Yet under the auspices of the OIC, the states in question had adopted a 'declaration', which was not intended to be legally binding and which had no enforcement or supervisory mechanisms of any sort. They were thus willing to subject themselves to scrutiny and firm commitments under one regime but not the other – an 'Islamic' one. One reason for this is no doubt potential conflicts between differing legal obligations. A second equally important reason relates to states trying to reconcile 'Islamic' principles and rights as agreed in an international forum with their domestic laws, many of which bear little actual relation to Islam, notwithstanding references to Islam in domestic constitutions. A third reason will again return us to the plurality of Islam itself.

In substantive terms, if one examines the rights in the UDHR and those in the Cairo Declaration, more or less every essential right is shared, even though they must be seen with their different perspectives. But if we revert to Articles 24 and 25 of the Cairo Declaration, as noted above, the different perspectives becomes clearer. These provisions stipulate that all rights are 'subject to the Islamic Sharia'. What this precisely means in practice is unclear, as different Muslim-majority states have understood and implemented aspects of Sharia in very different ways. Notwithstanding this diversity, certain themes are common. In particular, these relate to discrimination against women in numerous contexts and non-Muslims. The following are some examples regarding women, which we will examine again in further detail later in the guide.

Choice of a husband: most schools of (Islamic) jurisprudence (known as *fiqh*) do not allow a woman to marry without the consent of a male guardian, who has the right to determine the suitability of the husband. Although most jurists consider the consent of the woman to be necessary, custom and cultural practices can lead to women being forced into marriage.

Polygamy: authorised by the Qur'an, limited to four wives at any one time and subject to other restrictions. It is accepted in some form or other in most Muslim countries although some have prohibited it or severely restricted it.

Divorce: in most schools of jurisprudence it is significantly easier for a man to obtain a divorce than it is for a woman. Some schools accept that a woman can stipulate her right to divorce and the grounds in the marriage contract. Most Muslim-majority states have sought to legislate matters of divorce to some extent or other.

Custody: in most schools of jurisprudence the divorced mother is awarded custody of small children, under the guardianship of the divorced father. At a certain age, which varies according to the school of jurisprudence and gender of the child, the custody is transferred to the father – although the presumption of transference is rebuttable. In addition, when the mother remarries another man, she loses custody of her children to the children's natural father, regardless of the age of the children.

Inheritance: in almost all cases, schools of jurisprudence prescribe that a man's share of the inheritance is double that of a woman in the same relation to the deceased. This is the case where children inherit from their parents.

Testimony: in some cases, the testimony of two women has the same worth as that of one man.

Women's freedom of movement/hijaab: one of the most contentious issues is the ability of women to move freely without a chaperone and further the stipulations

concerning modesty of clothing. While both men and women are obliged to dress modestly, only women are deemed by all schools of jurisprudence to be required to be covered at all times in public. In some states, but not all, this has manifested itself into legal requirements for women to wear certain types of all-encompassing dress. In a similar context, some Muslim-majority states influenced by certain interpretations of Islam do not allow women to drive cars alone or travel any distance from the home without the express permission of a guardian/husband, and then only with a male chaperone who is closely related to the woman, such as a brother, son or father. Though the issue is subject to significant contention and dispute, there is little doubt that in practice it is highly discriminatory against women in numerous but certainly not all Muslim-majority states.

3.5.4 The Arab Charter on Human Rights 2004

The final document to be examined in this section is the 2004 Arab Charter on Human Rights. The Charter is, as the name suggests, a treaty and imposes legal obligations upon the states party to it; it came into force in 2008. The Arab Charter also has a supervisory mechanism, so in both of these key respects it is distinct from the OIC's Cairo Declaration to which it alludes. The Arab Charter was adopted under the auspices of the Arab League, an international organisation of states which are Arab in culture and orientation and are geographically in northern Africa and the south-west of Asia. The aim of the Arab League, according to its Charter, is to strengthen 'relations between the Member States, the coordination of their policies in order to achieve cooperation between them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of the Arab countries'. The Member States of the Arab League are all Muslim-majority although there are sizeable religious minorities in a number of them, with Lebanon being the most religiously diverse.

Given the context and membership of the Arab League, it is surprising how limited the role of religion, in particular Islam, in the Arab Charter is. Furthermore, the Charter makes express reference to the universality of all rights. The preamble is illustrative of these issues. It notes:

> Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilizations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality,
>
> In furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions,
>
> Being proud of the humanitarian values and principles that the Arab nation has established throughout its long history, which have played a major role in spreading knowledge between East and West, so making the region a point of reference for the whole world and a destination for seekers of knowledge and wisdom,
>
> Believing in the unity of the Arab nation, which struggles for its freedom and defends the right of nations to self-determination, to the preservation of their wealth and to development; believing in the sovereignty of the law and its contribution to the protection of universal and interrelated human rights and convinced that the human person's enjoyment of freedom, justice and equality of opportunity is a fundamental measure of the value of any society,

In terms of substantive rights, the Charter is both broad and comprehensive, referring to an impressive array of issues and rights, such as those to self-determination (**Article 2**); non-discrimination (**Articles 3** and **11**); life (**Article 5**); prohibition of torture (**Article 8**); prohibition of slavery (**Article 10**); fair trial rights (**Articles 13** and **16**); liberty and security of person (**Article 14**); privacy and family rights (**Article 21**); right to a remedy (**Article 23**); freedom of movement (**Article 26**); freedom of religion (**Article 30**); freedom of expression (**Article 32**); family life (**Article 33**); right to work (**Article 34**); right to association (**Article 35**); social security (**Article 36**); development (**Article 37**); and education (**Article 41**).

The manner in which the rights are articulated in the Arab Charter is perfectly in keeping with the approach in universal human rights treaties. Furthermore, the

manner in which 'restrictive clauses' are drafted displays a consistency of approach with universal human rights treaties. Article 43 of the Charter notes clearly:

> Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the states parties or those set forth in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.

The contrast with the approach adopted in the Cairo Declaration (Articles 24 and 25), where all rights were to be interpreted in light of Sharia, is noteworthy. In the Arab Charter there is a firm commitment to other international human rights treaties. This is not to say the Charter is unproblematic from a human rights perspective but there is a discernibly different approach in terms of relativity than that reflected in either the UIDHR or the Cairo Declaration. And that in summary is the paradox – arguments about Islamic relativism persist with vibrancy and the practice and legal position in Muslim-majority states with regard to numerous human rights issues display a marked contrast with international human rights standards, but Muslim-majority states are full members of the international community and an important and influential part of it. Thus, they play a role in the formation of norms and indeed in preventing norms from developing. We will return to a number of these issues later in the guide but, as the above discussion highlights, the issues are complex and very nuanced.

ACTIVITY 3.5

Is it accurate to talk about 'Islamic human rights'?

3.6 The Bangkok Declaration: Asian human rights

The Bangkok Declaration represents a statement of intellectual, political and legal autonomy by a block of Asian nations. It is a catalogue of rights that was presented to the World Conference on Human Rights in 1993. Commentators were surprised by the resistance to the idea of universal human rights and the affirmation of a set of Asian values. It is worth considering the document in detail to ascertain the precise terms of the Asian disagreement with the concept of universal human rights. Although adopted over 20 years ago, and notwithstanding regional human rights developments (especially the creation of an Association of South East Asian Nations – ASEAN – a human rights body) among some of those states that were vociferous supporters of the Bangkok Declaration, it still represents one of the clearest articulations of a general position by such states of their view on human rights. The document begins by stressing that international human rights remain of profound significance but the direction that the Declaration is to take is indicated by the assertion that it is necessary to have a 'just and balanced approach' to the precise nature of rights and by the reference to the inheritances of Asian nations, which do not share the values of Western nations. The Declaration stresses the 'universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicisation'.

This raises several questions. What is the basis of this argument? In what ways are there 'double standards' in the application of human rights? This may mean that behind the claim to the impartial application of human rights, there is, in fact, an implicit orientation towards the values of powerful Western nations. Other statements in the Declaration give a clearer sense of this objection. The overall position asserts the importance of social and economic rights within the context of a right to development, and a right to de-link aid and rights. The 'Asian objection' then can perhaps be seen as an objection to the way in which Western nations use a rhetoric of rights. As was noted above, rights abuses in other states are highlighted selectively by other states as part of their ideological disagreements. The Bangkok Declaration returns repeatedly to a reiteration of the value of sovereignty:

> ...all countries, large and small, have the right to determine their political systems, control and freely utilise their resources, and freely pursue their economic, social and cultural development.

This is restated somewhat differently later on:

> ...the right to self-determination is applicable to peoples under alien or colonial domination and foreign occupation, and should not be used to undermine the territorial integrity, national sovereignty and political independence of states.

The context and background to the Declaration is the colonial experience and resistance to foreign occupation. It can in this sense be related to the Arab Charter above and the African system, which we will examine later in the guide. This claim is made contemporary by referring to the Palestinian situation, as the states in the Declaration:

> ...strongly affirm their support for the legitimate struggle of the Palestinian people to restore their national and inalienable rights to self-determination and independence, and demand an immediate end to the grave violations of human rights in the Palestinian, Syrian Golan and other occupied Arab territories including Jerusalem.

It is important to note that that Declaration is about much more than an argument about universalism and cultural relativism. This is a political claim that operates at a number of levels. Most specifically, it appears to be a criticism of certain policies towards the Palestinian situation. But this is not just a claim about sovereignty; it is an argument that different traditions have different understandings of human rights. This is made clear when it asserts:

> ...while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

To elaborate these claims, it is important to take a step outside the document and refer to one of the major proponents of the Asian rights case, the former Prime Minister of Singapore, Lee Kuan Yew. Even several years after his death, the view articulated by Lee and the 'Singapore School' that is associated with his name, continues to be influential. Similar views were also expressed by Mahathir Mohamad during his first term as Prime Minister of Malaysia. It is obvious that political leaders for these countries do not represent the views of an entire region; nevertheless, they are particularly interesting articulations of the Asian view. We will use the Singapore School as our paradigm. Lee repeatedly argued in his writings and speeches that there are fundamental differences between Western concepts of society and government and those which prevail in East Asia. This argument is based on a privileging of society over the individual in the name of economic and social development. If one considers the social contract in Singapore, this is apparent. A small island territory with few natural resources is one of the most prosperous states in the world. There are severe restrictions on political rights that seek to promote the interests of society as a whole but, the government argues, in return there is a level of prosperity, education and health care that is among the highest in the world. This prioritising of society over the individual was also stressed by another former Prime Minister of Singapore, Goh Chok Tong. In an article he argued:

> For success to continue, correct economic policies alone are not enough. Equally important are the non-economic factors – a sense of community and nationhood, a disciplined and hardworking people, strong moral values and family ties. The type of society determines how we perform. It is not simply materialism and individual rewards which drive Singapore forward. More important, it is the sense of idealism and service born out of a feeling of social solidarity and national identification.
>
> (Goh Chok Tong, 'Social values: Singapore style', *Current History* 1994, p.417.)

In order to appreciate the diversity of Asian understandings of human rights, it is necessary to look at China's elaboration of its own understanding of the role that rights play in its history and culture. In 1991, the *Beijing Review* published a document

that attempted to elaborate a defence of human rights in China in the wake of Tiananmen Square. 'Human rights in China' begins by affirming a belief in the universality of human rights:

> The issue of human rights has become one of great significance and common concern in the world community. The series of declarations and conventions adopted by the United Nations have won the support and respect of many countries. The Chinese government has also highly appraised the Universal Declaration of Human Rights, considering it the first international human rights document that has laid the foundation for the practice of human rights in the world arena.

In this respect 'Human rights in China' is similar to the Bangkok Declaration. Once again, it is worth stressing that these 'alternative' statements of human rights are not concerned with a complete revision of the idea of human rights. What is important is a realisation of context:

> However, the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken different attitudes towards the relevant UN conventions. Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region. Such is the practical attitude, the attitude of seeking truth from facts.

This resonates with another theme in the Bangkok Declaration: sovereignty is linked to the specific development of a culture. Universal rights claims take second place to the assertion of a 'social, economic and cultural' specificity. What, then, is unique about human rights in China?

> From their own historical conditions, the realities of their own country and their long practical experience, the Chinese people have derived their own viewpoints on the human rights issue and formulated relevant laws and policies. It is stipulated in the Constitution of the People's Republic of China that all power in the People's Republic of China belongs to the people. Chinese human rights have three salient characteristics. First, extensiveness. It is not a minority of the people or part of a class or social stratum but the entire Chinese citizenry who constitute the subject enjoying human rights. The human rights enjoyed by the Chinese citizenry encompass an extensive scope, including not only survival, personal and political rights, but also economic, cultural and social rights. The state pays full attention to safeguarding both individual and collective rights. Second, equality. China has adopted the socialist system after abolishing the system of exploitation and eliminating the exploiting classes. The Chinese citizenry enjoys all civic rights equally irrespective of the money and property status as well as of nationality, race, sex, occupation, family background, religion, level of education and duration of residence. Third, authenticity. The state provides guarantees in terms of system, laws and material means for the realisation of human rights. The various civic rights prescribed in the Constitution and other state laws are in accord with what people enjoy in real life. China's human rights legislation and policies are endorsed and supported by the people of all nationalities and social strata and by all the political parties, social organisations and all walks of life.

Although one may consider this to be political rhetoric, there is something to the broader social contract and its evolution that we have been witnessing in China in recent years. China's rapid economic growth and its influence as a major actor globally are not unrelated. If we consider poverty reduction policies in China, it is clear that more people in China have been lifted out of poverty in the last 30 years than has ever been the case anywhere at any time in history. In absolute terms that can be put down to the sheer scale of the population in China but notwithstanding this, it is still a remarkable achievement. This is analogous to some extent to the situation in Singapore: put simply, a restrictive and oppressive political order that emphasises the collective over the individual but that leads to economic growth. We cannot of course know what level of economic growth there would have been in either of these

countries if more 'individual-oriented' models had been adopted. Further, we must always approach governmental statements with a critical eye to assess the reality, but nevertheless these are interesting and difficult issues which are worth reflecting on. But even if we consider these statements on their terms, it is important that we engage with them critically. To take an example: it has been the case for a number of years now that China treats its Uighur minority (who are mostly Muslim) in an exceptionally discriminatory manner. In 2018 reports started to leak out of China that referred to mass detentions, torture, 'brain washing' – and the term 'cultural genocide' has been used. Some of these claims have been substantiated but not by formal courts or tribunals, at the time of writing. China denies the reports or justifies aspects of its behaviour as 're-education' or dealing with security concerns. Interestingly, no state has yet raised the matter with China in a public forum such as the UN General Assembly. The approach China has adopted in recent years towards Hong Kong is similar. The 'one country, two systems' approach has led to significant and ongoing repression of dissent in Hong Kong. The United Kingdom, the former colonial power, has raised muted objections but the global silence in both cases is deafening. In the case of the Uighurs, it is much more troubling. The issue, however, is whether or not these are simply examples of repression, negating a security threat, eradication of a minority culture, a combination of the aforementioned or something else. What is clear is that these 'clamp downs' cannot be dismissed or justified by the 'Asian values' argument.

It is thus important to recognise that the argument has clear limits and that these are recognised by all. For more information on this and related issues regarding the Uighurs and Hong Kong, see: www.bbc.co.uk/news/world/asia/china and www.theguardian.com/world/china

Self-assessment question

Considering the above discussion concerning China, what sort of approach to values does it represent?

Activity 3.6

'To describe Asian articulations of human rights as relativist is only partially helpful in understanding the tensions in international human rights law; they have to be seen as political responses to specific situations.'

Discuss.

3.7 The challenge of populism?

While there are debates about relativism and universalism, a more recent pushback against human rights has been from 'populism'. The ebb and flow of political beliefs and fortunes are cyclical, and it was perhaps only a matter of time for populism, in its various forms, to again rear its head and enter the mainstream of the political fray. Populism can be seen as a movement that puts the partial interests of the mobilised above the interests of others, while claiming that the populist movement represents the entirety of society. Populism is, as Jan-Werner Müller explains, 'a way of perceiving the political world that sets a morally pure and fully unified people against elites who are deemed corrupt or in some other way morally inferior'. Some populist parties have a very strong aversion to immigrants. This aversion stems ostensibly from a stated desire to preserve national identity and culture. Human rights courts – in particular, international ones – are thus presented as an impediment to the fulfilment of the populist manifesto and the right of the State and its populace to make their own decisions. Populism can be defined in various ways and, in contemporary politics, manifests itself in various ways but, at heart, it is a nationalistic rhetoric. That nationalism is seen as necessitating a return to some mythical past. It can be seen in the politics of leaders in, for example, Brazil, Israel, Hungary, Poland, India and the USA (under Donald Trump) and led, in part, to the decision in the United Kingdom to leave the European Union. Populism is not homogenous – it differs significantly from state to state – but broadly it is the politics of the right. It is socially conservative and

believes in national decision making and autonomy – the restoring of sovereignty. It is, however, democratically legitimate in the sense that it uses the instruments, tools and apparatus of democracies to undermine liberalism within them. Human rights are a liberal project; the rights of minorities, the outsiders, the unpopular, the dissident are not considered by illiberal regimes to be necessary, let alone a priority. Even states that are not run by populist leaders have elements of the populist agenda within their political mainstream. The danger of populism to human rights is that populism marginalises some populations and gives greater credence to domestic institutions as compared to international ones and the scrutiny that comes with them. It is still too early to tell if populism will accelerate and expand in the years to come but it is certainly something we need to keep an eye on. In the context of the Council of Europe, it poses real challenges and we will consider it further in Chapter 6.

3.8 Towards a conclusion: relativism, universalism, the politics of exclusion and recognising new rights

In this chapter we have considered the relativism versus universalism debate and tried to tackle some of its nuances. It is also apparent that the debate is not clear-cut and indeed may be something of a distraction when it comes to understanding the pressing, contemporary problems of human rights. The issue, as outlined by the UN, is perhaps more properly understood as the exclusion of certain types of people from a definition of rights that is now sensitive to the problems inherent in the universalism of rights claims.

The contemporary defence of human rights brings together universalism with a sensitivity to diversity and cultural specificity. The following passage comes from the Report of the UN Commissioner for Human Rights issued at the Vienna Conference of June 1993. As such it represents a principled and sophisticated defence of the Vienna Declaration and Programme of Action that re-affirmed the universality of the UDHR. Recognising that 'the significance of national and regional particularities, as well as various historical, cultural and religious backgrounds, must be borne in mind', the report stressed that 'it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'.

From one perspective, the universalism of human rights is indisputable. However, that the 1993 Conference could acknowledge that the 'universal ratification' of all 'the relevant international instruments had still not yet been achieved' suggests that, despite the UDHR and the associated documents, it is still not possible to speak of the universalism of human rights as a reality. Notwithstanding increasing ratification and accession by states to the UN Human Rights Treaties, there are very significant gaps in ratification and further a myriad of reservations, some of which are so extensive they effectively seek to entitle the state to do nothing. Even where there are no or far more limited reservations, ratification of a treaty is not the same as implementing and respecting the rights in question.

It might be suggested that a key issue is the need to address the continued exclusion of types of persons from universal protection. This is not just a question concerning the protection of women or children, for example. Certain groups, such as indigenous peoples and minorities, have long been marginalised and excluded. The violation of the rights of minorities has often been a major source of human rights violations. At heart this is about discrimination against minorities, be it religious, cultural, ethnic, racial or on the basis of their sexual orientation. But here we can also highlight a related issue. One of the clearest trends in international human rights in the last 50 years has not been about recognising new rights *per se*, although that has happened as well (please see the article by Alston in the Further reading for a wonderful discussion on this), but rather about ensuring those excluded from society have their rights better recognised, elaborated upon and protected. One can see this in terms of efforts dealing specifically with, for example, rights of women, children, the disabled, migrant workers and also indigenous peoples. But this is not always so. The law has had to develop and recognise that the same issues do not arise for all in the same way. Thus,

for example, as we will see later in the guide, a key issue in recent years has been the marginalisation of indigenous peoples and how this has been addressed. The distinct identities of indigenous communities was denied by some states. Further, land rights affect indigenous peoples in ways and to an extent that they do not non-indigenous people, notwithstanding that serious problems may exist in relation to land rights for others also. In a related way, we can see the development of norms specifically dealing with sexual orientation discrimination. As the Alston and Goodman reading (pp.220–38) highlights, this has been a battle with states taking very diverse views for a number of reasons.

3.9 Conclusion: rights, desire and identity

Is any conclusion possible? How can we think about the complexity of rights? Costas Douzinas has considered the matter as follows:

> Human rights do not just confirm or enforce certain universal personality traits. Their continuous extension to new groups and novel areas of activity indicates their deeply antagonistic character. Their recognition goes to the heart of existence, addresses the fundamental other-appreciation and self-esteem of the individual beyond respect and touches the foundations of identity. We are doomed or blessed to strive endlessly for concrete recognition of our unique identity. But the avoidable misrecognitions, the myriad instances of mismatch between the self-image of an individual or group and the identity the law and rights allow them to project, make law a necessary but inadequate and defective partner in the struggle for identity. A complete identity cannot be based on the universal characteristics of law but on the continuous struggle for the other's unique desire and concrete recognition. Human rights, like desire, are a battlefield with ethical dimensions. Social conflict may be occasionally destructive of the social bond but it is also one step in the development of political and ethical forms of community. But the desire for the other remains a step ahead of law. It keeps seeking greater formal recognition but, as soon as the claim for legal form has been granted, its achievement undermines the desire for the other. Human rights create selves in this intricate but paradoxical intertwining with identity and desire.
>
> (Douzinas, C. *The end of human rights*. (Oxford: Hart Publishing, 2000) p.179.)

How might this account of rights help us to orient ourselves towards the material we have been considering? Rights are, first of all, 'deeply antagonistic'. This suggests that for all the international conferences devoted to the coordination of human rights, there is something that remains irreducible. This is because rights have to be seen as operating in social and cultural contexts where 'identity' is always at stake. Law is invoked in these claims to identity, whether they are claims to individual or group identity, but there is a 'mismatch' between the need to articulate identity and the role that rights play. Claims to identity will never be satisfied by law. This is because identity is not ultimately based on law, but 'on the continuous struggle for the other's unique desire and concrete recognition'.

Desire, in this sense, constantly strives to make claims about individual and cultural recognition, a recognition by others. This cannot be limited by the law, although the law is essential to its articulation. In this sense, the key term is political desire. We could thus see a statement of Islamic rights as a claim that Islam should be recognised as an alternative rights tradition. This takes a legal form in the documents that we have studied, but these documents themselves are only understandable by referring to broader social and religious concerns that are inseparable from the Islamic claim to identity. The Sharia issue should not be seen purely in narrow terms as the need to reconcile legal traditions. Claims made for recognition of Sharia law have to be understood as more fundamental assertions of a legal tradition that is bound up with claims to Islamic identity. There is one final matter to note. The universalist–relativist debate implies that rights are accepted in the West. That has never been the case, rights have always been challenged. Contemporary geopolitical developments indicate a rise in so-called 'populism'. This has many manifestations in all parts of the globe. The rise of the political right in Italy, France, Brazil, Italy, Hungary and Poland can all be seen as part of this trend. It is the election of Donald Trump to the

Presidency of the United States of America that is most significant, even if he lost the 2020 presidential election. The rise of 'populism' challenges many long-established assumptions and a great deal that has been taken for granted by those who are part of the 'human rights movement'. The article listed in the Further reading by Philip Alston on 'The populist challenge to human rights' considers these issues and it is something you would do well to consider.

Reminder of learning outcomes

By this stage you should be able to:

- **approach international human rights as a potentially problematic field of dispute rather than an obvious set of legal entitlement claims that should automatically be pursued**
- **identify the distinctive features of the universalist approach**
- **identify the distinctive features of the critique of the universalist approach (i.e. that it is a mode of imposing cultural, economic and/or social norms on other jurisdictions)**
- **describe the main features of alternative human rights traditions**
- **discuss the concept that rights are expressions of political and cultural identity**
- **understand how the above issues are characterised via the categories of 'universalism versus cultural relativism' and be prepared to take a critical stance on this characterisation and (ultimately) on this way of understanding the issues.**

Sample examination question

'The nature of human rights is contested; this is itself positive. Consensus would prevent the development of human rights.'

Discuss.

Advice on answering the question

This is quite a difficult question to answer. What one should certainly avoid is listing the various schools of thought that have been examined above. The best approach is to think carefully about what the question is asking, and respond directly to the issues it raises. The statement above can be broken down into a number of related issues, which in turn can be seen as questions: to what extent is the nature of human rights contested? Is it good that this is the case? To what extent would consensus prevent further development of human rights? To cover this question, one would have to address all these issues. It would probably be wise to agree with the first issue: the nature of human rights is certainly contested. This can be evidenced by the different ways of thinking about human rights discussed in this chapter. The essay could review some of the salient conflicts over the nature of rights. The second and third issues could be taken together. Does a contest make for the development of human rights? It would be hard to agree completely with this statement. To some extent, argument and dispute allow human rights to develop. One might think about the way in which social and political rights have been put on the agenda of bodies like the World Bank. However, contestation can also lead to conflict. One might think about the way in which Islamic attempts to posit human rights have come into opposition with Western models of rights. Some might argue that over certain issues there is simply no consensus: rather, the development of two different traditions.

4 Human rights and the international legal order

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Introduction

This chapter will argue that international human rights law has to be seen as an essential element of global politics and that human rights are linked to the emergence of an international legal order. Within this structure human rights are, at the global level, primarily the concern of the United Nations. However, it is necessary to appreciate that human rights are now what are referred to as 'cross-cutting' principles, which means that other international institutions should bear in mind the human rights impact and implications of their policies and decisions. In essence, other international organisations and bodies should implement their objectives as defined but also ensure their activities are sensitive to or at least take account of what this means, in human rights terms, for those affected by their activities. The initial and primary responsibility of the World Bank, the International Monetary Fund (IMF) and the World Trade Organization (WTO) is the regulation of international finance and trade. They should now, however, be human rights-sensitive. To take an example, a developing country lacks adequate electricity for the needs of its population. It thus decides to build on one of its large rivers a reservoir and dam with a hydro-electricity generator. This will generate cheap and accessible electricity for the population and local infrastructure such as schools and hospitals and further allow industry to develop in the region which will create much-needed employment. One can only consider this positively. It is sustainable, environmentally friendly and should significantly improve the lives of those who can access the electricity generated – including contributing to better health care and education. To build the reservoir and dam, however, the country will have to flood an area that is home to indigenous tribes and their ancestral lands, which are hugely culturally and religiously important to them. The developing country is willing to move the indigenous tribes and flood their lands but needs access to funding from the World Bank to build the dam. A key question, therefore, would be whether the World Bank should help fund the dam in light of the human rights consequences of doing so – both negative and positive. These have long been difficult questions and we can see that the longer-term implications may be more damaging even if there are shorter or medium-term economic benefits. For example, deforestation of pristine forests may allow growth of a cash crop, creating jobs and earning foreign currency, but what of the habitat loss and longer-term environmental damage? How are such matters to be balanced? Recall that in democracies shorter-term measures are often key to electoral success. So, is authoritarianism to be preferred? There are complex 'social contract' issues here on which views legitimately differ. The World Bank and IMF are key in this regard but remember that economically powerful states can offer loans to other states. China's belt and road initiative is key here as its scale and ambition is unmatched since the US Marshall Plan after the Second World War, which sought to help rebuild Western Europe. China does not impose 'human rights conditionality' on states it is investing in – equally, its terms may be unaffordable in the longer term but more attractive in the shorter term. Thus, the belt and road initiative may undermine efforts by international organisations to impose human rights conditionality in their lending. The belt and road initiative is not only complex but also hugely controversial in many states. It is beyond the remit of this module as it is a state-based activity that is not directly subject to international human rights supervision. You can, however, find more about it on various websites. Just take care as to whether the website/report is objective or not.

We do need, however, to examine the human rights remits of international institutions. The operation of these institutions and the regulation of the world economy raises detailed and complex issues that cannot be investigated in depth in the confines of this module guide. Within this chapter, the term 'the political economy of human rights' will refer to a general argument: it is necessary to place human rights in a political and economic context in order to understand their global operation. This does not mean that we should downplay the role of individual nations in supporting (or even hindering) human rights and the work of international institutions. However, it is suggested that these international bodies of law have a supranational competence that takes our focus away from domestic law. This chapter will be largely dedicated to explaining these keys terms, and elaborating this understanding of human rights.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- **outline the development of human rights within the United Nations**
- **discuss the meaning of 'the political economy of human rights'**
- **achieve a basic understanding of the international institutions of the post-1945 world order (the UN, the World Bank, the WTO, the IMF) and also the rise of issues such as climate change and businesses as major global actors**
- **map the development of human rights law**
- **analyse the international nature of human rights law**
- **explain the concept of civil society and how it works in practice**
- **develop an understanding of international civil society**
- **discuss the historical development of civil society**
- **outline the relationship between human rights and civil society/international civil society**
- **explain the role of non-governmental and international non-governmental organisations**
- **explain the role played by new social movements.**

4.1 Human rights and the values of the international legal order

Core text

- **De Schutter, Chapter 4 'Human rights law as part of international law', especially Section 4.3.**
- **Bantekas and Oette, Chapter 3 'Human rights in practice', Chapter 13 'The right to development, poverty and related rights', Chapter 18 'Human rights obligations of non-state actors' and Chapter 19 'Globalisation and its impact on human rights'.**

Further reading

- **Alston and Goodman, Chapter 17 'Human rights, development and climate change', pp.1516–36.**

This discussion relates to human rights and development and picks up some themes which highlight a complex interaction of social, political, economic and other forces on a global scale. We will come back to many of these issues throughout the chapter. We can consider human rights as part of the process of globalisation. Globalisation is the transition from the colonial empires of 'old' Europe to an international order defined at the end of the Second World War. This era is characterised by a qualified hegemony of American, European and Asian trading blocs and the increasing integration and interdependence of states. As states have increased in number and political entities thus become smaller, to be viable they tend to become more reliant upon each other for food, energy, goods, consumables and indeed many other things. No one state can alone fulfil the needs and demands of its population, as well as have a prosperous economy and ensure its defence. Although formal decolonisation has taken place since the Second World War, the post-war world remains marked by a division between developed and developing countries. Moreover, international order is defined by the foundation of powerful supranational agencies charged with the task of overseeing the operation of the global economy: the IMF, the World Bank and the WTO. The UN does not act in a vacuum, but operates in a global contest that is in part defined by the activities of these other organisations.

The UN has its roots in the desire for a lasting peace that arose after the Second World War. Prior to the creation of the UN, there had been other attempts to create international mechanisms for the prevention of war. There were two important forerunners of the UN. In 1899 the International Peace Conference adopted the Convention for the Pacific (i.e. 'peaceful') Settlement of International Disputes and established the Permanent Court of Arbitration, which began work in 1902. After the

First World War, in 1919, the Treaty of Versailles created the League of Nations, 'to promote international cooperation and to achieve peace and security'. Although the League of Nations failed to prevent the outcome of the Second World War, with the conclusion of hostilities the international community saw the need for a body that would prevent future conflicts. In 1945, at a meeting in San Francisco, delegates drew up proposals for a UN Charter that was signed later that same year.

US President Roosevelt stated that the UN 'spells…the end to the system of unilateral action, exclusive alliances and sphere of influence, and balances of power, and all the other expedients which have been tried for centuries and have always failed'.

The sovereign state was fundamental to the UN; and the UN depended on the goodwill of nations for the preservation of peace. However, at the time of the UN's inception, human rights were not as central as they were to become. A little context is necessary to understand this point. Prior to the Second World War, international law did not impede the right of sovereign states to violate the rights of their subjects. The summary execution or torture of a citizen only became a legal problem if the victim was a subject (national or citizen) of another state. In other words, citizens did not have personal rights as such; the law tended to treat the state itself as the aggrieved party. This position was based on the idea of a state's sovereignty. A citizen did not enjoy rights that would protect him or her from the state. Human rights became more important in the direct aftermath of the Second World War.

The International Military Tribunal was set up by the Allies at Nuremberg to try Germans accused of war crimes and crimes against humanity. This was and still is hugely contentious because the Allies also undeniably committed such crimes during the war but only the vanquished were tried. The very notion of a crime against humanity does suggest, however, that there is 'something' inviolate to the human being and a government can be held accountable for the way in which it treats individuals.

The role that human rights played in the setting up of the UN, however, was rather limited. This was due to the central idea of a state's internal affairs being solely its concern, something that is one of the UN's basic principles as articulated in Article 2 of the Charter. The notion of human rights implies a limitation to a state's sovereignty. In other words, the protection of human rights suggests that citizens have to be protected from governments. This implies that some international body would have jurisdiction over the domestic affairs of a state. Although Articles 55 and 56 of the UN Charter do refer to human rights, the role they have played has increased over time and is far greater than envisaged at the time of drafting and adoption.

It is clear that the contemporary understanding of the centrality of rights to international law and politics was not shared by all the founders of the UN. We can examine this in more depth by looking at the drafting of the Universal Declaration. The first sessions of the UN were dedicated to the drawing up of a Universal Declaration of Human Rights.

As has been alluded to in previous chapters, the central problem facing those drafting the Declaration was how could they agree a set of core beliefs that underlay the different political and ideological systems of the world? The solution was to affirm a common belief in fundamental rights and freedoms. The Declaration was adopted by the Member States of the UN in December 1948. In the words of a UN General Assembly representative from France, the Declaration was 'a world milestone in the long struggle for human rights'. There are three important points to note concerning the Declaration. First, it is not a legally binding document – it is a declaration – as states could not agree to the document being formally legally binding and it was purposely not adopted as a treaty. Rather, it states a 'common standard of achievement for all peoples and nations'.

Second, the rights stated within the Declaration are seen as a totality. The Declaration stresses the universality, the indivisibility and the interrelationship of all human rights. It reinforces the idea that human rights – civil, cultural, economic, political and social – should be taken in their totality and not disassociated from one another. Thus, we can speak of an interrelating set of documents, of which the Declaration forms but one part.

The other instruments include the two 1966 Covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These two Covenants are legally binding. The UDHR and the two Covenants are collectively known as the International Bill of Rights.

Third, as has been alluded to previously, we have to appreciate that a number of subsequent treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child have been adopted to augment the International Bill of Rights. That the original treaties needed supplementing raises some interesting points about the nature of human rights – indeed, the very idea of what constitutes a subject of human rights. Why, for instance, was it thought necessary to adopt new conventions? In a previous chapter, we discussed how the adoption of new treaties related to trying to ensure that those who are deemed 'other' are included by societies. This identification of those whose rights are specifically to be addressed underlines that we are examining a body of law that evolves as political priorities change. For instance, at the World Conference on Human Rights held in Vienna in June 1993, states reaffirmed their commitment to the Universal Declaration and adopted the Vienna Declaration and Programme of Action. The Programme sought to put pressure on governments to honour their human rights commitments, and also to encourage a proactive approach to the protection of human rights. Furthermore, if we turn our attention to the 'Millennium Declaration' of 2000, we can appreciate that rights are related to development issues. Member states articulated specific targets aimed at overcoming hunger and poverty in the developing world, protection of the environment and promotion of democracy.

Although we will return to the issue of the nature of human rights shortly, it is worth engaging with the political vision that underlies the Declaration. The Declaration, as noted in the previous chapter, formally appears to draw on a secular culture rather than a religious one. Furthermore, the politics of the Declaration are those of a version of the good life – a life that leads to fulfilment through respect for each individual's humanity. The Declaration arguably defines a minimum of what is acceptable in terms of the values that underlie political community, such as the right to life, liberty and security of person; the right to an adequate standard of living; the right to own property; the right to freedom of opinion and expression; freedom of thought, conscience and religion; and the right to freedom from torture and degrading treatment.

Self-assessment questions

1. **What organisations were forerunners to the UN?**
2. **Why was there a reluctance to favour human rights in the early years of the UN?**
3. **What is the significance of the Universal Declaration?**
4. **What is the International Bill of Rights?**

Activity 4.1

Why is there tension between a state's sovereignty and human rights?

Reminder of learning outcomes

By this stage you should be able to:

- **outline the development of human rights within the United Nations**
- **discuss the meaning of 'the political economy of human rights'**
- **achieve a basic understanding of the international institutions of the post-1945 world order (the UN, the World Bank, the WTO, the IMF) and also the rise of issues such as climate change and businesses as major global actors.**

4.2 Categories of rights and their transformation

ESSENTIAL READING

- **Young, K.'Rights and obligations' in Moeckli et al. (eds) (available in VLeBooks via the Online Library).**

The jurisprudence of international human rights is an expanding and dynamic area. It is impossible, in a module guide, to cover the full range of human rights issues in any detail. In this section of the chapter, however, we address the question: how can we think about international human rights law?

As suggested in the introduction, this means thinking about three related issues. First, how can we conceptualise the human rights law of the UN (and regional systems)? Second, how can we think about the way in which human rights law is increasingly part of the agenda of other international institutions? Third, what are the issues that underlie the differing human rights jurisdictions of these different bodies? We will see that these international bodies of law are very different from domestic legal orders.

To explain the character of rights, we can make use of the traditional typology of 'generations'. So-called first-generation rights can be seen as the 'classic' liberties (e.g. freedom of speech, prohibition of torture) which developed in the 18th and 19th centuries, aimed at providing protection for the individual against the state. One can think of them as immunities in the sense that they, broadly speaking, prohibit the state from doing something deemed harmful to the individual – thus they are primarily considered negative in nature. Although this is a rather simplistic way of considering them – as negative rights – it is a useful way to understand their nature. Civil and political rights, as these rights are known, have ideologically been perceived as central to Western democratic political orders. Second-generation rights are those such as the right to food, shelter, education and work. In contrast to the first category, second-generation rights are about rights that lead to a more fulfilled, indeed humane, existence. They require the state to do something so as to ensure they are respected. Again rather simplistically but usefully, they are primarily positive in nature. Third-generation rights can be described as 'solidarity rights', or rights that can only be enjoyed collectively. This last category of rights presents certain challenges to a jurisprudence that has always considered the notion of human rights to be inextricably linked to the individual. These are legal claims that function politically: it is hardly surprising that their articulation relates in part to the struggles against colonialism. One can think of minority group rights, the right (of peoples) to development and the right (of peoples) to self-determination. As useful as these categorisations are for the purposes of explanation, and notwithstanding their continued widespread use, it is important to stress that the dichotomy between these categories of rights is not as clear-cut as often argued. There are clear overlaps between some of the rights, which are seen as belonging to different categories, and some are complementary to others. Freedom of expression is considered a classic civil and political right – yet, without the right to education, a classic economic and social right, it is fair to argue that the right to expression can be meaningless. The relationship between different 'types' of rights is a complex and nuanced one, and while the typology of rights is useful, it is at times overly simplistic; through the course of this module guide, it is important to bear this in mind and consider it a key theme in trying to appreciate the practical working of human rights law.

We will be examining various rights in this module guide but it is worth thinking about the types of rights a little more so as to give us some perspective. We will focus on economic and social rights (so-called second-generation rights) so we can draw a contrast with civil and political rights.

There has long been a debate among governments, NGOs and writers about the nature of economic and social rights and whether they differ qualitatively from civil and political rights. Some have argued that this debate is over but that conclusion seems premature as different views on economic and social rights are still being expressed. In one view, espoused by, among others, the US government, economic and social

rights are not true rights but rather represent principles, aspirations and policy goals. A second view accepts that economic and social rights are, properly speaking, rights but argues that they are different in nature from civil and political rights. Proponents of this view point to various treaties. Article 2(1) of the ICESCR provides that the rights in it are to be progressively realised in the light of available resources, whereas the ICCPR has no such provision. From this it is argued that civil and political rights are of immediate application, whereas economic and social rights are to be progressively realised; and that such realisation requires considerable economic resources, unlike the realisation of civil and political rights. They then go on to argue that economic and social rights, unlike civil and political rights, are not capable of being enforced by courts (i.e. justiciable) because the broad language in which they are formulated and the economic resources required for their realisation would involve courts in choices of policy goals and the allocation and prioritisation of what are often scarce resources – matters that in a democratic society are the concern of governments, not courts. In any case, judges lack the expertise to make decisions about resource allocation.

This view of the nature of economic and social rights can be strongly contested. The Teheran and Vienna Declarations of 1968 and 1993, respectively, assert that all human rights are indivisible, interdependent and interrelated; they argue that economic and social rights are no different in nature from civil and political rights. Like economic and social rights, civil and political rights often require considerable resources for their realisation: for example, the right to a fair trial requires the provision of courts and the availability of legal aid for the needy; accommodation in existing prisons may need to be extensively modified so as not to constitute inhuman and degrading treatment. Conversely, some economic and social rights are capable of immediate realisation without the need for significant resources, such as the rights to collective bargaining and to equal pay for equal work. As to the question of justiciability, some economic and social rights are obviously justiciable, such as the right to equal pay for equal work and that courts have long been engaged in making judgments that involve policy choices and the allocation of resources.

If we return briefly to the nature of the obligation in the ICESCR, this is helpful to us. Article 2(1) states:

> Each state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) and its implications for both states parties and the work of the ICESCR Committee have given rise to much discussion. Conceptually, the Committee's initial approach was to see the obligations in the ICESCR as including both obligations of conduct and obligations of result. It later abandoned that approach and from General Comment No. 12 (issued in 1999) onwards adopted a threefold typology of obligations: respect, protect and fulfil. The obligation to respect requires a state party 'to refrain from interfering directly or indirectly with the enjoyment of Covenant rights' and will often be an obligation of immediate effect. The obligation to protect requires a state party to 'prevent third parties from interfering with the rights recognised in the Covenant'; sometimes the obligation is of immediate effect, at other times it is one requiring 'positive budgetary measures' (i.e. it is progressive). The obligation to fulfil is sub-divided into two: first, to facilitate, meaning that a state party must 'pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure' enjoyment of a right; and second, to provide a right directly. The obligation to fulfil will always be progressive. This typology was developed in part to affirm that in certain key respects, economic and social rights are similar to civil and political rights because both types of rights involve the three kinds of obligation.

Thus, in spite of the principle enunciated in Article 2(1), not every right in the ICESCR, or not every aspect of a particular right, is progressive. The ICESCR Committee has declared certain rights to be of immediate effect. They include the obligation to guarantee that the rights in the ICESCR will be exercised without discrimination of any

kind (Article 2(2)) and the right to equal pay for equal work (Article 7). Even where a right is in general terms progressive, there may be elements of it that are of immediate effect. Thus, in relation to the right to housing in Article 11, which in general is clearly of a progressive nature, the ICESCR Committee has nevertheless found that there are some immediate obligations contained within that right, such as the obligation of states parties to refrain from engaging in or permitting forced evictions and to monitor effectively the housing situation in its territory. Furthermore, in the case of rights or aspects of rights that are progressive, it has declared that the obligation on a state party under Article 2(1) to take steps to realise that right means that they 'must be taken within a reasonably short time after the Covenant's entry force for the state concerned. Related to the idea of immediately taking, or at least not delaying in taking, the necessary steps towards realising ICESCR rights, is its notion of there being a 'minimum core obligation' to each right. This concept is not very precisely articulated. While, according to the ICESCR Committee, a state would *prima facie* be failing to discharge its obligations under the Covenant if, for example, 'any significant number of individuals is deprived of essential foodstuffs, of essential primary care, [and] of basic shelter and housing', account must also be taken 'of resource constraints applying within the country concerned'. But this requires a state to show that it has made every effort 'to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.

This short discussion highlights that drawing clear distinctions between types of rights is misplaced and fails to appreciate the complexity of rights and how rights and their meaning and implications have evolved. We will further examine the relationship between 'types' of rights later in the module guide.

ACTIVITY 4.2

How can we conceptualise human rights law?

Summary

The development of human rights can be thought of as passing through three generations. This is a useful, if limited, way of thinking about the manner in which rights have been transformed from narrow claims to civil liberties, through to much broader claims about the way in which the social, economic and political world should be organised.

4.3 The human rights obligations of the IMF, the World Bank and the WTO

ESSENTIAL READING

- **Leader, S. 'Human rights and international trade' in Sheeran and Rodley (eds), pp.245–62 (available in VLeBooks via the Online Library).**
- **Muchlinski, P. 'International finance and investment and human rights' in Sheeran and Rodley (eds), pp.263–84 (available in VLeBooks via the Online Library).**
- **Joseph, S. 'Trade law and investment law' in Shelton (ed.), pp.841–70 (available on the VLE and in Oxford Handbooks Online via the Online Library).**

You may prefer to work your way through the discussion below before tackling the above readings.

The IMF, the WTO and the World Bank are bodies that were created by treaties and are thus institutions of international law. We do not want to become too focused here on a detailed description of how these institutions function. However, in terms of a working definition, we can suggest that:

- the WTO regulates and encourages global trade

- the IMF and the World Bank both regulate world finance, make loans to nations and assist in the economic development of poorer nations.

For the moment, we are more concerned with the way in which these institutions make use of human rights in order to fulfil their respective roles. We will consider them in turn.

4.3.1 The World Bank

The Articles of Agreement for the International Bank for Reconstruction and Development (IBRD, hereafter the World Bank) and the International Monetary Fund (IMF) were drawn up and adopted at Bretton Woods (USA) in 1944. These institutions can be seen as central to the reconstruction of a world order after the conclusion of hostilities in 1945. Their objectives were to provide finance for the reconstruction of the post-war world, but, over time, both institutions have become increasingly involved in the economic development of developing countries. Both the IMF and the World Bank have been criticised for doing too little to aid in the development of poorer countries; some accused them of exacerbating the debt crisis in developing countries that broke out in the 1980s.

In this overview of these institutions, we are concerned with the way in which human rights and the development mission have become an essential part of the management of the world economy.

The World Bank provides low-interest loans, interest-free credit and grants to developing countries as well as loans to higher-income developing countries. In the case of poorer countries, which are either unable to borrow money in international markets or can only do so at very high rates of interest, the World Bank provides an essential source of finance. In more recent years, the World Bank, in cooperation with the IMF, has been behind initiatives to resolve the debt crisis in developing countries. The Heavily Indebted Poor Countries (HIPC) Initiative aims to provide sustainable debt relief, and the World Bank has committed itself to the Millennium Development goals.

Depending on the outcome of an overall review of a nation's economic condition and the development problems that it faces, the Bank can arrange investment loans and adjustment loans. Whereas the former can cover a broad range of sectors, including 'financing goods, works and services', the latter provide 'quick-disbursing external financing' to enable reform.

Since the late 1980s the World Bank has considered human rights to be an essential part of the economic development of poorer countries. However, the Bank also argued that although human rights are now fully part of its development mission, this was not always the case. In other words, in the past the Bank operated on the basis that economic goals such as the relief of poverty were strictly separate from a concern with human rights. Now rights are seen as essential to development, but rights themselves are only considered possible within countries that have good governance, are democratic, are accountable, respect the rule of law and lack corruption.

The Bank's approach suggests that rights only make sense if the social, legal and economic infrastructures are present that allow rights to function. For instance, there is no point in talking of human rights if there is no functioning system of courts that can protect human rights, just as there is no point in having an educated and professional judiciary if there is widespread corruption. It is also important to note that the Bank continually stresses the interdependence and indivisibility of rights – civil and political and economic, social and cultural.

4.3.2 The International Monetary Fund

We can approach this issue through the IMF's own understanding of its purposes, as outlined in the first Article. The IMF is described as a permanent coordinating body that will encourage 'monetary cooperation' (Article I(i)). Through the coordination and consultation functions of the IMF, a 'balanced growth of international trade' will achieve 'high levels of employment', 'real income' and the development of national

economies. Article I(iii) specifies the centrality of 'exchange stability' and 'orderly exchange arrangements' as key aspects of this balanced international order. The intersection of currency and trade concerns can be appreciated in Article I(iv), which details the IMF's role in ensuring that a 'multilateral system of payments' for 'current transactions' are put in place, and that trade restrictions are relaxed. Another central task of the IMF is to offer 'temporary' financial help with 'adequate safeguards' to member nations having difficulties with balance of payments. The safeguards must ensure that the overriding objectives of international stability are achieved. Article I(iv) returns to the concern with balance of payments, specifying a maintenance of equilibrium at an international level.

Like the World Bank, we could note that these are first of all economic objectives. In what sense, then, does the IMF make use of human rights law? By assisting economic development, the IMF one way or another can be seen as reducing poverty – which certainly contributes to respecting human dignity. But that is not to say the interventions of the IMF are an unqualified good. Austerity measures such as reducing pensions to cut national deficits can adversely affect the poor and vulnerable. On the other hand, macroeconomic imbalances and, in particular, high inflation are detrimental to a state and especially the poor among the population. Inflation creates distortions and contributes to the misallocation of resources, which hampers economic growth and employment opportunities for those who need them.

Trade may promote growth and a rise in living standards. If this is coupled with a well-managed economy, a nation should be able to 'create an environment that supports poverty reduction'. The IMF understands its task as helping poorer countries by ensuring that economic concerns are linked to the creation of 'better governance' structures. For instance, we can appreciate how a right to property would be vital in securing investment in a country. The investors would have to be sure that their investments were safe, and that the courts of that country would use the law to ensure that protection. Thus a functioning legal system that protects rights to property was often seen as a precondition for the attraction of foreign investments that would aid in the development of a nation's economic prosperity.

It is worth bearing in mind that increasingly investment can also be protected by the adoption of investment treaties. These take the resolution of disputes outside of national courts, thus allowing investment in states while they are reforming and developing, which avoids to some extent the situation that impoverished states must reform (with little money) before they can attract inward investment. This is especially important for states recovering from conflict, but on the other hand such investment treaties, which often set up their 'dispute resolution clauses', can be used by developed or more powerful states to exploit natural resources in impoverished states with little financial risk and even less scrutiny of the human rights implications of such activities. Take, for example, Chinese investment in the Democratic Republic of the Congo (DRC); this is related to the belt and road initiative discussed above. The DRC has many natural minerals and resources that are critical to Chinese industry and manufacturing. By investing directly in these mines and exploiting the resources, with the agreement of the DRC government, Chinese industry helps reduce the DRC's government's reliance on monies from the World Bank or assistance from the IMF. The DRC's government can insist on payments for access to its mines but the human rights implications of that investment are not necessarily a consideration in making such a decision. Does the DRC insist on respect for health and safety standards in Chinese-operated mines in its territory? Are the miners paid a fair wage? What of any villages and settlements that have had to be moved to accommodate the mines – were such villagers compensated? Has the DRC's government distributed the payments made to it or invested them in infrastructure, or has the wealth been siphoned off by corrupt officials? One can guess the correct answers. As noted above, these are not things the IMF or World Bank – or indeed human rights bodies – can directly do very much about and it highlights that the private sector and other states are also relevant actors in the development process. We will discuss shortly the role and responsibilities of 'non-state actors' when it comes to human rights.

Activity 4.3

What are the functions of the World Bank and the IMF?

What are the criticisms of them? Consider the approach more broadly and specifically, for example, in the context of Greece.

4.3.3 The World Trade Organization (WTO)

The origins of the WTO lie in the General Agreement on Tariffs and Trade (GATT), signed in Geneva in 1947. Integral to GATT was the idea that nations should negotiate with each other as to the terms on which they were to trade. In 1994, at the end of the 'Uruguay Round' of trade talks, the WTO came into being so as to better realise the objectives of GATT.

WTO trade agreements are complex and cover a diverse range of subjects. Agreements cover topics such as agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations and intellectual property. The WTO is a forum for negotiation between nations in relation to trading matters and also provides a dispute-resolution mechanism. Above all, however, the WTO aims to regulate and coordinate world trade.

A number of key principles run through the agreements that the WTO oversees. These principles relate to the foundation and perpetuation of a multilateral trading system. Three principles are fundamental:

- trade without discrimination: nations must treat their trading partners with equality
- imported and locally produced goods must be treated equally with regard to tariffs and taxation
- ongoing negotiations towards the realisation of free trade is in the interests of all nations.

Our key question is: should the WTO take into account human rights obligations in regulating world trade?

Answering this question raises many difficult issues. It begs, first of all, a question about the nature of human rights. We tend to think of human rights as creating obligations for states, but should we think of 'other actors', such as organisations (even multinational companies), as subject to human rights obligations?

These questions are particularly pertinent to the world trade system but it has persuasively been argued that both bodies of law (international human rights law and international trade law) have developed independently of each other – they have been described as 'ships passing in the night'. Partly as a result of this, intellectual property rules, for example, have led directly or indirectly to the effective exclusion of many people from access to essential medicines, notably to drugs needed by the developing world to inhibit the spread of HIV/AIDS, malaria and TB – although there have been initiatives to tackle this particular issue. In a similar way, in many countries, policies that promote the privatisation of public services have made it more difficult for people to send their children to school, to secure safe drinking water, to have access to health care, or to travel to market. These failures have undermined the legitimacy of national and global political institutions, and impacted negatively on the quality of life of millions of people. The COVID-19 pandemic has acutely highlighted some of these issues. The wealthier developed nations have resisted waiving their intellectual property rights (under the WTO – the so-called TRIPS waiver) for the vaccine so that poorer developing nations can distribute vaccines to their populations. There is a fundamental question of justice here but there are also questions around setting precedents and the economic interests of very large and powerful pharmaceutical companies. Those companies can only afford the hugely expensive research and development for new drugs if they make profits on those few drugs that reach the market.

FURTHER READING

- **Although Alston and Goodman does not contain extracts dealing with the WTO, see pp.1463–96 for an excellent engagement with issues of human rights and multinational corporations, which has been alluded to several times above. The other texts noted above engage with this issue in much more detail. It is extremely interesting as it highlights the evolution of issues and standards. Multinational corporations – such as Google, Apple, Dell or Shell – can be more powerful than many states. They can compel certain states to behave in particular ways, yet they do not fit into the paradigm of the state as the abuser of rights. Equally, developing states in pursuit of development – for very understandable reasons – feel pressurised into behaving in certain ways in the pursuit of economic growth. This is part of gloablisation but the impact on human rights are real and profound.**

ACTIVITY 4.4

Do you agree with the views of the IMF, the World Bank and the WTO on human rights in the developing world?

Summary

The international system of trade and finance must be seen as though drawn from an economic theory whereby nations cooperate with each other to achieve mutual advantages. However, this theory of peaceful economic cooperation obscures the extent to which international economy is based on the exploitation of poor nations by rich nations. It may also need to be modified to take into account what scholars have called the incoherence or the 'systemic disharmony' between various norms of law and economic regulation. Critics have presented the world system as one characterised by imperialism or neo-colonialism. These accounts move away from models of economy based on mutual advantage, and they show how profound inequalities of power lie behind the system of trade and finance.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **map the development of human rights law**
- **analyse the international nature of human rights law.**

4.4 The right to development

This section will examine a number of related concerns, including the extent to which we speak of development as a right. We will review the arguments in this area and look at two important issues: the New International Economic Order (NIEO) and the promulgation of the right to development.

The NIEO represented a new departure in international law and can be seen as an initiative driven by developing nations to create a set of international norms that worked in their favour. Although the NIEO was never accepted as creating binding obligations by nations of the developing world, it can be seen as an important development: an attempt by developing nations to intervene in international law and promote the development of new principles. This endeavour can be related to the later promulgation of a right to development.

What is development?

CORE TEXT

- **Bantekas and Oette, Chapter 13 'The right to development, poverty and related rights'.**

FURTHER READING

- **Alston and Goodman, Chapter 17 'Human rights, development and climate change', pp.1516–36.**

You have read these texts earlier to provide context but now we will examine the issues in more detail and more broadly.

The extract of Sen's work promulgates a broad definition of development as much more than economic, and embracing social, political and welfare standards. Other articles suggest the controversial nature of the right to development. Abi-Saab and Bedjaoui present arguments in favour, while Donnelly argues that the right pushes against the conceptual limits of the idea of human rights. The other extracts cover issues such as the MDGs. The discussion as a whole describes the political environment of development and the problems of providing aid to the developing world. But development cannot just be thought of in terms of aid. In this section, we will look at how the developing world has tried to influence the development agenda and the structure of international law.

4.4.1 The NIEO

The United Nations Conference on Trade and Development (UNCTAD) was formed in 1964. In 1973, UNCTAD announced a declaration and a programme of action to create a new international economic order (NIEO). The NIEO can be considered an attempt to interrupt the existing legal and economic order and to create a different philosophy and approach to the development of states and international economic relations. According to Chowdhury, a number of key concepts underpin the NIEO: 'equity, sovereign equality, independence, interdependence, common interest and cooperation' (Chowdhury, S.R. 'The legal status of the Charter of Economic Rights and Duties' in Hossain, K. (ed.) *Legal aspects of the new international economic order*. (London: Bloomsbury, 2013)). But to what extent did these principles become part of international law?

The draft of the Declaration on International Development submitted by the then USSR (now Russia) to the Economic and Social Council of the UN had the principles of the NIEO at its heart. The document was aimed at the 'equitable exchange of goods' among developing nations. It proposed certain agreements over the terms of international commodity trade and, most radically, the creation of a fund composed of financial resources resulting from disarmament that could be utilised to assist development. However, the various working groups and drafting parties could not agree a text and a form of words. The NIEO ended up with an ambiguous legal status, and this is a reflection of the fact that the terms in which it sought to challenge the global order were unable to be agreed upon. The NIEO is now largely forgotten and at best occupies a marginal position in international law.

4.4.2 The right to development

In 1986 the General Assembly of the UN promulgated the right to development. Referring back to the foundational Charter, the right is introduced in the context of resolving problems of an 'economic, social, cultural and humanitarian' nature and the promoting of 'human rights and fundamental freedoms'. These objectives are associated with the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights. However, the right to development is given an explicit political edge by being linked to 'de-colonisation' and to the rights of peoples to 'self-determination'. These claims are conjoined with the notion of development as a wide-ranging process, which is based in communal participation within economic, social, cultural and political activity that results from an equitable, 'fair distribution' of the 'benefits' produced.

This certainly echoes elements of the NIEO but reinterprets these claims to equality in a new context. Perhaps the key theme is the notion of the interconnected and indivisible nature of all rights. It is also important to note that it is the 'human person' that is 'the central subject in the development process', as opposed to the NIEO's stress on collectivism. At the same time, we can see the influence of the NIEO on the language of this Declaration in the linking of human rights to a 'new international economic order', the reaffirmation of sovereignty over natural resources, and the enumeration of apartheid and colonialism and neo-colonialism as 'massive and flagrant violations of human rights'.

These arguments and concerns also underlie the individual Articles. We will review the first five Articles to give the general sense of the right to development. The 'inalienable human right' to development in Article 1 'entitle[s]' involvement in those activities that perpetuate material life. This right also covers self-determination and sovereignty over resources. The right could be seen as allowing for interference in what had been seen as matters of sovereign concern. Article 2 returns to the centrality of the human being to the development process; this is presented as a right attached to an individual rooted in a political community that should be perpetuated towards an end that best realises equitable distribution. Is there a sense here that the politically sovereign states created in the struggle against colonialism have been lacking in creating and sustaining democratic cultures? Article 3 operates at an international level, again restating the NIEO call for mutual aid and cooperation between nations. This is extended in Article 4 to the duty to collaborate on international development plans, and extended still further in Article 7 to cover disarmament. Article 5 is aimed at apartheid (now formally over) and other human rights abuses. So, the right to development can be seen as a document that potentially challenges both the developing and the developed world. The development mission is recomposed around a political problem that is challenging for a post-colonial order that has seen governmental elites entrench themselves, and a wide-scale failure of democratic culture.

Since the 1986 Declaration, however, there have been other initiatives to try to reconfigure relations between the developed and developing world. The readings in Alston and Goodman discuss the Millennium Development Goals (now referred to as the Sustainable Development Goals, which you can find here: www.un.org/sustainabledevelopment/ so please do look at this). This was one initiative among others that sought – and seek – to assist the poorest in developing states. The Jubilee 2000 campaign was an initiative aimed at debt relief, led by civil society groups. Over time, this movement and others led to the World Bank and IMF adopting measures to try and tackle the debt load of Heavily Indebted Poor Countries (HIPC) and sought to restructure their loans. It is estimated by the World Bank that over $100 billion in debt was written off with an eye to increased expenditure on poverty reduction by the states whose burdens were being alleviated.

Essential reading

- **The Sustainable Development Goals, www.un.org/sustainabledevelopment/**
- **Sepúlveda Carmona, M. and K. Donald 'The promise and pitfalls of the Sustainable Development Goals: has the time come for a rights-based approach to poverty reduction?' in Akande, D. et al. (eds) *Human rights and 21st century challenges: poverty, conflict, and the environment*. (Oxford: Oxford University Press, 2020) [ISBN 9780198824770], pp.266–93 (available on the VLE).**

This is complex but the best single piece on the Sustainable Development Goals and well worth your time and attention.

Activity 4.5

Can one speak of a right to development?

Summary

International law is frequently seen as an apolitical body of rules and principles. In this section we have been reviewing approaches to the subject that are contrary to this commonly held view. The NIEO was an attempt by nations of the developing world to influence the development of international norms that would suit their economic development. The marginal nature of the NIEO testified to the power of the developed world in determining the constitution of the principles of international law. However, the promulgation of the right to development shows that developing world initiatives did not end with the NIEO. Although the terms of the right to development are somewhat different from those of the NIEO, one can see it as an attempt to force development onto the rights agenda.

4.5 International civil society

Core text

- **Bantekas and Oette, Chapter 3 'Human rights in practice'.**

Further reading

- **Alston and Goodman, Chapter 16 'Non-state actors and human rights', Section C 'International non-governmental organizations'.**

This section will assess the idea of international civil society. Although strictly separate from the matters discussed above, associating our concern with civil society within the context of development allows us one way to assess the significance of civil society for international law and the protection of human rights.

What, however, is international civil society? In many senses international civil society is the international equivalent of what is known in domestic politics as the 'third sector'. It is distinct from government and seeks to promote the interests of different sectors of society – they are often known as non-governmental organisations (NGOs). Lawyers, doctors and other professional associations, religious groups, charitable organisations, advocacy groups, businesses and trade unions, for example, all seek to contribute to public debates on matters of interest. Alston and Goodman in the reading rightly stress the centrality of these civil society groups for a variety of tasks and activities in the promotion and protection of human rights.

We can draw a distinction between nationally based NGOs and international ones (INGOs), whose focus is not only domestic. A second distinction could be made between those institutions that focus on human rights and those organisations whose remit is somewhat differently focused. This latter group would include groups whose remit concerns a particular problem or concern, such as Save the Children, or broader-based groups such as Oxfam, Christian Aid or Médecins Sans Frontières. This distinction is not sharp. For instance, Save the Children has a concern with children's rights, and also with the broader problems of poverty, which involves lobbying across a number of fields. The International Committee of the Red Cross (ICRC), with its concern with humanitarian law, could also be seen as having a broad remit that covers humanitarian law, the victims of war and the coordination of international relief efforts in conflicts. It is important to stress, however, that not all INGOs and NGOs are benevolent. Civil society is not solely the prerogative of those seeking to do 'good' but equally those seeking to protect the interests of those whose concerns could be detrimentally affected by certain developments in human rights law – be they multinational oil companies, the tobacco industry or major pharmaceutical companies. Thus some 'civil society organisations' concerned with issues centring around health and smoking may be focused on protecting the interests of tobacco growers and the major cigarette makers as opposed to some other 'civil society organisations' that may be concerned with highlighting the deleterious effects on health of smoking tobacco and thus seeking, for example, to limit advertising cigarettes or where and to whom they may be sold. One must bear in mind the idea that civil society represents the full scope of interests that exist and not just those that are beneficial to the promotion and protection of human rights.

Furthermore, even those we may consider working for the 'good' are rarely, if ever, neutral in their approach. The one partial exception is the ICRC, which maintains 'formal neutrality' at all times, but this is in the context of not 'taking sides' as to right and wrong in an armed conflict, so as to enable them (the ICRC) to provide assistance (medical, food, shelter and so forth) to those not involved in the fighting. Beyond that, all civil society organisations, by engaging in advocacy on a certain matter, no matter what it is, adopt an ideological position that can be challenged. Further on this point we need to consider the structures, finance and governance of civil society organisations. Where their funding comes from, how the organisation is run, who the organisation is accountable to and how it is held accountable are all important considerations and worth bearing in mind when examining the work of civil society organisations.

The concept of civil society is developed in political theory primarily with reference to a national civil society. We need to understand the reason for this articulation of the concept before turning our attention to the question of international civil society. The extract below is from the German philosopher Jürgen Habermas. Although its language is difficult, it is worth persevering with it, as it contains a number of important themes that place civil society in its historical and political context.

It is worth noting that Habermas uses a term drawn from Marx: the bourgeoisie. We can understand this as a reference to a particular class – those who own the economic means of production, distribution and exchange. As such, Marx and Habermas would distinguish the bourgeoisie from the proletariat (those who have to sell their labour to the bourgeoisie). Although these terms were primarily developed to think about class relations in Western Europe in the 1800s, they still have some relevance today. Habermas is concerned with a political and historical process that gives rise to civil society.

> The bourgeois public sphere may be conceived above all as the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor. The medium of this political confrontation was peculiar and without historical precedent: people's public use of their reason.
>
> (Habermas, J. *The structural transformation of the public sphere*. (Cambridge: Polity Press, 1992) p.27.)

Habermas' claim is that the public sphere represented something 'peculiar and without historical precedent: people's public use of their reason'. We need to see this claim in context. The public sphere slowly takes shape against the medieval world, where powerful nobles would deal directly with the prince (the territorial ruler) over matters of social, political or economic concern. Politics thus tended to be matters disputed between the aristocratic, land-holding classes, the monarch and also the church. Those whose wealth was based on trade and commerce, as distinct from land, had some influence but they remained outside mainstream politics. Politics conducted in terms of feudal privileges, symbols, rituals and networks of influence lacked the structures of a critical public debate that would allow the development of an equitable and broad economic process.

The growth of the public sphere, and its political influence, can be seen as quickening in the first part of the 18th century. This becomes clearer if we relate them to historical examples. In Britain, we can roughly link the growth of the public sphere with the extension of the franchise (right to vote) from the Great Reform Act of 1832 onwards and the accompanying transformation of political structures and institutions. This intensified changes that were already under way in terms of agitation over basic rights and liberties, terms of trade and the networks that enabled the communication of both business and political affairs. The latter changes, at least, could themselves be traced back to the growth of salons and coffee-house culture in the 1800s. The development of transport infrastructures and dissemination of print media, such as newspapers, novels and pamphlets, provided the means for creating and spreading the 'news' and other information. This fuelled the establishment of corresponding societies, professional associations and pressure groups that opened up new political opportunities.

These developments can be seen as challenging the existing political institutions and this can be indicated in a number of ways. This period saw the establishment of one of the most successful pressure groups in English political history, the Anti-Corn Law League (founded in 1838), whose popular agitation led to trade reforms when the Corn Laws (laws that kept prices for imported grain unfavourably high so as to assist domestic growers but which meant that basic food was much more expensive than it needed to be) were repealed in 1846. The developing public sphere can be demonstrated by the appearance of new political groupings and the transformation of existing ones. The Liberal and Conservative parties that emerged in the latter part of the 1800s were thus quite different from the political groupings represented by Whigs and Tories.

We could also include in this brief sketch of civil society the creation of groups that were dedicated to issues that went beyond the nation state. To some extent this was true of groups aiming to force changes in trade policy, like the Anti-Corn Law League. But if we also include, for instance, the Society for the Abolition of the Slave Trade, established in 1787, then we can see that there was always the sense in which civil society was concerned with international matters. We will return to this point when we think about international civil society later in this chapter.

4.5.1 Civil society and human rights

How can we link together the concept of civil society and human rights? We have to see human rights as part of civil society. Human rights inform the social and political culture of societies. This, in turn, is part of the concept of democracy, where the state is seen as existing to better the lives of citizens. As far as human rights are concerned, this means that normally the state should not restrict essential rights like freedom of speech, assembly and association, and freedom of conscience. These liberties are essential so as to enable public scrutiny over what the state is doing and whether it is acting in the public interest. Civil society can thus provide a check on the state but only if there is a strong social and political culture. This presumably requires a free press, a system of public education and the existence of political parties. This in turn ensures the existence of a plurality of groups. Although some of these groups may be political in nature, or involved in forms of civil protest, civil society groups also consist of interest groups and business associations. In their different ways, these groups and associations represent important interests that the government should consider when making policy. However, certain groups of people are not good at organising themselves and ensuring that their interests are represented. They will thus be excluded from civil society and their voices will not be heard. This is especially true of those traditionally marginalised, such as refugees, the disabled, religious or racial minorities and the impoverished. There are national and international elements of this problem. In terms of national politics, the logic of civil society suggests that unless groups are organised, their interests will not be taken into account. This presupposes of course that there is a more or less functional democratic culture. At the international level, the representation of civil society interests has clear resonances for those institutions charged with the protection and encouragement of human rights. The whole problem of civil society is that unless a group is organised, it will lack a presence and its interests will therefore not be taken into account.

4.5.2 International civil society and human rights

We now turn our attention to a slightly different, but related, issue. How can we think about international civil society? In some senses, the concept is immensely problematic. We have seen that national civil society requires a democratic culture and democratic institutions. But neither exists *per se* at the international level. Thus it is important to consider international civil society differently. The philosopher John Rawls, the most important and influential liberal thinker of the late 20th century, addresses such matters in *The law of peoples*. It is important to stress, however, that Rawls' approach is based on the idea that societies are liberal and democratic – which many simply are not – and he transplants this 'liberalism' to the international sphere in the hope of what may be achieved. Rawls outlines the principles of international law, the law of peoples, that allows nations to act in consort. These principles thus move some way towards an idea of values that **might** underpin international civil society. The following extract provides a rationale for his thinking.

> I assume that working out the law of peoples for liberal democratic societies only will result in the adoption of certain familiar principles of justice, and will also allow for various forms of cooperative association among democratic peoples and not for a world state. Here… (I think)… that a world government – by which I mean a unified political regime with the legal powers normally exercised by central governments – would be either a global despotism or else a fragile empire torn by frequent civil strife as various regions and peoples try to gain political autonomy. On the other hand, it may turn out, as I sketch below, that there will be many different kinds of organizations subject to the judgment of

the law of democratic peoples, charged with regulating cooperation between them, and having certain recognized duties. Some of these organizations (like the United Nations) may have the authority to condemn domestic institutions that violate human rights, and in certain severe cases to punish them by imposing economic sanctions, or even by military intervention.

Rawls argues that the law of peoples will underlie an idea of **justice** relevant for liberal democratic societies. He is building on the work of the important philosopher Immanuel Kant, who thought that world government would either be an international tyranny or so weak as to be hard to hold together and constantly plagued by fighting between factions. However, *The law of peoples* provides a body of principles that nation states and international organisations could use to structure their activities and relationships. Rawls suggests that the law of peoples would provide a principled way forward in which an organisation like the UN could have the power to impose sanctions and, if necessary, to intervene with force. This, however, is a law of 'peoples' in the context of international law, which is the law of states and in which 'peoples' have a very limited role and personality. Nation states do happen to be the form of political organisation that peoples have adopted. This suggests that states are (although more accurately **should be**) limited by the rule of law and, as such, that the law of peoples is consistent with an idea of civil society. Rawls outlines the following key principles.

1. Peoples (as organised by their governments) are free and independent and their freedom and independence is to be respected by other peoples.
2. Peoples are equal and parties to their own agreements.
3. Peoples have the right of self-defence but must not engage in war.
4. Peoples are to observe a duty of non-intervention.
5. Peoples are to observe treaties and undertakings.
6. Peoples are to honour human rights.

For our purposes, we should note a number of points. The law of peoples stresses the importance of human autonomy and in turn individual rights. This is consistent with the underlying belief that democratic political societies are defined in part by civil society and that this, in turn, is an essential idea of any form of international civil society that brings states together. What is also striking is that the 'law of peoples' and some of the key notions above draw on the fundamental principles that all states have accepted as members of the United Nations. One need only examine the opening articles of the UN Charter (especially Article 2) to see that states have accepted these principles even if they are not always respected by them in practice. Rawls is broadly concerned with the notion of human flourishing. This is a broader idea of what a 'good' or 'worthwhile' human life requires. But what such a good or worthwhile existence entails will differ according to which society or culture an individual belongs to. If human rights are in large part also about an individual's autonomy, then there must also be a degree of deference to the views and beliefs of the people in question. We will return to some of these issues throughout the module guide.

4.5.3 NGOs/INGOs and civil society

Civil society groups clearly have played an important role in the development of civil society. What about their contemporary role? To some extent this has been touched upon in our general consideration of civil society. To take an example, one of the major contemporary INGOs concerned with human rights, Amnesty International, traces its roots back to 1961. After the arrest and sentencing of two students in Portugal for toasting 'freedom', an appeal was announced to help these and other 'prisoners of conscience'. Such was the scale of the appeal that a permanent organisation, Amnesty International, was founded. Amnesty was distinctive because its focus lay away from national and party politics and concerned a commitment to civil and political rights that should be respected by all governments irrespective of political persuasion. As noted above, INGOs are always ideological in their approach; Amnesty has always

focused on civil and political rights as opposed to poverty or housing or education, for example. There are always reasons for the focus or approach adopted, be it historic, an identified issue, an emerging issue and so forth. Amnesty International's traditional focus has always been 'prisoners of conscience'; as noted above this was the reason for it being established. Its traditional method of seeking change was by encouraging 'letter writing' to those in power in societies where such prisoners of conscience were being held. International civil society has evolved rapidly in recent years, and the activities of bodies such as Amnesty International have had to also. Notwithstanding the ideology of their approach and work, such organisations need to be reputable and trusted for their advocacy to be influential. To ensure that they are considered trustworthy and able to work in all parts of the world with governments of all persuasions, such organisations tend to avoid certain issues and refrain from certain activities. Thus Amnesty has a position on the death penalty, supporting abolition, but has not taken a public stance on abortion even though it is a human rights concern. The reason for this is likely to be due to the very different views on this matter across all cultures and faiths and the fact that advocacy on such matters will not make any headway. Amnesty International's credibility as an organisation helped it gain permanent observer status as an NGO at the United Nations. To gain a proper understanding of the nature of civil society groups, it is necessary to understand that their various roles have not been accepted uncritically. The co-option of NGOs into formal international agencies has been seen as one way in which controversial institutions like the World Bank can legitimise their activities.

It also needs to borne in mind, however, that NGOs must take positions that are potentially harmful to them if they are to maintain their credibility. Organisations such as Amnesty International may criticise states but within the limits of their remit (e.g. civil and political rights). They have avoided addressing 'situations'. Human Rights Watch, in this regard, has been more courageous. For example, it has called the situation in Israel/Palestine one of apartheid; this has been hugely controversial but the legal analysis is robust and the narrative is slowly changing. Israel and its supporters have launched fierce attacks on Human Rights Watch but the latter has defended its argument. China's mistreatment of the Uighurs is another example. Human Rights Watch has 'called it out' and provided extensive evidence, which it has published. Those activities also come within the remit of Amnesty International that, to date, has been less vocal in the public domain. The only reason such reports do gain traction and attention is due to the credibility of the organisations; that credibility is difficult to build but is easily eroded. Addressing such controversial matters is not without cost and it will be seen what happens over time.

4.6 New social movements

As noted above, civil society has evolved significantly over time. They are now much more professional, organised and influential than they have ever been. The interests and groups being represented have changed markedly. 'New social movements' are one of the reasons for wider interests being advocated. Such movements can be linked to forms of political mobilisation that started to appear from around the mid-1960s and tended to be distinct from existing political parties or ideological groupings. Balakrishnan Rajagopal in his groundbreaking study noted:

> Unlike the national liberation movements, which saw themselves and were mainly seen in political and economic terms, these 'new' movements have embraced culture as a terrain of resistance and struggle. This 'turn to culture' among mass movements in the Third World during the last two decades has emphasized rights to identity, territory, [and] some form of autonomy…
>
> (Rajagopal, B. *International law from below*. (Cambridge: Cambridge University Press, 2003) p.166.)

The reason behind such movements coming to the fore is because the rights and interests they sought to promote were not being adequately considered or protected. Rajagopal argues that the discourse of human rights helped to build and then

legitimise states but that those states did not actually adequately protect the rights of their citizens. In his words, human rights remained 'aloof from the "private" violence of the market on individual and communities'. So, in understanding new social movements, we need also to appreciate the limits of human rights arguments. Thus, groups emerged that were specifically concerned with, for example, women's rights, struggles against poverty, racism and the marginalisation of certain ethnic groups. The 'indigenous peoples' rights movement', for example, can be considered a paradigm of the new social movements. We will be discussing indigenous peoples' rights later in the module guide but indigenous peoples and their rights to their land, their culture and lifestyle are a classic example of rights that were simply not being considered, let alone protected, in numerous states. They thus mobilised and cooperated around areas of common concern, notwithstanding the very clear differences between the approaches some of them adopted with regard to certain matters, and over time sought and achieved at the domestic and international level specific recognition of particular rights that explicitly affected them.

Social movements can also be spontaneous and hugely attention-grabbing but they are not organised. Social media, for example, spawned the #metoo movement regarding the harassment of women. Yet it is worth reflecting on what the long-term implications and consequences might be. Is raising awareness of value? Another example we can think of is the #blacklivesmatter movement. This has been important and gained international attention by highlighting an existing issue but, again, what is the lasting change? Perhaps the change is indirect and feeds into national pressure for change. But such movements also dissipate over time; being ephemeral and short lived is part of their very nature.

Activity 4.6

Comment on the following statement:

'It is impossible to have a sophisticated understanding of human rights without acknowledging the role of civil society groups.'

Summary

This section of the module guide has sought to introduce the complex interactions that exist between NGOS, INGOs and other groups on an international scale. These groups fulfil various important functions in relation to the defence and promulgation of human rights, and can be shown to be both influential and to achieve concrete changes in both governmental policy and the orientation of agencies like the World Bank. However, criticisms have also been made of these civil society groups. Some have argued that they serve to legitimise the activities of organisations, like the World Bank, that should be more thoroughly reformed; others have suggested that the influential Western civil society groups are elitist and undemocratic. Civil society groups thus play a central, if controversial, role in the defence and promulgation of human rights.

Reminder of learning outcomes

By this stage you should be able to:

EXPLAIN THE CONCEPT OF CIVIL SOCIETY AND HOW IT WORKS IN PRACTICE

- **develop an understanding of international civil society**
- **discuss the historical development of civil society**
- **outline the relationship between human rights and civil society/international civil society**
- **explain the role of non-governmental and international non-governmental organisations**
- **explain the role played by new social movements.**

Further reading

- **Rajagopal, B. 'International law and social movements: challenges of theorizing resistance', *Columbia Journal of Transnational Law* 41(2) 2003, p.397. This article is important as it provides an account that is critical of the founding norms of international law, and creates a 'theory of resistance' that could assist in the transformation of the subject in the interests of the developing world.**

Sample examination question

To what extent are rights part of an international legal order?

Advice on answering the question

Rights clearly form an essential part of the international economic order but this question should begin by defining its terms. The international economic order is characterised by the UN, the World Bank, the IMF and the WTO. The essay should develop a description of these bodies in a couple of paragraphs. Although they have distinctive roles, it is fair to say that rights are becoming increasingly central to the way in which they operate. Although the UN is clearly dedicated to the protection of human rights, the essay should show how this agenda has developed since the organisation's foundation, in that rights were downplayed in relation to the sovereignty of nations. Rights are now seen as placing obligations on nations towards their citizens and imposing obligations for the developed world to assist in the development of poorer nations. As far as the WTO, the IMF and the World Bank are concerned, the essay should also show that rights were not seen to be central to their work when they were founded. As the post-war period developed, human rights were seen to have an important role in structuring trade and finance. Whether or not the work of these institutions furthers or undermines rights should also be touched upon. Even if one is critical of the role of these organisations, it is fair to say that rights are increasingly central to the way in which they present their work and articulate their visions of global development.

NOTES

5 The UN system for the protection and enforcement of human rights

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Introduction

This chapter will look at the system for the protection of human rights that exists within the United Nations. The UN system can be compared with the other systems for the protection of human rights that we will examine in this module guide: the European, the Inter-American and the African. So we need to understand how the UN system works before we can place it in its international context. In this chapter we will look at the Universal Declaration of Human Rights, institutions dedicated to the protection of human rights that derive their authority and powers from the UN Charter, and institutions that derive their mandate from various treaties: the International Covenant on Civil and Political Rights, the two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights. This is a large and broad topic which provides the foundations for much of what follows. It has various parts to it, so please take your time working through all the materials and ensure you build a strong foundation for much of what will follow.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **summarise the rights contained in the Universal Declaration of Human Rights (UDHR)**
- **explain the fundamental provisions of the UN Charter**
- **explain the basic institutional structure of the UN**
- **identify the rights contained in the International Covenant on Civil and Political Rights (ICCPR)**
- **outline the rights and procedure contained in the two Optional Protocols**
- **identify the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR)**
- **describe the enforcement and protection systems that operate under the Covenants and the Charter.**

Core texts

- **De Schutter, Chapter 9 'The United Nations human rights treaties system' and Chapter 10 'The United Nations Charter-based monitoring of human rights' OR**
- **Bantekas and Oette, Chapter 4 'The United Nations Charter system' (available on the VLE) and Chapter 5 'The UN human rights treaty system'.**

Further reading

- **Alston and Goodman, Chapter 3 'Civil and political rights', beginning of chapter to end of Section A 'The International Covenant on Civil and Political Rights: introduction'; Chapter 8 'The United Nations human rights system' and Chapter 9 'Treaty bodies: the ICCPR Human Rights Committee'.**
- **Freedman, R. 'The Human Rights Council' in Mégret and Alston (eds) pp.181–239. (available via the Online Library).**
- **Evans, M. 'The UN and human rights: reform through review?' in Hartmann, J. and U. Khaliq (eds) *The achievements of international law: essays in honour of Robin Churchill*. (Oxford: Hart Publishing, 2021) [ISBN 9781509917372].**
- **The United Nations has a wonderful website that is worth exploring in depth. The UN Audiovisual Library also has many documents as well as lectures – please spend time exploring this immensely useful archive and source of accurate information. In particular, if you can, please watch the following videos:**
  - **International human rights protection and the Human Rights Committee by Mr Nisuke Ando**
  - **The work of the United Nations Human Rights Committee: enforcing the International Covenant on Civil and Political Rights by Ms Ruth Wedgwood**
  - **The United Nations human rights treaty body system by Ms Jane Connors**

- **Explaining the human rights treaty-based complaints procedures at the United Nations level by Mr Markus Schmidt**
- **The universal periodic review of the Human Rights Council and its interaction with other human rights procedures by Mr Markus Schmidt.**

- **The Office of the United Nations High Commissioner on Human Rights also has a wonderful website, which is a fascinating treasure trove of information. It contains far more information than it is possible to analyse or discuss here and you can follow up on any matters that really take your interest, or indeed it will hopefully pique your interest. It can be found here: www.ohchr.org/EN/Pages/Home.aspx**

5.1 The UN Charter and the institutions of the UN

In order to understand the UN human rights system, it is necessary to begin with a brief outline of the UN itself. We will see that agencies responsible for the protection and promulgation of human rights are part of a much broader institutional structure. It is worth bearing this in mind later in this module guide when we look at other rights issues, such as military intervention.

5.1.1 The UN Charter

The UN was established in 1945. Its foundational document, the UN Charter, is a legally binding intergovernmental agreement. Along with the other institutions described in Chapter 4 of this module guide, such as the IMF, the World Bank and WTO, it can be seen as essential to the reconstruction of the international community after the Second World War. The UN is unique in that there has previously never been such an ambitious attempt to regulate such a broad array of issues on the global level. The objectives of the UN are outlined in the preamble to the Charter. Most notably they are:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind
- to reaffirm 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
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained
- to promote social progress and better standards of life in larger freedom.

The desire to prevent major armed conflict is obviously understandable and important but it is also worth pointing out that the world order envisaged by the preamble is based on other key principles: 'faith in fundamental human rights, equality, the rule of law, social progress and cooperation between nations'. This, however, is done in the context of Article 2 of the Charter, which reaffirms the central notions of the state-centric order. Those most relevant in this context are:

- all states recognise the sovereign equality of all Members – Article 2(1)
- all Members shall refrain in their international relations from the threat or use of force against another state – Article 2(4)
- no state nor the United Nations may intervene in matters which are within the domestic jurisdiction of any state – Article 2(7).

Articles 55 and 56, which need to be read together, are the basis for the UN's human rights activities. They state:

Article 55

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55.

There is little doubt that in retrospect Articles 55 and 56 have been accorded far greater importance than was envisaged by the drafters of the Charter. At the San Francisco Conference in 1945, which preceded the establishment of the UN, it had been suggested that the United Nations Charter should contain a 'bill of rights'. A lack of time at the Conference meant that this was not pursued then but it was decided that the General Assembly of the then envisaged organisation would consider the proposal and give it effect. Articles 55 and 56 were included to ensure that such matters were thus under the purview of the organisation. The Charter is in institutional terms a skeleton that must be fleshed out by practice. How, for example, are the objectives in Articles 55 and 56 to be achieved? The Charter provides little, if any, guidance. The challenges facing the drafters of the Charter were immense. They needed to create a set of strong institutions that were able to achieve the objectives above, but on the basis of the principles set out in Article 2 and with a distribution of power that was agreeable enough to persuade states to join and stay as members, let alone work together. It is worth bearing in mind that the League of Nations, the UN's predecessor, failed because, in part, major powers such as the USA did not join and many other states withdrew over time. Thus, in the context of the UN, we need to examine how the principles underpinning the UN interface with its institutional structure and then isolate those elements of the structure that are most directly concerned with promoting and protecting human rights.

5.1.2 The institutions of the UN

According to Article 7, the principal organs of the United Nations are:

- the General Assembly
- the Security Council
- the Economic and Social Council.

The General Assembly is the main debating body of the United Nations (www.un.org/ga). The General Assembly is empowered by Article 10 to discuss questions or matters within the scope of the Charter and may make recommendations to the members of the United Nations, the Security Council, or to both on any such questions. The General Assembly can take into account human rights issues during the course of its deliberations on these matters. The General Assembly may bring to the attention of the Security Council situations that are likely to endanger international peace and security. However, this is usually only so where there are extreme cases. To understand the more usual functioning of the UN, it is necessary to examine the role and function of the Economic and Social Council (usually referred to as ECOSOC). Chapter X of the UN Charter (Articles 61–72) establishes ECOSOC and set outs its powers. The first two paragraphs of Article 62 state:

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialised agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

Article 68 reads:

> The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

It was decided in 1945 that at its first session ECOSOC should establish a commission for the promotion of human rights as envisaged in Article 68 of the Charter. In February 1946, ECOSOC established an embryonic Commission on Human Rights, which in due course led to a recommendation that an international bill of rights be drafted; that bill of rights in the first instance led to the Universal Declaration of 1948 and subsequently the two 1966 Covenants. We will examine the UDHR again shortly but what is key here is the fact that ECOSOC is the principal body that coordinates the economic, social and human rights work of the UN and it has used its powers extensively to that end. For detailed information on ECOSOC's current activities, see www.un.org/en/ecosoc – which although informative, is not the most inspiringly presented body of information.

Activities 5.1 and 5.2

5.1 What are the goals of the UN?

5.2 What are the major institutions of the UN and what are their functions?

5.2 The Universal Declaration of Human Rights

As noted above, in 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. Drafting the UDHR had been the central focus of the early work of the Commission on Human Rights.

5.2.1 The Articles of the UDHR

Article 1

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This is a statement of the most basic and foundational principle of human rights. It builds on the assertion in the preamble that rights are themselves founded on the dignity of the human being. However, terms like 'dignity' and 'a spirit of brotherhood' are vague. Notwithstanding this, Article 1 articulates a laudable goal. One might well ask how this fundamental statement of human dignity sits alongside the equally fundamental assertions of the sovereignty of states and non-interference in the internal affairs of other states. As states are the primary abusers of human rights, there is an inherent tension here.

Article 2

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international 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.

This articulates a principle that underpins all human rights treaties: it prohibits discrimination. The prohibition on discrimination also prevents discrimination of minorities within the territorial boundaries of the nation state. This extension of the principle is clearly of great relevance. In the period after colonialism, many nations that had been governed by European powers gained their independence. The arbitrary creation of many of the borders of these new states meant that minorities were often included in territories to which they had no desire to belong and, in expressing a desire for self-determination, became the victims of discrimination by the new national governments.

Article 3

> Everyone has the right to life, liberty and security of person.

The simplicity of this statement belies the complexity of the assertion made. This Article as drafted has relevance for the operation of legal systems and interfaces with values such as due process and the right to a fair trial. It says nothing, however, about what life is. When does it commence? Further, what of those living in abject poverty? Does it entitle them to a quality of life or is it that the state will not arbitrarily kill them but allow them to starve to death? This brings us back to the idea of the nature of rights.

Article 4

> No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

The operation of the slave trade was and is unquestionably a fundamental abuse of the dignity of a human being. Human beings were and still are being traded as commodities. The fact that the slave trade was formally abolished by many nations some centuries ago does not detract from the contemporary relevance of this Article. The slave trade continues in many parts of the world, as do practices akin to it such as bonded labour and the trafficking of women and children for the purposes of sexual exploitation.

Article 5

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

There are a number of issues here. What are the distinctions between the terms used and what is the relationship between them? Is one, for example, more serious than the others or are they all equal but referring to different sorts of ill-treatment? This fundamental human right, one which is now recognised as an obligation *erga omnes*, is elaborated upon in numerous other treaties.

Article 6

> Everyone has the right to recognition everywhere as a person before the law.

Article 6 is important in the promulgation of due process and fair trial rights. However, it is broader than this. It ensures that all human beings have a legal status that cannot be denied. Closely related to this is Article 7.

Article 7

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 7 specifically applies the fundamental principle of equality to the law and provides basic rule of law standards for a society. It is related closely to Article 6, and the principles Article 7 sets out are further elaborated in Articles 8, 9, 10 and 12.

Article 8

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Legal processes are meaningless unless they can guarantee an effective remedy. This Article affirms that 'national' tribunals (domestic courts or tribunals as opposed to international mechanisms) have to make sure that effective remedies are available for breach of the rights in the Declaration and thus that the rights in the Declaration can be realised.

Article 9

> No one shall be subjected to arbitrary arrest, detention or exile.

This is a further elaboration of core due process values.

Article 10

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Trial before an independent and impartial tribunal is one of the most fundamental due process values. Article 10 clearly applies to both criminal and civil law.

Article 11

> (1) Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
>
> (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Due process rights are always more important in criminal (rather than civil) law as an individual's liberty is at stake and the punishments that can be handed down can be extremely severe. Thus, the Declaration stresses the importance of safeguards in criminal trials. There is no equivalent article that goes into such detail on civil procedure.

Self-assessment question

Is the absence of an article on safeguards in civil trials an important omission in the Declaration?

Article 12

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The Article repeats some of the content of Article 9 and also builds on Article 3. However, Article 12 extends these earlier Articles by relating their values to the right to privacy. Privacy is understood in a broad sense as covering an individual's reputation. This Article also outlaws arbitrary police searches and the seizure of an individual's property or correspondence.

Article 13

> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.

These principles thus cover freedom of movement in a broad sense: both within the borders of a nation, and between nations.

Article 14

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 14 very simply guarantees a right to asylum but states on what grounds asylum should be granted and equally importantly what amounts to 'persecution'. Articles 13 and 14 can be read together.

Article 15

> (1) Everyone has the right to a nationality.
>
> (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

This Article relates back to the rights that guarantee the civic or legal status of individuals.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

Article 16 is contentious in asserting a universally accepted human right. Many cultures and religions discriminate between the rights of men and women during marriage and upon its dissolution. The notion that marriage must be between consenting partners reveals the historical and cultural specificity of this Article – in many cultures marriage is arranged by the families of the bride and groom. Further, should marriage only be limited to a union between a man and a woman? Finally, what is a family? Is it the nuclear family (husband, wife and their children)? But what of polygamous marriages, extended families and non-traditional families? In many senses this Article is a reflection of the time at which it was drafted and reflects a conservatism when it comes to family relations.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 17 asserts the right to property. Although property as such is not defined, ownership of property is essential to an individual's civic status. The article does not envisage an absolute right to property – the second paragraph would allow deprivation of property rights if this justification is shown not to be arbitrary. This presumably means justified by law.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

These three Articles state the classic Western civil liberties or human rights. They all, but in particular Articles 18 and 19, have been subject to tremendous controversy and contention. These provisions are also related in other ways. To take an example, does the right to expression under Article 19 entitle one to ridicule the religious beliefs of others and does this violate their right to religion as protected by Article 18? These are tricky issues and this highlights the relationship between rights and also the tensions that can exist between them.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

We can read this Article alongside those rights that provide for guarantees of civic status. This Article states a right that can be seen as fundamental to the relationship between citizen and government. The first paragraph lays down a democratic principle: one has the right to participate in the government of the country in which, by virtue of Article 15, one is a national. This right to participation is linked to the equally fundamental democratic principle that government is based on the authority of the people expressing themselves in a free and fair election. This right is linked, in the second paragraph, to a right of access to 'public services'. This Article espouses the principle of democracy – although it is agreed that there is no legal right to live in a democracy as protected by international law. But what is key here is that all states, even theocracies, kingdoms and dictatorships, hold elections of some sort. Thus the Article and those related to it in human rights treaties have certainly influenced the behaviour of political leaders.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 22 goes further than Article 21 in elaborating the rights and entitlements that a citizen should enjoy. This is the first really classic economic and social right in the Declaration where the state is required to take positive measures to fulfil it. It is, however, rather vague although the 1966 Covenant on Economic, Social and Cultural Rights does expand on it as we will see.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

These paragraphs provide a more detailed elaboration of the economic and social rights that the Declaration seeks to protect. The right to work is also related to other fundamental rights, such as the prohibition of discrimination, and the freedom of assembly and association, in relation to the right to join a trade union. It is not just the right to work but to be treated fairly in work, to organise so as to protect workers' rights and be socially protected. The 1966 International Covenant on Economic, Social and Cultural Rights expands further on these rights.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

This Article continues the development of the principles elaborated in Article 23. It is not just about the right to work but employment that is 'humane', allowing periodic breaks from work as well as paid time away from it. This arguably imposes quite an economic burden on employers and thus involves economic cost – it is not a right that is easily realisable. The 1966 International Covenant on Economic, Social and Cultural Rights expands further on it.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 25 covers a number of concerns around health, well-being and motherhood. Once again, it is easy to see how this builds on previous articles, in particular those concerned with equal access to social provision. The protection of gender-specific rights in Article 25 has been significantly expanded upon in both the 1966 Covenants and the 1979 Women's Convention.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

The right to education is a fundamental human right. One cannot access, enforce or even know of one's rights without an education. Its centrality to the well-being and development of informed citizens is crucial. The Article places an obligation on the state to provide free education at an elementary level and education at higher stages to which access is based on merit and without any element of discrimination. The second paragraph mandates a content for education that includes the values set out in the UDHR. The third paragraph clearly gives parents rights in relation to their children and this recognises the lack of autonomy that children are endowed with. This right is further elaborated upon in the ICESCR.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This is a fascinating provision. It is the first cultural right in the Declaration and it is important to note that there are relatively few subsequent cultural rights developed in international law. The manner in which paragraph 1 of the provision is drafted suggests culture as a luxury. It is not about the right to one's culture, which may include the right to use a minority language or to dress in a particular way, for example, which would be critical to identity. The second paragraph is about a right to intellectual property, hardly a fundamental and pressing rights issue!

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

Article 28 is an anomalous provision. It is a right to a just international society. Is it about states having to work together to achieve rights protection for all? It is a provision that has essentially been marginalised as its content is so difficult to articulate although it has been cited as the basis of obligation in campaigns against global poverty.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Rights cannot always be absolute – as noted above they clash and states would not agree to documents setting out catalogues of rights unless there were circumstances in which they could limit or restrict their obligations. Limitation clauses (as they are known) take various forms. Some limitation clauses relate to a specific provision, others apply to the entire catalogue of rights. Article 29 of the UDHR is the general limitation clause that relates to the entire catalogue of rights it contains. Paragraph 1 states that rights are linked to duties and that a rights holder has duties to the community in which he or she lives. Article 29(1) links rights to duties that are owed to the community. This links to 29(2). The state can limit rights within reason. The reasons for justifiable limitations on rights are those set out in a closed list. Although not referred to in Article 29, any limitation, even if for a justifiable reason, must be proportionate to the ends sought. Thus not only must the reason be justifiable, so must the means.

Article 30

Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

In human rights documents this is now another common clause. It seeks to prohibit the argument that one right in the Declaration can be used to limit or destroy any other right. Rights may conflict and a balance will need to be struck but they cannot be used to justify the destruction of the rights of others.

Activity 5.3

'The Universal Declaration of Human Rights contains a list of rights that are incoherent and not connected to each other.'

Discuss.

Summary

This section has reviewed the rights contained in the Universal Declaration of Human Rights and shown how the rights contained in the Declaration seek to establish standards and principles that are necessary for a society that will respect the human rights set out.

5.3 Promoting and protecting human rights in the UN

We can see from the above that human rights matters have been a focus of activity in some of the institutions established under the auspices of the UN. It is not an exaggeration to state that over nearly 80 years there has been an evolution so that there is no area of the UN's activities that now does not relate to human rights in some way or other. The work of, for example, UNICEF (United Nations Children's Fund), FAO (Food and Agriculture Organization) and WHO (World Health Organization) all relates directly or indirectly to human rights matters. The General Assembly has, since the establishment of the UN, played an important role in human rights issues. Even the Security Council, which one would not on a literal reading of the Charter consider related to human rights issues, has in recent years become involved more centrally in such matters in aspects of its practice. What we mean, however, in the

context of this chapter when we refer to promoting and protecting human rights in the UN is a number of distinct things, each of which we will discuss. We are referring not to activities or the promulgation of policies that bear a relation to human rights issues, such as the right to food or access to medicines. What we are examining is the work within the UN that seeks to promote human rights issues with states and the 'enforcement' mechanisms that exist within the UN to protect human rights. There is an important distinction to bear in mind here – that between promotion and protection – but at times this distinction can become rather blurry. Within the UN, the bodies responsible for promoting and protecting human rights can be divided into two main groupings: those that derive their authority from the UN Charter itself (known as Charter bodies or Charter-based methods) and those bodies that have been created under various human rights treaties (which are known as UN treaty bodies). The distinction relates to the source of authority to promote and protect human rights. There is in the actual work and practice of the different bodies (both Charter-based and Treaty-based) an overlap between promotion and protection or enforcement but the dynamic that really distinguishes them is the amount of political influence that states can exercise. Charter-based mechanisms are much more amenable to the views and practices of states and they retain the ability to politically influence proceedings. Treaty-based bodies are different. Politics plays a role in the design of the mechanisms and methods of enforcement but states agree in a treaty the standards they will abide by and how their compliance with those standards will be assessed. Treaty bodies in their work – while subject to some political influence and consideration which we will discuss – are generally independent of political matters, much more legalistic and have a critical role in interpretation and standard-setting. We will now examine in turn the work of Charter bodies and then treaty bodies. For the latter, we will use the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) as our two prime examples. Although there are differences between the legal powers and practice of the various treaty bodies, the two we refer to will also allow us to pull out and reflect on a number of other themes such as the nature of rights and how this may affect enforcement mechanisms.

5.3.1 The Charter bodies

The UN initially established, as discussed above, the Commission on Human Rights. This was due to the view that the realisation of the goals of the UN could only be achieved if individual human rights became an important part of the reconstruction of the international community. In 1946, the Economic and Social Council (ECOSOC), as noted above, relying on the authority mandated to it by the UN Charter, passed a resolution that created the Commission on Human Rights. The Commission was charged with various functions, one of which was to alert the Security Council to abuses of human rights that were so serious as to represent a threat to international peace and security. As discussed in detail above, one of the first tasks of the Commission was to draft the Universal Declaration on Human Rights (UDHR). The UDHR was promulgated by the General Assembly on 10 December 1948, a day now celebrated by the UN as 'Human Rights Day'. The Commission then went on to draft two further human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which were both adopted in 1966. Collectively, the three documents are known as the International Bill of Human Rights. The use of this term 'International Bill of Human Rights' is noteworthy. The initial proposal had been for a single legally binding document, the 'International Bill of Human Rights', that contained the rights agreed upon and also the methods of considering state compliance. Very quickly, however, it became clear that there were major ideological tensions and disagreements between states. Thus it was agreed to adopt what became the UDHR, which was the identification of rights in a formally non-legally binding document and to then subsequently draft and agree a treaty, which is of course legally binding, with a view to articulating the rights and how they would be enforced. It took around two years to draft the UDHR, and by the end of the 1940s the Cold War had commenced and a deep freeze in relations between ideological blocs ensued. It took 18 years of wrangling and disagreement for the realisation of what became

two treaties – the 1966 Covenants. Two treaties – known as 'sister Covenants' – were adopted as a compromise as states could not agree on how the various different rights should be enforced. The rights were thus split into two Covenants, adopted with differing approaches to enforcement and the nature of the obligation, although in more recent years some of the differences and disagreements that were exceptionally entrenched over enforcement methods and the nature of the obligation in question have been overcome. We will examine this later in the chapter.

Returning to the two Covenants, once they were adopted in 1966 it then took another 10 years for enough states to become party to them so that they could enter into force. Thus from 1946 when it was agreed to draft an International Bill of Rights, it took 30 years until 1976 for this vision to be realised and for there to be legally binding measures in place setting out fundamental human rights and how compliance with them would be supervised. The lengthy gestation period of the Covenants was due to the broad range of rights they cover. During this period the global community also evolved significantly. While there were two polar blocs, a significant number of former European colonies achieved independence and sought to assert their views on human rights matters. Further, there were other pressing issues coming to the fore and thus the Commission on Human Rights also considered other matters. In practice, the Commission primarily considered its role to be about standard-setting, and it left supervision of compliance with those norms to other more specialised bodies. This made significant sense since otherwise compliance would become further embroiled in the political dynamics of the Commission. In terms of standard-setting, one can see that the efforts of the Commission were successful as it not only adopted the two Covenants but also a number of other human rights treaties and important declarations. Key examples include:

- the Convention Against Torture
- the Convention on the Rights of the Child
- the Declaration on the Right to Development
- the Declaration on the Rights of Minorities.

Although these issues were (and still are) contentious, as they are area- or issue-specific (that is related just to the eradication of torture, for example) they are much easier to adopt than general treaties like the Covenants that deal with a significant variety of rights. The Commission was therefore successful in adopting standards. Implementation of human rights law, however, has always been a different matter. As was noted in Chapter 2, states adopt different approaches to international law. In some states, those adopting the monist tradition, becoming party to a human rights treaty may give rise to legally enforceable rights in the national legal system. In dualist states, if the national legislature chooses not to make the rights in the Covenants or a Convention part of national law, then a citizen cannot rely on those rights in a national court. Furthermore, leaving matters solely to the discretion of states and their internal compliance did not improve the 'situation on the ground' in most states. In states with oppressive regimes in power or where the rule of law and the separation of powers are not respected, even the most wonderful domestic measures do not lead to the effective realisation of human rights. In that regard some sort of external or international scrutiny is required. In 1947 the Commission on Human Rights made perfectly clear that it had no competence to deal with any complaint about violations of human rights in any state. As a matter of law, that was perfectly correct as Article 2(7) of the UN Charter makes clear; the UN and its Member States cannot intervene in the internal affairs of a sovereign state. State representatives who sat in the Commission would clearly seek to resist external scrutiny by others as these representatives were tasked by their own governments to protect them from censure by fellow sovereigns. However, whatever states agree to in a political forum or a legal one, they should (in the latter case are obliged to) comply with it. The Commission on Human Rights thus sought to establish bodies and mechanisms that could seek to consider the human rights situation in states. These mechanisms did have value but over time the Commission as a whole became overly politicised and increasingly discredited.

The Commission on Human Rights became a forum for Member States of the United Nations to settle political scores and to use human rights abuses as a method of

condemning and denouncing some but not others. Thus, for example, Arab states with their allies systematically used the Commission as a forum to denounce Israel for its systematic human rights abuses against the Palestinians. There is no doubt that Israel did and does engage in egregious human rights abuses against Palestinians, which are worthy of the strongest condemnation. But the many Arab states, who also engage in systematic violations of human rights, worked as part of a bloc with a view to shielding each other from similar criticism. Powerful (which also includes wealthy) states with many allies avoided censure. China is a good example: any state that sought to cross China soon found that it had many friends and significant influence. To be credible, a body considering human rights compliance by states needs to be even-handed. No state should be beyond censure and no state singled out disproportionately. So despite much valuable work, the Commission on Human Rights began to be seen as far too political and therefore compromised and discreditable. As a result, a successor body – the UN Human Rights Council – was established in 2006. The Human Rights Council is not a complete break from its predecessor and it is possible to see various legacies of the Commission in the Council's practices and set-up. The Council also suffers from politicisation and concerns are being raised that it is (already) no longer credible. While there is something to that, it is not entirely accurate. (See further on this issue the discussion in Freedman, which is part of the Further reading for this chapter.) Furthermore, it is clear that it is unrealistic, if not impossible, to avoid the politicisation of political processes where they relate to human rights issues. This can be seen very clearly in the system known as the Universal Periodic Review (UPR), which is one of the cornerstones of the work of the Human Rights Council. This is notwithstanding the fact that the 'Universal' Periodic Review is indeed universal and all Member States must report to the Council every 4–5 years on their human rights compliance. The process, however, is one of peer review. States compile a report themselves on their own compliance and then this, along with other material, is considered by other states. No state is going to condemn itself, although some states are reassuringly candid about the problems they face and how they have tried to address them. Some states, when they are considering the reports of other states, tend to be unjustifiably complimentary or silent when it comes to their allies and disproportionately scathing when states with which they have less friendly relations are being considered. Notwithstanding this, UPR has significant value. First, it does expose all states to scrutiny; the previous system did not. Second, many states, but certainly not all, engage with the process in a constructive way and do genuinely make an effort to improve with regard to certain matters over which they have some element of control. Third, peer review and having a number of friendly states examining a state's compliance is not a guarantee of immunity of censure – states that become outliers can find that even their traditional allies are not willing to turn a blind eye to abuse and certain violations of human rights. A key role here is played by INGOs concerned with human rights and other civil society organisations that compile much more critical reports of the situation in states under review, and these feed into the UPR process. Read in conjunction with the state's own documentation, this gives a more balanced view of the situation in the state in question. Fourth, states often share their practice and experience from which other states can learn lessons. Thus the process functions, in part, as an information exchange process. These positives do not detract from the problems that UPR does suffer from, and it certainly does not always function well. But if one considers the other activities of the Human Rights Council, then the value of its work is undeniable. We will now look very briefly at one other aspect of the work of the Human Rights Council, the special procedures.

5.3.2 The special procedures system

Since the late 1970s, the Commission on Human Rights established what are generally known as special mechanisms/special procedures. The Human Rights Council, since its establishment in 2006, has continued this work and mandated numerous experts to study particular human rights issues. These experts (often university law professors of the highest repute or human rights lawyers or judges with a global reputation) constitute what are known as the United Nations human rights mechanisms or mandates, or the system of special procedures. Over the years, these procedures have sought to set standards, examine themes and evaluate situations in states. For example,

there are currently around 40 thematic and 14 country mandates. Thus there are either rapporteurs, independent experts or working groups examining the situation in, for example, the Occupied Palestinian Territories; Cambodia; the Democratic Republic of Congo; North Korea and Somalia. These are known as country mandates. In terms of themes, the issues currently under examination include religious freedom; the right to food; torture; the death penalty; arbitrary detention; disability; indigenous peoples and the rights of older people. This proliferation of activities may potentially mean a lack of focus but equally ensures that many different issues are subject to scrutiny and sometimes normative evolution that would not have occurred otherwise.

Rapporteurs and working groups

We can look at these mechanisms and procedures in a little more detail. Although these procedures vary, there are certain general features in common. The issue or situations are examined either by an individual rapporteur or a group of experts known as a working group.

Rapporteurs are independent and operate in their personal capacity with a brief that covers certain mandates. A mandate requires a rapporteur or working group to examine and report on either human rights abuses in specific countries (country mandate), or to examine a major issue of general concern (a thematic mandate). Country visits may be made but not all states cooperate with mandate holders. Some states do not permit entry at all to mandate holders; others permit entry but then seek to do all they can to obstruct the mandate holder's visit. Reports are made on a yearly basis and there is also an effort to coordinate the work of the mandate holders although there is invariably some overlap.

The value of some of these procedures has been immense. To take one example, the articulation and understanding of the right to food – undeniably one of the most fundamental of rights – has developed significantly since a Special Rapporteur on the Right to Food was first established in 2000. A critical matter that has been considered is not just the policies states adopt internally and that affect their domestic populations but also what states do that affects the right to food of those in other states. This ensures a more holistic approach, which is not only about internal food policy but also issues such as trade relations with third states and how what a state may seek to achieve in economic trade terms – which is beneficial to it economically – is fundamentally detrimental to some of those in another state and their right to food. Considering the right to food this way can lead to a different approach to policy, which seeks to benefit all as opposed to benefiting some at the cost of others, usually those who can least afford it. By examining and elaborating upon such issues, norms can develop in directions they would not otherwise. Thus it is little wonder that the special procedures are valued as highly as they are by those familiar with their work.

On the other types of work the Human Rights Council undertakes and the different aspects of the UN Charter-based system, more generally, please see further the detailed discussion in Alston and Goodman, Chapter 8. Please work through all the material there carefully and then tackle the following activity.

Activity 5.4

In the light of your readings, what differences of opinion are there about the role of the rapporteur?

The remit and the work of Special Rapporteurs increased significantly with Kofi Anan's policy of mainstreaming human rights into the work of all UN agencies and supporting human rights activities at a grassroots level. There have been various institutional and administrative reforms that have both streamlined and coordinated the efforts of the various teams and individuals; at the level of the Commission, rapporteurs are now also given more opportunity to engage in dialogue with representatives of the states that they have visited, and to engage with the efforts of NGOs also working in the human rights field.

ACTIVITY 5.5

Outline the activities and powers of the UN Human Rights Council.

FURTHER READING

- **Bernaz, N. 'Reforming the UN human rights protection procedures: a legal perspective on the establishment of the Universal Periodic Review Mechanism' in Boyle, K. (ed.) *New institutions for human rights protection*. (Oxford: Oxford University Press, 2009) [ISBN 9780199570546] pp.75–92.**
- **Meng, S. and L. Haina 'China and the special procedures of the UN Human Rights Council: is China cooperative and can they work better with each other?' (2020) 42(2) *Human Rights Quarterly* 357.**

Summary

In this section we have been examining the Charter bodies that exist under the UN system. We have concentrated on the Human Rights Council, considered its role and functions, and assessed its role in the protection of human rights. We have also considered the role of rapporteurs and working groups. We have also attempted to assess the efficiency of these ways of protecting human rights.

5.4 The human rights treaty bodies

CORE TEXT

- **De Schutter, Chapter 9 'The United Nations human rights treaties system' (available on the VLE) OR**
- **Bantekas and Oette, Chapter 5 'The UN Human Rights treaty system'.**

As alluded to above, there are a number of human rights treaty bodies that derive their powers from the treaties, adopted under the auspices of the UN that created them. Alongside the 1966 Covenants there are a number of other 'core' UN human rights treaties. Each covenant or treaty sets up independent monitoring, staffed by independent experts elected by Member States, and responsible for overseeing the operation of the treaty. The treaty bodies are as follows.

- The **Human Rights Committee** (HRC) oversees implementation of the International Covenant on Civil and Political Rights 1966 and its Optional Protocols. The HRC's remit is limited to the Covenant and its Protocols and it is established by the ICCPR itself.
- The **Committee on Economic, Social and Cultural Rights** (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights 1966 and its Optional Protocol. The CESCR was formally established in 1985 by ECOSOC Resolution 1985/17 although it had already been established in embryonic form since the ICESCR came into force.
- The **Committee on the Elimination of Racial Discrimination** (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD). The CERD is established by the treaty.
- The **Committee on the Elimination of Discrimination against Women** (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women 1979 and its Optional Protocol.
- The **Committee against Torture** monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment – there is also a Sub-committee on Prevention of Torture as established under the Optional Protocol to the Torture Convention.
- The **Committee on the Rights of the Child** (CRC) monitors implementation of the Convention on the Rights of the Child 1989 and its Optional Protocols.
- The **Committee on Migrant Workers** (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.

- The **Committee on the Rights of Persons with Disabilities** (CRPD) monitors implementation of the Convention on the Rights of Persons with Disabilities 2006 and its Optional Protocol.
- The **Committee on Enforced Disappearances** (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance 2006.

To understand the relationship between the treaties themselves and the treaty bodies, it is worth thinking about the generic structure of all the instruments listed above. The treaties all contain a list of rights. That is common. What is not entirely common are the powers and functions of the treaty bodies and where they derive such powers from. In terms of commonality, one recurrent function that all of the treaty bodies have is that of in practice considering State Reports. This is known as 'State Reporting' and is a method of considering compliance with the treaty itself – it is always compulsory. The next issue is the treaties all establish the treaty bodies, they set out their competence and so forth. The exception to this is the CESCR, which is not referred to in the ICESCR itself but has been established in practice and accepted by all states party to the covenant. Each treaty, with the ICESCR being the exception, sets out criteria for membership of the treaty body it establishes, the numbers of members, frequency and length of meetings and so forth, although many of these have changed through practice over time. Thus the number of members of a treaty body has in some cases been enlarged as more states have become party to a particular treaty so as to allow the treaty body to carry out its functions more effectively than it would otherwise. The next issue is the other powers of the treaty body in question. As noted above, all consider State Reports, as all states who are party to the treaty are obliged to submit them. Another power a treaty body may have is to consider 'individual communications' or 'individual petitions'. This is akin to a sort of judicial process (more accurately it is quasi-judicial – we will examine this in due course) where an individual can make representations to the treaty body that a state is violating that individual's rights as protected by the treaty itself. Whether this power should exist, and with regard to which UN human rights treaty, has been a subject of enormous contention and dispute. We can see this in the following examples.

In the 1984 Convention Against Torture, Article 22 establishes that, for those states that accept the obligation, an individual can submit a petition. Similarly, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination allows CERD to consider individual communications for those states that have accepted such an obligation. With regard to the ICCPR, this power is not set out in the Covenant itself. However, in 1966 at the same time as the ICCPR was adopted, an Optional Protocol to the ICCPR was also adopted and this set out the process of individual petitions and how and in what circumstances they would be considered by the HRC. There is already a theme here – petition systems with regard to UN Human Rights Treaties are always optional. With regard to the ICESCR, the sister Covenant and third part of the 'International Bill of Rights', there was no equivalent to the ICCPR's Protocol. This takes us back to the idea of the different nature of various types of rights. It was strongly argued that civil and political rights as protected by the ICCPR were amenable to judicial determination. Economic, social and cultural rights, on the other hand, were argued to be more about policy objectives and goals as opposed to concrete legal obligations and thus not amenable to legal determination. This was one of the reasons (if not the key reason) as to why two Covenants were adopted in 1966. Finally in 2008, 42 years after the Optional Protocol to the ICCPR had been adopted, an equivalent Protocol to the ICESCR was adopted that also set out the power of the CESCR to consider individual petitions. In a similar vein, Protocols were adopted many years later to accompany the Women's and Children's Conventions to allow the treaty bodies that those Conventions establish to consider individual petitions. The most recent treaties highlight that there is still no consistency on this matter. The 2006 Convention on the Rights of Persons with Disabilities has an Optional Protocol also adopted in 2006, which relates to individual communications, whereas the 2006 International Convention for the Protection of All Persons from Enforced Disappearance has a provision within it relating to exactly the same issue.

A further power that all treaty bodies have is the ability to consider inter-state petitions. This is a petition by one state party against another, where one state party considers the other is violating its obligations under the treaty in question. This is a very traditional way of enforcing a treaty – in practice no state party has ever bought a petition against another under one of the UN human rights treaties. Again, it is always optional.

One final thing to note is that some of the UN Human Rights Treaties have additional substantive Protocols, which contain further rights or obligations. These are optional but they are not self-standing in that, although they are in law treaties in their own right, a state can only accept the obligations under a Protocol if it is a party to the human rights treaty itself. Thus the ICCPR has an additional Protocol on abolition of the death penalty. The Children's Convention has a number of additional Protocols dealing with, *inter alia*, child prostitution and children in armed conflict. Such Protocols underline the evolution of the body of norms. States have continued to negotiate and agree new human rights standards or sought to deal with other issues not addressed in the original treaties in their own right. The human rights standards adopted have also been evolved by the treaty bodies. To what extent and how this has been done differs from treaty body to treaty body, as each has its own dynamic and internal politics but the body of norms is not static and constantly evolves.

We need to achieve an overview of the International Covenant on Civil and Political Rights (ICCPR), the two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its 2008 Optional Protocol. We will proceed as follows. After looking at the ICCPR and the Optional Protocols, we will consider how individual petitions to the HRC are possible. (Note that individual petitions are also allowed in relation to the ICESCR under the Optional Protocol.) We will then turn to examine the ICESCR before turning to look at the reporting procedures, common to both Covenants, and allow the HRC to consider human rights issues.

ACTIVITY 5.6

Read through the entire ICCPR and its (1966) Optional Protocol as well as the entire ICESCR and its 2008 Optional Protocol and try to familiarise yourself with them, the rights contained and the structure of the Covenants.

No feedback provided.

5.5 The International Covenant on Civil and Political Rights

ESSENTIAL READING

- **Articles 2, (please browse Articles 3–27), 28–39 and 41–42 of the Covenant and Articles 1–5 of the First Optional Protocol.**

The structural parts of the Covenant are contained in Articles 1–5. The right to self-determination is detailed in **Article 1.** This Article is a group right; it cannot be asserted by individuals. It is also the same as the first Article of the International Covenant on Economic, Social and Cultural Rights. This suggests the centrality of this principle to the rights that follow. **Article 2**, Part II, asserts a state must respect and ensure the rights of the Covenant, without discrimination, to all persons within its jurisdiction. Although there are some exceptions, these rights extend to all persons in a state's territory. The Covenant requires states to provide remedies to those whose Covenant rights have been breached. This is clearly a key provision of the Covenant. Without it, there would be no legal remedies for those who had suffered violation of their rights.

The jurisprudence of the Covenant goes somewhat further in understanding the responsibilities of a signatory state. These have been described as tri-partite. First, the state must respect the Covenant rights. This could be described as a negative obligation: an obligation not to do something. The second obligation goes somewhat further: not only must a state party refrain from violating rights, it must positively protect Covenant rights by preventing non-states parties from violating rights. Third, a state must promote rights through the provision of services such as legal aid, which allow people access to and use of domestic courts.

Article 3 of the Covenant ensures the 'equal rights of men and women'. It is strengthened by Article 26, which provides for equality before the law and equal protection of the law without discrimination. Non-discrimination is thus a major principle of the Covenant.

As with all catalogues of human rights, the Covenant recognises that there are situations where a state can legitimately suspend or restrict rights. **Article 4** specifies that in exceptional 'public emergency' situations, a state may derogate from Covenant rights for a period. However, such derogations must not themselves be discriminatory, and derogation from some rights is never possible (Articles 6–8).

In cases of derogation, the burden of justification rests with the state party, which must show that any restriction on a right satisfies the tests of legality, necessity, reasonableness and legitimate purpose. The state party must also inform the Secretary General of the UN that such a derogation has been necessary.

A state party may also limit or restrict rights protection through a reservation. A reservation is a declaration by a state party that, on signing the treaty, it will not apply one or more of the Covenant rights in its jurisdiction. What is the effect of a reservation? Some international treaties deal with the effect of reservations, but the Covenant does not. This means that it is necessary to rely on the general principles of international law. According to these general principles, a reservation may be entered into to the extent that it is not inconsistent with the general objectives of the treaty to which the reservation applies. As far as the Covenant is concerned, the Committee has the authority to determine whether or not a reservation is acceptable, and can choose to apply the Covenant obligations to the state in question.

Article 5 confers a general protection on the Covenant rights, providing that nothing in the Covenant confers the right to limit or destroy any of its provisions.

Part III has been described as 'the heart of the Covenant' as it catalogues the rights that the treaty guarantees.

Article 6 provides the right to life. For those countries that maintain the death penalty, capital sentences can only be imposed by the law and for the most serious crimes. There must be a right of pardon or commutation, and the death penalty cannot be imposed on persons under 18 or pregnant women.

Article 7 prevents the imposition of 'cruel, inhuman or degrading treatment or punishment' and also forbids enforced subjection to medical or scientific experiments.

Article 8 prohibits slavery and servitude.

Article 9 is part of a group of Articles that relate to legal processes, and the protection accorded by the law. The Article states that everyone has 'the right to liberty and security of the person'. This prohibits arbitrary arrest and detention as part of a wider guarantee of due process and fair trial rights that continues through to Article 17. Within this group, Articles 12 and 13 could be read together as they deal with movements within states, between states and expulsion of aliens.

The next group of Articles moves away from due process guarantees.

Article 17 guarantees the right to privacy, **Article 18** freedom of thought, conscience and religion, and **Article 19** freedom of opinion and expression.

Article 19 is subject to special limitations that restrict freedom of expression to the extent that it does not interfere with the reputations of others, and for the protection of national security or public morals.

Article 20 could also place limitations on Article 19, as it prohibits 'propaganda for war' and the 'advocacy of national, racial or religious hatred' that amounts to 'discrimination, hostility or violence'.

Articles 21 and **22** articulate the classic civil liberties of the right to peaceful assembly and to freedom of association.

Article 23 specifies that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'. This rather general

principle is given a more detailed content by the provision of a right to marry, and a guarantee that states parties ensure the equality of both parties in both marriage and divorce.

Article 24 can be read as a continuation of Article 23, although its focus shifts to the rights of children. Children have the right to their recognition as minors, to their registration after birth and to a nationality.

Article 25 articulates a right to political participation. This includes the right to vote and to be elected at genuine periodic elections by universal suffrage and secret ballot as well as the rights to take part in public affairs and to have access to the public service.

As mentioned above, **Article 26** guarantees the fundamental provision of equality before the law and equal protection of the law. In its interpretation of this Article, the Human Rights Committee has applied it to all laws in any given country, rather than just the protections accorded by the Convention.

Article 27 states that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy and practise their own culture, religion or language. This can best be understood as a group right similar to that expressed in Article 1.

Part IV of the Covenant, which sets up the Human Rights Committee, will be dealt with in detail below.

Part V relates the Covenant to the Charter.

Article 46 states that the Covenant cannot be interpreted as 'impairing the provisions of the Charter of the UN'; and **Article 47** specifies that the Covenant shall not be interpreted as 'impairing the inherent right of all peoples to enjoy and utilise their wealth and natural resources'.

The final **Articles 48–53** in Part VI contain various provisions relating to the operation of the Covenant and the procedures through which states can become members.

Article 50 is interesting. It states that the Covenant applies to all parts of a federal state. This provision is important for federal states whose law may make certain state or provincial authorities competent to act when federal authorities cannot. The Covenant would thus apply to those competent authorities. If this were not the case, then it would be easy to avoid the obligations of the Covenant by delegating powers to state or provincial authorities and claiming that there was no overall authority over their operation.

ACTIVITY 5.7

How do the rights in the ICCPR relate to each other?

Summary

This section has considered the ICCPR, and shown how the rights that it contains build up a coherent set of rights relating to political and civil life.

5.6 The two Optional Protocols to the ICCPR

5.6.1 The First Optional Protocol

Article 1 of the First Optional Protocol describes mechanisms for the Committee to consider individual complaints that allege a violation of one or more of the Covenant's rights. Individuals must satisfy all the admissibility criteria before any communication can be heard. Individuals who allege a breach of their Covenant rights must first have exhausted all available domestic remedies (unless the application of the remedies is unreasonably prolonged (Article 5)) before they submit a written communication to the Committee (Article 2). Providing that the communication is not an abuse of the process and not anonymous (Article 3), the Committee can decide to bring it to the attention of the state party (Article 4). After the state party has received the

communication, it has a six-month period to submit to the Committee a written explanation or statement that clarifies the matter and specifies what remedy (if any) has been put in place (Article 4). However, if the same matter is being examined under another procedure of international investigation, the Committee will not consider the communication. The meetings that consider communications are closed (Article 5). The Committee includes in its annual report a summary of its activities under this Protocol (Article 6).

5.6.2 The Second Optional Protocol

The purpose of this Protocol is outlined in the preamble. The abolition of the death penalty is seen as central to the enhancement of human dignity and progressive development of human rights. This builds on Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights. The abolition of the death penalty is thus fundamental to the enjoyment of the right to life.

Article 1 prohibits capital punishment by parties who are signatories to the Protocol and places an obligation on states parties to take all necessary measures to abolish the death penalty within its jurisdiction. Reservations are not possible, except for applications of the death penalty in time of war for serious crimes of a military nature (Article 2). Article 3 provides that signatories should include in the reports they submit to the Human Rights Committee details of measures that they have adopted to give effect to the present Protocol.

The Protocol also includes enforcement mechanisms. States parties recognise the competence of the Human Rights Committee to receive and consider communications when a state party claims that another state party is not fulfilling its obligations under the Protocol (Article 4). Moreover, Article 5 extends the competence of the Human Rights Committee to receive and consider communications from individuals.

Activity 5.8

What are the main roles of the First and Second Optional Protocols?

5.6.3 Individual communications

Core texts

- **De Schutter, Chapter 9 'The United Nations human rights treaties system', Section 9.2 (available on the VLE) AND**
- **Bantekas and Oette, Chapter 8 'Civil and political rights'.**

It is important to note that the discussion in Bantekas and Oette is about civil and political rights and not specifically in the context of the ICCPR. So while useful, this should be borne in mind. The discussion in De Schutter, while broader, is more focused on the ICCPR and the work of the Human Rights Committee.

Further reading

- **Alston and Goodman, Chapter 9 'Treaty bodies: the ICCPR Human Rights Committee', pp.808–44.**
- **Articles 1–5 of the First Optional Protocol, available on the UNHCHR website at: www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx**

It can again be stressed that a number of the UN human rights treaty bodies have the power to consider individual communications or petitions (they are not cases – note the language) as alluded to before. We are using the ICCPR as our paradigm since it has the greatest amount of jurisprudence (note, however, the legalistic language), and because in the context of how we are approaching the broader issue of human rights protection in the UN, it makes most sense to do so. But to return to something again alluded to above, the different treaties are variations of the same theme. It should also be noted (although it is rarely openly acknowledged) that lawyers and states, to some extent as well, tend to pay greater regard to the findings of those treaty bodies that

are more heavily composed of lawyers. This obviously has repercussions! The Human Rights Committee of the ICCPR has tended to be dominated by eminent international law professors and judges.

The manner in which the admissibility criteria are interpreted is designed to ensure that only 'worthy' complaints are considered by the treaty bodies. These admissibility criteria, with only slight variations, exist in all petition systems within the UN treaty bodies. The vast majority of communications that are submitted do not pass this filtering process. It is important to try to understand how the petition system works in practice and further how the admissibility criteria are interpreted. This is covered in depth in your reading in Alston and Goodman, De Schutter and Bantekas and Oette.

ACTIVITY 5.9

a. **Why is the machinery under the Covenant better described as quasi-judicial rather than judicial?**

b. **Why do you think the drafters of the Covenant chose this form of machinery rather than judicial machinery?**

c. **Why is the procedure for inter-state petitions (Articles 41 and 42) made optional?**

d. **Why have no petitions so far been brought under this procedure?**

e. **Why is the right of individual communication under the Protocol to the Covenant optional? How effective is it likely to be, and has it been, in practice?**

f. **Do you think the admissibility criteria have been interpreted in an appropriate manner?**

g. **Are systems of individual complaints appropriate in global instruments?**

Summary

This section has considered the procedural mechanisms laid down by the First Optional Protocol and the substantive and procedural provisions of the Second Optional Protocol. The First Protocol allows the Committee to hear individual complaints about breaches of rights in the Covenant, and the Second Protocol abolishes the death penalty. We have also attempted to assess the effectiveness of individual communications as a way of protecting human rights.

5.7 The International Covenant on Economic, Social and Cultural Rights

CORE TEXTS

- **De Schutter, Chapter 5 'Fulfilling human rights: progressive realization' AND**
- **Bantekas and Oette, Chapter 9 'Economic, social and cultural rights'.**

ESSENTIAL READING

- **The entire ICESCR, especially Articles 2 and 16 of the Covenant and all of the Optional Protocol, available on the UNHCHR website at: www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx**

5.7.1 ICESCR

The relevance of the ICESCR and its relationship to the Declaration and the ICCPR can be seen in the preamble. A statement of economic, social and cultural rights is seen as the best way of realising the 'ideal of free human beings enjoying freedom from fear and want'. This goal can only be secured if 'conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'. Rights are thus inherently interrelated. A statement of political rights can only make sense in the context of further rights that cover different but related areas of social life.

Part I

Article 1, like Article 1 of the ICCPR, stresses the principle of self-determination. Self-determination could thus be seen as the fundamental right. Indeed, as the Article goes on to state, it is 'by virtue of [this] right people both freely determine their political status and freely pursue their economic, social and cultural development'. The post-colonial context of the Article is apparent in its articulation of the principle that self-determination entails national control of natural wealth and resources. However, this is immediately qualified by the requirement that obligations arising out of 'international economic co-peration, based upon the principle of mutual benefit, and international law' are honoured.

Part II

Part II opens with **Article 2**, which stresses a state's obligation to the 'progressive realisation' of the Covenant rights; a process that must take place without discrimination on grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. At paragraph 3, a proviso applies to 'developing countries' that may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals. The Covenant thus acknowledges that the rights it describes may be applied differently in developed and developing nations. Minimum core obligations thus take into account the availability of resources in any given country. However, a state party that deprives a significant group of individuals of basic health care, shelter or basic education would be seen as failing in its obligations under the Covenant.

Articles 3–5 can be read as a block.

Article 3 obligates states parties to 'ensure the equal right of men and women to the enjoyment' of the Covenant rights; and its sense is elaborated by Article 4. This Article provides that states may subject Covenant rights to such limitations as are determined by law and in the interests of 'promoting the general welfare in a democratic society'. **Article 5** provides that a Covenant right cannot be used as a pretence for the denial or limitation of other Covenant rights. This would also apply to an argument that a right recognised in the law of any given country could be used to limit or derogate from a Covenant right.

Part III

Part III contains a number of substantive rights. **Article 6** recognises 'the right to work'. This includes 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. The Article places certain duties on a state party to ensure 'steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'. **Article 7** recognises 'the right of everyone to the enjoyment of just and favourable conditions of work'. These conditions include a right to remuneration, safe and healthy working conditions, equal opportunities and 'reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'. In keeping with these rights, **Article 8** ensures that states parties recognise the right to form and join trade unions, and for unions themselves to have rights, including the right to strike. **Article 9** recognises the right to social security.

Article 10 is similar to Article 23 of the ICCPR. The description of the family as the 'natural and fundamental group unit of society' is common to both Articles, as is the assertion that marriage should be entered into with the free consent of the intending parties. Article 10 goes further, though, in asserting that 'special protection' should be 'accorded to mothers during a reasonable period before and after childbirth' and this means that 'working mothers should be accorded paid leave or leave with adequate social security benefits'. Paragraph 3 of Article 10 can also be read alongside Article 24 of the ICCPR. Article 10 elaborates children's rights as a means of protecting them against 'economic and social exploitation'. Article 24 is more concerned with guaranteeing the civic status of the child.

Article 11 states 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. The second paragraph goes on to recognise 'the fundamental right of everyone to be free from hunger'. Guaranteeing both rights means that states must cooperate to create measures that are needed:

a. to improve methods of production, conservation and distribution of food

b. to take into account the 'problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need'.

As has been mentioned, there is a large gap between the goals of this Article and the reality in many parts of the world. Let us look at the problem of adequate housing. While the problems are often particularly acute in developing countries that have major resource issues, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed (Official Records of the General Assembly, Forty-third Session, 1992 Supplement No.8, addendum A/43/8/Add.1). There is no indication that this number is decreasing. It seems clear that no state party is free of significant problems of one kind or another in relation to the right to housing. (The right to adequate housing (Art.11(1): 13/12/91. (CESCR General comment 4).)

Article 12 concerns 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. States parties must undertake certain obligations to meet this standard. These include:

a. measures to reduce stillbirth and infant mortality; efforts must also be made to promote the healthy development of children

b. measures to improve 'all aspects of environmental and industrial hygiene'

c. measures to prevent, treat and control 'epidemic, endemic, occupational and other diseases'

d. the creation of 'conditions which would assure to all medical service and medical attention in the event of sickness'.

In **Article 13** states parties undertake to 'recognise the right of everyone to education'. Education is defined as 'directed to the full development of the human personality and the sense of its dignity'; it is also rooted in a human rights context. Education 'shall strengthen the respect for human rights and fundamental freedoms'. Education is, ultimately, about the creation of articulate citizens; it should allow 'all persons to participate effectively in a free society, promote understanding, tolerance and friendship'.

The Article goes on to elaborate precisely what form education must take. Primary education must be 'compulsory and available free to all'. Secondary education should include 'technical and vocational secondary education' and should 'be made generally available and accessible to all by every appropriate means'. In particular, this end is to be achieved by 'the progressive introduction of free education'. Finally, higher education must 'be made equally accessible to all, on the basis of capacity'. The accessibility of higher education is inseparable from the 'progressive introduction of free education' that allows all people to develop intellectual skills.

The Article acknowledges that access to education for children is itself determined by the educational opportunities of parents. Thus, 'fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education'. The means to achieve this standard is the 'development of a system of schools at all levels'. Moreover, 'an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved'. The Article goes on to set standards in relation to the choice of schools made by parents: states parties must show 'respect

for the liberty of parents and, when applicable, legal guardians to choose' schools for their children, provided that those schools 'conform to such minimum educational standards as may be laid down or approved by the state'. States parties must also ensure that children are educated 'in conformity with their own convictions'.

Article 14 clarifies certain technical matters in relation to the provision of education.

In **Article 15** the states parties 'recognise the right: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; and (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. In clarifying these duties, the Article asserts that states parties must take steps to ensure 'the development and the diffusion of science and culture'; 'to respect the freedom indispensable for scientific research and creative activity' and to 'recognise the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields'.

Part IV

Part IV of the ICESCR is fascinating as it displays very clearly the practical evolution of how to consider compliance with a human rights treaty. Please read again Articles 16–25 of the Covenant.

In practice, the CESCR considers State Reports in almost exactly the same way as the ICCPR and this is tackled in the next section.

5.7.2 Optional Protocol to the ICESCR

The Optional Protocol to the ICESCR was adopted after a lengthy and difficult process in which a number of states continued to argue that economic and social rights were not amenable to legal determination. Although there are governments who still hold this view, it is now widely accepted that economic and social rights do have legally definable content. The Protocol is similar to that of the ICCPR but there are subtle differences here and there.

Activity 5.10

How do the rights in the ICSECR differ from the ICCPR?

How do you think the nature of the obligation in the two treaties differs? This is not about a particular right but about the nature of obligation towards all the rights in the Covenant in question.

What differences can you detect in the communications procedures for the Covenants? What do you think might explain those differences?

Summary

This section has considered the content of the ICSECR and placed it in the context of the ICCPR. The rights contained in the Covenant include the right to self-determination (Article 1), equality (Articles 3–5), work and welfare rights (Articles 6–9), rights that relate to the family (Article 10), a right to an adequate standard of living (Article 11), a right to health care (Article 12), a right to education (Article 13) and cultural rights (Article 15).

5.8 The reporting system under the ICCPR and the ICESCR

5.8.1 The Human Rights Committee and the Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) was established by a Resolution of the Economic and Social Council in 1985 in order to perform the task of monitoring economic, social and cultural rights according to Part IV of the Covenant.

The Human Rights Committee (HRC) was set up by Article 28 of the International Covenant on Civil and Political Rights. Both bodies consist of 'experts' who are nationals of the states parties to the Covenant. This is to ensure that the proceedings of the Committee are politically impartial. Members serve in their personal capacity, and not as representatives of their states.

In its role as the monitoring body of the Covenant, the HRC has four functions.

The Committee receives **State Reports** on the progress they have made in the implementation of Covenant rights (Article 40). A state's first Report is due within one year of the entry into force of the Covenant for the country concerned. Further periodic reports are due at intervals specified by the Committee to the state party. Reports are submitted to the Secretary General of the United Nations, who may in turn send them to specialised agencies if the report falls into their area of competence.

- The Committee publishes **General Comments**, which assist in the interpretation of the Covenant rights. The competence to issue such comments is derived from Article 40, paragraph 4.
- The Committee considers **individual communications** under the Optional Protocol from individuals who claim violations of their Covenant rights. If the communication is successful, the state party is requested by the Committee to remedy the violation. This is a power derived from Article 2, paragraph 3 of the Covenant, which obligates a state to provide an effective remedy for Covenant violations. The remedy may be for compensation, repeal of legislation or, if the complainant is in prison, for his or her release.
- The Committee has the authority to consider **complaints made by one state party** that another state party is not abiding by the Covenant. This function of the HRC is based on the fundamental principle of the protection of human rights. Thus, human rights treaties do not just give rise to obligations that a state owes to its citizens, but are also multilateral treaties in an international law sense. This means that all states parties that are signatories to a treaty have an interest in making sure that all other signatories abide by the rules and principles that it articulates. However, this Article 41 mechanism only applies to those states parties that have recognised the competence of the HRC in this area. Although many states have done so, the HRC has yet to receive a single complaint.

Under Articles 16 and 17, the CESCR also considers reports from states parties within two years of accepting the Covenant, and then at five-year intervals. The Committee makes recommendations to states parties that are called 'concluding observations'.

The Committee can now consider individual complaints under the Optional Protocol from those states that have accepted it. The Committee also publishes General Comments on the interpretation of the Covenant.

ACTIVITY 5.11

a. Why do you think there were disagreements over the precise nature of the obligations under the Covenant?

b. Why do you think the Human Rights Committee and/or Committee on Economic, Social and Cultural Rights have developed practices for the consideration of State Reports?

Why is this aspect of the Committees' work important? What persistent problems hamper the work of the Committees?

c. Consider Alston and Goodman, pp.768–91 and the extract below:

> The process of compiling a report, as described, provides an opportunity for a state party to clarify, in the context of its own national framework, the content of its obligations assumed under the Covenant and to take stock of the current situation with respect to Covenant rights, as well as to identify areas that require reform to ensure full compliance with the Covenant. The consultations required within government structures and between government and civil society in order

to prepare a thorough report can improve understanding of the Covenant and the objectives of human rights generally. At the same time, publicity surrounding the preparation of a report draws attention to the level of the state's compliance with its obligations and the ways individuals and groups can further contribute to their implementation. The report's consideration by the Committee allows for dialogue between the state party and a group of impartial and highly experienced experts, during which areas requiring improvement can be identified and suggestions made. Reporting also highlights good practices and lessons learned which may be drawn on by other states as they seek to implement the Covenant. Finally, the outcome of the procedure in the form of concluding observations constitutes an authoritative guide for future legislation, policies and programmes. Although directed at the state party, they can also be used by other stakeholders to encourage implementation and a culture of human rights in the state party. They also serve as a valuable guide to other states parties where similar issues arise.

To what extent is the system of State Reports and comments by the Committee effective in protecting human rights?

There are examples of concluding observations in Alston and Goodman, pp.771–89 and examples of General Comments on pp.791–801. Equally, you can find them very easily on the webpages of the UNHCHR.

Summary

This section has assessed the reporting system that is common to both Covenants. The Human Rights Committee has a number of powers. It is mandated to receive **reports from states parties** on the progress they have made in the implementation of Covenant rights (Article 40). The Committee can also consider individual communications from citizens in those states that are signatories to the Optional Protocol and allege breach of the ICCPR. The Committee can also publish general comments on the interpretation of the Covenant (Article 40, para.4), and is also empowered to hear complaints made by one state party against another alleging breach of Covenant rights. The CESCR now has similar powers but has not yet been functioning as a communications body for long enough for us to make a firm determination as to the role it will play in this regard.

5.8.2 The relationship between State Reporting and communications procedures

It is clear from the discussion above that the UN human rights treaty bodies consider State Reports and communications. This is not novel but it is worth considering the implications of this. The fact that the same body engages in both constructive dialogue through the reporting procedure with state representatives and also sits in judgment upon a state's compliance with its obligations under the same treaty is not without problems. The first is a concern for the workload of the individuals involved. The more extensively a petition system is used, the greater the burden it imposes on the part-time members of UN human rights treaty bodies. As this is in addition to their duties under the reporting system it will become more difficult to manage. A more fundamental problem, however, may be the potential incompatibility of the two. It is a hard assignment for one body, first to engage a state party in constructive, fruitful dialogue on the steps it has taken to comply with its obligations – a non-confrontational, consultative exercise with the aim to be helpful – and then for the same body to behave as a quasi-judicial investigative and settlement body. It is quite likely (although difficult to prove) that states have become reluctant to engage in frank, constructive dialogue of their problems in the reporting phase if they are likely to have to face that same committee in a quasi-judicial context. The reporting system is of course the 'basic mechanism' for supervision as it is always compulsory.

Communications allow detailed legal analysis and determination of the extent to which a state party is complying with its obligations in a way that the reporting system simply does not. Criticism of the duplication of effort can be rejected on the basis that as the same body will be involved in both compliance mechanisms, it can utilise its own work

for both procedures. A UN petition system, be it before the HRC or CESCR or another, is based on comprehensive written proceedings presented by both complainants and governments; it will allow the treaty body to analyse the legislation and the situation in practice, in a manner that is unlikely to happen under the reporting procedure. It will thus highlight in more detail the extent of the non-compliance and allow the treaty body to provide the state party with greater guidance as to the measures that need to be taken to ensure compliance. Second, communications not only lead to a consolidation of standards but also allow their progressive development. In numerous communications, treaty bodies refer to their conclusions from the reporting cycles to define the standards and the basic requirements of the treaty provisions in question. That much is to be expected. A complaints system importantly, however, often provides an opportunity for non-governmental bodies to try to persuade the treaty body towards the progressive development of standards. The relationship between communications and reporting is a complex one but both systems can function more effectively if used in a complementary manner.

5.9 The problems with the UN treaty bodies system and reform

CORE TEXT

- **De Schutter, Chapter 9 'The United Nations human rights treaties system', pp.923–34 (available on the VLE).**

As will be obvious from your reading and the work you have done so far, the UN treaty bodies system, notwithstanding the value and importance of its work, suffers from significant problems: delayed reports, inadequate reports, states not cooperating with treaty bodies, the non-implementation of findings, duplication of issues, contradictory approaches to issues and a shortage of time to consider matters, to name but a few. In actual fact the list is a long and rather depressing one. For many years now there has talk of reform of the UN treaty bodies to cope with their workload and the backlogs of reports. Further there is the issue of non-cooperation of a number of states over time. For many years now there has been talk of crisis and reform (see General Assembly Resolution A/68/L.37 Strengthening and enhancing the effective functioning of the human rights treaty body system). In 2019 the chairpersons of the UN treaty bodies took a key step by adopting a 'position paper'. The full paper is available here:

www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/31Meeting/AnnexIII_A_74_256_Vision_Chairs.docx

The development is interesting on a number of levels. The 'position' paper agrees to a general alignment of working methods. There will be a simplified reporting procedure (SRP), which means State Reports are less onerous for states. Secondly, there will be a reduction of unnecessary overlap. All treaty bodies will coordinate their list of issues to be discussed with states prior to discussion of their reports. Thirdly, the timing of the reporting cycles will change. The treaty obligations do not change but there is scope as to scheduling in practice as to when states discuss their reports. The two Covenant Committees may choose to offer states parties the option of a joint report.

Further, the treaty bodies have agreed to follow the same general format for the consideration of reports. For the first time it is recognised that, exceptionally, the dialogue may take place by means of a video conference. Very helpfully, the treaty bodies' concluding observations will follow the same approach. They aim to be short, focused and concrete and to prioritise balancing immediate with longer-term goals and objectives.

There are also changes to be made to the capacity of the treaty bodies to review documents. Agreed methods include working in chambers, working groups or country teams. This will help the need to review between 25 and 50 reports per year. Finally, the committees will consider conducting dialogue with states parties concerning their reports at a regional level.

It remains to be seen what difference these changes will make and how states will respond to them. There has been talk of crisis in the UN treaty bodies for over

two decades now. Perhaps putting matters into the hands of the UN treaty bodies as opposed to the states parties will help to move matters forward. For a better understanding, you should now read again the chapter by Evans, M. 'The UN and human rights: reform through review?', which is listed above, as that gives an outstanding overview of matters and where they are.

Activity 5.12 (thinking of the relationship between Charter mechanisms and treaty bodies)

a. Do you think the Charter-based systems are a valuable additional mechanism to those that exist in treaties? What are the dangers?

b. What relationship/problems do you think might exist between universal periodic review and the treaty bodies?

c. There is a plethora of Special Representatives and Special Rapporteurs; what use do you think they serve to the treaty bodies?

Further reading

- **Alston, P. 'The Committee on Economic, Social and Cultural Rights' in Mégret, and Alston (eds), pp.439–78 (available via the Online Library).**
- **Hennebel, L, 'The Human Rights Committee' in Mégret and Alston (eds), pp.339–92 (available via the Online Library).**
- **Khaliq, U. and R. Churchill, 'The protection of economic and social rights: a particular challenge?' in Keller, H. and G. Ulfstein *UN human rights treaty bodies: law and legitimacy*. (Cambridge: Cambridge University Press, 2012) [ISBN 9781107006546] pp.199–260. Please note you should only read pp.199–218 and then pp.243–60. This is a long and complicated piece but it covers much of the discussion above and also tries to discuss the distinction between rights and their nature.**
- **Tistounet, E. 'The problem of overlapping among different treaty bodies' in Alston, P. and J. Crawford (eds) *The future of UN human rights treaty monitoring*. (Cambridge: Cambridge University Press, 2000) [ISBN 9780521645744] (available on the VLE). This essay contains an important analysis of the problem of 'overlapping guarantees' and criticises UN institutions for a failure to cross reference and coordinate their activities.**

Reminder of learning outcomes

By this stage you should be able to:

- **summarise the rights contained in the Universal Declaration of Human Rights (UDHR)**
- **explain the fundamental provisions of the UN Charter**
- **explain the basic institutional structure of the UN**
- **identify the rights contained in the International Covenant on Civil and Political Rights (ICCPR)**
- **outline the rights and procedure contained in the two Optional Protocols**
- **identify the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR)**
- **describe the enforcement and protection systems that operate under the Covenants and the Charter.**

Sample examination question

'Before one assesses the effectiveness of the UN system for the enforcement of Human Rights, one has to be clear about the meaning of "enforcement".'

Discuss.

Advice on answering the question

It would be wise to agree with the quotation in this question. The quotation is prompting consideration of the issue of how one assesses the operation of the UN agencies that are responsible for overseeing the protection of human rights. This calls for a consideration of both the Charter and the treaty bodies. One should avoid simply listing the functions of these bodies under the various mechanisms and focus on the key concern of the question: what does enforcement mean? Unless we have clarified this concept, we cannot accurately assess the task of the UN. One might think that enforcement requires a court that is able to impose legal remedies as a vindication of a breach of a right. This model is clearly not an accurate way of assessing the UN. It does not operate in a 'courtly' way. Rather, both the Human Rights Council and the UN treaty bodies have a variety of functions that relate to the overseeing of the Charter and the Covenants as well as the other core treaties. In relation to the former, its task is both standard-setting, and investigation and thematic reviews. The treaty bodies can hear individual communications (usually under the Optional Protocols) and consider State Reports.

Both the Council and treaty bodies also initiate debates and publicise good and bad practice. These methods of enforcement are not similar to a court applying a remedy; there is also a great deal of political manoeuvring that is required before an individual government is denounced as an international pariah. Ultimately, the Member States would not tolerate a more 'legal' set of mechanisms that would allow intervention in their domestic affairs. Whether or not these methods of enforcement (through overseeing and standard-setting) are effective is difficult to judge; however, the way in which one assesses these UN institutions has to acknowledge that they are not acting like a court of law.

6 The European system for the protection of human rights

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Introduction

In the previous chapters we have been examining the UN-based system for the protection of human rights. Universal mechanisms have always existed alongside regional ones. To start with we will examine the relationship between universal and regional human rights documents.

CORE TEXTS

- **De Schutter, Chapter 11 'Regional mechanisms of protection', beginning of chapter to end of Section 11.1 AND**
- **Bantekas and Oette, 'Chapter 6 'Regional human rights treaty systems' to end of Section 6.2.**

ESSENTIAL READING

- **Nussberger, A. *The European Court of Human Rights*. (Oxford: Oxford University Press, 2020) [ISBN 9780198849650], Chapter 1 'The Court over sixty years' – this gives a wonderful overview of the main themes and issues in the development of the Convention system (available in Oxford Scholarly Authorities on International Law via the Online Library).**
- **Mowbray, A. *Cases and materials on the European Convention on Human Rights*. (Oxford: Oxford University Press, 2012) third edition [ISBN 9780199577361] pp.1–63 (available on the VLE) AND**
- **The texts of Protocols 15 and 16 and the explanatory report to Protocol 16 (available on the VLE) AND EITHER**
- **Leach, P. 'The European system and approach' in Sheeran and Rodley (eds), pp.407–25 (available in VLeBooks via the Online Library) OR**
- **Greer, S. and L. Graham 'Europe' in Moeckli et al. (eds).**

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **outline the historical roots of the European Convention on Human Rights and the European Union**
- **identify the basic human rights provisions provided for by the European Union**
- **understand the basic nature of the European Social Charter**
- **summarise the basic provisions of the European Convention on Human Rights**
- **explain the basic operation of the European Court of Human Rights**
- **explain the specific nature of the European system for the protection of human rights.**

6.1 Regional, universal, general, right specific – differing human rights treaties?

Political and legal developments at the global level, with regard to any issue, are often slowed down by political differences between States or a lack of initiative or commitment among some of them. The greater the diversity and number of actors, by definition the greater the difficulty in reaching agreement. By contrast, with regard to many but not all issues, States within a geographic region are more likely (due to political, economic, religious, historic or cultural reasons) to be able to come to some agreement between themselves about standard-setting or enforcement, which they may not be able to reach within a broader community of States. This is particularly true of human rights. The United Nations as a universal organisation has since the outset recognised, in the context of its work, the important role to be played by regional organisations – that is organisations created by States that are within close geographical proximity to one another. In the UN Charter the role of regional organisations is specifically recognised albeit in other contexts. In terms of human rights protection, once it became clear that what became the UDHR was going to get bogged down in the geopolitics of the era, the UN was keen for like-minded States to undertake their own efforts to legally protect and promote human rights. Over time, such efforts have led to an impressive and sophisticated body of rules. This does mean, however, that there are layers of overlapping treaties dealing with the same issue – as an example, the prohibition of torture and inhuman and degrading treatment. As we established in earlier chapters, the ICCPR prohibits this. We have also established that the UN Convention Against Torture, 1984 (UNCAT) exists and also prohibits such ill-treatment. The ICCPR in this regard can be considered a general civil and political rights treaty as it protects a number of civil and political rights, of which torture is one. UNCAT is a right- or issue-specific treaty dealing with civil and political rights. It is a global treaty, so at the universal level you have at least two human rights treaties – a general one, the ICCPR, and a right/issue-specific one, UNCAT, that address the same issue. As we will discuss in a later chapter there are differences between these two treaties but without doubt they overlap. If we move away from the universal level, we can see the same phenomenon at the regional level. The Council of Europe (European States), Organisation of American States (North and South American and the Caribbean States) and the African Union are all examples of regional organisations under whose auspices human rights treaties have been adopted. We will discuss some of the different treaties in later chapters. If we examine further the issue of torture as our example, we can ascertain the following. Torture is prohibited by the European Convention on Human Rights, 1951 – a regional human rights treaty. Further, there is a European Convention for the Prevention of Torture 1987, which also seeks to tackle the issue. Again, there is a difference between the treaties but there is overlap. So, potentially, in the Council of Europe States, which are also party to the two aforementioned UN treaties, there are four possible sources of treaty-based legal obligation when it comes to torture. In legal terms, the regional treaties are neither superior nor inferior to the UN human rights treaties. States must uphold all their legal obligations in good faith. The right-specific treaties are neither superior nor inferior to the general treaties. There is very clearly the potential to have conflicts between these treaties. While it does not tend to manifest itself so much in practice with torture, it does in other areas. Conflicts exist between regional and universal human rights treaties and between universal human rights treaties themselves, in particular right-specific treaties, on the one hand and, on the other, the general treaties. It is worth bearing this in mind while we examine the 'European' system. Regional human rights systems are a form of cultural relativism and this needs to be borne in mind. Even within regional systems, among more culturally alike States, there are clear differences and this will be explored as well. Thus much of the discussion that has come beforehand will form part of the theme or underlying current of what follows in much of the module guide.

6.2 European organisations and the international protection of human rights

In the remainder of this chapter we will examine the systems for the protection of human rights that apply only to European States. There are three key European organisations: the Council of Europe, the European Union and the Organization for Security and Co-operation in Europe (OSCE). We will deal with the latter first, the OSCE. The OSCE is a product of the Cold War and its manifestation in Europe and it was established in the 1970s. The OSCE, as it now is, has undergone change and evolution since its inception. While the OSCE plays a valuable role with regard to some human rights issues, it is an organisation that is concerned with a wide variety of issues, of which human rights is but one. Most of its work is concerned with security and conflict prevention and thus it need not detain us any longer. More centrally concerned with human rights is the European Union. This may come as a surprise as the European Union is primarily a political and economic union. After the Second World War, Britain and France disagreed over how to undertake the reconstruction of Europe and the functions of the organisations they would set up. Thus what became the EU and the Council of Europe were both set up, with the EU initially focused on economic issues and the Council of Europe on human rights. Over time, however, human rights have become an important issue for the Union as opposed to being of peripheral interest – much of this is concerned with the political legitimacy of the integration project. The British vote in a referendum in 2016 to leave the EU was in part due to the perceived lack of the EU's legitimacy. Human rights in the EU were not a major issue in the debate in the UK about whether to remain or leave the EU but they have been an important issue for the EU both with regard to how it is perceived and how it perceives itself. The EU has been in a tussle of sorts with our third organisation, the Council of Europe, when it comes to human rights protection in Europe. Whereas the EU is primarily a political and economic organisation that has become increasingly involved in human rights matters, the Council of Europe was set up as an organisation that had human rights as its central focus. The relationship between the two is an interesting one, which also highlights the political dynamics and evolution of human rights. However, there should be no doubt the pre-eminent human rights actor in Europe is the Council of Europe and that is where we will focus most of our time. The discussion takes a historical perspective so that the dynamism of human rights protection can be appreciated. This also allows an appreciation of the evolution of human rights as a body of law. The Council of Europe is widely regarded as the most successful human rights organisation in the world. There is quite something to that assertion but it is also the case that the Council of Europe system is under significant pressures. We will also examine this.

6.3 The origins of the European Convention on Human Rights

In 1949 Europe was in ruins at the end of the Second World War. The scale of the task of reconstruction was massive. It was necessary not only to rebuild economies and infrastructures but also to re-establish European democracy. Winston Churchill was clear how to achieve this:

> What is this sovereign remedy? It is to recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety, and in freedom. We must build a kind of United States of Europe.
>
> (Winston Churchill, 19 September 1946, Zurich (Switzerland)
> www.coe.int/en/web/documents-records-archives-information/timeline-1946)

Churchill's hope for a 'United States of Europe' suggests a need to bring European nations together. Underlying this desire to achieve a lasting peace were both economic and social principles. Rather than gearing economies to mutual competition, would it be possible to collaborate and avoid suspicion and hostility? Moreover, fascism had showed the need for a European-wide commitment to the values of democracy, human rights and the rule of law. The foundations of the new Europe were thus to be found in a spirit of economic cooperation and mutual respect for human rights. Cold War tensions also added to the sense that it was necessary

to bring together nations committed to democratic government. But, one has to be aware that the nature of the European project is not limited to these historical events. The end of the Cold War and the desire of former Eastern bloc nations to be included in the European Union has changed the nature and direction of the debate about the form of European integration. Furthermore, it would also seem that nationalistic aggression and ethnic tensions are on the rise in Europe. The ongoing efforts to build democracy and human rights in Europe are manifold and complex. They have also met with some political resistance from those who fear the loss of power and influence from the nation State and the rise of what some see as a European federal structure. The British vote to leave the EU is in part a rejection of the centralisation of power and certainly an assertion of the power of the nation State.

In May 1948 delegates from numerous European countries attended The Hague Conference. The Conference was dedicated to promoting European unification. One of the resolutions taken at the conclusion of proceedings was for the drafting of a European Convention on Human Rights. In 1949 the Council of Europe was created and tasked with the creation of the Convention. Although the Council was initially reluctant about the project, it became one of the major champions of the Convention, which it began to appreciate was central to the realisation of social, economic and democratic stability. The European Convention for the Protection of Human Rights was signed in Rome in 1950 and came into force in 1953. The Convention guarantees certain rights including the right to life, freedom from torture, freedom from arbitrary arrest, the right to a fair trial, the right to privacy, freedom of religion, freedom of expression, and freedom of assembly and association. It is worth noting that the very content of the Convention has been criticised, in particular its exclusion of social and economic rights. The Council of Europe tackled this later by adopting the European Social Charter in 1961. The reasons behind the split are essentially the same as those we considered when examining the two 1966 Covenants: States disagreeing as to the nature and justiciability of the different rights. Institutionally, the Convention provided for an international court (the European Court of Human Rights (ECtHR)) and a Commission to consider complaints and decide whether or not to remit them to the Court. Even at this early stage, it is possible to see that certain nations saw this as a possible compromise of their sovereignty. The Convention allowed a nation to determine whether or not it would accept the jurisdiction of the Court. At the time it was adopted, the Convention system was a radical innovation. Never before had there been a system of international law that held States accountable to a superior (international) court in respect of actions against their own citizens carried out in their own territory. That States found this novel and challenging was made clear by them in some of their early submissions to the Court when cases were brought against them. The Court, as it had to, rejected arguments based on 'internal affairs' and upheld the power of the Court to consider complaints against States for the violation of individual rights. Underlying this is the clear acknowledgment that the State itself is the primary abuser of human rights.

It is worth emphasising that there has been very significant reform in the operation of the Court set up by the Convention, and this reform is ongoing. The system is under incredible pressure – to use a cliché, it is a victim of its own success. But it is not only that. First, there has been very substantial political change in Europe and the expansion eastwards; this is especially so if one considers that the Convention now applies to Russia as well as all of Eastern and Central Europe, whereas in the past it was primarily a Convention that applied to small number of economically developed, Western, liberal democracies such as Sweden, Iceland, Norway, the Netherlands, France, Belgium and the United Kingdom. The political context has changed fundamentally for an organisation that has had to accommodate the endemic human rights problems in countries such as Turkey, Ukraine and Russia, not to mention those countries of Central and Eastern Europe which have had to face up to the violations of rights that occurred under their previous totalitarian regimes. Further, there is the rise of authoritarian governments in Europe, such as those in Hungary and Poland. It is also the case that the Court is having to deal with rights violations in the context of military conflicts. Russia, Turkey, Armenia and Azerbaijan, for example, are Member States of the Council of Europe.

Second, the system itself, not just the context, evolved substantially over time. The confidence of the Court to hold States accountable grew and in return the confidence they had in the system grew. International courts function best when there is mutual trust and respect between the Court and states parties, and the Court enjoyed this; and as it became a more established feature of European democracies, the system developed. Under former arrangements, there was a European Commission of Human Rights and a Committee of Ministers. The Commission of Human Rights would rule on breaches of the Convention when a case was submitted to it by a state party. Under the old procedure, states parties and the Commission could then refer the case to the ECtHR. In other words, an individual complainant did not have a right to petition the ECtHR. This system was found to be increasingly inefficient and unable to deal with the increasing case load. The Commission was abolished by Protocol 11 in 1998 (the Committee of Ministers retains enforcement powers under the new arrangements). These changes have enhanced the power of the Court but there are still misgivings about its ability to cope with the number of cases with which it has to deal. This has led to further Protocols (some in force, others not) seeking to make the system more efficient. We will examine this below.

The other peculiarity of the Convention is the status of the 'shared' political inheritance between nations to which it appeals. Undoubtedly, this refers to the books, philosophies and thinkers that could be said to characterise the European tradition; but the trauma of the Second World War might also suggest that the values of humanity had been quickly forgotten in a Europe of concentration camps, collaborators and total war. It is actually difficult to find a historical period prior to the drafting of the Convention when Europe was free of conflict. From this perspective, the Preamble of the Convention has to be read as an inculcation of the values that it stands for. Precisely because Europe had torn itself apart, it is now necessary to speak of what could bring it back together. Even if the Second World War suggested that the values of European democracy were not as strong as a drive towards annihilation, the Convention will seek to remind Europeans that those values existed in the past and could be recovered for the future.

As Churchill himself warned in the Zurich speech of 1946, the dark days could very easily return.

Activity 6.1

To what extent is the Convention rooted in a European context? What are the values that underlie the Convention?

Reminder of learning outcomes

By this stage you should be able to:

- **outline the historical roots of the European Convention on Human Rights and the European Union.**

6.4 The European Union and human rights

The European Union was founded in 1992 by the Treaty on European Union (TEU). The Union was based upon the European Community, which in turn had been established by the Treaty of Rome (1957). The Treaty of Rome as amended still exists and is now known as the Treaty on the Functioning of the European Union (TFEU).

The ECHR is not to be confused with the various treaties that constitute the European Union. Defining the Union is not straightforward but a basic working definition is possible. The European Union is essentially at heart a 'common economic market' created among (now that the UK has left) 27 Member States who are all Western European democracies practising market economics. Linked to the common market and open to varying degrees of acceptance by the Member States of the Union is an ongoing experiment in social democracy. This means that the common market is subject to regulation and that there is a commitment to a package of various social, economic and welfare rights. This section of the chapter will attempt to outline the

nature of these rights and their relationship with the ECHR and the ECtHR. But it is worth stressing (because it is a common error) that the law deriving from the Treaty of Rome and the other treaties that relate to the European Union are different sources of law from those of the Convention. Clearly, both sources of law feed into the broader context of the protection and enforcement of rights in Europe.

The TFEU provides the basic framework of the common or single market, which is founded on the free movement of goods, labour, capital and services – these are known as the 'four freedoms' and are the basis of the Union. These freedoms are accompanied by policies on transport, competition, agriculture and external trade. The basic point of the Union is to create an internal market and improve the competitiveness of the Member States and thus also allow them to operate as a trade bloc which can compete at the international level. There is, furthermore, a social democratic element to the Union as the treaties make clear that the 'essential objective of their efforts is the constant improvement of the living and working conditions' of the citizens of the Member States. The economy thus operates as a social market, bringing benefits to the citizens of those States that make up the Union.

The TFEU does contain certain rights that can be seen as human rights, to the extent that they are similar to those contained in the Universal Declaration, the Covenants or other international human rights instruments. The following examples are not meant to offer a definitive coverage of the Treaty but are meant to indicate the extent to which the common market is also linked to social and economic rights. Articles 18–25, backed up by Article 45, state that all citizens of the European Union (EU) have the right to move and reside freely within the territory of the Member States. This is clearly comparable with rights to freedom of movement within the Declaration, although it is obviously more limited. Article 141 TFEU provides that Member States should maintain the application of the principle that men and women should receive equal pay for equal work. This principle is itself based on the wider prohibition on discrimination that runs through human rights instruments, but it clearly illustrates the way in which the TFEU draws on the wider human rights inheritance.

The institutions of the European Union

The central institutions of the European Union are:

- the Commission
- the Council of the European Union
- the European Parliament
- the Court of Justice of the European Union (CJEU).

We will briefly describe these bodies and their relationship. The Commission can be thought of as the Union's executive body.

The objectives of the Council of the European Union are to coordinate the economic policies of Member States. The European Parliament provides a democratic input. It is involved in the legislative process but also has other, broader powers. The Court of Justice of the European Union (do not confuse this with the European Court of Human Rights) is the Union's judicial body with authority over the application and interpretation of the treaties that make up the Union.

It is worth pointing out that the legal order of the EU is different from the forms of international human rights law that we have examined so far. The following Statement, drawn from one of the most celebrated decisions of the CJEU, outlines some of the salient features:

> By contrast with ordinary international treaties, the [EU] has created its own legal system which, on the entry into force of the Treaty, becomes an integral part of the legal system of the Member States and which their courts are bound to apply. By creating a [Union] of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of the sovereignty or a transfer of powers from

> the States to the community, the Member States have limited their sovereign rights, albeit within a limited field, and have thus created a body of law which binds both their nationals and themselves.
>
> (*Costa* v *ENEL* [1964] ECR 585.)

Thus, the EU creates an international legal structure that is different from other international legal orders, in that it becomes an 'integral part of the legal system of Member States'. To create rights binding within States, nations have had to give legal effect to EU law. In this sense, the EU is not markedly different from other international legal orders. However, the CJEU has increasingly moved towards the idea that certain EU laws are self-executing and do not require national legislation. This goes beyond the methods for the protection of human rights that we have examined; as indeed does the notion of the supremacy of EU law. This can be illustrated by an English case, *ex parte Factortame* (a series of 5 cases and 11 judgments from when the UK was a Member State), where Parliament dis-applied a UK statute because it was inconsistent with EU law. Clearly, this has never happened in relation to international human rights law. It also has to be stressed that this case did not raise what would conventionally be seen as human rights issues. However, it does raise the question of whether, given the increasing commitment to human rights within the Union (see below), it might represent one of the most effective ways of protecting human rights.

At a broader level, the Union has committed itself to democracy and human rights as both internal and external policies. The Union in its relations with third States is legally required to promote democracy, the rule of law and respect for human rights and fundamental freedoms. The Union has also adopted the EU Charter of Fundamental Rights, a document that lists a variety of different rights and principles, and this is legally binding. This means that the EU Charter of Fundamental Rights imposes a legally binding obligation to respect certain rights upon the Union institutions and Member States when acting under Union law.

We return to the notions discussed above that Union law is supreme and that Member States must give effect to EU law obligations in their domestic legal systems. As EU law is supreme, this means it can override human rights protection in domestic law. This has been problematic; it means an EU freedom, such as that to trade, may override a human right, such as those to express oneself or to organise. Such issues have arisen in practice more than once. A most difficult and problematic issue for the CJEU and national courts has been how to balance the EU 'freedoms' with human rights. The CJEU has never expressly overridden a human right in upholding a freedom, but more than once, the balance it struck between them has felt less than satisfactory and seemed to prioritise economic freedoms over individual rights. In part, in response to this – but more fundamentally to ensure the 'legitimacy' of the Union project in a broader 'Europe of values' – the EU has legally committed itself to acceding to the ECHR. This has, however, run into very substantial logistical and practical problems notwithstanding the best efforts of the EU and the Council of Europe. The issue has been the view of some of the Member States of the Council of Europe, such as Russia, which has taken a very intransigent position and has little good faith towards either the EU or the Council of Europe, even though it is a member of the latter. Protocol 14 to the ECHR *inter alia* allows the EU, in theory, to accede to the ECHR, and the Protocol has now entered into force. Previously, the ECHR was open to States only. However, it is the political agreement to allow the EU to accede to the ECHR that has proved elusive. Notwithstanding this, the EU's future accession to the ECHR is symbolically important as it entails the express recognition that EU law is not supreme in its relationship with the ECHR – in reality it also means the CJEU's decisions can effectively be reviewed by the ECtHR, although this will be done indirectly. This puts to an end any uncertainty as to which is the more superior body of norms in Europe. However, there are areas where the EU has powers where the Council of Europe does not. Key among these are Articles 2 and 7 of the TEU.

Article 2

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the

> rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This provision sets down a basic obligation and commitment. The procedural provision related to this is Article 7 TEU. This is a lengthy provision:

> **Article 7**
>
> (1) On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
>
> The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
>
> (2) The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
>
> (3) Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
>
> The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.
>
> (4) The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

These paragraphs set out a process whereby a Member State can be suspended from the European Union. In addition to the reputational damage, the State can lose numerous rights. Exclusion from the decision-making process (in the Council) is a significant threat. Such measures could include the withholding of payments under the budget, which would severely affect some of the less powerful Member States. Equally, one can imagine that such measures could not be taken against the most powerful and influential States as they would have the influence over others to stop such measures. Procedures have commenced against both Hungary and Poland relating to various rule of law transgressions. The disputes in question have been rumbling on for some years and how they will play out remains to be seen.

6.5 Other Council of Europe human rights treaties

The Council of Europe in its statute is committed to achieving greater unity between its members 'for the purpose of safeguarding and realising the ideals and principles which are their common heritage'. This has meant that the Council of Europe has adopted a very significant number of human rights treaties. An important regional treaty it has adopted is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1998. This is discussed in more detail later in the module guide.

More importantly, from the perspective of seeking to protect a variety of rights, is the European Social Charter. The European Social Charter is the counterpart, in the field of economic and social rights, of the European Convention on Human Rights. The

original version of the Charter was adopted in 1961. A number of further rights were added by a Protocol in 1988. In 1996, a more thoroughgoing revision of the Charter was undertaken, when many of the existing rights were substantially amended and updated and a number of new rights added and included in a new treaty, known as the Revised European Social Charter. A number of states (around eight or so) are party to the European Social Charter only in its original form. A similar number are party to the Charter as amended by the 1988 Additional Protocol, while 36 or so states are parties to the Revised Charter. This still means that a number of members of the Council of Europe are not party to the Charter in any of its versions.

The Charter provides two forms of machinery for seeking to ensure that its parties comply with their obligations under it. The first is a system of reporting which has been in existence since the adoption of the Charter in 1961 and is obligatory for all parties to both versions of the Charter. The second compliance mechanism is a system of collective complaints that was introduced in 1995 and is optional. It is important to emphasise that the complaints system, which was adopted 35 years after the 1961 Charter, is a collective one, not an individual one like the Optional Protocol to the ICESCR, for example.

The Charter is interpreted by the European Committee of Social Rights ('ECSR'), a body of independent experts in social policy and law, which plays a major role in both the reporting and the collective complaints procedures of the Charter, although in both procedures it is subordinate to the Committee of Ministers of the Council of Europe, a political organ, which is the only body that may address recommendations to states parties. Nevertheless, it is recognised, at least in theory if not always in practice, that the ECSR is the only body that is competent to give an authoritative interpretation of the Charter. Such interpretation is often necessary because many of the provisions of the Charter are drafted in broad and imprecise language – precisely one of the reasons why it has often been argued economic and social rights are not justiciable. It is the ECSR's interpretation of the Charter, together with its views on how the Charter is to be applied in the context of a national report or collective complaint, that constitutes its 'jurisprudence'. Unlike UN treaty bodies such as the Human Rights Committee or the CESCR, the ECSR does not produce general comments that set out the views of the monitoring body concerned relating to the treaty in question.

Both the original and revised Charters make a distinction between 'core' and 'non-core' rights. In the original Charter there are seven core rights: the right to work; to form trade unions and employers' associations; to bargain collectively; to social security; to social and medical assistance; to social, legal and economic protection for the family; and to protection for migrant workers. The revised Charter adds two further core rights – the right of children to protection and the right to equal opportunities and treatment in employment. The second category of rights comprises the non-core rights. In the original Charter these are the rights to just conditions of work; safe and healthy working conditions; fair remuneration; vocational guidance and training; special protection for children, women, the handicapped and migrants; health; social welfare services; and special protection for mothers and children, families, the handicapped and the elderly. The 1988 Additional Protocol to the Charter adds a further four rights – the rights to equal opportunities and equal treatment in employment; of workers to be informed and consulted in the workplace; of workers to take part in the determination and improvement of their working conditions and environment; and of the elderly to social protection. The revised Charter adds eight more non-core rights – the rights to protection in cases of termination of employment; protection of workers' claims in the event of their employer's insolvency; dignity at work; equal opportunities and treatment for workers with family responsibilities; protection of workers' representatives in the workplace; information and consultation in collective redundancy procedures; protection against poverty and social exclusion; and housing.

The European Social Charter appears to be unique among human rights treaties in permitting its parties not to accept all the rights it contains. The reason for this is because of the considerable differences in the level of economic and social progress among members of the Council of Europe at the time when the original Charter was being drafted. Unlike, say, the International Covenant on Economic, Social and Cultural

Rights, the rights found in the European Social Charter are in general not progressive in nature (i.e. they are not to be implemented gradually as a state party's resources and level of development permit, but are of immediate effect). The Charter does share a characteristic of most treaties concerned with economic and social rights, namely that a number of its rights are framed in vague and hortatory language. On the other hand, many of its provisions, particularly those concerned with employment rights, are drafted in sufficiently precise terms to be judicially enforceable. The rights contained in the Charter apply only to the nationals of the state concerned and to the nationals of other states parties lawfully resident or working regularly in that State, not to all within the jurisdiction of the State concerned, as is the case with the European Convention on Human Rights, for example.

6.5.1 The reporting procedure to the European Social Charter

Under this procedure, parties to the Charter are required to submit a report every two years concerning the application of the core rights of the Charter they have accepted, a report every four years on the non-core rights that they have accepted, and reports 'at appropriate intervals as requested by the Committee of Ministers' on those provisions that they have not accepted. The procedures and bodies by which the reports of states parties are examined have changed over time.

The system is now as follows. The State Reports, together with the observations on them of national trade unions and employers' associations, are examined by the ECSR. In examining the reports, the ECSR is to assess from a legal standpoint compliance of national law and practice with the Charter. After being examined by the ECSR, the Reports, together with the ECSR's conclusions, are forwarded to the Governmental Committee of the Council of Europe, which consists of one representative of each state party to the Charter (usually a civil servant), together with representatives from up to two international organisations of employers and up to two international trade union organisations sitting as observers in a consultative capacity. The Governmental Committee then sends a report containing its conclusions on the national reports – to which are appended the conclusions of the ECSR – to the Committee of Ministers of the Council of Europe, which comprises a minister, or more commonly a senior diplomat, of each Member State of the Council of Europe. In its report the Governmental Committee is to give reasons for its choice, on the basis of social, economic and other policy considerations, of the situations which should, in its view, be the subject of recommendations by the Committee of Ministers to each state party. Based on the report of the Governmental Committee, the members of the Committee of Ministers that are parties to the Charter may decide, by a two-thirds majority vote, to address 'any necessary recommendations' to a state party to the Charter. Such recommendations are not legally binding.

The fundamental and continuing weakness of the reporting system of the ESC is that it is not sufficiently independent of the states parties to the Charter – there is too much governmental involvement through the Governmental Committee and the Committee of Ministers. Nevertheless, in spite of past and continuing weaknesses in the reporting procedure, we know that a number of changes to national legislation and practices have been made as a result of the procedure. However, we should note that there have also been a number of cases where states have not changed their law despite a finding of non-compliance with the Charter.

6.5.2 The collective complaints system to the ESC

As part of the process of revitalising the Charter, decided on in 1990, a system of collective complaints was introduced in 1995. According to the preamble of the 1995 Protocol, the aim of this mechanism is to 'improve the effective enforcement of the social rights guaranteed by the Charter' and to 'strengthen the participation of management and labour and of nongovernmental organisations'. Under this system, complaints of non-compliance with the Charter by a state party may be made by four types of organisation: essentially employers' organisations and NGOs that have consultative status with the Council of Europe and have been put on a list for the purpose of making complaints.

Once a complaint has been lodged, the ECSR decides whether it is admissible; and, if it is, the ECSR then draws up a report with its conclusions on the merits of the case, which it forwards to the Committee of Ministers for consideration. If the ECSR finds that the Charter has been complied with, the Committee of Ministers need do little. If, on the other hand, the ECSR concludes that the Charter has not been observed in a satisfactory manner, the Committee of Ministers 'shall adopt' by a two-thirds majority a recommendation addressed to the defendant State.

Acceptance by states parties to the Charter of the collective complaints system (and thus to be a defendant to a complaint) is optional. So far, only a minority of States that are party to the Charter have accepted the system but in recent years there has been an impressive number of complaints submitted and dealt with. In relative terms the number of complaints dealt with is small (at the end of 2020 it was 186) but in real terms they represent a significant and valuable jurisprudence on the meaning of certain economic and social rights.

ACTIVITY 6.2

To what extent do you feel the EU is committed to human rights?

To what extent do you consider the supervision mechanisms of the European Social Charter are 'different' from the UN human rights treaties you have studied previously?

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **identify the basic human rights provisions provided for by the European Union**
- **understand the basic nature of the European Social Charter.**

6.6 The European Convention on Human Rights

The European Convention is undeniably the jewel among the Council of Europe's human rights treaties. It has been so successful that it has effectively overshadowed all of the Council of Europe's other activities. As noted above, however, the Convention system is now under severe stress and pressure. Let us examine the Convention and its provisions in more depth and we will return to the challenges.

Article 1 States an 'obligation to respect human rights'. It States a founding principle that underlies the operation of the Treaty. States parties undertake to 'secure to everyone within their jurisdiction' the rights that are defined by the Convention. It was initially thought that the term 'within their jurisdiction' was not problematic but, as some of the reading makes very clear, this has become a source of contention in the Court's jurisprudence. Section I goes on to list the rights and freedoms that are protected.

Section I

Article 2 States the right to life. This is a more extended definition than that provided by the Universal Declaration. The fundamental nature of this Article is indicated by the fact that it is not possible to derogate from it (see 15(2)), except for 'deaths resulting from lawful acts of war'. The Article begins by placing a positive duty on a state party to protect 'everyone's right to life'. There are then exceptions to the principle. The first broad exception covers judicial execution pursuant to a sentence pronounced by a court of law. Section 1(2) goes on to provide that the right to life will not have been breached if, in cases of necessity, force is used:

- to defend a person from unlawful violence
- to make an arrest or prevent an escape of someone who has been lawfully detained
- in lawful actions taken against extreme instances of public disorder such as 'riot or insurrection'.

Article 3 States the prohibition of torture. This also covers 'inhuman or degrading treatment or punishment'. Like Article 2, no derogation from this Article is possible (see 15(2)). The absolute nature of the Article has led some to argue that less serious forms of ill-treatment could not be considered under it, as this would trivialise the protection that Article 3 offers. In *Ireland* v *UK* [1980] 2 EHRR 25, the Court defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering' – certain robust interrogation techniques and even physical assaults on prisoners were thus not found to constitute torture. In a series of later cases against Turkey and also France, the Court has found torture to have been carried out, and in coming to these conclusions the Court was heavily influenced by the definition of torture found in Article 1 of UNCAT, which we came across earlier and will examine in detail later.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1998 supplements Article 3. The Convention establishes a European Committee for the Prevention of Torture (CPT). This body has the power to visit detention centres and prisons and monitor the treatment of those detained. The Committee draws up reports after visits; these reports are communicated to the state party concerned.

Article 4 concerns the prohibition of slavery and forced labour. The Article begins by explicitly prohibiting 'slavery and servitude' and goes on to prohibit 'forced or compulsory labour'. No derogation is possible from Article 4(1) (see 15(2)). Article 4(3) then outlines the exceptions to this general principle. 'Forced or compulsory labour' does not include work carried out in the 'ordinary course of detention', work of 'service or a military character', work carried out in emergency situations, or work as part of normal civic obligations. This Article has, in comparison to the others, generated little case law.

Article 5 articulates the right to liberty and security. The Article begins with a positive Statement of the right: 'Everyone has the right to liberty and security of person'; the consequence of this is that arbitrary detention is prohibited, except in certain circumstances where it is 'prescribed by law'. These include:

- lawful detention after sentence has been pronounced by a competent court
- lawful arrest pursuant to a court order or to 'secure' the fulfilment of lawful obligations
- detention to enable a person to be brought before a court of law where there is reasonable suspicion of an offence having been committed or to prevent the commission of an offence
- detention of a minor for educational purposes or to enable the minor to be brought before competent legal authorities
- detention to prevent the spread of contagious disease or to control certain classes of persons
- lawful arrest to prevent unauthorised entry into a country or to allow deportation.

Due process safeguards are also provided by the Article: in the situation of arrest, the right to be promptly informed, in a language that the detainee understands, of the reasons for the arrest and whether or not there are any charges against him. Paragraph 3 states that the detainee must be brought before a judge, equivalent law officer or tribunal and is entitled to a trial in a reasonable time, or release pending trial. Paragraph 4 States that the detained person is also entitled to take proceedings that determine the lawfulness of detention and the final paragraph provides a right to compensation if the Article 5 rights have been breached.

This Article has produced a great deal of case law. We can examine one important case, *Engel* v *The Netherlands (No 1)* (1979–80) 1 EHRR 647, a case that concerned military discipline. The court argued that Article 5(1):

> is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol No 4). This is clear both from the use of the terms 'deprived of his liberty', 'arrest' and 'detention', which appear also in paragraphs 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols. (para.58)

It is necessary, therefore, to read this Article in its correct context. It is aimed primarily at unlawful detention or deprivation of liberty in 'an arbitrary fashion'. One can thus understand that the structure of the Article reflects the positive Statement of the rights and an enumeration of those instances where detention is justifiable. The Court held, *inter alia*, that a system of military discipline did not, in itself, constitute a breach of the Article; although certain disciplinary practices could in themselves amount to breaches if a penalty or measure deviated from those normally pertaining to the armed forces.

Article 6 covers the right to a fair trial. The Court hears more cases related to Article 6 than any other substantive article of the Convention; at times the Court has more Article 6 cases on its docket than all the other substantive rights collectively. Article 6(1) covers fair trial rights that relate to both 'determinations' of criminal and civil 'rights and obligations'. Note that this definition is broad and thus extends beyond formal courts of law. The paragraph contains a list of minimal rights: every person has a right to be judged by a lawfully constituted independent tribunal within a reasonable time. There are a number of exceptions to the principle that the hearing must be in public: the right to a public judgment can be legitimately restricted in the interests of 'morals, public order or national security in a democratic society' or, in the interests of juveniles, the protection of private life, or, a catch-all provision: 'to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

If a person is charged with a criminal offence, they have by Article 6(2) the right to be 'presumed innocent until proved guilty according to law'. The Article then enumerates a number of minimum rights. These include:

- the right to be informed in a language that one understands, of the 'nature and cause' of the accusations made against one
- adequate time and facilities to prepare a defence
- the right to defend oneself, or to counsel.

In certain circumstances, there may be:

- a right to legal aid
- the right to examine hostile witnesses and to compel the attendance of witnesses
- a right to use a translator free of charge, if he cannot understand the language of the court.

To benefit from Article 6, the applicant must have an arguable right under domestic law. Article 6(1) does not guarantee any particular substantive content for civil rights and obligations in national law but provides only the procedural guarantees for the determination of tenable rights. Although Article 6(1) cannot be used to create a substantive civil right, it may apply in cases where domestic law contains immunities or procedural bars that limit the possibility of bringing potential claims to court. In such cases, the Convention provides a degree of 'constraint or control' on States' abilities to remove civil rights from the jurisdiction of the court or to provide immunity to particular groups of persons.

Article 6 expressly confers fair hearing rights in broad and unqualified terms. In addition, the Court has recognised an 'implied right' of access to the courts and a series of other 'implied' fair trial rights. It has taken the view that implied Article 6 rights can only be restricted in furtherance of a legitimate aim and where the measures taken are necessary for the achievement of this aim and are proportionate.

Special additional rights are conferred on those facing criminal charges. There are therefore five questions to be asked when considering whether a public body has violated Article 6.

1. Is the body engaged in the determination of civil rights and obligations or a criminal charge?
2. In the case of a criminal charge has there been any breach of the minimum guarantees in Article 6(2) and 6(3)?
3. Has there been an infringement of the express right to an independent and impartial tribunal, a hearing within reasonable time, a public hearing and public pronouncement of judgment?
4. Has there been an apparent infringement of the applicable implied fair trial rights? If so, was this infringement for a legitimate aim, necessary and proportionate?
5. Has the applicant waived the right in question?

Article 7 enshrines the principle that there should be no punishment without law. (Article 15(2) provides that no derogation from this Article is possible.) It effectively prohibits *ex post facto* laws. In *Kokkinakis* v *Greece* (1994) 17 EHRR 397, the court pointed out that:

> Article 7 para.1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable. (para.52)

Articles 8–11 of the Convention share a broadly similar structure. Each sets out a substantive right in the first paragraph and then the circumstances and grounds under which it can be limited and restricted. Each can also be derogated from under Article 15 of the Convention. These rights are thus not as fundamental in the Convention system as, for example, Articles 3, 4 and 5.

The right to respect for private and family life, home and correspondence is guaranteed by **Article 8**. Article 8(2) prohibits any 'interference' by public authorities except 'as in accordance with the law and is necessary in a democratic society'. Such restrictions would include limitations on the Article in 'the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. In *Kroon* v *The Netherlands* (1995) 19 EHRR 263, the Court Stated:

> The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. Although the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, the applicable principles are similar. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation. (para.31)

The Court thus explained that the positive obligation to respect private life relates to an obligation to refrain from certain conduct; however, the precise extent of the State's obligations is difficult to define. The relevant test is to balance the interests of the individual and the community but, in striking this balance, the 'right' of the State itself to take action must be respected. Commentators suggest that the Court has not spelt out in detail the precise content of the restrictions that would be considered legitimate. Arguably, this does accord with a **margin of appreciation** that accepts that State action in these areas is necessary. The concept of the margin of appreciation is a clear recognition of the diversity of approaches adopted by States when it comes to certain rights.

Article 9 on freedom of thought, conscience and religion initially produced very little case law but this has changed enormously in more recent years as Article 9 has been routinely invoked in the clash between religions, between religious and secular views and in the context of the relationship between freedom of expression and association, on the one hand, and, on the other, religious views. The second paragraph of the Article, 9(2), places restrictions on the right as articulated in 9(1). The restrictions are ones that are justifiable in a 'democratic society' in the 'interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

Article 10 articulates the right to freedom of expression. Broadly defined as covering the 'freedom to hold opinions and receive and impart information and ideas', the right is restricted at Article 10(2) by a Statement of the 'duties' that the right entails. It may thus be subject to 'such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'. The list of exceptions is somewhat different to that provided in the Articles above. It covers: 'the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

Article 10 is fundamental to the achievement of a democratic society. In *Handyside* v *UK* [1976] 1 EHRR 737, the court elaborated this principle. It aims to protect 'pluralism, tolerance and broadmindedness', civic virtues that are necessary for a flourishing democracy. However, the fundamental nature of freedom of expression does not mean that the Article is absolute, as can be seen from the restrictions imposed.

Article 11 states two connected freedoms: assembly and association. The latter includes the 'right to form and to join trade unions'. As with the Articles above, there are also restrictions on the extent of these freedoms. These are limited to those that are 'prescribed by law and are necessary in a democratic society'. They thus cover restrictions 'in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'. There is an important concluding sentence that stresses that restrictions can be lawfully imposed by 'the armed forces…the police or… the administration of the state'.

The right to marry in **Article 12** covers the right to 'found a family' within the context of the domestic laws that govern this area. In essence, the domestic law of the states parties has not to be arbitrary or effectively prevent the enjoyment of a general right to marry.

Articles 13 and **14** provide, respectively, a right to an effective remedy and a prohibition of discrimination. Article 14 reads a non-discrimination clause into each of the substantive rights in Articles 2–12 of the Convention. Article 14 has been expanded upon in Protocol 12, which has sought to create a free-standing non-discrimination clause for those states that are party to it.

The relevant applications of **Article 15** have been referred to above.

Articles 16–18 can be read as a group. Article 16 allows restrictions to be imposed on the political activity of aliens. Article 17 prevents bothstates and individuals or groups from claiming 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'. Article 17 has been described by the Court as safeguarding 'the free functioning of democratic institutions' (*KPD* v *FRG* [1957] No 250/57 1 YB222, at 223). The Court also went on to say that an order banning the German Communist Party could be justified under this Article because it advocated a form of politics in which the rights of the Convention would not be respected. Article 18 is not an independent and free-standing Article. It can only be pleaded by someone alleging a restriction on a substantive right. The Article seeks to prevent restrictions on one set of rights being used as restrictions on other rights.

Activity 6.3

What important rights do you consider are missing from the ECHR?

Section II

Section II of the Convention has been substantially amended first by Protocol 11 and then by Protocol 14. Protocol 14 came into force in 2010 and even at the time it was apparent that the procedural changes would not alleviate the workload and case load pressure the Court is facing. **Article 19** establishes the European Court of Human Rights. Various Articles then relate to the appointment of judges and their terms of office. It is worth noting that the judges of the Court serve in their individual capacities (**Article 21**). The Court is thus impartial and independent of the states parties who are signatories to the Convention. **Articles 27–30** state that the Court is organised into Committees, Chambers and a Grand Chamber. These divisions of the Court have slightly different powers in relation to declaring cases inadmissible.

Article 32 outlines the Court's jurisdiction. Article 32(1) states that it extends to both the interpretation and application of the Convention and its Protocols. The Court also has a general power to determine its own jurisdiction in event of dispute (Article 32(2)). These powers are then further outlined. **Article 33** relates to inter-state cases. One state party may refer to the Court any breach of the Convention or its Protocols by another state party. There have been relatively few such cases in the history of the Convention but those that have been brought are over severe and egregious breaches of the Convention. **Article 34** allows individual applications. The Court can receive applications from 'any person, non-governmental organisation or group of individuals' who claim that a state party has violated one or more of his Convention rights. However, there are admissibility criteria, set out by **Article 35**. The applicant must first have exhausted 'all domestic remedies'; furthermore (Article 35(2)), the Court will not accept anonymous submissions, or those that are 'substantially the same' as those it has already considered, or which are being considered by 'another procedure of international investigation or settlement and contains no relevant new information'. Under Article 35(3)(b) the Court no longer has to consider petitions where the applicant has not suffered a 'significant disadvantage'. The changes to the Convention with regard to applications that are 'substantially the same' and the absence of a 'significant disadvantage' were brought about to try and stop the Court having to hear thousands of applications where the Court has already dealt with the matter for another or there has been a technical breach of the Convention but no real harm has been suffered in practice. For example, thousands of cases have in the past been heard by the Court all relating to the length of hearings for civil cases in Italy. These are related to structural defects in the Italian legal system. Thousands of decisions for the ECtHR stating almost exactly the same thing about the length of such hearings does not serve a useful purpose to Italy and takes up the Court's valuable time and resources – hence the attempt to filter out such matters so the Court does not have to deal with them repeatedly. The Court also has a wide jurisdiction to declare inadmissible applications that are 'incompatible' with the Convention, are 'manifestly ill-founded' or an abuse of process. The Court also has a wide power to strike out applications (**Article 37**).

Article 36 provides that in all cases that go before a Chamber or the Grand Chamber, a High Contracting Party has a right to submit written comments and to take part in hearings if one of its nationals is involved in proceedings.

Article 38 provides that once the Court has declared a case admissible, it can itself pursue investigations, for which states must provide 'all the necessary facilities' (Article 38(1)). **Article 39** provides that the Court must secure a 'friendly settlement' that is coherent with the Convention. If, however, the Court finds that there has been a violation of the Convention, and the relevant state party's domestic law does not provide a full set of remedies, the Court has the power to 'afford just satisfaction to the injured party' (**Article 41**).

The division of the Court into Committees, Chambers and a Grand Chamber is also relevant to the way in which cases are dealt with and judgments issued. Judgments of the Chambers become final:

- if the parties state that they do not want the case to be referred to the Grand Chamber
- if a referral is not requested
- if the Grand Chamber refuses a request within three months after the judgment (44(2)).

By **Article 46**, states parties undertake to 'abide by the final judgment of the Court'.

Article 47 allows the court to issue Advisory Opinions at the request of the Committee of Ministers. These opinions do not concern themselves 'with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention'. Reasons must be given for Advisory Opinions, as per **Article 44**.

Protocols

Note: there are also a number of Protocols under the Convention. Protocols 8 and 11 have been mentioned above, and reference will be made to Protocol 2 below. We can also briefly review some of the most important Articles of the other Protocols.

- **Protocol 1** adds further rights to the Convention: the right to property (Article 1), certain educational rights of parents (Article 2) and the right to free elections (Article 3).
- **Protocol 4** contains:
  - freedom from imprisonment for debt (Article 1)
  - liberty of movement (Article 2)
  - freedom from exile (Article 3)
  - a prohibition on mass expulsion of aliens (Article 4).
- **Protocol 6** prohibits the death penalty in time of peace (Articles 1 and 2).
- **Protocol 7** contains:
  - the right not to be expelled from a nation without due process (Article 1)
  - a right to appeal in criminal cases (Article 2)
  - the right to compensation for miscarriages of justice (Article 3)
  - immunity from prosecution twice for the same offence (Article 4)
  - equality of rights for spouses in matters of private law relating to children (Article 5).
- **Protocol 12** prohibits discrimination with regard to any rights protected in law. This Protocol supplements Article 14 of the Convention.

6.6.1 The Convention as a 'living instrument'

One of the issues that the Court has always faced is that the rights protected by the Convention need to evolve over time as society evolves. If this were not the case then the rights would become obsolete and the Convention would lose its utility for societies. The Court has for a long time now used the notion that the Convention is a 'living instrument', which has allowed the Court to justify the approach it takes and ensure that standards evolve. This has the consequence that standards always improve. What may have been acceptable 10 years ago may not be acceptable now as societies have changed. In this way, the Court always keeps itself busy because what it may have stated in the past can be revisited. The Court needs a good reason to depart from a previous decision but as the approaches of the Contracting States change, the Court can reasonably expect all states to adhere to a new standard. This can be controversial but, equally, the Court does not undertake this lightly. A fascinating

series of cases can be used to highlight this trend in the Court's jurisprudence. All the cases against the United Kingdom were brought by transsexuals. Transsexuals are persons who have changed their gender from one to the other. Rights and terminology always evolve and that is a key aim of this discussion. 'Trans rights' is a term sometimes now used, 'transgender' is another. 'The term used here is 'transsexual' as that is the language used by and before the Court. While that is not controversial in itself, it is the rights associated with the transition that were being argued for. Although a number of subsequent cases have been considered by the Court both against the UK and other States, we are going to examine a limited number of cases to illustrate how standards can evolve over time.

The cases all relate as far as we are concerned with Articles 8 and 12 of the Convention.

Article 8 Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 Right to marriage

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The first case we shall examine is *Rees* v *The United Kingdom* [1986] ECHR 11. In this case a female-to-male transsexual complained that United Kingdom law did not confer on him a legal status corresponding to his actual condition. In particular, the law did not allow Rees to have the birth certificate issued (at the time of birth) amended to show his new gender. The European Court of Human Rights held that there had been no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The changes demanded by the applicant would have involved fundamentally modifying the system for keeping the register of births, which would have had important administrative consequences and imposed new duties on the rest of the population. Thus, under Article 8(2), the balance between the rights of the individual and the population at large was one where the individual's rights were outweighed by the interests of society and the State. In coming to this view, the Court attached importance to the fact that the United Kingdom had borne the costs of the applicant's medical treatment. However, the Court was conscious 'of the seriousness of the problems affecting transsexuals and of their distress' and recommended 'keeping the need for appropriate measures under review, having regard particularly to scientific and societal developments' (s.47 of the judgment). So here we have the 'living instrument' argument and the Court noting that what is acceptable will change.

The Court also held that there had been no violation of Article 12 (right to marry and found a family) of the Convention. It found that the traditional concept of marriage was based on a union between persons of opposite biological sex. States had the power to regulate the right to marry.

Four years later in *Cossey* v *The United Kingdom* [1990] ECHR 21 the Court came to similar conclusions as in *Rees* and did not find new facts or particular circumstances that would lead it to depart from the earlier judgment.

The Court held that there had been no violation of Article 8 (right to respect for private and family life) of the Convention. It reiterated that 'gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex' (s.40 of the judgment). It also noted that an annotation in the birth register would not be an appropriate solution.

The Court also held that there had been no violation of Article 12 (right to marry and found a family). Attachment to the traditional concept of marriage provided 'sufficient reason for the continued adoption of biological criteria for determining a person's sex

for the purposes of marriage' and it was for the States to regulate by national law the exercise of the right to marry.

Two years later, however, in *B* v *France* [1992] ECHR 40 the Court concluded for the first time that there had been a violation of Article 8 (right to respect for private and family life) of the Convention in a case concerning the recognition of transsexuals. The facts were different due to the situation in France. A male-to-female transsexual complained of the refusal of the French authorities to amend the civil-status register in accordance with her wishes. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, taking into consideration factors distinguishing the case of B, particularly the differences between the United Kingdom and the French civil status systems. While there were major obstacles in the United Kingdom preventing birth certificates from being amended, in France these were intended to be updated throughout the life of the person concerned. The Court observed that in France many official documents revealed 'a discrepancy between [the] legal sex and [the] apparent sex of a transsexual' (s.59 of the judgment), which also appeared on social security documents and payslips. The Court accordingly held that the refusal to amend the civil status register here had placed the applicant 'in a daily situation which was not compatible with the respect due to her private life'. So there is clearly an evolution here in standards and approach but the Court distinguished the cases against the UK.

X, Y and Z v *The United Kingdom* [1997] ECHR 20 is a fascinating case. The first applicant, X, a female-to-male transsexual, was living in a permanent and stable union with the second applicant, Y, a woman. The third applicant, Z, was born to the second applicant as a result of artificial insemination by donor. The applicants submitted that the lack of legal recognition of the relationship between X and Z amounted to a violation of Article 8 of the Convention. While the Court concluded that here had been no violation of Article 8 (right to respect for private and family life) of the Convention, it did nonetheless acknowledge the existence of family life between a transsexual and his partner's child: 'X has acted as Z's "father" in every respect since the birth. In these circumstances the Court considers that the [*de facto*] family ties link the three applicants' (s.37 of the judgment). The issue here was not directly recognition of X's change of gender but whether family life existed – where X enjoyed 'family life' with Y (X's female partner) and Z (the child the couple parented). Ultimately though the application was unsuccessful as the Court did not require the UK to show X as the (male) father in Z's birth certificate. This would have led to an anomaly in that X (if successful) would have been recognised as a (male) father on the child's birth certificate but still be female on his own. In all of the above cases the European Court had referred to the 'margin of appreciation' that the United Kingdom enjoyed. This refers to discretion that a State enjoys in how it protects rights. It is up to the State how it protects rights, so long as rights are protected to the minimum standard set by the European Court. If most other States start to behave a different way, then the 'margin of appreciation' narrows and the State has to have a more compelling reason to justify its approach. This balancing exercise – between the rights of the individual and the concerns of society and the State is inherent in Article 8(2). As attitudes and approaches change, the weight attached to one side or the other will evolve.

Just two years later, in 1998, the issue was revisited in *Sheffield and Horsham* v *The United Kingdom* [1998] ECHR 69. In this case the Court was not persuaded that it should depart from its *Rees* and *Cossey* judgments but noted that: 'transsexualism continues to raise complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among the Contracting States' (s.58 of the judgment). This is the point made above about establishing benchmarks based upon what most Contracting States do. The Court held that there had been no violation of Article 8 (right to respect of private and family life), Article 12 (right to marry and found a family) or Article 14 (prohibition of discrimination) of the Convention. However, it reaffirmed 'that the area needs to be kept under permanent review by the Contracting States' (s.60 of the judgment) in the context of 'increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter'.

Four years later, however, the Court took a different approach in *Christine Goodwin* v *The United Kingdom* [2002] ECHR 588. This was a decision of the Grand Chamber handed down in 2002. The applicant complained of the lack of legal recognition of her changed gender and in particular of her treatment in terms of employment, her social security and pension rights, and of her inability to marry. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, owing to a clear and continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals. 'Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant' (s.93 of the judgment). The Court further held that there had been a violation of Article 12 (right to marry and found a family) of the Convention. The Court was 'not persuaded that it [could] still be assumed that [the terms of Article 12] must refer to a determination of gender by purely biological criteria' (s.100). The Court held that it was for the State to determine the conditions and formalities of transsexual marriages but that it 'finds no justification for barring the transsexual from enjoying the right to marry under any circumstances' (s.103).

Although it took a number of years, the Court's approach shows clearly the evolution in society and values. It is important to stress that the Court cannot be proactive – it is reactive as the changes must take place for the Court to be able to justify its approach toward recalcitrant States who are not keeping up with the trend and approach of others. Following the Grand Chamber judgment in *Christine Goodwin*, the United Kingdom introduced a system whereby transsexuals could apply for a gender recognition certificate. While other cases have since been brought and continue to be brought, the basic legal obstacle to the legal consequences of gender reassignment has been removed.

The living instrument approach makes perfect sense from the perspective of protecting rights over time. However, there is the very legitimate concern of States that are being held to obligations that they did not envisage signing up to. This has fed into the narrative of populists in Europe. In an earlier chapter, there was discussion of populism and the challenge it poses to human rights. There were also some readings. Here, we will now look at how populism has manifested itself in terms of the European Convention and how there is now a plethora of challenges facing the Court. The discussion tries to pull these themes together.

6.6.2 Populism in the context of the European Court

Populism in Europe, as is the case with all parts of the globe, is nothing new. There are various European right-wing parties and, equally, some with a radical left-wing ideology that can be described as populist. Populist movements holding, sharing or influencing the agendas of domestic regimes in power amongst European States are no longer aberrations. Populism – which we also discussed previously – can be seen as a movement that puts the partial interests of the mobilised above the interests of others, while claiming that the populist movement represents the entirety of society. Some European populist parties have a very strong aversion to immigrants and this is especially so in northern Europe (Denmark, Sweden and Germany, for example) and central, eastern and southern Europe (Poland, Hungary and Serbia, for example). This aversion stems ostensibly from a stated desire to preserve national identity and culture. Human rights courts – in particular, international ones – are thus presented as an impediment to the fulfilment of the populist manifesto and to the right of the State and its populace to make their own decisions. The Council of Europe and, in particular, the European Court of Human Rights is thus caught up in this vortex of forces.

The Council of Europe was established to enforce the relationship between democracy, the rule of law and human rights in Europe. These pillars can be found in the statute of the Council of Europe. As noted above, the Council's great contribution to human rights protection has been the concluding of the European Convention

on Human Rights in 1951 and the subsequent establishment of the European Court of Human Rights. Importantly in this context, the function of the European Court of Human Rights has been to deal with human rights and it is not best suited to upholding democracy and, to a lesser extent, the rule of law. The rise of populism in Europe has led to the erosion of confidence in politics, government, courts and the mainstream media.

Where the European experience is distinct from other regions of the globe, however, is that, in the past when populism and its manifestations came to the fore in Europe, the repercussions were felt globally. The world wars of the 20th century were of course European conflicts in origin but, due to the expansive colonial empires they possessed, tensions between European States had consequences in many parts of the globe. The suffering in the Second World War – as we know – was a primary impetus for the adoption of the Universal Declaration of Human Rights in 1948. It is worth stressing, however, that no matter how 'globally diverse' the nine key drafters of that Declaration were in terms of the States they represented, the dominance of European cultural heritage amongst them is clear. The adoption of the 1948 Declaration has been the basis for the legally oriented global and regional human rights edifice that has been steadily constructed ever since.

Broadly speaking, European States since 1948, notwithstanding their actual domestic legislation and colonial practices, have rhetorically been fervent supporters of the adoption of global human rights treaties. This was the case throughout the Cold War and subsequently. How that dynamic played out within Europe – in terms of regional developments – was, of course, cast by politics. Those European States under Soviet influence were not party to any legally binding human rights obligations and had their own arrangements. They preferred to support global treaties addressing human rights issues adopted under the auspices of the UN. The Council of Europe, by contrast, was established in 1949 and, by the end of 1950, its Statute had been ratified by 14 States.

The end of the Cold War led to a very significant expansion of the membership of the Council of Europe, effectively doubling in the 1990s. The resurgence of populism and the adoption of populist policies in a number of Council of Europe Member States – policies that selectively support some human rights but seek to undermine others – is important for a number of reasons in this trajectory. As noted above, since the adoption of the UDHR, European States – more specifically, Council of Europe States – have broadly been vocal supporters of human rights treaties at the global level (we saw this in the discussion on cultural relativism). Council of Europe Member States that are sceptical, if not outright hostile, in global and regional fora relating to the protection of human rights has proven a more novel proposition. If we further consider that legally binding human rights, despite protestations about universality, do reflect a European cultural philosophy, then European States undermining that philosophical basis through their words and actions present more of a threat to the theoretical and philosophical basis of all global human rights instruments than if it were done by some others.

The current challenges to the consensus that undergirded the European human rights system should, however, be placed in a broader historical context. First, the protection of human rights must be a long-term strategy infused with pragmatism in the interpretation and application of human rights norms and their implications for collective policies. This is obvious from a reading of this module guide. The adoption and expansion of human rights norms among Member States of the Council of Europe occurred because it was not solely an ideological project but equally one of adaptation, mutation, reflection as well as evolution. Populism, no matter how pressing a challenge, is simply one of many challenges. The European Court in this context is seen as part of a corrupt and morally inferior elite, who further are 'foreign' and thus represent the antithesis of 'native' values. Viktor Orbán, for example, the President of Hungary and a notorious populist has attacked the European Court of Human Rights saying that it should be urgently reformed because its judgments were a 'threat to the security of Europeans' and an 'invitation for migrants', whom he referred to as a 'Trojan horse of terrorism'. As noted above, some Member State governments are openly hostile to the European Court. Other Member State

governments are increasingly sceptical and very few fully supportive of the Court and Convention system. Dealing with more assertive, sceptical, hostile and authoritarian regimes in more recent years has become unavoidable for the Court. Tensions around the Court's interpretation of the Convention are nothing new but the issues have taken on a new twist and urgency with the rise of populist governments and related movements, and further the challenges to the checks and balances that are key to the domestic protection of human rights.

6.6.2.1 The (relative) success of the ECHR over time

The view that the European Court of Human Rights is the most successful international human rights court has persisted, despite its failings. In 2008, Michael O 'Boyle, then-Deputy Registrar of the European Court and co-author of the leading English language treatise on the Court and its jurisprudence expressed it best, noting:

> [t] here seems to be unanimous agreement in Europe today that the European Convention on Human Rights ... is one of the major developments in European legal history and the crowning achievement of the Council of Europe.

This is remarkable even though the Court, 'is overwhelmed with cases and takes so long to produce its judgments and decisions in deserving cases'.

The assessment of the Court as the most successful has always been relative compared to the other regional human rights courts in the Americas and Africa. (Note: these regional human rights systems and the historic and modern challenges are also discussed in Chapters 7 and 8 of this module guide). But on what basis was it the most successful? The European Court has undeniably been a leader in terms of detailed jurisprudence despite the slow pace of judgments in its early years. Can we measure success by compliance? Possibly, yes, but even if so, the context was, and is, important. The European Court did have a 'golden era' in the 1970s, 1980s and, arguably, in the early 1990s but, by then, it was often noted that the Court was becoming a 'victim of its own success'. It was always suggested that the Court had too many cases to deal with because it was so good at what it did — not because structural problems were endemic in some States and there were egregious and systematic breaches of the Convention in others. Any problems were portrayed as being related primarily to delays within the Commission and the Court, and these became the impetus for Protocol 11, which amended the Convention's institutional machinery. Entering into force in 1998, Protocol 11 revised the European Convention system, abolishing the Commission and making acceptance of the Court's jurisdiction and thus the right to individual petition compulsory for all contracting States. Protocol 11 was an important and necessary streamlining of the process for determining a complaint but was never going to be enough. These have been discussed above but the broader context is key.

By the end of the 1990s the Cold War had ended. With the exception of Turkey, which ratified the Council of Europe's Statute in 1950 – and perhaps to a lesser extent Greece which withdrew in 1969 when it was under military rule but returned in 1974 – the membership of the Council of Europe during the Cold War consisted only of a small group of Western European, capitalist States. Throughout the 1950s and 1960s, membership of the Council of Europe grew, but slowly and only extended to like-minded States. Notably, at its founding and until well into the 1960s, Belgium, Britain, France and the Netherlands – all Member States of the Council of Europe – still had colonial empires in which they perpetrated gross and systematic violations of human rights, under regimes that perpetuated egregious economic, social and racial inequalities. The contradictions between those Member States having empires and their relationships with the European Court of Human Rights are reflected by Article 1 of the Convention, which (in)famously limits the extra-territorial jurisdiction of the Convention and thus Member State responsibility outside of the physical territory of the State to exceptional circumstances (see Chapter 14 on this).

At the end of the Cold War, as the Council of Europe's membership expanded rapidly, it encompassed a number of new Member States who were not well-established democracies. With expansion, the broader political context in which the Court and

Convention functioned, changed fundamentally. There were not only the historic abuses within the territories of those new Member States but also the lack of suitable domestic mechanisms and processes as well as the absence of a broader culture that respected individual rights.

By the end of the Cold War, the European Convention system had been evolving – institutionally and jurisprudentially – for the best part of 40 years. It was an established, mature system. The (then) prospective Member States – who were seeking to join the Council of Europe in the early 1990s – were presented with a fully fledged system, with its own approach, history and way of doing things, into which the new Member States had no input or influence and to which they were compelled to adapt. This is notably in contrast to the UN human rights treaties, where those same primarily central, eastern and southern European States had been keen protagonists from the outset and had contributed significantly to the drafting, establishing and functioning of the UN human rights treaty bodies. This is an often-overlooked point. The Council of Europe is a regional human rights system. Such regional systems should be finely attuned to the specific regional vagaries and cultures of that region in the context of human rights. Yet, eventually half of all Member States from that same geographical region joined the Council of Europe many years after its establishment. They did not join as equals but as the vanquished and as outsiders still finding their feet in a recalibrated geopolitical environment. Membership of the Council of Europe was a clear goal for many central, eastern and southern European States as an indicator of a break from their past. Furthermore, as discussed above, membership of the European Union necessitates accession to the European Convention and respect for the rule of law and democracy.

6.6.2.2 The pushback against the European Court

Here we pick up a number of themes that have been alluded to. The European Court of Human Rights and its methods of interpreting the Convention have long been strongly contested but that contestation has been overlooked for far too long. We looked at the 'living instrument' approach through a case study of the 'transsexual cases' from the UK but the tensions were clear. In the seminal case of *Marckx* v *Belgium* decided in 1979, some of these tensions were first laid bare. Sir Gerald Fitzmaurice in his Dissenting Opinion noted that the Convention was interpreted by the Court in a manner that was never intended by those who drafted the Convention. This is a classic issue – original intention or contemporary context – and familiar to scholars of constitutional systems around the world. What Sir Gerald was identifying is what has subsequently become known as the *pro homine* methodology of interpretation of human rights treaties. This requires that human rights treaties are interpreted in the way that is most favourable to the individual and the protection of human dignity. That can be far removed from what contracting parties actually thought they agreed to.

While methodologically complex and not always predictable in its approach, the Court has always argued that the 'living instrument' approach has informed the evolution of substantive rights and these rights should be seen in light of the approaches taken by the majority of Member States. We can see this again in the transsexual cases discussed above. Thus, in interpreting the Convention, the Court can consider the approaches taken by other Member States in determining whether a particular Member State is in compliance with its obligations or not. This is the so-called 'European consensus'. If there is a broadly similar approach adopted by some or many other Council of Europe States to a matter, then that may require the respondent State in a particular case to come into line with the policies or approaches of the other Member States. If there is no such broad, identifiable approach, then the respondent state has more discretion as to how it approaches the matter at hand. This 'scope of discretion' is another technique, which is referred to in the Court's jurisprudence as the 'margin of appreciation'. The margin of appreciation essentially recognises that states parties are sovereign and thus have discretion as to how they protect a right. The Court's role is to identify the minimum threshold and, if the respondent

State's approach is below that threshold, that will equate to a violation of the right in question. But that minimum threshold will evolve upwards over time if society becomes more progressive. Between these various techniques, the Court has been accused by some of going beyond its mandate.

Where populist regimes may play a disproportionate role compared to others in the context of the 'margin of appreciation' and 'European consensus' is that they are less likely to approach certain rights in a more progressive way. It is important to stress that the Court is reactive, as the evolution must have taken place in some States for the Court to be able to justify its approach toward recalcitrant States who are not keeping up with the trend and approach of others. If some, or most, contracting States have taken a certain approach to a particular matter, then those out of line with this approach will have less discretion (margin of appreciation) and may be obliged to comply with the more 'progressive' approach. This was precisely the approach used by the Court in *Hirst* v *United Kingdom*, [Application no. 74025/01, *Hirst* v *United Kingdom, (No 2) judgment*, Grand Chamber, 6 October 2005] where the Court found, to the UK government's great irritation, that a blanket ban prohibiting all prisoners from voting did not align with most other European States who allowed many prisoners to vote. Thus, the UK had a narrow margin of appreciation and was consequently in breach of its Convention obligations. Successive British Conservative governments have refused to comply with the European Court's judgment. In sum, this means that the Court has less scope to be progressive in certain areas, in particular, where some regimes – namely, populist ones – are more socially and culturally conservative. That may prevent a similar approach from developing among all Council of Europe States and, consequentially, affording greater discretion to Member States on particular matters.

From the turn of the millennium there also has been a systematic and ongoing review of the activities and functions of the Convention system and a closer scrutiny of it than in earlier times. This is clear in all the Protocols that have been adopted and are discussed earlier in this chapter. Denmark, for example, is a founding member of the Council of Europe and traditionally portrayed itself as a strong supporter of the European Convention system and human rights instruments globally. Yet domestic politics, in particular relating to immigration, and indeed some decisions of the Danish Supreme Court, have seen Denmark at loggerheads with the Convention system in recent years and Danish governments stridently critical of it. But the Convention system has wider problems than just these.

Stemming from Russia's invasion of Crimea in 2014, the Court now has thousands of applications before it relating to the consequences of that invasion. This is in addition to the many thousands of petitions already outstanding and stemming from other situations in Russia and a handful of other States. Inter-State complaints are also now being used in ways that they were not previously. The Court and its future legitimacy and viability is continually being challenged. Of these challenges, the Brighton Declaration of April 2012 adopted at the initiative of UK's chairmanship of the Committee of Ministers (of the Council of Europe) has had the greatest long-term effect. The Brighton Declaration emphasised the importance of subsidiarity. Subsidiarity in this context is about the states parties having the discretion they wish for and thus the appropriate recognition of their sovereignty as to how they protect rights. As of August 2021, Protocol 15 to the Convention has come into force. Article 1 of Protocol 15 seeks to rebalance the relationship between the States party to it and the Court by reaffirming that States have:

> the primary responsibility to secure the rights and freedoms defined … and that in doing so they enjoy a margin of appreciation, [namely, discretion] subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

This is a reassertion of sovereignty, in the guise of subsidiarity. The calling for a return of sovereignty – whatever it actually means – is, of course, common to many populist regimes.

6.6.2.3 Pushing back against populist regimes?

While populist regimes pose one of several challenges to the European Court, the Court has pushed back against some of their practices and policies. Article 18 of the Convention, which had lain dormant, has sprung to life in more recent years. Article 18 establishes: 'The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.' The Court's leading judgment on Article 18 was *Merabishvili* v *Georgia* [Application No. 72508/13, *Merabishvili* v *Georgia*, 28 November 2017], which shed light on how the Court views the application of the Article. The decision, however, rings some alarm bells in terms of holding populist regimes to account. Succinctly, Irakli Merabishvili, a former Georgian Prime Minister, was accused of a number of crimes and argued that his pretrial detention had the purpose of ensuring that his political presence and standing were curtailed. In 2014, the applicant was found guilty by a Georgian court of the majority of charges against him. This outcome was challenged before the European Court of Human Rights, which drew distinctions between the ulterior purpose of a restriction from an assessment of measures based on on a plurality of purposes. Here the Court was seeking to examine all the possible motives for imposing restrictions and then to assess what is the predominant purpose of the measures being contested. This would be done by evaluating all of the circumstances as they evolve over time. If the predominant purpose is deemed illegitimate, then Article 18 is violated. The Court also noted 'the nature and degree of reprehensibility of the alleged ulterior purpose' and the fact that 'the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law are key'. In terms of temporality and circumstances, assuming the restrictions stay in place (even if they change in scope), the reasons behind the restrictions may change over time provided their primary purpose remains legitimate.

The obvious associated issue is the burden of proof and how the predominant reason should be identified and on what basis. The Court, giving itself maximum flexibility and states parties limited clarity, held that it can rely on 'information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts' and this could be corroborated and reinforced by third party reports and judicial decisions, and inferences could be properly drawn from this information. The predominant purpose test lacks objective criteria. Equally problematic is the notion that the Court's approach considers illegitimate purposes tolerable so long as they do not outweigh the predominant purpose, which must be legitimate at all times.

The recourse to Article 18 in *Merabishvili* v *Georgia* is critical as the provision was initially included in the Convention so as prevent States curtailing freedoms and regressing to totalitarianism and thus limiting the democratic nature of the State. Subsequently, the Court has considered Article 18 in *Navalnyy* v *Russia* [Application No 29580/12, *Navalnyy* v *Russia*, Grand Chamber, 15 November 2018]. Here matters related to the conduct of another populist and repressive regime were again directly under scrutiny. In *Navalnyy* the Court found at para. 175 that it had:

> …established beyond reasonable doubt that the restrictions imposed on the applicant … pursued an ulterior purpose within the meaning of Article 18 of the Convention, namely to suppress that political pluralism which forms part of 'effective political democracy' governed by 'the rule of law', both being concepts to which the Preamble to the Convention refers.

How the Court will determine 'ulterior purpose' in future petitions remains to be seen. But the reference to pluralism and tolerance as hallmarks of a democratic society cut both ways as the hijab cases, for example, illustrate – these cases are discussed in detail in Chapter 13 of the module guide. What is different in the balance relating to Article 18 and democratic governance is that mainstream opposition parties are more likely to be protected as they are indicative of tolerance. Equally, more unpopular views, especially those associated with the 'other', are likely to be marginalised and unprotected by Article 18, even though they are part of the plurality of views indicative of a tolerant society.

6.6.2.4 Dealing with the challenges from within

Populist movements that are influential at the domestic level, as noted above, are not aberrations among Council of Europe States. Some are showing all the hallmarks of regressing towards totalitarianism. Then there are others who have never been liberal democracies but have still been admitted to the Council of Europe. It was widely acknowledged that Russia did not meet the criteria for membership, yet it was still admitted in 1996. Russia is the successor State to the Soviet Union – at the end of the Cold War it was ostensibly subscribing to democracy, rule of law and human rights under a capitalist model. The opportunity to engage with Russia as a member of the Council of Europe and seeing it as a 'work in progress' was clearly preferable to keeping it at arm's length. It was plausible that engagement with the Council of Europe could lead to positive developments in terms of the protection of rights and democracy in Russia. Russia clearly has not developed in terms of liberal democracy, the rule of law or human rights protection in the way hoped for. It remains within the fold, however, notwithstanding various measures, such as sanctions and suspensions of voting rights in the Parliamentary Assembly. Equally, one could say that Turkey has not developed as was hoped. Turkey has been a Member State since 1950 and has engaged in egregious breaches of the Convention relating to its Kurdish minority along with the invasion of Cyprus in 1974.

Russia is, however, different to all other Council of Europe members. It is enormous in terms of territory, has by far the largest population, it is militarily formidable and has immense natural resources. It is inconceivable that it could become a member of the Council of Europe (which had, of course, been a club for a small number of Western liberal capitalist democracies) and not fundamentally destabilise the Council of Europe in some way and change its culture and way of doing things. Russia is now a key actor in the Council of Europe. Its influence and importance are obvious and the choices made need to be managed. Significantly, it has always been clear that the European Court as a retrospective mechanism cannot compel change in States. The Court can only fine tune existing liberal democracies; it has never been able to establish and then sustain them – especially in such a large, powerful and recalcitrant State as Russia.

In terms of those States sliding towards repression within the Council of Europe, there is greater hope that the European system of human rights can serve as a brake but what exactly the Court can do is not clear. If we consider the careful dismantling of the rule of law in Poland or Hungary, then the solutions are not straightforward. In Poland, the matter primarily is revolving around the independence of the judiciary. Matters are, at the time of writing, in a flux. The EU is also taking a lead here – as both Poland and Hungary are Member States of the EU. The European Union's mechanisms allow it to use its financial and political levers to ensure that Poland and Hungary uphold the values articulated in Article 2 of the Treaty on European Union (TEU), which refers to respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights – these were noted earlier in the chapter. But again we are in a state of flux here. What is clear is that we are in a time of turbulence and the European Court has many challenges on its hands.

Summary

The ECHR creates a catalogue of rights that is not dissimilar from the other international Covenants on human rights that we have studied. Article 2, the right to life; Article 3, the prohibition of torture; Article 4, the prohibition of slavery; Article 5, the right to liberty and security; Article 6, the right to a fair trial; Article 7, the principle that there should be no punishment without law; Article 8, the right to respect for private and family life; Article 9, freedom of thought, conscience and religion; Article 10, the right to freedom of expression; Article 11, freedom of assembly and association; Article 13, the right to a remedy; Article 14, the prohibition of discrimination. Section II of the Convention creates the European Court of Human Rights and defines its personnel and jurisdiction. In overview, these include the authority to provide rulings on the interpretation of the Convention; a jurisdiction over inter-State actions; and a jurisdiction over individual petitions. Although the Court is charged with promoting

'friendly settlements' in disputes, it does have the power to award remedies to injured parties in certain limited circumstances.

Further reading

- **Bantekas and Oette, De Schutter, and Alston and Goodman all in various places provide a wide selection of materials that relate to the operation of the Court. You should use them to supplement your other reading so as to understand some of the substantive issues the Court has had to deal with.**
- **Spano, R. 'The future of the European Court of Human Rights – subsidiarity, process-based review and the rule of law', *Human Rights Law Review* 18 2018, p.473. This very interesting article by a judge considers how the Court's role is changing and how it may respond to the challenges it faces.**

Reminder of learning outcomes

By this stage you should be able to:

- **summarise the basic provisions of the European Convention on Human Rights**
- **explain the basic operation of the European Court of Human Rights**
- **explain the specific nature of the European system for the protection of human rights.**

Self-assessment questions

1. **Under the Convention in its original form, states parties to the ECHR were not obliged to accept cases brought against them by individuals (the right of the individual petition). Why do you think this was? Why, in the revised Convention, is it no longer the case? Why do you think the alternative type of procedure, a case brought by one State against another, has been so little used?**
2. **Individual cases can only be brought by a 'victim'. Is this too restrictive? What is meant by a 'victim'? How, if at all, has this changed over time?**
3. **Explain the rationale for the various conditions of admissibility that have to be satisfied before an application under the ECHR will be held admissible. Are all the conditions necessary?**
4. **Why were Protocols 11 and 14 thought necessary? Is the revised Convention machinery an improvement on the original system? What do you think Protocol 15 will achieve?**
5. **The defendant in a case is a State. An alleged breach of the Convention must be attributable to the defendant State, but is a State responsible for the acts of private individuals? Should it be responsible?**
6. **From your reading do you consider the European Court to have a particular approach to interpretation and a vision for itself? If so, what do you think it is? What difference, if any, do you think it would make if the Court perceived itself or functioned as a 'constitutional court' as opposed to a 'human rights court' or vice versa? What does Protocol 16 suggest about the role of the ECtHR in this regard?**

Sample examination question

'The European system for the protection of human rights sets the standard for all other regional systems.'

Discuss.

Advice on answering the question

This essay-style question can be approached in one of two ways. It can be approached as a comparative essay where the answer seeks to compare the European system fully with the Inter-American or the African systems, for example. That, however, would take up a lot of time. A better approach, therefore, would be to undertake a detailed analysis of the 'European system' and to see what its strengths and shortcomings are and then to assess whether others can emulate that. This would focus more closely on the material studied in this chapter and deal with the question in a more circumscribed and focused way, allowing a higher mark to be obtained in the time frame allowed. It would be wise to point out that there is no one European system for the protection of human rights. There is the EU, the Council of Europe and the OSCE. Beyond that, the OSCE is concerned with human rights as one activity among many. The EU has become more of a human rights actor, but once it accedes to the ECHR then it is debatable which is the 'superior' body of norms among States that are States party to both the Council of Europe system and the EU. The ECHR has indeed long been seen as the most successful of regional instruments, more so than the African and Inter-American systems – but it is clear that the ECHR is now under severe stress, and numerous attempts at reform have not been successful. What is also clear, however, is that the European Court was able to make a significant contribution to the protection of certain human rights during a period when there was relative stability and when membership of the Council of Europe was limited to Western, highly developed and wealthy democratic States. Expansion has brought numerous problems. It is also the case that the European Convention only protects a very narrow group of civil and political rights – the European Social Charter in its various incarnations seeks to protect economic and social rights but has been less successful than the ECHR in doing so, although its efficiency and effectiveness have improved in recent years. There is no correct conclusion to be drawn here – parts of the 'European system' have worked well at times, others less so.

NOTES

7 The Inter-American system for the protection of human rights

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Introduction

This chapter considers the Inter-American system for the protection of human rights. We examine the main foundational documents and the two organs created to promote and protect human rights: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The Inter-American system is one of the three regional systems that are dedicated to the protection of human rights. In this chapter, we will draw some comparisons between it and the African system (to follow) and the European system (discussed in the previous chapter). The Inter-American system also draws attention to a particularly pressing problem: how to deal with human rights violations on a massive scale. There are no easy solutions to this problem; but we will see that the Inter-American Court and Commission have been concerned with developing a human rights jurisprudence that engages with these most pressing issues.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the structure of the Inter-American system for protection of human rights and outline its distinctive features**
- **state the role of the Inter-American Commission and the Inter-American Court of Human Rights**
- **outline the provisions of the American Convention on Human Rights**
- **describe the basic functions and powers of the Commission and the Court**
- **appreciate that the jurisprudence of the Court is via a series of representative judgments**
- **explain the role of Country Reports**
- **summarise the jurisprudence of the Court and the Commission as it applies to the processes of amnesty and social reconstruction.**

Core texts

- **Bantekas and Oette, Chapter 6 'Regional human rights treaty systems', Part 3 AND/OR**
- **De Schutter, Chapter 11 'Regional mechanisms of protection', Part 2.**

Essential reading

- **Sandoval, C. 'The Inter-American system of human rights and approach' in Sheeran and Rodley (eds), pp.427–43 (available in VLeBooks via the Online Library) OR**
- **Antkowiak, T. 'The Americas' in Moeckli et al. (eds).**

Further reading

- **Alston and Goodman, Chapter 5 'National security, terrorism and the law of armed conflict', pp.415–32 and Chapter 11 'Regional arrangements', Section B 'The Inter-American system'.**

The last reading from Alston and Goodman is concerned with torture/internment in Guantánamo but shows well the activities of the Organization of American States (OAS) organs. Do not worry so much about the substance at this stage; we will cover this again later – please focus on the type of activity (precautionary measures, etc.) to tackle the issue with a state (the USA) not party to the American Convention.

- **The OAS has a superb website in English and Spanish – it is worth spending some time exploring the section on human rights-related activities.**

7.1 The origins and development of the Inter-American system

7.1.1 Historical background

The historical roots of the Inter-American system can be found in the movements to achieve unity among the North American and Latin American states in the mid-19th century. The 'First Congress of American States' was held in 1826 but the origins of the current organisations can be traced to the Pan-American Union, founded after a series of meetings in Washington, USA, between 1889 and 1890. The objectives of the Union were economic cooperation and settlement of disputes between nations; human rights were not a major concern. Indeed, it was not until after the Second World War that the states concerned sought to both reorganise the terms of their union and promulgate the protection of human rights as a key objective. The Charter of the Organization of American States (OAS), 1948, established the organisation as a regional agency within the UN to secure 'peace and security, representative democracy, eradication of poverty and the pacific resolution of disputes between the nations of the region'.

The original signatories of the OAS Charter were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay and Venezuela. Other states have joined the OAS since 1948. This group includes: Barbados (1967); Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (1979); Saint Lucia (1979); Antigua and Barbuda (1981); Saint Vincent and the Grenadines (1981); the Bahamas (1982); St Kitts and Nevis (1984); Canada (1990); Belize (1991); and Guyana (1991).

The first key human rights document adopted was the 1948 American Declaration of the Rights and Duties of Man (ADHR). This document, which has similarities to the Universal Declaration, was adopted in May 1948 and thus predates the Universal Declaration. In Santiago (Chile) in 1959, it was resolved that an Inter-American Commission and a Court for Human Rights would be created. The OAS Council approved the Statute of the Commission in 1960.

Some years later, the American Convention on Human Rights (ACHR) was adopted by the Member States of the OAS in Costa Rica, in 1969. We will examine this document in more detail below. In summary, it contains a catalogue of rights, and outlines the powers of the Court and the Commission. It is worth noting that the Convention redefined the powers of the Inter-American Commission that had been created 10 years earlier. The Commission was made 'a statutory organ of the OAS' and given powers to protect human rights and operate as a consultative body to the Organisation. However, the new powers (see Articles 18–20 below) of the Commission would only be binding on those nations who ratified the Convention.

The American Convention has been ratified by Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Unlike the European Convention, which despite threats of denouncement from some states has not yet been denounced by any Council of Europe States, the ACHR has been denounced by Trinidad and Tobago in 1998 and Venezuela in 2012. In both cases, the states had long-standing issues of contention with the American Court. Neither state has, however, denounced the ADHR, which requires denunciation of the statute of the OAS and thus leaving the OAS itself. It is worth noting that to be a member of the Council of Europe, it is obligatory to be party to the European Convention, thus no state has yet denounced it. On this point, it is finally worth noting that Jamaica has denounced the First Optional Protocol to the ICCPR and Trinidad and Tobago has sought to do so. It is worth noting that South Africa has in the past sought to denounce the International Criminal Court but this has never been achieved in practice. Thus, the denunciation of the ACHR is not unique among human rights treaties but it is in general terms quite unusual. In terms of the ACHR and membership it is worth noting that the USA is a signatory to the Convention but to date has not ratified it. Canada is not a signatory to the Convention.

7.1.2 The Inter-American Commission

The old powers allowed the Commission to look at the human rights situation and to report on flagrant and repeated violations. The Commission could request information from the government concerned with a view to making recommendations and, with the consent of the relevant government, make a country visit. It could only consider individual complaints as part of its examination of general abuses of human rights. In 1965, these powers were extended, allowing the Commission to take into account individual abuses but only in limited cases. In these instances, the Commission could issue a report but it could not make decisions. Using the powers to report on general abuses, the Commission was able to examine Cuba and the Dominican Republic; 'Country Reports' were also undertaken in relation to, for example, Haiti (1980), Uruguay (1977), Chile (1974–80), Panama (1978), Nicaragua (1978), El Salvador (1979) and Argentina (1980). It should not go unremarked that all of these countries have suffered from major and systematic human rights violations, with them having spent time under brutal dictatorships with arbitrary killings, detention without trial, torture, disappearances and so forth. In the European system, the concern has largely been about the scope of the Convention or the meaning of family life, for example. In the OAS, the political environment of human rights protection has been far more challenging than it has been in the Council of Europe system and that has been reflected in the activities of the institutions in question. The extended powers of the Inter-American Commission attracted a large number of communications from individuals but the Commission was and remains too under-funded and under-resourced to be able to achieve the cooperation of the relevant governments. Thus, we can note, at this stage, a peculiarity of the Inter-American system: the Commission has a 'dual mandate', and has done a great deal of its work under its 'old functions' that predate those powers granted by the Convention, which only came into force in 1978.

As we will see below, the Commission and the Court have begun to develop a human rights jurisprudence that tackles the extremely difficult problems it has had to deal with.

7.1.3 How is the Inter-American system for the protection of human rights distinctive?

The Inter-American system is a regional system but one that differs from the European system, which we have already examined, in a number of ways. First, the Inter-American system is more complex than the European Convention in that it is based upon two overlapping instruments, namely the American Declaration on the Rights and Duties of Man and the American Convention. Second, the jurisdiction of the Inter-American Commission on Human Rights over states depends upon whether they are parties to the Convention or not. The Court has jurisdiction in contentious cases only over Convention parties. Third, the Inter-American Commission not only hears petitions but also conducts visits to consider violations, leading to the adoption of Country Reports on the human rights situations in OAS Member States. There is no equivalent in the European system. Fourth, while the Council of Europe system extends to all European states, there is effectively a dislocation in the OAS system. Although one may think of the developed liberal democracies of North America, the USA and Canada, as being committed to human rights, in fact they are partial players in the OAS system due to their refusal to become parties to the ACHR. In reality, the ACHR and OAS system more generally has been a 'Latin American' system, essentially focusing on the many human rights problems of Latin American nations as opposed to the more limited but still very real and, at times, serious human rights violations in Canada and the USA. It is worth emphasising again that the Inter-American system is constituted by two 'overlapping documents': the Declaration and the Convention. In simplistic terms, the Convention can be seen as an amplification of the Declaration but it also creates the Court and so gives rise to mechanisms of enforcement that were lacking from the earlier document. Finally, it is worth noting that the manner in which the Inter-American system has normatively and practically developed and evolved over time is a reflection of the pragmatic approach that has had to be adopted when dealing with a significant number of states whose commitment to protecting human rights has at times been far from sincere. It is worth reiterating that the Court

has jurisdiction in contentious cases only over Convention parties. This complicated arrangement reflects the different levels of commitment that Latin American nations are willing to make to international human rights.

7.1.4 Other human rights aspects of the Inter-American system

The OAS system, like the Council of Europe system we have studied and the African Union system we will study, has adopted a number of documents related to the protection of human rights beyond the American Declaration and the American Convention that we have alluded to. As will be discussed below, the OAS has adopted the Inter-American Convention on Forced Disappearance of Persons, 1994. This was in response to a very serious and endemic problem in Latin America and was a precursor for developments at the UN level. The OAS has also adopted the Inter-American Convention to Prevent and Punish Torture, 1985. This was adopted a year after the UN Convention Against Torture and again predates the Council of Europe's 1988 Convention on the Prevention of Torture. Thus the impression often given that the Council of Europe is at the vanguard of regional human rights protection is mistaken. As will become clear throughout this chapter, the OAS system has faced very significant problems in its practical application yet the OAS institutions have worked admirably in seeking to overcome these.

Returning to the Inter-American Convention on Forced Disappearance of Persons, 1994 and the earlier Inter-American Convention to Prevent and Punish Torture, 1985, they are primarily jurisdictional treaties – meaning that their aim is to criminalise such behaviour and ensure that those accused of such crimes are tried and punished. The OAS has also adopted numerous other treaties addressing issues such as the death penalty, asylum, disability, racial discrimination and violence against women. Most importantly in the grand scheme of developments is the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988, usually known as the 'Protocol of San Salvador'. This sets out a limited number of classic economic, social and cultural rights – working conditions, trade union rights, social security, right to education, health, food, healthy environment and culture but these are more limited in scope and number than in the ICESCR or the Council of Europe's Social Charters. It is further the case that the supervisory mechanism is report-based with only trade union rights and the right to education amenable to consideration by the Inter-American Court of Human Rights.

Activity 7.1

What are the foundational documents of the Inter-American human rights system?

Activity 7.2

What is distinctive about the political situation in which the Inter-American system operates?

7.2 The American Convention on Human Rights

The Preamble to the American Convention outlines the values that inform the document. Although it is rooted in the politics of North and South America and the Caribbean, it is also in touch with the broader currents of thought represented by the Universal Declaration. The American Convention can thus be seen as a regionally specific articulation of principles that are seen as universal.

The Convention has to be seen as encouraging a general democratic ethos, based on 'personal liberty', 'social justice' and the 'essential rights of man'. The rights of man are themselves founded 'upon the attributes of the human personality' – a bold statement of what could be seen as a form of a natural law philosophy of rights. Moreover, this philosophy justifies a legal argument for a Convention that reinforces or complements the protection that is provided by domestic law. Reading between the lines, we can perhaps find here a negotiation of the perennial problem of human rights: the claim to human rights is universal but the systems that protect human rights are most often domestic and local.

Chapter I

Part 1 addresses the obligations of states, and Chapter I begins by outlining general obligations. **Article 1** states the first of these general principles: the obligation to respect rights. States parties must guarantee that 'all persons subject to their jurisdiction' are granted the 'free and full exercise' of the Convention's rights and freedoms without any form of discrimination. **Article 2** elaborates the sense of this general duty by placing an obligation on states parties to achieve a realisation of Convention rights through legislative or other means.

Chapter II

Chapter II goes on to outline the civil and political rights guaranteed by the Convention. **Article 3** is the right to 'juridical personality'; or the right to be recognised as 'a person before the law'. We have seen in our analysis of other conventions the centrality of such a right: without a recognition of juridical personality, an individual is a 'non-person' deprived of all legal protection. In this sense, human rights as a legal concept must be founded on a claim to the legal recognition of the individual. **Article 4** articulates the fundamental right to life. Life is seen to start from the 'moment of conception', and the influence of the Catholic Church is clearly evident here. However, in keeping with other statements of the right to life, the death penalty is not explicitly abolished. Rather, for those nations that have not already abolished it, it can be imposed, within certain limited instances, by a competent court for serious crimes.

Article 5, the articulation of a right to humane treatment, may be peculiar to the American Convention, but the content of this right is not unique. Article 5 rests on the basic principle that everyone has 'the right to have his physical, mental, and moral integrity respected'. This is linked to the prohibition of torture and of 'cruel, inhuman, or degrading punishment or treatment'. Article 5 goes on to outline other due process safeguards: those deprived of their liberty should be 'treated with respect for the inherent dignity of the human person'. This general principle can be made more detailed:

- Paragraph (3) states that punishment must only be for a criminal offence.
- Paragraph (4) makes a distinction in the treatment of accused and convicted persons.
- Paragraph (5) says minors who are subject to criminal proceedings must be treated as such.
- Paragraph (6) asserts that punishment is essentially reformative.

We can see that this Article brings together a diverse catalogue of due process guarantees that relate, in the main, to the criminal justice process.

Article 6 abolishes slavery. The definition is broad and includes 'involuntary servitude' and the 'trade and traffic in women'. Paragraph (2) further elaborates the prohibition on slavery to cover 'forced or compulsory labour', other than as a sentence of a court of law, or as falling into certain classes of exception, such as 'military service' or 'work or service that forms part of normal civic obligations'.

Article 7 contains the right to personal liberty. According to Article 7(2), the right to personal liberty means: 'No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the state party concerned or by a law established pursuant thereto.'

Article 7(3) is aimed against arbitrary arrest, arbitrary imprisonment and detention for debts. It is also linked to a broad catalogue of due process guarantees: thus, there is a right to be informed of the reasons for one's detention and a right to a prompt trial and to bail. These guarantees are continued in **Article 8**, which expressly concerns itself with the right to a fair trial. Paragraph (1) states the general principle:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Fair trial rights, as in other conventions, thus cover both criminal and civil procedure but also extend to the determination of matters of an administrative nature. The fundamental fair trial guarantees are also stressed: an impartial and independent court established by law. As well as a right to be presumed innocent, paragraph 2 contains a list of other minimum guarantees that cover:

- the right to a translator
- notification of charges faced by an accused person
- adequate time to prepare one's defence
- the right to defend oneself personally or with counsel
- the right to examine witnesses
- the right not to be compelled to be a witness against oneself
- the right of appeal to a higher court.

Moreover, confession evidence is only admissible if it was made 'without coercion of any kind'.

Article 9 can also be seen as a fair trial right: no one can be convicted under *ex post facto* laws. In other words, one can only be convicted of a criminal offence under the law that was current at the time of the offence's commission. The right to compensation in **Article 10** can also be understood as part of this general articulation of due process and fair trial rights.

Articles 11–16 are the classic civil liberties. **Article 11**, the right to privacy, is founded on respect for a person's 'honor and dignity'. **Article 12** states that all are to enjoy freedom of conscience and religion within the limits provided by the law; a similar form of words applies to **Article 13**: the right to 'freedom of thought and expression' is also limited by the law, and **Article 14**, the right of reply (essentially a right to respond to libel or slander) also limits freedom of expression. **Article 15** is a statement of the right to 'peaceful assembly' and **Article 16** guarantees the freedom of association. All these rights are similarly limited.

Article 17 departs from civil liberties to cover the rights of the family. The American Convention, like the others that we have studied, is committed to the family as 'the natural and fundamental group unit of society' and as such is 'entitled to protection by society and the state'. This overall right can be broken down into a catalogue of principles. Thus paragraph (2) is the 'right of men and women of marriageable age to marry and to raise a family' within the terms of domestic law, so far as they are not discriminatory and as long as the marriage is consensual (paragraph (3)). Paragraph (4) is a broad duty placed on states parties to 'ensure' the 'equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution'. This right is thus broad enough to cover marriage as well as divorce. Paragraph (5) applies a similar principle to the right of children: these shall be the same whether the child is born in or out of 'wedlock'.

Article 18, the right to a name, can be read as an elaboration of Article 3, and as linked to the right of the child in **Article 19**. These are rather briefly described as 'the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. These 'identity' rights are completed with a 'right to nationality' at **Article 20**.

The next group of rights can perhaps be seen as those enjoyed by the citizen and thus follow on from guarantees of basic issues such as name and nationality. **Article 21** is the right to own property within the limits established by law; **Article 22**, the right to freedom of movement and residence; and **Article 23**, the right to participate in government. If one accepts that these are the rights that the citizen enjoys then the slight repetition of due process guarantees that occurs in **Articles 24** and **25** can perhaps be seen as a further elaboration of the essential status of the citizen in a rule of law state. Thus, the citizen enjoys, by **Article 24**, equal protection before the law and, by Article 25, the right to judicial protection. **Article 25** is based on the principle that:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Article 25 is thus more than the due process guarantees specified above; it is more of a right to action and to remedy.

Chapter III and Chapter IV

Chapter III of the Convention is a statement of economic, social and cultural rights. We will now examine some of the more salient Articles. **Article 23** is a broad statement that states must cooperate towards the progressive development of the rights stated in the Charter of the Organisation of American States. However, as Chapter IV, **Article 27** specifies, derogations from certain Convention obligations may be made in times of 'war, public danger or other emergency'. The Articles that are excluded from this category are:

- Article 3 (right to juridical personality)
- Article 4 (right to life)
- Article 5 (right to humane treatment)
- Article 6 (freedom from slavery)
- Article 9 (freedom from *ex post facto* laws)
- Article 12 (freedom of conscience and religion)
- Article 17 (rights of the family)
- Article 18 (right to a name)
- Article 19 (rights of the child)
- Article 20 (right to nationality)
- Article 23 (right to participate in government), or of the judicial guarantees essential for the protection of such rights.

These Articles thus represent, according to the ACHR, rights that are more fundamental than the others, as a state can never derogate from such rights.

Chapter V

Chapter V, which contains **Article 32**, is also unique to the American Convention, as it expressly details the relationship between rights and duties:

> Every person has responsibilities to his family, his community, and mankind.
>
> The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

Both these paragraphs are rather widely drawn. For instance, it is hard to know what an individual's 'duty' to 'mankind' might be in detail; further elucidation is provided to some extent by the second paragraph, but again, phrases such as 'the just demands of the general welfare' remain vague. This Article is perhaps best read as a general ideological or philosophical statement of the necessary limitation of the idea of rights: all rights are limited by the duties that one might owe to others. That this is the case is stressed by the specific limitations on the rights contained in Chapters II and III. Of course, in these instances, the limitations are to the specific rights listed in the relevant Articles. Article 25 can be read as a general, overall statement that applies to the Convention in its entirety.

Chapter VI, Part II

Part II of the Treaty sets out the means for the protection of the rights that we have been considering. Chapter VI describes the organs that are established by the

Convention. **Article 33** describes these as: (a) the Inter-American Commission on Human Rights and (b) the Inter-American Court of Human Rights.

The composition and functions of the Commission are the subject of Chapter VII (see below). The Commission is composed of seven members (**Article 34**) that represent all the member countries of the OAS (**Article 35**). Members of the Commission, elected by the General Assembly of the Organisation, serve in their personal capacity (**Article 36**). The main function of the Commission is to promote 'respect for and defence of human rights' (**Article 41**). To this end, it has a variety of functions and powers; most notably: to make recommendations to the governments of the Member States; to prepare studies and reports; to request governments of Member States to provide it with information on measures adopted to promote human rights; to take action on petitions presented to it subject to **Articles 44–51** (below) and to submit an annual report to the General Assembly of the OAS.

Section 3 deals with the competence of the Commission. Although Articles 44 and 45 describe two different enforcement mechanisms, we will deal with them together because there are certain common features. **Article 44** states that any persons or NGOs in the territories of Member States may lodge with the Commission 'petitions… containing denunciations or complaints of violation of this Convention by a state party'. **Article 45** sets out a different mechanism: a state party can also indicate that it 'recognises the competence of the Commission…to receive and examine communications in which a state party alleges that another state party has committed a violation' of the human rights detailed in the Convention.

Article 46 details common procedural requirements that relate to both Articles 44 and 45. There are requirements that:

- all remedies in domestic law have been pursued and exhausted
- the petition or communication is made to the Commission within six months of the date from which the victim of the alleged violation was 'notified of the final judgment'
- the matter is not being dealt with by any other international procedure
- in applications under Article 44, the petition is not anonymous and contains certain details about the individual petitioner.

However, the first two requirements shall not be applicable if:

- the domestic law of the relevant state does not have due process provisions for the protection of the rights that have been allegedly breached
- or the alleged victim of a rights violation has been denied access to domestic remedies or prevented from exhausting all domestic remedies
- or there has been 'an unwarranted delay' in the final judgment.

Section 4, **Article 48**, details the procedure the Commission must follow when it considers a petition or communication. If the petition or communication is admissible, the Commission must request information about the alleged breach from the government concerned. Once the information has been received, the Commission must determine whether or not a case of violation of right(s) has been established. If a violation is established then the Commission must pursue further investigations to establish the facts; this could include visiting the territory of the state party concerned and the Commission can request any necessary further information or evidence from the state party. After gathering the evidence, the Commission must sponsor a 'friendly settlement' of the matter. In 'urgent' or 'serious' cases, the Commission can move straight to an investigation. **Article 50** deals with the situation if a friendly settlement is not reached: the Commission shall draw up a report (which may contain dissenting opinions from Commission members) containing such recommendations as it thinks necessary. If, after three months from the date of the receipt of the report by the state party, the matter has either not been settled or not submitted to the Court, the Commission can determine its own conclusions and recommendations by majority vote (**Article 51**). If the state has not followed the recommendations of the Commission within the period mandated, then the Commission can decide by a majority vote to publish the report.

ACTIVITY 7.3

a. What are the institutions created by the Convention?

b. What are the powers and functions of the Commission?

Article 41 states that the main function of the Commission is to promote 'respect for and defence of human rights'. Thus, the Commission is empowered to make recommendations to the governments of states parties; to prepare studies and reports; to request governments of Member States to provide information on measures adopted to promote human rights and to submit an annual report to the General Assembly of the OAS. **Article 44** provides that any persons or NGOs in the territories of Member States may lodge petitions with the Commission that allege violations of the Convention. **Article 45** allows one state party to allege to the Commission that another state party is in breach of the Convention. **Articles 46–50** deal with procedural requirements that apply to these enforcement mechanisms.

Chapter VII

Chapter VII describes the composition and jurisdiction of the Inter-American Court of Human Rights. We will now examine some of the more central Articles. **Article 52** states that the Court consists of a panel of seven judges (but the Court is quorate with five (**Article 56**)), who serve in their personal capacity. They must be authorities in the field of human rights, and possess the requisite qualifications in the nations where they are nationals. To avoid disproportionate representation of states, no two judges can be nationals of the same state (52(2)). However, if the Court is hearing a case from the same nation as a judge, the judge retains his right to hear the case (55(1)). There are also rules in this Article that relate to the appointment of ad hoc judges should the nationality of the judge be an issue.

The Court is empowered to draw up its own constitutional statute, and determine its own rules of procedure (**Article 60**); but see Article 66, below.

The Statute of the Court was approved in 1980. Later, definitive rules of procedure were adopted and came into effect. Those adopted in 2009 currently apply to cases being brought to the Court.

Article 57 states that the Commission appears in all cases before the Court. The sense of this Article is clarified in Section 2. **Article 61** specifies that only states parties and the Commission have 'the right to submit a case to the Court'. In the past the Commission was involved in all cases referred to the Court and exercised a clear discretion as to whether a case should be sent to the Court or not, regardless of the views of the petitioners. The practice of the Commission now is to send almost all cases to the Court and not usually to involve itself in the procedure before the Court. Articles 48 and 50, described above, also relate to the procedures for putting a case to the Court.

Article 62 is important as it describes how the rulings of the Court are to be binding on states parties. For rulings to be binding, a state party must declare that it recognises the jurisdiction of the Court in all matters relating to the Convention. Such a declaration can be either 'unconditional', on the condition of 'reciprocity', or for a limited period, or for limited cases (62(2)). **Article 63** moves on to the remedies that the Court can provide. If the Court finds that there is a violation of a right, it can rule that 'the injured party be ensured the enjoyment of his right or freedom that was violated' 63(1), and that this could include compensation. Furthermore, 63(2) specifies that:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

These Articles have to be read alongside **Article 68**: states parties undertake to comply with the judgments of the Court – and this extends to payments of compensation that are to be governed by the relevant domestic laws relating to judgments against the state.

Article 64 concerns the interpretative authority of the court. The Member States of the OAS can consult the Court for authoritative rulings on the interpretation of the

Convention, or indeed on other treaties concerning human rights in American states. The organs that make up the OAS have a similar right. States have asked the Court to further elaborate and clarify upon the meaning of its judgments that relate to them.

The Procedure of the Court is also mandated by the Convention. Section 3, **Article 66** provides that the Court itself shall give reasons for its judgments, and that if a judgment is not unanimous, then a dissenting judge is entitled to have his dissent appended to the judgment. Under **Article 67**, judgments of the Court are final, and cannot be appealed.

Activity 7.4

What are the powers and functions of the Court?

Reminder of learning outcomes

By this stage you should be able to:

- **describe the structure of the Inter-American system for the protection of human rights and its distinctive features**
- **state the role of the Inter-American Commission and the Inter-American Court of Human Rights**
- **outline the provisions of the American Convention on Human Rights**
- **describe the basic functions and powers of the Commission and the Court**
- **appreciate that the jurisprudence of the Court is via a series of representative judgments.**

7.3 The jurisprudence of the Inter-American Court of Human Rights

In this section we will consider three cases decided by the American Court of Human Rights: *Rodriguez, Garbi and Corrales* and *Cruz*. The jurisprudence of the Court is expanding and this study of these three cases is meant only as a rather limited example of the Court's work. Although they were decided some time ago, there are many worthwhile and lasting lessons to be learned from them. As detailed above, the Court also has the power to provide Advisory Opinions and, although we will make reference to one of these opinions, they will not concern us in a general sense. Our primary focus will be what *Rodriguez, Garbi and Corrales* and *Cruz* tell us about the Court's response to extreme violations of human rights. It is worth stating at the outset that the American Court has been one of the most creative and also progressive of all human rights courts and tribunals, and thus has sought in difficult and testing conditions to realise the potential of the American Convention. When we consider the promise of human rights, the ACtHR has been a body at the forefront of seeking to deliver on their promise.

7.3.1 The *Velásquez Rodriguez* case, July 1988

This case raised the question of whether the government of Honduras had violated Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the Convention; the Commission was also asking that compensation be paid. It was alleged that Velásquez, who was a student at the National Autonomous University of Honduras, was detained without a warrant for his arrest by members of the National Office of Investigations (DNI) and the Armed Forces of Honduras. He was then subjected to torture on at least two different occasions and 'disappeared'.

Proceedings were brought in Honduras but were dismissed by the Honduran court. The Commission referred the matter to the Inter-American Court. The case could be submitted to the Court because Honduras had ratified the Convention and recognised the jurisdiction of the Court (see Article 62).

'Disappearances'

The Court addressed itself to the matter of disappearances. The Court observed that although disappearances were not new as far as violations of human rights were concerned, the 'systematic and repeated nature and their use' had become a feature of Latin American politics. The Court argued that it was necessary to approach the problem of disappearances in a coherent and general way. For instance, the UN had established a Working Group on Enforced or Involuntary Disappearances in 1980, and General Assembly Resolutions had already condemned the practice. It is worth noting that subsequently both the OAS and also the UN have adopted issue-specific Conventions dealing with disappearances (Inter-American Convention on Forced Disappearance of Persons, 1994 and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006) specifically to try to tackle a problem that is endemic in many parts of the world.

How then would human rights law conceive of disappearances before these subsequent developments? In retrospect we can better appreciate the significance of the *Velásquez Rodriguez* decision. Could they be considered a crime against humanity? One problem with this approach has been the absence of any international treaty that uses these terms. However, the preamble of the Inter-American Convention on Forced Disappearance of Persons, 1994 notes that 'the systematic practice of the forced disappearance of persons constitutes a crime against humanity'. In a similar vein, the 2006 UN Convention notes in its preamble, 'Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity.' The *Velásquez Rodriguez* judgment was delivered at a time when states had not more generally agreed to this – the Court had to determine whether and how disappearances could be considered a human rights issue.

First of all, kidnapping is an arbitrary deprivation of liberty and an abuse of the due process guarantees in Article 7. The isolation of the detained individual and the torture that they are subjected to amounts to 'cruel and inhuman treatment' in breach of the right to the integrity of the person stated in Article 5. As disappearances result in the murder of the detainee, a 'secret execution without trial', they are also a breach of the right to life contained in Article 4. As well as the breach of these specific Articles, the practice breaches the commitments to human dignity on which the American Convention is founded. A government either tolerating or engaging in disappearances also puts itself in breach of other fundamental Articles: Article 1(1), the obligation to respect rights. This raises an interesting jurisprudential point. The Court noted at paras 163–65 that the Commission did not specifically allege the violation of Article 1(1) of the Convention but that does not preclude the Court from applying it.

> The precept contained therein constitutes the generic basis of the protection of the rights recognised by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia* ['The court knows the laws'], on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.

The Court continued that

> [t]his states a wide power of the Court that should be available in all cases where rights are violated but Article 1(1) is not actually pleaded. Precisely because 1(1) states such a foundational principle, violations of specific rights must also be a breach of this fundamental value. Moreover, it is essential that 1(1) be referred to by the Court, even if it is not pleaded, so that the violations of rights can be 'imputed' to the state party.

As the Court further asserted, Article 1

> charges the States Parties with the fundamental duty to respect and guarantee the rights recognised in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

Article 1(1) thus imputes responsibility upon the state as the Article attributes the 'impairment' of rights to the acts or omissions of a state party. As the Court noted at para.165 of its judgment, Article 1(1) places an obligation on states to respect the right and freedoms under the Convention; this obligation limits the legitimate actions of a public official because human rights protect the dignity of the individual, which must be seen as thus 'superior to the power of the state'.

The Court stressed that the protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These 'individual domains' are considered beyond the reach of the state or the state has limited access. For the Court protecting human rights by definition restricts state power. The Court then developed this further by connecting it to the 'second obligation' of states parties. For the Court, states parties are obligated to ensure the full exercise of Convention rights to all in their jurisdiction. The implication of this principle is that the agencies of government must themselves guarantee human rights. The 'consequence of this obligation' is that states must do everything in their power to prevent violations of rights and, if a violation is proved, to both restore the right and provide compensation. Thus there is responsibility both for what a state does and also what it fails to do.

The Court considered Article 1(1) to be more 'direct' (see para.168) than Article 2. Article 2 obligates a state party to take legislative or other measures to make national law coherent with the Convention. Article 1(1) makes any exercise of power by a public body that violates a Convention right illegal. This is the case whether or not the body has breached domestic law, as it is a principle of international law that a state assumes responsibility for the acts and omissions of its agents. Finally, the Court stressed that the state itself has a legal duty to investigate human rights abuses to the best of its available resources, and to put right any breaches. As the Court concluded:

> In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velásquez, and of the fulfilment of its duties to pay compensation and punish those responsible, as set out in Article 1(1) of the Convention. (para.178)

This is a powerful vindication of human rights, but not only that – it is a meaningful development in seeking to ensure rights are upheld and remedies provided. It is key to stress that the American Court has been at the forefront of human rights law when it comes to awarding reparations for violations. Notwithstanding the widespread abuses that took place and the lack of commitment of many Latin American dictatorships to respect human rights, by awarding reparations to victims and their families the Court developed a pragmatic but meaningful approach. It is finally worth noting on this that almost all OAS states on almost all occasions actually paid the reparations awarded by the Court to the victims of the state's human rights abuses.

Activity 7.5

What does the *Rodriguez* case tell us about disappearances as a human rights issue and what does it tell us about the approach of the ACtHR?

The *Garbi and Corrales* and the *Cruz* cases raise similar points. We will briefly outline the facts before turning to consider some aspects of the judgment in the former.

7.3.2 The *Godinez Cruz* case 1989

In submitting the case, the Commission requested that the Court determine whether the state in question – Honduras – had violated Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the Convention. In addition, the Commission asked the Court to rule that 'the consequences of the situation that constituted the breach of such rights or freedoms be remedied and that fair compensation be paid to the injured party or parties'.

Saúl Godínez Cruz was a schoolteacher who disappeared on 22 July 1982. An eyewitness stated that a person resembling Cruz was arrested by a man in military uniform accompanied by two men in civilian dress. A petition was filed with the Commission, which after unsuccessful attempts to obtain information from the Honduran government, applied Article 42 of its Regulations and presumed 'as true the allegations contained in the communication of October 9, 1982 concerning the detention and possible disappearance of Saúl Godínez in the Republic of Honduras'. The Commission pointed out to the Government that 'such acts are most serious violations of the right to life (Article 4) and the right of personal liberty (Article 7) of the American Convention'. In turn, the Honduran government argued that a writ of *habeus corpus* had been refused because it was not served correctly and another was still pending. The Commission decided to continue with the case and the Honduran government appointed an investigatory committee. The report of the latter stated that there was no evidence that Cruz had been 'disappeared' and the Commission referred the case to the Court.

7.3.3 The *Fairén Garbi and Solís Corrales* case

Francisco Fairén Garbi and Yolanda Solís Corrales were Costa Rican nationals who disappeared in December 1981 while travelling through Honduras to Mexico. The Commission submitted the case to the Court to determine whether the Honduran government had breached Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the Convention.

We can consider some of the rulings that the Court made in relation to the argument made by the Honduran government in both cases: that all the domestic remedies that were available in this case had not been exhausted. In reviewing this claim, the Court elaborated the jurisprudence of remedies under the Convention for breach of human rights. The Court pointed out that 'the rule of prior exhaustion of domestic remedies' means that a state must decide a case under its own domestic law before international proceedings become possible. A state is of course under a burden to provide legal remedies under Article 25, as the Court had itself decided in a prior ruling in the *Fairén Garbi and Solís Corrales* case (Preliminary Objections, 22, para.90). The Honduran government argued that the writ of *habeus corpus* was one domestic remedy that would apply to the facts of the case. The Court argued, however, that such a remedy was not appropriate because the writ would have to specify the place of detention, and this was obviously not possible when people were being held 'clandestinely… by state officials' (para.90). Thus: 'Procedural requirements can make the remedy of *habeas corpus* ineffective if it is powerless to compel the authorities…' (para.91) to act. Moreover, if there is evidence that a particular practice is tolerated by government then this would also render domestic remedies ineffective. In these instances the exceptions to Article 46(2) would apply and there would be no obligation on the complainant to exhaust all domestic remedies. The case highlights the fact that a determined state and a pliant or intimidated judiciary can render the idea of the rule of law meaningless. As the Court noted:

> [a]ccording to…evidence, from 1981 to 1984 more than one hundred persons were illegally detained, many of whom never reappeared, and, in general, the legal remedies which the Government claimed were available to the victims were ineffective.

In *Garbi and Corrales* the Court also went on to consider other important procedural points. The Commission was arguing that the government both tolerated a policy of disappearances and suppressed evidence of those disappearances. If it was possible to show that such practices existed then the disappearance of any given individual could be proved through circumstantial evidence or by inference. If this argument was not acceptable, it would be impossible to show that either Garbi or Corrales had been disappeared (para.127). The Court accepted this argument and went on to clarify the standard of proof required because no guidance was provided on this issue by either the Convention, the Statute of the Court or the Court's own rules of procedure. The Court stressed that the standard of proof is not as formal in international proceedings as domestic cases (para.131). The Court considered that different burdens of proof

can be used depending on the context and that the burden used depends upon that context. In the context of the case, the Court noted where a state is alleged to have breached human rights, the court has to 'apply a standard of proof which considers the seriousness of the charge', but were this standard too high, then it would be impossible to provide evidence of the violations of rights, or, in the words of the Court, be 'capable of establishing the truth of the allegations in a convincing manner' (para.132).

Very importantly, the Court was clear that human rights cases should not be seen as comparable to a model drawn from domestic criminal justice. The 'objective' of international human rights law is not to punish the state but to provide for the protection of the victims of human rights and the provision of reparations (para.136). On the facts of the case, the Court noted that circumstantial and indirect evidence were admissible, provided that they 'lead to conclusions consistent with the facts' (133). However, the Court was not willing to accept that the evidence showed that the Honduran government had been responsible for the disappearance of Garbi and Corrales. What was established, however, was that:

> in Honduras in the period in which those events occurred, there was a repressive practice of forced disappearances for political motives. That practice is a violation of the Convention and could serve as a principal element, together with other corroborative evidence, to create a legal presumption that certain persons were the victims of that practice. However, in the absence of other evidence, whether circumstantial or indirect, the practice of disappearances is insufficient to prove that a person whose whereabouts is unknown was the victim of that practice. (para.157)

The Court came to a similar conclusion in *Cruz*.

Activity 7.6

What do the cases *Cruz* and *Garbi and Corrales* tell us about a state's responsibility to provide effective remedies for human rights?

Summary

In this section, we have considered three representative cases from the Inter-American Court of Human Rights: *Rodriguez, Garbi and Corrales*, and *Cruz*. In *Rodriguez*, the Court considered the matter of the 'disappearance' of victims of torture and opponents of military regimes. The Court argued that such practices are breaches of Articles 7, 5 and 4. There is, moreover, a general breach of Article 1(1), the obligation to respect rights. The *Garbi and Corrales* and the *Cruz* cases raised similar points but also raised issues related to evidence and procedure.

7.4 Country Reports and the Inter-American Commission on Human Rights

N.B. All IAHRC Country Reports are available at: www.oas.org/en/iachr/reports/country.asp

7.4.1 The example of Colombia

As we have seen above, the Commission has the power to investigate human rights abuses and to prepare reports that bring these to the attention of the OAS and the wider international community. In this section, we will consider the Commission's reports on human rights abuses in Colombia and what they can tell us about the political context of large-scale violations of human rights. In the decade from 1980 to 1990, the Commission reported on the human rights situation in Colombia. Their reports suggest the wider failures of the Colombian state to create the institutions necessary to sustain a rule of law society. There have been further reports in 2003 and then in 2014 and these contain an important overview of the evolving political situation in Colombia and the human rights situation. In the 2003 report (2014 is the most recent report, at the time of writing) it was noted:

> The problem of violence in Colombia is long-standing and very complex. The stability of democratic institutions is negatively impacted by profound social inequalities and high indices of violence whose significance cannot be reduced to terrorist violence alone. This is a situation that demands solutions, the search for which cannot be further delayed. Nonetheless, the road to peaceful co-existence is not simple: successive governments have failed in their efforts to eradicate the violence or have had only partial or relative successes. Given this context, the complexity of the situation will no doubt require extraordinary efforts to regain peace and ensure the rule of law for all Colombians.

In 1980, during the presidency of Julio César Turbay Ayala, the Commission was invited to visit Colombia. The Colombian government was engaged in a protracted struggle with left-wing guerrillas. The Commission reported that: 'mass-scale torture was tolerated, no measures were taken to prevent and repress such abuses' (7th conclusion of the 1981 report). There were also mass arrests of alleged collaborators on the flimsiest of evidence; it is estimated that between August 1978 and July 1979 over 60,000 people suffered this fate. Mistreatment and torture of arrestees was a widespread practice.

The Commission noted that in the period between 1982 and 1986, during the Belisario Betancur presidency, the relationships between the army and the government changed, as the executive began to withdraw its support from the military's clandestine and covert operations against guerrillas. Although real efforts were made to broker peace between the various factions, the result was the growth of paramilitary groups that opposed a negotiated settlement and resisted the government's attempts to restore the rule of law. Alliances grew up between paramilitary groups, rich landowners and drugs traffickers, as clandestine operations continued against left-wing guerrilla groups. These groups were also engaged in criminal activities but there was a general perception that the amnesty process favoured them and made it hard to prosecute in the conventional courts. The Asociación Campesina de Agricultores y Ganaderos del Magdalena Medio (ACDEGAM), an alliance of right-wing political groups, was created in 1984. It was one of the major forces in sponsoring and supporting violent right-wing groups. On the political left, a truce declared with the Revolutionary Armed Forces of Colombia (FARC) in 1984 led to the formation of the Unión Patriótica (UP), a political grouping that brought together former guerrillas and other left-wing groups.

The volatile nature of Colombian politics was illustrated dramatically in 1985 when the Palace of Justice was taken over by a group called the M-19 Commando. In the ensuing storming of the building by government forces, over 100 people were killed, including half the justices of the Supreme Court. Right-wing organisations also stepped up operations against the Unión and assassinated several members of the group. The reasons for this sudden intensification of criminal activities were fears that the left was about to win control of local government and had not yet severed its ties with guerrilla forces.

The intensification of right-wing violence continued during President Barco's period in office (1986–90). These years were also marked by the growing influence of drugs cartels, which began to take over certain paramilitary groups and also increased their investments in legitimate business sectors. The government responded by declaring a state of emergency and creating new public order courts with jurisdiction over offences relating to terrorism and drug trafficking. *Habeus corpus* was restricted, and government forces assisted in their operations against both the drugs cartels and the guerrilla forces.

The Commission cites a report issued in 1981, which paints a stark picture of the human rights situation in the country:

> the general policy in human rights is organized around and based upon an analysis of the Colombian socio-political situation in the last forty years. Colombia's economic, political, social and moral structures are collapsing and the exercise of fundamental human rights is suffering as a result. In spite of the State's efforts to restore a just democracy, obstacles remain that the Government does not have the means to overcome. After four decades of progress and change, social inequalities and a concentration of wealth are still the country's most salient features. Despite its vigorous economy and cultural advancement, Colombia continues to be a country of alarming contrasts: there are those who are prospering in the tremendous economic boom, but they are far outnumbered by the many who still live in dire poverty.

The report shows that a government committed to the rule of law can be paralysed by strong oppositional groups who do not share such values. It is profoundly difficult to create a human rights culture in such a situation. Negotiations with various armed groups, and their attempted inclusion into legitimate politics, made some progress towards social reconstruction. New institutions were also created. The Office of the Presidential Advisor for Human Rights was founded in 1987, and attempts made to bring the military under control through the appointment of a civilian Prosecutor for the Military and Police Forces. An Office of the Attorney Delegate for Human Rights was also created and given the remit to investigate cases of genocide, disappearances and torture. Despite these reforms, violence remained endemic. Three presidential candidates were assassinated between 1989 and 1990, and the Attorney General, Carlos Mauro Hoyos, was murdered in February 1988. The drugs cartels continued to try and force the government's hand and to prevent the suppression of the narcotics trade, a brand of violence known as 'narcoterrorism' that continued unabated throughout the 1990s.

1990 saw something of a recovery of stability. The new president, César Gaviria Trujillo, successfully continued the pacification of the country, achieving the demobilisation of three powerful guerrilla factions. In 1992, the people of Colombia voted in favour of a new constitution, and elections were later held to determine the members of the National Constitutional Assembly. The Assembly successfully completed its task, and the new constitution entered into force on 6 July 1991. However, the Constitutional Assembly decided to dissolve Congress and to call for elections for a new legislative body. This caused something of a constitutional crisis and President Gaviria used exceptional powers to call the election. The Assembly also created a transitional legislative body, 'El Congresito', to perform certain functions until the new body was in existence. The problem was that the transitional body turned the exceptional powers that the president had used into law. This was worrying as powers that should have applied only in an emergency situation became the regular law of the land. Later, the Constitutional Court ruled that some of these powers were void but others remained. From a human rights perspective it is a matter of concern that emergency laws became part of regular law.

Efforts to pacify Colombian society continued during the administrations of presidents Samper Pizano and Andrés Pastrana. The latter created, in 1999, 'zona de distensión' ('demilitarised zone') to enable negotiations with the FARC. The extension of the zone in 2000 showed the partial success of the negotiating process, although it must be noted that as part of the ongoing reconciliation process, crimes of forced disappearance, forced displacement, genocide and torture are excluded from pardon and/or amnesty. The legal framework, resting on Law 418 of 1997, extended by Congress by Law 782 in December 2002, is described in the report:

> The laws establish, *inter alia*, that a cessation of procedure (cesación de procedimiento), a resolution of preclusion of the investigation (resolución de preclusión de la instrucción), or a resolution of dismissal (resolución inhibitoria) may be granted on behalf of those who confess and have been or were accused of or tried for political crimes, and have not been convicted by a firm judgment, provided that they choose to participate in an individual or collective demobilisation. According to these provisions, those who have benefited from a pardon or with respect to whom a cessation of procedure has been ordered may not be tried or prosecuted for the same facts giving rise to the granting of benefits. (73)

An upsurge in violence in 2002 brought an end to these negotiations and critics have also argued that those already demobilised have not been successfully reintegrated into society. In the Commission's last report from 2013 (Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, OEA/Ser.L/V/II. Doc. 49/13, 31 December 2013) the developments that had taken place in the interim and the attempt by the Government and FARC to reach a peace deal were noted. The Commission noted the evolution of the situation and looked to the future when it concluded at paragraphs 1201–02:

> The Commission notes that Colombia is engaged in a process of negotiations with the FARC, which could lead to the end of the internal armed conflict in the short or medium

> terms. Given that circumstance, attention must be paid to the state's obligations toward the past, the present, and the future. Regarding the past, the Commission has on repeated occasions stated that the serious human rights violations committed during the armed conflict cannot go unpunished. As the established precedent of the Inter-American human rights system affirms, the state must exhaust all the available means to cast light on and investigate the human rights violations committed and to punish the perpetrators. In addition, all the actions and measures taken in that regard must be focused on the victims' needs and expectations, in order to repair the harm inflicted.
>
> Regarding the present, the Commission believes the sate must ensure that the peace accords respect the principles established by international human rights law and its other international obligations, and that it must ensure, as long as the situation of internal armed conflict continues, that all victims of human rights violations are treated in accordance with the principle of equality before the law, that the protections and guarantees for preventing human rights violations are strengthened, and that the victims enjoy access to mechanisms that guarantee comprehensive redress for the human rights violations they have suffered.

The Commission has, in considering the situation in Columbia, sought to encourage the creation of a legal framework that sets out clear conditions for demobilisation of armed groups and a participatory truth and reconciliation process that would include reparations for the victims. In 2016 the Columbian government held a national referendum on the peace agreement that had been reached with the FARC with a view to a permanent settlement. Although it was rejected by the electorate, both sides publicly committed to continue to respect the ceasefire that had been in place for some time. It is clear from the Commission's reports and findings that the situation in terms of the armed conflict in general and the legal framework that applies to human rights protection and violations has evolved significantly for the better. It is of course still far from ideal but the situation is far better than it was.

ACTIVITY 7.7

What do the Commission's reports on Colombia suggest about the problems facing the government and its attempts to create a rule of law society?

7.4.2 Social reconstruction after armed conflict: the role of the Court and the Commission

Considering the situation in Colombia reinforces the sense of the magnitude of the task faced by the Inter-American system in creating and sustaining cultures of human rights in the region. In this last part of the chapter, we will look at the way that the Court and the Commission have collaborated in an attempt to develop principles that relate to social reconstruction and an elaboration of rights principles that can guide societies from conflict to peace.

The Court and the Commission have been active in developing a jurisprudence that relates to demobilisation and the disarmament of warring factions and in doing so have applied an international jurisprudence to the situation in Latin America. The guiding themes in the creation of principles in this area have been balancing the re-creation of a functioning and peaceful civil society, with a need to determine the truth about the human rights violations and atrocities that took place in the conflict and to provide reparations to the victims. The legal norms that inform this process are drawn from the Charter of the OAS and the American Declaration of the Rights and Duties of Man and, in those instances where states are signatories, to the American Convention.

In all cases, these treaties must be interpreted from the perspectives of the principles that can be found to govern international legal obligations in general and, in particular, human rights obligations. It has to be stressed that these obligations are applicable to armed conflict and so cannot be obviated by arguments that exceptional situations mean that human rights obligations are suspended. The human rights obligations entered into bind states, as international actors, but also relate to the persons under the jurisdictions of states; this is of course the peculiarity of international human rights law. As far as the Inter-American system is concerned,

these obligations are linked to the supervisory roles of the Commission and the Court. Ultimately, the 'normative framework' also includes the other international treaties, which states parties are signatories to, as well as customary law. The foundational principles derived from these sources are truth, justice and reparation as fundamental in rebuilding a culture of peace, tolerance, respect for the law, and rejection of impunity.

The work of the Court has been predicated on the need to develop more precise rules that emanate from these grounding ideas. They have been active in a number of inter-related areas.

One of the most pressing problems in social reconstruction has been the need for the survivors of violence to know the truth about the crimes they suffered and for society at large to know the truth about those who died or were murdered during armed conflict. In this sense, it is possible to speak of a right to know the truth and to compel those who were involved to reveal the truth about their activities. The Court has used Article 25 of the American Convention to provide legal remedies in this area. The starting point is that the right to truth should not be 'restricted through legislative or other measures' (Colombia Report, 2004). This means that any amnesty laws should not serve in such a way to allow the past, or the actions of actors, to be concealed. Moreover, amnesty laws should not allow victims to be deprived of remedies for any loss that they may have suffered. This, in turn, feeds into different policy initiatives. Article 25 compels states to take seriously the right to seek and receive information, to set up investigative commissions and to enable the judiciary to undertake investigations into alleged crimes and rights violations.

Furthermore, Articles 8 and 25 of the Convention require that the next of kin of a victim can obtain from the state both the relevant facts and the prosecution of those who have committed any crimes against the deceased. This is consistent with a ruling of the Human Rights Committee of the United Nations, which determined that states are under a duty to legally establish the precise details of human rights violations as part of the political processes of social reconstruction and the granting of reparations to the victims. This has been further generalised by both the Commission and the Court to a right for society as a whole to know the truth about the 'aberrant crimes' of the past.

One can appreciate that this linking of the individual right to know with a right for society at large to be told the truth is part of a much wider, complex and difficult process where the wounds of a society have to be healed through the law. Human rights are thus part of a political transformation. But this process is also a symbolic 'cleansing' of the law. In those societies that have experienced sustained civil conflict, the law itself has been compromised. As we saw above, one of the problems that the Court had to address in Colombia was the way in which the law was either abused or ineffective. The right to know can be linked to the need to effectively 'start again'; to show that an impartial and neutral rule of law society is possible. In this sense the state becomes universal, able to speak for all, rather than a partisan in an unspoken civil war.

Certain crimes must not be left unpunished as part of an amnesty process. Among these crimes are political assassinations; disappearances; rape; the displacement or forced resettlement of groups of people; torture; inhumane acts; military attacks on civilian populations; and the use of child soldiers. In relation to these 'imprescriptible' offences, states parties are under a duty to investigate and punish those responsible. In terms of the Inter-American system, the relevant Articles are XVIII and XXIV of the American Declaration and Articles 1(1), 2, 8 and 25 of the American Convention. These Articles apply whether the perpetrator is a state agent or a private party; moreover, the state in these circumstances bears the burden of bringing the prosecutions; it, rather than the victims or their representatives, must both initiate the process and ensure that it is carried through. There are also non-derogable obligations under the Geneva Conventions that mandate the prosecution of war crimes. These correspond with Articles 27 and 29 of the American Convention.

From this perspective, the fundamental principle that underlies amnesty is that the crimes that can be a subject to amnesty are rather limited, restricted to 'political

crimes or common crimes linked to political crimes' that are not serious violations of human rights standards.

The other major principle that underlies the amnesty process is the victim's right to reparations for the harm caused. The reason underlying this principle is twofold: it stresses that citizens have legal status and thus must be recompensed for harm suffered; and it is an attempt to rebuild trust in the legal system. The remedies available must be diverse; they could take the form of compensation or rehabilitation, at least as far as those whose status has suffered, but must in all cases be 'proportionate' to the offences committed. Of course, in instances of kidnapping or unlawful detention, the person's liberty should immediately be restored; people who have lost land or property may have a right to restitution; those who are the next of kin of victims of unlawful violence may have the right to compensation. These principles are also coherent with those mentioned earlier, so that society as a whole has a right to 'public recognition of the events and the responsibilities; recovery of the memory of the victims; and teaching the historical truth'. The process must also include the disbanding of armed groups and factions, and the reintegration of combatants into civil society.

Activity 7.8

Is it possible to speak of a jurisprudence of social reconstruction?

Further reading

- **Farer, T. 'The rise of the Inter-American human rights regime: no longer a unicorn, not yet an ox', *Human Rights Quarterly* 19 1997, pp.510–46.**
  Farer's article is interesting as it provides an account of the Inter-American system, and an important sense of how it contrasts with the European system.
- **Antkowiak, T.M. and A. Gonza *The American Convention on Human Rights: essential rights*. (Oxford: Oxford University Press, 2017) [ISBN 9780199989683].**
  This is an accessible and succinct analysis and overview of the American Convention and its operation and is well worth consulting.

Summary and conclusion

The focus of this chapter has been the Inter-American system of human rights. We have looked in detail at the American Convention and the powers and functions of the Commission and the Court. We have seen that both bodies are developing a jurisprudence that engages with the particular political problems of the region: the wide-scale abuse of human rights. In examining the reports of the Commission on Colombia, we have seen that human rights rest on a functioning rule of law society. Achieving such a society demands much more than legal principles; what is necessary is a cultural commitment to democracy. The Court and the Commission are attempting to encourage the growth of democratic government in the region and to move away from the legacy of armed conflict and organised crime that has been the traumatic experience of most Latin American nations.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the role of Country Reports**
- **summarise the jurisprudence of the Court and the Commission as it applies to the process of amnesty and social reconstruction.**

Sample examination question

'Protecting human rights in Latin America raises some profound problems for those bodies charged with this task in the Inter-American system.'

Discuss.

Advice on answering the question

The statement for discussion in this question does indeed identify a distinctive feature of human rights protection in Latin America. The question demands that one both identifies the bodies responsible for human rights in the Inter-American system and then provides some commentary on the nature of the problems that they face. Thus, the first part of the essay should present an outline of the Court, the Commission and their powers within the context of the Inter-American system. The essay must then go on to analyse the difficulties that these bodies face. In general, the 'profound problems' are related to a region in which governments have not been committed to the rule of law, or to the respect of human rights. Accounting for this is perhaps outside the scope of the question but one could at least observe that many scholars have made a contrast between the American and European systems.

Although Europe has seen civil conflict, massacres and wars, the European system has perhaps not had to deal with human rights abuses on a massive scale. It would be possible to make use of the reports on the situation in Colombia to exemplify and elaborate some of these points. Human rights can only flourish in rule of law societies. It may be possible that with the amnesty process, Colombia is moving towards a more settled political order and that this will provide a sure foundation for human rights.

NOTES

8 The African Union system for the protection of human rights

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Introduction

In this chapter we examine the third of the regional systems we will be considering. The Arab League and ASEAN (Association of Southeast Asian Nations) systems are still far too embryonic to be worthy of detailed study, although we have made reference to them in earlier chapters. The African system is the youngest of the three regional systems we will be examining in detail. Much like the OAS system, the African system has faced very significant challenges. Armed conflicts, famines, endemic poverty, economic underdevelopment, corrupt and brutal dictatorships are to name but a few of the problems faced in trying to protect, respect and fulfil human rights in the African Union context. The African Union system also provides a useful basis in which to examine the cultural context of rights. Cultural practices and approaches to rights, duties, individuals and society in Africa encompass a tremendous number of perspectives. Neither Europe nor the Americas, or indeed any group of states, are culturally or socially homogenous. The African continent, however, represents possibly the greatest variety of approaches and challenges. There is the Arab-speaking and predominantly Muslim North Africa, notwithstanding the very real differences between the populations there – for example, Berbers and Arabs and also between the different variants of Islam practised and other religious groups such as Coptic Christians and Jews. There is also a significant racial mix in the predominantly Arab-speaking North. Sub-Saharan Africa is an enormously complex and intricate web of diverse societies, cultures, ethnicities, races and faiths. In religious terms, there are very significant Muslim and Christian populations as well as a large number of adherents of various forms of animalism and other forms of spiritualism. Cultural practices vary incredibly. It is in fact incorrect to speak of an African approach to any issue as some commentators and politicians from Africa have; there are simply approaches adopted by persons, communities and societies which hail from the African continent. With this mind, we will trace the transformation of the Organisation of African Unity into the African Union, and examine the human rights aspects of both the old and the new body. Established in July 2001, the African Union is the current regional organisation for Africa.

The African human rights system rests on four treaties:

- The Convention on Specific Aspects of the Refugee Problem in Africa (came into force in 1974)
- The African Charter on Human and Peoples' Rights (1986)
- The African Charter on the Rights and Welfare of the Child (1999)
- The Protocol on the Establishment of an African Court on Human and Peoples' Rights (the Protocol came into force in January 2004, and the Court has now been established).

A Protocol on the Rights of Women has also been adopted. This Protocol came out of a concern that, despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments adopted by the majority of states parties, women in Africa still suffer from discrimination and marginalisation. Two of these treaties have enforcement mechanisms. The African Commission on Human and Peoples' Rights was established by the African Charter on Human and Peoples' Rights.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the role of the Organisation of African Unity and the African Union in protecting human rights**
- **outline the basic provisions of the African Charter on Human and Peoples' Rights (1986)**
- **outline the basic provisions of the Protocol on the Rights of Women**
- **outline the basic provisions of the African Charter on the Rights and Welfare of the Child (1999)**
- **outline the basic provision of the Convention on Specific Aspects of the Refugee problem in Africa (1974).**

Core texts

- **Bantekas and Oette, Chapter 6 'Regional human rights treaty systems', Part 4 (to end of chapter) AND**
- **De Schutter, Chapter 11 'Regional mechanisms of protection', Part 3.**

Further reading

- **Alston and Goodman, Chapter 11 'Regional arrangements', Section C 'The African System'.**
- **Killander, M. 'Africa' in Moeckli et al. (eds).**
- **The African Union has a website of limited use in English, French and Arabic.**
- **The African Court on Human and Peoples' Rights has a useful website in various languages.**
- **The African Commission on Human and Peoples' Rights has its own website.**

It will be useful for you to spend an afternoon or so going through these websites at your own leisure once you have worked your way through the material and readings.

- **If you have the time and inclination you may wish at some point to read: Viljoen, F. 'The impact and influence of the African regional human rights system on domestic law' in Sheeran and Rodley (eds), pp.445–65 (available in VLeBooks via the Online Library). This considers, as the title suggests, the role played by the African systems in the domestic law of African states. Some of it will seem rather abstract but it is worth persevering with as it highlights some of the limited internal changes the African systems have led to.**

8.1 The Organisation of African Unity

The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, Ethiopia. The Organisation's main objective was to bring to an end the control of Africa by those powers that had established colonial and dependent territories in the continent and to end the apartheid systems of government in South Africa, South West Africa (now Namibia) and Southern Rhodesia (now Zimbabwe). Human rights were not, as such, the Organisation's main focus. Indeed, although the OAU was active in the anti-colonial struggle, it was perceived that the Organisation was ignoring human rights abuses within African states that had achieved independence. The killing of tens of thousands by Idi Amin in Uganda is a good example, as was the brutal authoritarian regime of Mobutu Sese Seko in Zaire (now the Democratic Republic of Congo), both of whom even served periods of time as chairperson of the OAU. Responding to these criticisms, the Organisation took action. Work on drafting a Charter began in 1979 (around the same time Amin was overthrown in Uganda) and the African Charter on Human and Peoples' Rights came into force in October 1986. We will look in detail at the provisions of the Charter itself below. It is necessary, however, to first examine the institutions created by the Charter.

8.1.1 The Commission

Article 30 of the African Charter on Human and Peoples' Rights creates 'an African Commission on Human and Peoples' Rights'. This is composed of 11 members serving in their personal and independent capacities and not as representatives of their countries. Its main functions, as described in Article 45, are the promotion and protection of human and peoples' rights in Africa and the interpretation of the Charter.

The Commission's promotion of the Charter is outlined in Article 45(1). To this end, the Commission has the power to 'collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments'.

The Commission's activities in these areas have allowed it to work with non-governmental organisations (NGOs) and pressure groups to build up an archive that can be used for lobbying and educational purposes. The role played by NGOs in the work of the Commission was recognised and intensified in 1988 when observer status was granted to certain NGOs. The Commission has also appointed a number of Special Rapporteurs whose role is to report on various human rights areas, and their work has led to a number of normative developments. Rapporteurs have always been members of the Commission and thus the synergy between their work is understandable. Working groups have also been established, including members who are not commissioners so as to bring in expertise and a perspective external to the Commission.

The tasks of the Commission are further outlined in Article 45(1)(b). The Commission is obliged to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental problems upon which African governments may base their legislation'. This allows the Commission to cooperate with other institutions in the development of a body of African human rights law.

How does the Commission ensure the protection of rights as it is charged under Article 45(2) and how can it ensure that the state does not violate peoples' rights? The Charter details a 'communication procedure' that is a system by which an individual, NGO or group of individuals can petition the Commission about human rights abuses. Thus the system is broader than an 'individual communications' procedure as exists under the ECHR or the ICCPR, for example. An inter-state complaints system also exists and a state party can petition the Commission if it believes that another state party has violated the Charter. If a communication meets the conditions of Article 56 of the Charter, the Commission formally accepts it for consideration. Article 56 states that the Commission can proceed to consider a communication only after it has ascertained that all local remedies have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. The Commission may, if it deems it necessary, ask states to provide it with all the relevant information and, when it is considering the matter, it may invite states to make oral or written presentations. Of the admissibility criteria, the most important in practice is the need to exhaust all domestic remedies. The African system, as with all human rights treaties, is subsidiary in nature and thus the state must be given every opportunity (at the domestic level) to address the grievance. If the Commission is satisfied that the criteria have been satisfied then it informs the state that has been accused of rights violations and invites it to submit a response. Under the terms of Article 52 of the Charter, the Commission must take all appropriate measures to secure an 'amicable solution' between the complainant and the state. If the Commission fails to secure such a settlement then it will determine whether or not there has been a violation of the Charter and make recommendations to the state and to the OAU on what remedies are required. In emergency situations – when the life of the victim is in imminent danger, for example – the Commission can request that the state delays any action and awaits the Commission's decision. The Commission's final decisions are recommendations. It should be noted at this point that certain communications can now be referred to the African Court, and we will deal with that process below. Returning to those communications dealt with solely by the Commission, the Commission has not laid down procedures to supervise the implementation of its recommendations. However, the Secretariat of the Commission does correspond with states that have been found to have violated the provisions of the Charter, calling upon them to honour their obligations under Article 1 of the Charter '…to recognise the rights, duties and freedoms enshrined in this Charter and…adopt legislative and other measures to give effect to them'. Compliance with the Commission's recommendations cannot be ensured and depends on the goodwill of the state in question; such goodwill is routinely in short supply.

The Commission can also undertake on-site visits or missions to investigate alleged rights abuses and to make recommendations to the state in question. Some such missions are designed to engage with a state and also civil society groups to

understand the situation better. Other visits can either be on the Commission's own initiative, where it considers there are widespread human rights abuses, or they can be related to a communication. Under Article 62, the Commission considers the reports that states are required to submit every two years on the measures taken to further and preserve the rights of the Charter. These have tended to be rather patchy at best in their content. Counter or shadow reports can be submitted by individuals and groups and specific questions can be asked of state representatives. The Commission studies these reports, engages at the session in dialogue with representatives from the states and makes recommendations, if necessary.

Activity 8.1

How does the Commission protect human and peoples' rights?

8.1.2 The African Court on Human and Peoples' Rights

As is clear from the discussion above, the African Charter did not establish a Court, only a Commission. That should not really surprise us for a number of reasons. First, in the comparable Council of Europe (CoE) and OAS systems, their respective Commissions were functioning and key actors in the machinery established. Second, under both the CoE and OAS systems it was not compulsory to accept the jurisdiction of the human rights courts that had been established; it still is not compulsory under the OAS system. Third, when the African Charter was adopted, the majority of African states were not democracies; indeed, most were fairly despotic regimes. Such states were unlikely to agree to a Court being established or to it having extensive powers. By 1994, the OAU Assembly (now the AU Assembly), the supreme organ of the organisation which comprised of the heads of state and governments from all Member States, felt that it was appropriate to consider establishing a Court. A Protocol was thus drafted and agreed in 1998, entering into force six years later in 2004. At the end of 2021, 30 states had signed and ratified the Protocol. Twenty-two had signed but not ratified it, with the remaining three states (Cape Verde, Morocco and Eritrea) having neither signed nor ratified the Protocol. The Court is based in Arusha, Tanzania – which has become a continental hub for African-focused courts and tribunals. The experience of the African Court on Human and Peoples' Rights has not to date been a productive one. As of the end of 2020, 295 applications had been submitted or considered and not one had produced any useful or significant jurisprudence. Some of the lack of dynamism in the Court undeniably comes from the fact that the African Union has decided to try to consolidate some of the institutions that have been set up. There are a number of other transnational courts dealing solely with matters pertaining to African states and the AU Assembly has decided to merge two transcontinental institutions to create an African Court of Justice and Human Rights. The basis for this is the 2008 Protocol on the Statute of the African Court of Justice and Human Rights, which seeks to merge the African Court on Human and Peoples' Rights with the Court of Justice of the African Union. By the end of 2020, very few of the 55 African states had ratified the 2008 Protocol. Even this has been compromised as there is a further Protocol from 2014 seeking to amend the 2008 Protocol, which is not in force either: in fact, only a handful of States have signed it. The 2014 document is rather confusingly entitled 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights'. It is therefore hardly surprising that the African Court on Human and Peoples' Rights has not been productive or made a major contribution to human rights protection in Africa as it is currently existing in a vacuum of institutional uncertainty.

8.1.3 The Charter

Notwithstanding some of the institutional, normative and organisational developments discussed above, it is still the 1981 African Charter on Human and Peoples' Rights that forms the basis of Africa-specific human rights protection. The 1981 Charter builds on the objectives of the Charter of the Organisation of African Unity. It states as its foundational principles: 'freedom, equality, justice and dignity'. These are the principles that underlie the eradication of 'all forms of colonialism from

Africa', coordinate 'cooperation and efforts to achieve a better life for the peoples of Africa' and 'promote international cooperation'. The Charter of the United Nations and the Universal Declaration of Human Rights remain constant points of reference. The essentially African nature of this articulation of human rights is then stressed.

The Charter is an elaboration of the 'historical tradition and the values of African civilisation', a set of concepts that in turn are linked to the 'concept of human and peoples' rights'. Peoples' rights becomes a fundamental concept that allows human rights to be posited:

> …fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights.

The other essential aspect of the African notion of human rights is the emphasis on duties and not just on rights. It is often argued in Western political rhetoric that with rights come responsibilities. The notion of responsibilities is similar to that of duties – this suggests, however, that rights can only be enjoyed if there is a *quid pro quo* of some sort. If one considers human rights to be individualistic and to be enjoyed as they exist due to the inherent dignity of humans, then rights do not necessitate duties. In the African Charter, however, which recognises more expressly than other human rights treaties that individuals are part of a society and that there are reciprocal responsibilities, it is noted that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. This claim to an African tradition of human rights also has to be related to the political circumstances of the Charter. There are two related concerns. The Charter stresses the right to development and the fact that civil and political rights cannot be disassociated from economic, social and cultural rights. The Charter is thus essential to the liberation struggle:

> Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.

We examine further the distinctive features of the Charter below.

8.1.4 From the OAU to the AU

In 1999, the OAU called for the establishment of an African Union (AU). This new body would have different and broader objectives. The Constitutive Act made provisions for a transition from the old to the new body and for the replacement of the Charter of the OAU by the Act itself. The objectives of the Union are to:

- 'achieve greater unity and solidarity between African countries and the peoples of Africa'
- preserve the sovereignty of its Member States
- work towards the 'political and socio-economic integration of the continent'
- promote common positions on matters of importance
- sponsor international cooperation, peace, security and stability
- promote democracy and good governance
- integrate the continent into the global economy
- promote sustainable development
- raise living standards on the continent
- promote research and public health.

The Constitutive Act also has an explicit concern with human rights: the AU is tasked with the promotion and protection of human rights 'in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. These objectives rest on certain principles.

One group of principles stresses the need to preserve the sovereign equality of nations and to preserve the borders achieved at independence, although the achievement of a 'common defence policy' may mean some negotiation of sovereignty. A second group of principles concerns peaceful resolution of disputes and 'prohibition of the use of force or threat to use force among Member States of the Union'. These principles extend to cover the right to request intervention from the Union in order to 'restore peace and security'. The principles are also careful to further qualify sovereignty with an important exception: 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.

The African Union has to be seen in the context of the New Partnership for Africa's Development (NEPAD). NEPAD grew out of an OAU initiative to develop a plan for the social and economic development of the continent; in particular, to tackle escalating poverty levels, underdevelopment and the marginalisation of Africa in the world economy. Part of NEPAD's broad remit is a concern with good governance and human rights that builds on the principles of the Constitutive Act.

Activity 8.2

a. What is the nature of the African Union's concern with human rights? Does the AU offer any human rights advantages over the OAU?

b. Prepare a short spoken presentation (one minute) on the changes that have occurred in the human rights field as a result of the change from the OAU to the AU.

No feedback provided.

Summary

The OAU (1963) has its roots in the struggle against colonialism. Human rights were not, at first, one of its priorities. However, the creation of the African Charter on Human and Peoples' Rights in 1986 made human rights far more central to the work of the Union. Like the American Declaration, or the European Convention, the African Charter can be seen as both part of the general tradition of human rights and as reflecting specific national and international cultures. For instance, the African Charter contains more of a stress on duties and peoples' rights than other international documents and also reflects the struggle against colonialism. In 1999, the OAU became the AU. This change reflects a refocusing of the objectives of the organisation towards good governance and regional economic cooperation.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the role of the Organisation of African Unity and the African Union in protecting human rights.**

8.2 The African Charter on Human and Peoples' Rights (ACHPR)

In this section, we will give an overview of the rights that the ACHPR provides and then turn to look in detail at the distinctive features of the Charter.

The main Articles of the Charter are as follows.

Article 2: the right not to be discriminated against on the grounds of 'race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

Article 3: the right to equality before the law.

Article 4: the right to life and integrity of the person.

Article 5: the right to respect and dignity. This Article includes a prohibition on slavery, 'torture, cruel, inhuman or degrading punishment and treatment'.

Article 6: the right to liberty and to the security of the person.

Article 7: the right to have [his/her] case heard. This Article contains numerous due process guarantees.

Article 8: guarantees 'freedom of conscience, the profession and free practice of religion'.

Article 9: the right to receive and disseminate information.

Article 10: the right to free association.

Article 11: the right to assemble freely.

Article 12: the right to freedom of movement and residence within the borders of the state.

Article 13: the right to participate freely in government.

Article 14: guarantees the right to property.

Article 15: gives individuals the right to 'work under equitable and satisfactory conditions' to 'receive equal pay for equal work'.

Article 16: the right to enjoy the best attainable state of physical and mental health.

Article 17: the right to education. Article 17(3) outlaws 'discrimination against women' and also makes it a duty of the state to 'ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.

Article 18: declares that the 'family shall be the natural unit and basis of society' and places a duty on the state 'to assist the family'.

We now turn to the distinctive features of the Charter: the concept of peoples' rights and the concept of duties.

8.2.1 Peoples' rights

Key to this are Articles 19–24.

Article 19: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.' Article 19 reflects the anti-colonial inspiration of the Charter. It specifically relates the equality principle to the problem of domination.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

It is clear that Article 20 builds on Article 19. Whereas Article 19 elaborates a principle of equality, Article 20 articulates a right to existence that is explicitly related to the right to self-determination. This is the right to determine 'political status' and again refers to the struggle against imposed governments. The principle of self-determination is linked to the right to engage in a political struggle against foreign domination and the associated right to aid in the liberation struggle.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
3. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
4. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 21 can be seen as an elaboration of Article 20 in that it states one of the consequences of self-determination: the claim over a people's ownership of wealth and resources. On a practical level, this Article would mean that a nation could claim ownership of resources within its territorial boundaries, and oversee their exploitation in the interests of the nation as a whole. The Article would be too limited if it referred to a nation's ownership of resources. Certain territories, still at the time under colonial government, could not be considered nations as such. The Article was consequently broadly framed. It is important to consider the communitarian underpinnings of this Article.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Read in the context of Article 21, Article 22 links ownership of resources to a right to development. This right could be seen as an element of the anti-colonial struggle. One aspect of colonialism was the underdevelopment of colonial territories and the linking of their economies to those of the colonial powers. Once nations had successfully achieved their independence, it was necessary to develop economic resources and capacity. The right to development gives a legal and political form to this aspiration.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between states.
2. For the purpose of strengthening peace, solidarity and friendly relations, states parties to the present Charter shall ensure that:
    a. any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other state party to the present Charter
    b. their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.

Article 23 relates principles of the UN Charter to the African political situation. Article 23(2) is interesting. The newly independent states in Africa, with unsettled borders or restive populations unhappily included into new nations, were experiencing political instability. Article 23(2) attempts to resolve this problem and affirms a principle of national sovereignty and non-interference in national affairs.

Article 24

> All peoples shall have the right to a general satisfactory environment favorable to their development.

Article 24 brings together a number of concerns with the integrity of the environment and the need to safeguard social and economic development. All these Articles refer to 'peoples' rights'. If we think of 'peoples' in another international law and human rights law context – self-determination – we can see that there it is peoples as a nation. But here we are considering beyond just the level of the nation – to communities, groups, minorities as well as nations. Thus peoples' rights refer in part to the role that rights play in a political or other struggle to achieve change. In this sense, rights are part of a political 'struggle', a focus around which struggles or movements can organise themselves. One can think of development or the recognition of linguistic and cultural rights as examples. It also considers the notion of rights as political as well as moral claims. They make sense as collective rights that can be then 'asserted' through political rather than legal action but lead to legal change.

8.2.2 What are collective rights?

Peoples' rights are usually linked with the right to self-determination – but in law this has become almost exclusively linked to the notion of sovereign states and the problem of secession. But when one considers self-determination, it is clear that it is impossible to separate the legal from the broader political issues; this highlights that the discourse of rights never exists separately from politics. Looked at a different way, these are genealogical issues – concerns about how a new category of rights should relate to the existing catalogue of rights. One perspective is that new-generation rights reinforce existing rights by becoming extensions of existing rights. Thus the recognition of the rights of indigenous peoples can be seen as extensions of existing rights to property, language, culture and so forth. These new developments force existing rights discourses to face new political problems. To argue otherwise would turn rights into a static concept. However, it is equally possible to argue that the very notion of third- (and perhaps even second-) generation rights 'devalues' and 'undermines' the foundational notion of rights and thus detracts from their fundamental nature.

An extension of this criticism would hold that it turns a rights discourse into a set of utopian political claims, rather than arguments that can be made by lawyers in courts. If one looks at the UDHR, however, one comes across Article 28 that states: 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised' – a statement that was not realised in the drafting of the Covenants in 1966. To the extent that debates over third-generation rights return to this omission, it might be suggested that the problems are not so much those of external political factors being brought to the debate, but the shape of the debate in its most official forms. Peoples' rights are thus a feature of the Charter. We will now turn our attention to the concept of duties.

8.2.3 Duties

Article 27

1. Every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 27 makes clear that rights correlate with duties and they can only be understood by seeing the individual holder of rights as a member of a community. Rights are qualified by virtue of this membership.

Article 28

> Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

> The individual shall also have the duty:
>
> 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need
> 2. to serve his national community by placing his physical and intellectual abilities at its service
> 3. not to compromise the security of the state whose national or resident he is
> 4. to preserve and strengthen social and national solidarity, particularly when the latter is threatened
> 5. to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law
> 6. to work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society
> 7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society
> 8. to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Article 29 sets out the most extended definition of the duties of the individual. They are owed to the family, the nation and to African cultural values. This makes explicit another pervasive concern: the concern with duties is an authentic mark of African culture. Thus, African human rights must represent this cultural development. The concept of duties is the second feature that the drafters of the Charter believed distinguished the uniqueness of African human and peoples' rights. This is not a theoretical innovation in itself; rather it stakes its claim on the originality of the emphasis that these duties are given in the Charter. This emphasis on duty is justified by referring to traditional African culture. The claim is also made that it is at this point in the Charter that African cultural values achieve a legal form. The duties describe an individual who is rooted in the context of family, community and nation. Already, then, there is a transposition of the notion of the traditional community to the notion of the nation: in other words, because tradition holds it clear that an individual has duties to kith and kin, then it follows that they should also have duties towards their nation. The Charter makes the link between duties and the state because the liberation struggle was focused on achieving independence for colonial territories. In that sense, the obvious focal point is the state, but the post-colonial state is not an end in itself when it comes to ending oppression. The experience since independence of many African states is not a happy one when it comes to protecting rights. Does the notion of duties to the state thus mean that once independence has been achieved, individual rights are always to be limited by a duty towards the state? Even, for example, when the state is systematically and egregiously abusing peoples' rights? There is a balance here that needs to be struck between the need to 'preserve and strengthen positive African cultural values' and the need not to 'compromise the security of the state'. It is clearly possible to suggest that preserving cultural values may be best served by opposing a corrupt and oppressive state and thus to satisfy the demands of duty. The problematic status of the concept of rights in the Charter can be linked to the criticism that the Charter's enforcement mechanisms are still weak and there has not been

the development of a vigorous human rights culture in Africa. To assess these claims, we will look at the way the ACHPR was used in a landmark case that received global attention.

ACTIVITY 8.3

What are the distinctive features of the ACHPR and do you think they add or detract from the protection of rights?

8.2.4 The case of Ken Saro-Wiwa and the Ogoni Eight

The role of the ACHPR and the Commission can be better understood by referring to a specific example of how they operate. We will focus on the execution of the Nigerian writer and activist Ken Saro-Wiwa and other activists to see how petitions to the Commission can produce political and legal changes. But these must be seen in the broader context of wider political and legal developments and thus the work and impact of the Commission cannot be considered in isolation. Before looking at the events in question, it is worth examining the situation up to then in Nigeria more broadly.

Since gaining independence in 1960 from the United Kingdom, Nigeria has enjoyed several periods of democracy although military rule has been commonplace. In June 1993 presidential elections, organised by a military government, were held and subsequently annulled. In November 1993, as a consequence of the ensuing turmoil and civil disturbances, the then Nigerian Defence Minister Sani Abacha assumed power. He dissolved all democratic political institutions and replaced elected governors with military officers. In June 1998 Abacha died and was replaced by General Abubaker, who undertook a very different course of action from his predecessor. The Provisional Ruling Council commuted the death sentences of a number of political opponents and also released a substantial number of political prisoners. The government also took several steps towards restoring workers' rights, which had deteriorated seriously under previous military regimes. In August 1998 the National Electoral Commission (NEC) was ordered to conduct elections, which were held in May 1999 and won by Chief Olusegun Obasanjo, who was sworn in as the democratically elected president of the Federal Republic of Nigeria. He was subsequently re-elected in 2003. In April 2007 state and federal elections were held, which, although widely considered to be deficient, returned Umaru Yar'Adua of the ruling People's Democratic Party as president. This was the first time in Nigeria's history that power was successfully democratically transferred from one civilian leader to another. Since then power has continued to be transferred peacefully after the holding of national elections , with the last being in 2019. It is, however, a fragile democracy.

Nigeria has a population of over 205 million (estimates and census dates vary), which is made up of about 200 ethnic groups, 500 indigenous languages and two major religions – Islam and Christianity. As a consequence of tensions between its various religious and ethnic communities, Nigeria has suffered from very serious inter-communal violence throughout its history. This can be evidenced not only by the Biafran civil war of the late 1960s but also more recent events such as the killing of about 700 people in 2004 as a consequence of inter-communal violence in Plateau State. Boko Haram (an extremist Islamist group) based in the north of the country and their brutal activities, such as kidnappings, are notorious.

The UN Human Rights Treaty Body findings, relating to the period prior to 1998, which is the era we will be examining, paint a very bleak picture of the human rights situation there. Arbitrary arrest, summary execution and other extrajudicial killings, torture, restrictions on the freedom of expression and association, widespread discrimination on the basis of ethnicity, race and gender, executive control over the judiciary, as well as an ineffective and poorly functioning judiciary were among a host of problems identified as being widespread. The situation was such that a Special Rapporteur, appointed in 1995 by the then Commission on Human Rights solely to deal with Nigeria and the reports of the Special Rapporteurs on extrajudicial, summary or arbitrary executions and independence of judges and lawyers, confirmed the extent of the problems that existed at the time.

We return to our case study concerning Ken Saro-Wiwa and eight other activists. They had been protesting about the social and economic marginalisation of the Ogoni ethnic grouping to which they belonged. The Ogoni live in the Delta Region of Nigeria and their lands are rich in oil. The Nigerian government was accused of extracting oil with little regard for the despoliation of the region or for financially compensating the Ogoni. Human rights abuses by the Nigerian police and military had also allegedly taken place. After rioting in May 1994, during which four Ogoni leaders were murdered, Ken Saro-Wiwa and his eight co-accused found themselves before a Civil Disturbances Special Tribunal.

Later, an ad hoc tribunal was established for their trial. Reviewing the case, the Special Rapporteur for the UN found that the rioting had resulted from government agents stirring up dissent between the Ogoni and neighbouring ethnic groups. The Tribunal itself was constituted in contravention of due process. Following procedures established by the military government, the judges (including an army officer) were appointed by the executive. As the United Nations report pointed out, this was in direct contravention of the basic principle of the right to trial by an impartial court. The constitution of a tribunal in such a way is also in breach of the African Charter of Human and Peoples' Rights (Article 7; Article 26) and the International Covenant on Civil and Political Rights (Article 14(1)). Indeed, a challenge was filed in the Constitutional Court, but it was not heard. There were further serious breaches of due process in the conduct of the trial, including exclusion of evidence that shed serious doubt on the prosecution case. This was accompanied by military harassment of the defence counsel.

These events were part of a broader series of trials which were essentially purges of opponents. Saro-Wiwa and his eight co-accused were tried for their alleged roles in the killings of four politicians in May 1994. In October 1995 the Tribunal sentenced Saro-Wiwa and the others to death and they were subsequently executed in November 1995. In 1995 the military government also alleged that 40 military officers and civilians, mostly journalists and human rights activists, were engaged in a coup plot. A secret tribunal convicted most of the accused and 13 death sentences were handed down. Saro-Wiwa's case, which we are concerned with, was petitioned before the African Commission.

In 1999 the Commission affirmed that there had been a breach of Article 5 of the African Charter. Saro-Wiwa and his co-defendants had been subject to ill-treatment during their imprisonment and interrogation. The government had effectively failed to recognise the 'legal status' of the human being. Breaches of Article 4, which protects the inviolability of the human being, supported this argument. There were also breaches of Articles 6 and 7. These Articles can be read as protecting due process, specifically aimed at outlawing arbitrary detention and specifying the standards that must govern the way in which a trial is conducted. The Nigerian government had also failed to uphold its obligations under Article 10, affirming the right of free association.

In 2001, a later decision of the Commission determined that the Nigerian government was in breach of a number of Articles of the Charter. The decision noted that although the Nigerian government is entitled to produce oil, this entitlement is qualified by certain duties and obligations. Article 21 is precise in stressing that exploiting natural resources is to be undertaken in an equitable manner and in the interests of 'the people'. Where degradation has occurred as a result of industrial extraction of natural resources, those affected have the right to compensation. Furthermore, the Article specifies that African governments should work to 'eliminate all forms of foreign economic exploitation' by multinational corporations and 'international monopolies'. The Commission stressed that governments have a duty to protect their citizens against acts by private parties.

It was also argued that the Nigerian government had violated two further Articles of the Charter. Article 24 places on the state the duty to preserve the environment to the extent that it is 'favourable' to people's 'development'. Article 16 relates to the state's manifold duties to safeguard the mental and physical health of individuals. The government had breached both Articles as it had participated in polluting the environment, caused harm to the people of the Delta region and had failed

to protect both people and the environment from the degradation caused by the Shell Consortium. The Nigerian government was also in breach of the obligation to undertake studies of the Ogoni lands with a view to assessing damage to the region. Those arguments were run alongside a claim that the government had not guaranteed the right to property under Article 14 and, drawing on a number of Articles, that the right to shelter had also been infringed by the destruction of Ogoni villages. The Commission also accepted arguments on the infringement of the right to food. Although this was not directly stated in the Charter, it was a clear implication of reading together the Articles protecting the right to life (Article 1), the right to health (Article 16) and the right to economic, social and cultural development (Article 22).

Although the African Commission's decision has been criticised, there is a sense in which it represents an important intervention in the political development of African democracy. During the period of military rule, the provisions in the Nigerian constitution that incorporated the African Charter on Human and Peoples' Rights had been suspended by the military. The fact that a civilian administration had returned to power suggests that there would also be a return to due process and a renewed commitment to human rights. The Commission noted, however, that the Nigerian government had not responded to communications about the availability of domestic remedies and hence the status of the Charter in Nigerian law was uncertain. Moreover, the Nigerian government acknowledged that there were ongoing abuses of the Ogoni and their land by oil companies operating in the region. If one looks at the broader human rights situation in Nigeria since democratically elected governments have consecutively held power, it is clear that, while very far from perfect, there has been a significant improvement. The credit for this does not lie with the African Commission but it has to be seen as part of a process, and the decision is in part vindication for the Ogoni people and part of the process of reconciliation and rehabilitation. In terms of remedies, the African Commission's decision merely reminded the Nigerian government of the importance of the matter. Although there is a symbolic importance to this type of utterance, it leaves a great deal to be desired in terms of compensation for the abuses suffered. This is an area that remains within the sovereign competence of the state.

Activity 8.4

Although the ACHPR has been criticised for having weak enforcement mechanisms, the Commission has played a positive role in highlighting human rights abuses. Discuss.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the basic provisions of the African Charter on Human and Peoples' Rights (1986).**

8.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

The Women's Protocol, which entered into force in 2005, places the rights of women in the context of social, economic and political development. The ACHPR offers inadequate protection to women. Consider Article 18: it prohibits discrimination against women, but only in the family; there are no provisions relating to a right to consent to marriage or to equality within marriage. The Charter's emphasis on African values also does not take sufficient cognisance that some traditional practices threaten the life and well-being of women. Although the Women's Convention has been ratified by many African nations, its provisions still reflect a European cultural heritage, which the African Charter as a whole has sought to rebalance, and needs to be revised within the context of the developing world. The Protocol presents itself as a development of the Charter. The Protocol refers back to Article 2 of the ACHPR and the principle of non-discrimination. It also refers to Article 18 of the Charter that calls on all states parties to 'eliminate every discrimination against women'. Articles 60 and 61 are

also relevant as they recognise regional and international human rights instruments and call for African practices to make reference to these international norms. Women's rights are presented by the Protocol as being essential for development and consistent with the principle of promoting gender equality stated in the Constitutive Act of the African Union and by NEPAD.

8.3.1 The main provisions of the Protocol

Article 2 places a duty on states to 'combat all forms of discrimination against women through appropriate legislative, institutional and other measures'. This gives rise to a number of obligations. States must:

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

Article 3, the Right to Dignity, covers 'the right to respect as a person' and the implementation of 'appropriate measures to prohibit any exploitation or degradation of women'.

Under **Article 4**, the Rights to Life, Integrity and Security of the Person, 'All forms of exploitation, cruel, inhuman or degrading punishment and treatment' are to be prohibited. This includes a prohibition on 'all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public' as well as duties to 'eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women' and also to prevent and condemn 'trafficking in women'.

Article 5, Elimination of Harmful Practices, provides that 'all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards' are to be prohibited.

Article 6 relates to marriage and states 'women and men' should 'enjoy equal rights and are regarded as equal partners in marriage'. Legislation must be enacted that guarantees that:

a) no marriage shall take place without the free and full consent of both parties;

b) the minimum age of marriage for women shall be 18 years;

c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;

d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;

e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;

f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;

g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;

i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;

j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Article 7 states that women and men enjoy equal rights in relation to separation, divorce and annulment of marriage. Legislation must be enacted that ensures that:

a) separation, divorce or annulment of a marriage shall be effected by judicial order;

b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;

c) in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;

d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 8 concerns access to justice and equal protection before the law and states that women and men are equal before the law. **Article 9** places a duty on states to promote the 'equal participation of women in the political life of their countries'; its provisions also cover electoral equality. Under **Article 10**, women have a right to peace, which is a right to 'participate in the promotion and maintenance of peace' through institutions dedicated to conflict prevention, and asylum seekers have a right to protection. **Article 11** relates to the protection of women in armed conflicts. Among its provisions is a duty placed on states to 'take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier'.

Article 12 details the right to education and training. The state has a duty to 'take all appropriate measures to…eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training'.

Article 13 details economic and social welfare rights. States must ensure that women are guaranteed 'equal opportunities in work and career advancement and other economic opportunities'. This covers matters such as equality of access to employment; equal remuneration for jobs of equal value for women and men; transparency in recruitment; and the freedom to choose an occupation. Government also has duties to:

- establish a system of protection and social insurance for women working in the informal sector
- introduce a minimum age for work and prohibit the employment of children below that age
- take the necessary measures to recognise the economic value of the work of women in the home
- guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors
- ensure the equal application of taxation laws to women and men.

Article 14 details health and reproductive rights. This right includes:

- the right of women to control their fertility
- the right to decide whether or not to have children, the number of children and the spacing of the children
- the right to contraception

- the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS
- the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.

The Article goes on to place duties on a state to provide the social and health services that make these rights a reality. Moreover, it includes the duty to 'protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.

Together **Articles 15–19** can be read as creating a set of rights that relate to provision of food, the quality of life and the provision of essential services. **Article 15** places a duty on states to ensure that women have the right to food security. **Article 16** gives women a right to adequate housing. **Article 17** states that women 'shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies'. **Article 18** is the right to a healthy and sustainable environment. **Article 19**, the right to sustainable development, stresses that the Protocol sees the inclusion of women in social and economic development as an essential element of the protection and sustainability of their rights.

Articles 20–21 shift the focus to widows' rights. **Article 20** ensures that states shall ensure that 'widows enjoy all human rights'. Note specifically:

a) that widows are not subjected to inhuman, humiliating or degrading treatment;

b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;

c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

Article 21 furthers this protection by giving a widow a right to 'an equitable share in the inheritance of the property of her husband'. A widow also has the 'right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it'. This right is then further clarified: 'Women and men shall have the right to inherit, in equitable shares, their parents' properties.'

The Special Protection of Elderly Women, Women with Disabilities and Women in Distress is dealt with in **Articles 22–24**. Under **Article 24**, the state has to:

a) ensure the protection of poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs;

b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

Under **Article 25**, the primary mechanisms of enforcement are in the hands of the state: states must 'provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated' and make sure that these rights are determined by competent authorities. Monitoring of the implementation of the Protocol is provided for in **Article 26**. Reports must be submitted in accordance with **Article 62** of the African Charter to show that legislative and other measures have been undertaken for the realisation of the Protocol.

8.3.2 The role of the Protocol

The Protocol distinguishes between positive and negative cultural practices and sees the role of women as equal to that of men in safeguarding traditional principles of equality, justice and democracy. Practices that damage the physical and moral

integrity of women, such as female genital mutilation, should be eliminated. Significantly, the universality of women's rights is affirmed. This is an ambitious document with the potential to fill many gaps in other instruments in Africa and the world as well as taking forward the principles of the Vienna and Beijing Conferences.

The obligatory factor and effectiveness vary greatly between different international instruments and mandates according to their nature. Pressing issues, such as concern about violence against women (notably female genital mutilation), can stimulate legal action. However, the Conventions and other instruments refer much more to traditional customs than to religion. States must have the will to address negative practices which are based on or imputed to religion and that do not conform with women's human rights.

Activity 8.5

The Protocol on the Rights of Women recognises the specific problems faced by women in social, economic and cultural spheres, but lacks an effective enforcement system.

Discuss.

Summary

The Protocol acknowledges that the Charter contains insufficient protection of women's rights. The Protocol contains a catalogue of provisions that provide for a prohibition on discrimination against women, and various social, welfare, economic and political rights. The Protocol also intends to put a stop to cultural practices that are damaging to women's health. Although it is sensitive to cultural mores, it affirms the universality of women's rights.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the basic provisions of the Protocol on the Rights of Women.**

8.4 The African Charter on the Rights and Welfare of the Child

The need for an African perspective on children's rights was considered acute by some African states as there was a perception that they felt that they were under-represented or that their views were inadequately considered during the drafting of the UN Convention on the Rights of the Child, 1989 (CRC) during the 1980s. The African Charter on the Rights and Welfare of the Child (ACRWC) 1990, adopted just a year after the CRC, was thus the response of the then OAU to that perception. Further, given the cultural and religious sensitiveness of issues relating to children, it was necessary to prepare a document that reflected the various African cultural and other perspectives on the matter.

The problems that came out of a specifically African context related to a variety of problems that can be sketched as follows. An African Charter had to address:

- children who were living under apartheid regimes
- discriminatory practices towards girls, such as circumcision and genital mutilation
- the problems faced by children who were displaced or refugees.

There was also a concern that the CRC did not reflect African norms relating to the family, adoption and fostering. However, the ACRWC did make use of principles from the CRC: non-discrimination, the concept of the best interests of the child, the survival and development of the child and the evolving capacities of the child. Critics have drawn attention to the failures of the ACRWC in certain areas, most notably the rules that relate to juvenile justice. These concerns underlie the final document. We will examine some of the more important sections.

Article 1 places obligations on states parties: 'any custom, tradition, cultural or religious practice' inconsistent with the rights, duties and obligations of the Charter shall 'be discouraged'. The Charter then goes on to elaborate a series of rights and duties.

Article 3 on non-discrimination provides that:

> Every child shall be entitled to the enjoyment of the rights and freedoms irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 4 lays down a major principle: that of the best interests of the child. This provides:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 5 deals with survival and development. Like Article 4, Article 5 concerns itself with providing a series of rights that are unique to children. However, these rights are based on the 'inherent' right to life that is common to both the UDHR and the ACHPR. Article 5 goes on to state that:

1. Every child has an inherent right to life. This right shall be protected by law.
2. States parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. The death sentence shall not be pronounced for crimes committed by children.

Article 6 can be seen as providing for the civil identity of the child. Entitled 'Name and Nationality', it states that:

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.

States parties to the present Charter shall undertake to ensure that their constitutional legislation recognises the principles according to which a child shall acquire the nationality of the state in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws.

Three Articles follow that adapt rights found in the UDHR and the ACHPR to the specific situation of the child. **Article 7** grants freedom of expression; **Article 8**, freedom of association and **Article 10**, protection of privacy. **Article 9** could also be seen as part of this series, as it declares the right of freedom of thought, conscience and religion. It specifies that 'parents and, where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child'.

Article 11 relates to education. A child's education should be directed to 'the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups'.

Article 15 concerns child labour. It provides that:

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral or social development.

Article 16 adapts rights found in the UDHR and ACHPR to provide protection against child abuse and torture:

1. States parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

The Charter builds on the concern in ACHPR with the family and roots of the child in this context. **Article 18**, entitled 'Protection of the Family', places a number of obligations on states parties:

1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the state for its establishment and development.
2. States parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

Article 19 can be understood as developing Article 18, and focuses on the relationship between parents and children:

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines, in accordance with the appropriate law, that such separation is in the best interest of the child.

There is further elaboration of parental responsibilities in **Article 20**:

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:
    a. to ensure that the best interests of the child are their basic concern at all times
    b. to secure, within their abilities and financial capacities, conditions of living necessary to the child's development
    c. to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

Article 21 articulates a somewhat different set of concerns. The Charter turns from the parent-child relationship to lay down principles that relate to the protection of children from harmful cultural and social practices:

1. States parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
    a. those customs and practices prejudicial to the health or life of the child
    b. those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited, and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Article 23 relates to refugee children:

1. States parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the states are parties.

Article 25 is entitled 'Separation from Parents'. It could be understood as part of the complex of rights and duties that concern parent and child relationships but one that deals with the breakdown of the child–parent nexus. It is also relevant to the situation faced by refugee children. The Article states: '...when considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious or linguistic background.'

Article 26 places a duty on states parties to protect children against apartheid and discrimination.

Article 27 deals with the specific problem of the sexual exploitation of children. It places a duty on states parties to:

1. ...undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:
    a. the inducement, coercion or encouragement of a child to engage in any sexual activity
    c. the use of children in prostitution or other sexual practices
    d. the use of children in pornographic activities, performances and materials.

Article 31 is interesting as it relates back to the central concern in the ACHPR with duties:

Responsibility of the Child

Every child shall have responsibilities towards his family and society, the state and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

a. to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need
b. to serve his national community by placing his physical and intellectual abilities at its service
c. to preserve and strengthen social and national solidarity
d. to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society
e. to preserve and strengthen the independence and the integrity of his country
f. to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

8.4.1 Supervision of the ACRWC

Article 32 establishes an African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights and welfare of the child.

Article 42 describes the mandate of the Committee:

a. To promote and protect the rights enshrined in this Charter and in particular to:
    i. collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organise meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments
    ii. formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa
    iii. cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child.
b. To monitor the implementation and ensure protection of the rights enshrined in this Charter.
c. To interpret the provisions of the present Charter at the request of a state party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any state party.
d. Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

Article 43 lays down the reporting procedure. States undertake to submit to the Committee reports on the measures they have adopted which give effect to the Charter. **Article 44** states that the Committee may receive communication, from any person, group or non-governmental organisation recognised by the Organisation of African Unity, from a Member State, or the United Nations, relating to any matter covered by the Charter. Under **Article 45**, the Committee may carry out investigations, resorting to any appropriate method of investigating. Their remit extends over any matter falling within the ambit of the present Charter, request from the states parties for any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the state party has adopted to implement the Charter. The Committee submits to each Ordinary Session of the Assembly of Heads of State and Government every two years a report on its activities and on any communication made under Article 44 of this Charter.

ACTIVITY 8.6

Outline the protection offered by the ACRWC.

Summary

The Charter on the Rights and Welfare of the Child comes out of the fact that African nations did not have a major input into the drafting of the CRC. It was thus necessary to create a catalogue of rights that related specifically to the problems faced by children in Africa. The Charter elaborates a number of welfare and social/economic rights that rest on the principles of non-discrimination and the 'best interests of the child'. The Charter also creates a Committee, which receives reports from states that have signed the Charter and can undertake investigations.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **outline the basic provision of the African Charter on the Rights and Welfare of the Child (1999).**

8.5 The protection of refugees' rights

Refugees are entitled to protection under the 1951 Geneva Convention Relating to the Status of Refugees, and to the social, economic and political rights contained in the 1966 Covenants as well as the ACHPR and its relevant Protocols. We will be examining the law relating to refugees in much more detail later in the guide. Persons who are considered refugees either flee or are unable to return to their country of nationality due to persecution in their country of nationality. The persecution must be for what is considered to be a 'Convention' reason, such as political opinion, religion, race and nationality. To be a refugee a person has to have crossed an international border. Persons who move within the state of nationality are not refugees; the international law term for them is an internally displaced person (IDP). In the context of the African Union, there are also relevant rights under the ACHPR. These include:

- **Article 4**, respect for life
- **Article 5**, the prohibition of torture
- **Article 6**, the right to personal liberty
- **Article 7**, due process
- **Article 18**, family reunion
- **Article 12**, the rights to freedom of movement and residence, and the right to seek and enjoy asylum.

The period from the 1960s to the early 1990s saw most African states follow an 'open door' policy. In the early part of this period, in the wake of decolonisation, conflicts

in Rwanda and Burundi caused many people to be displaced and to successfully seek asylum in neighbouring states. Refugees from the civil war in Mozambique likewise found asylum in neighbouring countries. Other conflicts in the southern part of the continent also generated large numbers of refugees. Since the early 1990s, however, there have been obvious changes in refugee policy. The brutal and significant conflicts in Sierra Leone, Liberia, Congo, Democratic Republic of Congo, Central African Republic, Angola and Rwanda among others meant that there were still large numbers of people fleeing conflict. Changes in refugee policy were motivated by the problems caused by accommodating displaced peoples. States have closed their borders, failed to provide security and made forced repatriations.

In all societies, refugees are associated with or blamed for a litany of problems. There are, however, a number of domestic concerns for countries that host refugees. The first of these is internal security. Many refugees come from situations of civil war and bring weapons, weapons training or the trauma of conflict with them. Such weapons may be used for crimes, which include armed robbery, and crime is often one of the few avenues open to those seeking refuge, especially when they are provided with little or no opportunity for work and where assistance is not forthcoming from the host state. Large influxes can also place serious strains on the environment and social infrastructure. These problems become more severe where burden sharing through international assistance is (or becomes) limited.

8.5.1 The Convention Governing the Specific Aspects of Refugee Problems in Africa, 1974

This Convention was founded on the need for a humanitarian approach to solving the problems of refugees at the regional level. However, difficult distinctions had to made, in particular, between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside. The Declaration on the Problem of Subversion and Resolution on the Problem of Refugees had already been adopted at Accra in 1965 and the Convention sought to build on this document. It also sought other international reference points, namely:

- the UN Charter
- the basic principles contained in the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967 relating to the status of refugees
- Resolution 2312 (XXII) of 14 December 1967 of the United Nations General Assembly, relating to the Declaration on Territorial Asylum.

As of April 2021 the Convention has been ratified by 46 states.

Article 1 contains a definition of the term refugee:

1. ...the term 'refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.
2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Article 1(4) contains important provisos and limitations that qualify Article 1. Article 1(5) also removes refugee status from war criminals or those who have committed crimes against humanity.

Article 2 goes on to define asylum:

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.
2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member States may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

We can see from these Articles that a refugee is anyone who suffers a loss or lack of protection in the country of origin due to a well-founded fear of persecution in his country of origin. A key part of the definition of persecution is the threat of violation or the actual violation of refugees' individual human rights.

The definition of the refugee in Article 1(2) is different to that contained in the 1951 UN Convention (and its 1967 Protocol). This recognised refugees as those persons who had suffered what was primarily individualised persecution for reasons of political opinion, religion, race or analogous reasons. We can see that in the African Convention this definition is modified: a refugee includes any person forced to leave his place of habitual residence because of 'external aggression, occupation, foreign domination and events seriously disturbing public order in either part or the whole of their countries of origin or nationality'. As a much broader definition of a refugee, it represents a context in which African states operated an 'open door' policy (see above).

Article 3 returns to the key concerns expressed in the introduction to this section of the chapter. It relates to the prohibition of subversive activities:

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

Article 4 contains a non-discrimination provision, and **Article 5** a prohibition against involuntary repatriation. Article 5(4) is an important section that concerns the status of refugees once they have returned to their country of origin:

4. Refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations, to facilitate their return.

Article 6 states that Member States should issue to refugees who are lawfully in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees.

Article 7 outlines cooperation of national authorities with the Organisation of African Unity.

> In order to enable the Administrative Secretary-General of the Organisation of African Unity to make reports to the competent organs of the Organisation of African Unity, Member States undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning:
>
> (a) the condition of refugees,
>
> (b) the implementation of this Convention, and
>
> (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

8.5.2 Conclusions

Despite the extensive protection offered by the African Convention, there are major problems with its implementation and with the scale of the refugee problem in Africa. The following assessment by three leading scholars in 2003 is scathing and as true today as when it was first written:

> On paper, African refugees benefit from one of the most progressive protection regimes in the world. In reality, however, they face seemingly endless human rights hurdles including forced return, discrimination, arbitrary arrest and detention, restricted freedom of movement and expression, and a level of economic deprivation synonymous with violations of social and economic rights. Faced with an ongoing struggle to bridge this gap between theory and reality, advocates for refugees have the option of innovatively using Africa's general human rights mechanisms to make the more specific case for refugee rights.
>
> The crisis facing refugees on the continent reflects not a paucity of norms, but rather a failure to implement them. A major weakness of the current international legal framework to protect refugees – one that was recognised during the ambitious UNHCR Global Consultations process of 2000 – is the absence of any meaningful system of supervision, such as a court or treaty body, to ensure that States abide by the letter and spirit of international refugee conventions. International and regional human rights mechanisms – and in particular the African human rights system – may go some way towards making up for this omission, providing advocates with an important complementary means by which to ensure that refugees and asylum seekers benefit in reality from those rights that they have on paper. Certainly the potential of such mechanisms to both develop the content of refugee rights and police their implementation warrants their being an important element of any comprehensive advocacy strategy on the continent.

> … The refugee crisis needs to be addressed at both a regional and international level… this would entail a political and economic agenda aimed at eliminating ethnic strife and conflict; curtailing the arms trade; establishing a firm foundation for democratic institutions and governance; respect for human rights; and the promotion of economic development and social progress…Finally, meaningful solutions to the refugee problem should include initiatives aimed at enhancing international burden-sharing both in emergencies, but also to provide assistance to ameliorate the environmental and other long-term impacts experienced by countries hosting large refugee populations.
>
> (Zard, M., C. Beyani and C.A. Odinklau 'Refugees and the African Commission on Human and Peoples' Rights', *Forced Migration Review* 16 2003, p.33, available at www.escr-net.org/usr_doc/Zard_article.pdf)

For further discussion of this issue, see Sharpe, M. *The regional law of refugee protection in Africa* (Oxford: Oxford University Press, 2018).

Activity 8.7

The Convention Governing the Specific Aspects of Refugee Problems in Africa represents an innovation in the protection of refugees' rights, but profound problems remain.

Discuss.

Summary

The Convention Governing the Specific Aspects of Refugee Problems in Africa, as its title suggests, reflects the specifically African aspects of the refugee problem; for instance, since the Second World War Africa has experienced wars and displacement of peoples on a scale different to that of Europe. The African Convention is not dissimilar to the UN Conventions, although it contains a much broader definition of the term refugee and is much more concerned with the problem of political subversion than other international instruments. However, despite the African Convention, the scale and complexity of the refugee problem suggests that what is necessary is coordinated and coherent policy between governments at both a regional and international level. It is unclear whether the political will exists to achieve this level of coordination.

Further reading

- **Pityana, N.B. 'The challenge of culture for human rights in Africa' in Evans, M. and R. Murray (eds) *The African Charter on human and peoples' rights*. (Cambridge: Cambridge University Press, 2011) second edition [ISBN 9780521187640]. This essay provides a useful comparative account of African human rights law.**

  By the end of this chapter you will have looked at the three regional systems we will be considering on the module. Thus to try and recap and consolidate your learning and to see them compared side by side, you should read:

- **Heyns, C., D. Padilla and L. Zwaak 'A schematic comparison of regional human rights systems' in Gomez Isa, F. and K. de Feyter (eds) *International protection of human rights: achievements and challenges*. (Bilbao: University of Deusto, 2006) [ISBN 9788498305173] pp.545–57. This publication is open access and can found here: www.deusto-publicaciones.es/ud/openaccess/hnet/pdfs_hnet/hnet19.pdf**

Reminder of learning outcomes

By this stage you should be able to:

- **outline the basic provision of the Convention on Specific Aspects of the Refugee Problem in Africa (1974).**

Sample examination question

'Although the African Human Rights system has seen development in recent years, compared to other regional systems it still has a long way to go before it is an effective and efficient means of securing rights in the region.'

Discuss.

Advice on answering the question

This question has at least two parts: you need to discuss the development of the system and then turn to consider the critical assessment that it still does not effectively protect human rights in comparison with other regional systems.

The first part of the question is not so problematic. One would need to discuss the development of rights in the regional system from the foundation of the OAU in 1963, through to the creation of the AU in 1999. One does indeed see a strong sense of development. Rights were not central to the liberation struggle in which the OAU has its roots but they soon became central to its agenda with the drafting of the African Charter. Development can also be seen in the creation of the Protocol on the Rights of Women, the Charter on the Rights and Welfare of the Child and in the protection of refugee rights. It would be worth showing how these latter documents build on the Charter itself.

The second part of the question picks up on the traditional criticism that the African system lacks enforcement methods but it is necessary to be critical of the idea that the African system can be meaningfully compared with other regional systems. We need to develop these two points separately.

To some extent, the call for a Human Rights Court by the AU may put in place a stronger system for providing remedies for rights abuses, and NEPAD and other regional initiatives may further the cooperation necessary to promote and sustain human rights.

Can the African system be compared with other regional systems?

It is hard to say definitively whether the African system is any more or less efficient than other regional systems. To compare it with the European system, for instance, would be wrong, as the scale and complexity of the problems facing the African continent are different from those facing European nations (to say nothing of the systematic underdevelopment of Africa). It may be closer, in this sense, to the Inter-American system; but how would one assess its effectiveness?

Ultimately, then, one should perhaps be critical of any assessment of the African system that refuses to see it in context. Although it would be easy to agree with the sense that there needs to be stronger enforcement mechanisms in the African system, any more general assessment of human rights in Africa is deeply problematic as it must take into account the political, economic and social aspects of the continent. Ultimately, human rights in Africa are developing within this particular context.

NOTES

9 Non-discrimination, equality and the rights of women

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Introduction

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- explain the nature of women's rights as human rights including feminist critiques of international law
- outline the Article of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)
- explain the operation of the Optional Protocol to CEDAW
- summarise the Declaration on the Elimination of Violence against Women
- explain the role of the Special Rapporteur on Violence against Women
- appreciate the cultural issues relating to the enforcement of women's rights.

Core texts

- De Schutter, Chapter 7 'The prohibition of discrimination', Parts 1–3 AND
- Bantekas and Oette, Chapter 11 'The human rights of women', pp.494–525 (available on the VLE).

Essential reading

- Byrnes, A. 'The Committee on the Elimination of Discrimination Against Women' in Mégret and Alston (eds), pp.393–438 (available via the Online Library).
- Moeckli, D. 'Equality and non-discrimination' in Moeckli et al. (eds).
- Otto, D. 'Women's rights' in Moeckli et al. (eds).

Further reading

- Alston and Goodman, Chapter 3 'Civil and political rights', Section B 'Women's rights and CEDAW'.
- Arat, Z. 'The Commission on the Status of Women' in Mégret and Alston (eds), pp.253–90 (available via the Online Library).

9.1 Discrimination, equality and human rights

At the core of the notion of legally protected human rights is the idea that all human beings have an inherent dignity and are thus entitled to certain rights, such as that not to be tortured or the right to expression, work or an education. We enjoy rights because we are human. This much is obvious and we have covered it already. If we step back for a moment, however, and think about not why we enjoy rights but why rights are violated, then discrimination on some basis or other is always part of the reason. An ethnic minority is discriminated against by the ethnic majority in a state as the minority is perceived (and may perceive itself) as being different from the ethnic majority. Members of the ethnic minority may thus find themselves being treated less favourably than members of the majority when it comes to, for example, the provision of housing, schooling or employment.

Discrimination may take place on the basis of race, disability, nationality, age, caste or religion, to take a few examples from many grounds. Not all discrimination, however, is punitive; at times treating people differently is perfectly justifiable. No reasonable person would argue that a four-year-old, for example, has the same right to marry someone of their choice as an 18-year-old. In this example, differential treatment on the basis of age is objectively justifiable and in certain circumstances discrimination may well be objectively justified. But it is more difficult to objectively justify drawing a distinction between those aged 16 and 18 in the example concerning marriage. Here, it is clear that some boundaries must be drawn, and how societies do so in such marginal cases differs.

Returning to our grounds of discrimination – it is clear that the law may outlaw discrimination on some grounds but not on others. Caste is an interesting example. In some societies distinctions are drawn between persons on the basis of their caste. Employment, education and housing, for example, may not be granted to persons because of their caste and preferential treatment afforded to others with regard to the above because of their caste. Caste is not expressly mentioned in any human rights treaty as a ground upon which discrimination is prohibited (although it can be read in to 'descent', which is mentioned as a ground in the Race Convention to be studied in the next chapter). In the UK, extensive efforts to have caste recognised as a ground upon which discrimination should be prohibited by law have been unsuccessful. This example highlights that there is significant contention over the grounds upon which discrimination should be prohibited both under domestic law and also in international law. Over time, new grounds of prohibition have been recognised. Discrimination on the grounds of sexual orientation is a good example; such discrimination is widespread in most societies but it is only in the last 20 or so years that the law has started to prohibit such discrimination in some societies and under international law.

Before continuing, it will be useful to define a few terms we will refer to at various points in this chapter. First, there is the notion of equality, which is distinct from non-discrimination. Equality is about persons being treated, as the term suggests, equally. But equality disguises a plethora of ills. To refer to a famous quote on the matter, 'In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread' (Jacques Anatole François Thibault, *The red lily* (1894)). A distinction can be drawn between 'equality of opportunity' and 'equality of outcome'. These notions are subject to contention but broadly speaking, 'equality of opportunity' is providing everyone the opportunity to do something – for example, to ensure a job is open to all regardless of age, gender, race and so forth. 'Equality of outcome' is broadly about trying to ensure that all persons more or less are able to achieve the same things and end up in similar situations – for example, in terms of educational attainment or that those who are employed, as judges, for example, are representative of society in terms of gender, race, sexual orientation and so forth. Equality of outcome requires discrimination (in this case positive discrimination as opposed to negative) so as to assist those who need it.

Two final concepts to be explained are direct discrimination and indirect discrimination. Direct discrimination is perfectly straightforward: a person is treated less favourably by another because he or she is considered to have a feature deemed objectionable. Thus a job is advertised and it makes clear that only men need apply. Women are perfectly able to do the job but the employer only wishes to employ a man. Two persons apply for a job. Both are perfectly qualified and can do the job – one applicant is female and the other is male. The applicant who is female is denied the job and it is awarded to the man solely because of discrimination on the basis of gender. In this hypothetical, the discrimination is direct – thus it is an example of direct discrimination. Indirect discrimination is where the criteria applied are ostensibly neutral but the outcome of the behaviour is discriminatory. Thus, for example, a job is advertised. The criteria stipulate that an essential criteria for all applicants is that they must be at least 2 metres tall and weigh over 100 kilograms. The criteria apply equally to all and appear neutral. However, when the criteria are applied it is clear that very few women will be able to satisfy the criteria and almost all, if not all, applicants will be men. The effect of the criteria is thus to discriminate against women – this would be an example of indirect discrimination. Direct discrimination cannot be justified. Indirect discrimination can. In the above example, suppose the physical requirement is stipulated because the job demands extreme physical strength. In that case, such criteria may be justifiable.

9.2 Provisions on equality and non-discrimination (relating to women) in human rights treaties

Every human rights treaty, in some form or other, has an equality or non-discrimination clause. There is no consistency, and the approach adopted depends on the treaty in question, what was agreeable at the time of drafting and what may have been agreeable later, where Protocols or other agreements that amend the treaty have been adopted. The aim of the short analysis that follows is simply to give some examples of the different approaches that have been adopted.

9.2.1 The ICCPR and ICESCR

As the global treaty concerned with civil and political rights, it can be seen that the ICCPR actually has three provisions relating generally to non-discrimination and equality: Articles 2, 3 and 26. Each serves a different function and purpose. It is also the case that a number of specific rights have non-discrimination provisions within them, for example, Article 24 concerning children's rights. The approach adopted in the ICCPR with regard to general non-discrimination clauses is the most comprehensive of any general human rights treaty.

Article 2

1. Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present 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.

....

Article 3

The states parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

.....

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 is the non-discrimination clause and seeks to ensure that the rights in the Covenant extend to all without discrimination. The grounds listed are not exhaustive as the provision refers to them as examples; 'such as' meaning the list is not closed. Article 3 is an equality clause, relating to men and women only, and is limited to the rights in the Covenant. Equality is only relevant with regard to gender in the context of Covenant rights. Article 26, on the other hand, is a combination of a non-discrimination and equality clause and further is not limited to Covenant rights but any right recognised by domestic law in a state party. Again the grounds are not limited and are simply examples of grounds, but those that are expressly stated must be recognised. The Human Rights Committee has elaborated upon the above-mentioned provisions and also the relationship between them in its jurisprudence and in its general comments (see General Comments 18 and 28), and aspects of the approach adopted have been very controversial.

The approach of the CESCR is determined by the terms of the ICESCR. The ICESCR does not have a free-standing clause such as Article 26, ICCPR. It does, however, have a non-discrimination clause in Article 2(2) and an equality clause relating to men and women only in Article 3. As is the case with the ICCPR, a number of rights in the ICESCR also have a non-discrimination clause within them. In its General Comments 16 and 20, the CESCR has interpreted the meaning of Articles 2(2) and 3 and considers non-discrimination and equality to be principles that underpin the entire Covenant.

9.2.2 The ECHR, ACHR and African Charter

In comparison to the Covenants, one can see a clearly different approach in regional treaties. The EHCR, has a paucity of measures relating to non-discrimination. Article 14 of the ECHR is the only non-discrimination clause, stating:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This is not a self-standing right as per Article 26, ICCPR but rather a provision that seeks to ensure the substantive Convention rights extend to all without any discrimination on the basis of one of the listed grounds. Again, the list is not closed and the European Court has extended it on occasion, but the European Court's conservatism in interpreting Article 14 is well established. Protocol 12 to the European Convention that came into force in 2005, for those states that accepted it, does establish a free-standing non-discrimination clause for any right existing in domestic law. The European Court still has not, however, been dynamic in its interpretation of the Protocol.

The American Convention by contrast sets out its stall with regard to non-discrimination in the opening Article. Article 1, which is entitled 'Obligation to Respect Rights', states:

2. The states parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
3. For the purposes of this Convention, 'person' means every human being.

Although this is similar in legal effect to Article 14, ECHR, the ACHR seems to place far more emphasis on non-discrimination than the ECHR does. Further, Article 1(2) expressly states that 'person' means every human being, not just some of them, however defined. Certain substantive rights provisions in the ACHR contain equality clauses within them. Article 17, ACHR that protects family life in para.4 obliges states parties to take 'steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution'.

The African Charter is the most comprehensive of the regional treaties when it comes to general provisions concerning equality and non-discrimination. Article 2 states:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

This is a standard non-discrimination clause with regard to the rights protected. Article 3 goes further, however, in that it seeks to ensure that: '[e]very individual shall be equal before the law' and that '[e]very individual shall be entitled to equal protection of the law'. These provisions have not been subject to detailed examination by the African Commission nor to date by the African Court but their potential is clear. The discussion now moves on to 'women's rights'.

9.3 Women's rights

In light of the above discussion, it is clear that non-discrimination and/or equality clauses exist in general human rights treaties. Every non-discrimination clause we have examined (and indeed all the others we have not examined or referred to as well) specifically prohibits discrimination on the basis of sex. Where there are general equality clauses, they expressly only refer to equality between men and women. As the ACHR makes clear, human rights extend to all humans. In light of the above, there is a legitimate question – why do we need 'women's rights'? Half of all humankind is female, and human rights extend to all those who are human, so why do there need to be women's rights? Women's rights are an integral part of human rights.

9.3.1 The challenge of 'women's rights'

Women's rights, as a specific category of rights, seek to challenge and break down the exclusion that women suffer in all parts of the world. We can relate women's rights to feminism as a cultural and political force although there is a clear schism between the 'women's movement' and the law relating to women. Feminism is best understood as a broad-based and diverse movement that seeks to protect and promote the interests of women. Feminists are also active in linking women's rights to the eradication of poverty and political emancipation. Poverty, as discussed earlier in the guide, is best understood in a wide sense as including not just a lack of financial and social resources but an exclusion from health care, legal services and civic life. Every survey in every part of the world highlights that women work longer hours than men, are paid less than men (even for the same work) and work far more hours in unremunerated labour than men. This inequity in turn perpetuates the gender gap in accessing needed resources. Reproductive health problems also impact negatively on women. Poor women may be forced to have more children than they want. Infection rates of HIV/AIDS and other SIDs are also higher for women than men.

Social and economic development requires the empowerment of women. Those countries that have shown good development rates have also invested in universal health care and education. Furthermore, successfully developing nations have passed laws and taken policy initiatives to end discrimination and ensure that women play a full part in the social and economic life of a country so as to take full advantage of the talent pool in a country as opposed to only relying upon a maximum of one half of it. Rural women face different issues from urban women in most states but especially developing countries. If a nation is able to improve the opportunities open to women, there are other positive consequences. Improving women's education helps reduce child malnutrition, for example, even more so than improvements in food availability. Closing the gender gap in education also helps women to reduce fertility and improve child survival. We will examine in a little more detail two particular areas of discrimination against women.

9.3.2 Case study: property rights of women in Kenya

We will briefly examine a Human Rights Watch Report on Property Rights in Kenya – 'Double standards: women's property rights violations in Kenya' available at: www.hrw.org/sites/default/files/reports/kenya0303.pdf

Property rights of women in Kenya are bound up with the structure of the country's land law. What has tended to drive reform since independence was gained in 1962 has been the need to ensure an equitable division of land between the different ethnic groups within Kenya. A related problem has been the different customary jurisdictions, with frequent contradictory provisions and the historical structure of title, inherited from colonial times, which favoured male ownership of land. Reforms have been made in the law of succession and family law but gender imbalance in land ownership remains. There are at present five different legal systems that apply to marriage. These are:

- civil (under the Marriage Act)
- Christian (under the African Christian Marriage and Divorce Act and the Marriage Act)
- Islamic (under the Mohammedan Marriage, Divorce and Succession Act)
- Hindu (under the Hindu Marriage and Divorce Act)
- customary (under customary laws).

At a constitutional level, discrimination on the basis of sex is prohibited but there are exceptions that allow discrimination in personal and customary law. However, at present, there is an ongoing process of constitutional reform and it is hoped that this will enhance women's rights. The failure to protect women effectively is one reason why they remain worse off than men. The HRW report notes at p.9:

> By just about any measure, women in Kenya are worse off than men. Their average earnings are less than half those of men. Only 29 per cent of those engaged in formal wage employment are women, leaving most to work in the informal sector with no social security and little income. The numbers of women in formal employment are decreasing. Women head 37 per cent of all households in Kenya, a number likely to grow as AIDS claims more victims. Eighty per cent of female-headed households are either poor or very poor, in part due to their limited ownership of and access to land. Girls receive less education than boys at every level, and women's literacy rate (76 per cent) is lower than men's (89 per cent). Violence against women is commonplace: 60 per cent of married women reported in a 2002 study that they were victims of domestic abuse. In another study published in 2002, 83 per cent of women reported physical abuse in childhood and nearly 61 per cent reported physical abuse as adults. According to women's rights advocates, there is only one shelter for battered women and their children in the entire country.

A similar pattern can be observed in relation to land holding. At p.10 the report states:

> Women's land ownership is miniscule [sic] despite their enormous contribution to agricultural production. Women account for only 5 per cent of registered landholders nationally. The agricultural sector contributes over 80 per cent of employment and 60 per cent of national income. Women constitute over 80 per cent of the agricultural labour force, often working on an unpaid basis, and 64 per cent of subsistence farmers are women. Women provide approximately 60 per cent of farm-derived income, yet female-headed households on average own less than half the amount of farm equipment owned by male-headed households. Rural women work an average of nearly three hours longer per day than rural men. With so many women working in the agricultural sector and so few in formal employment, it is all the more devastating when women lose their land.

Customary law derives from custom and practice but is also formally recognised by legislation and the Kenyan legal system. The tendency towards a complex patterning of customary law reflects the fact that each ethnic or tribal grouping may have its own law. Customary law is enforced by tribal leaders or elders but may also be applied in

court proceedings. Customary laws that relate to property can be traced back to the pre-colonial period. Precisely because customary law is fluid and changes as custom changes, it is not necessarily resistant to social change. However, what is problematic is the fact that the norms of customary law are rooted in customs that may themselves be deep-seated and hard to change. Consider the practice of wife inheritance that is practised in some parts of Kenya. Although there are many different permutations to this practice, some common features can be suggested. In the past, this custom was one way of ensuring a degree of social protection for widows. Widows were not themselves able to inherit land, so, ensuring that the widow herself was inherited went some way to making sure that she and her dependants would be supported. The rituals associated with wife inheritance involved the 'cleaning' of the widow. There was a fear that she would be contaminated with her husband's spirit. In one particular ritual, the widow would have to have sexual intercourse with a social outcast. As the report notes at p.12:

> Women's property rights closely relate to wife inheritance and cleansing rituals in that many women cannot stay in their homes or on their land unless they are inherited or cleansed. According to one women's rights advocate, 'Women have to be inherited to keep any property after their husbands die. They have access to property because of their husband and lose that right when the husband dies.' Women who experienced these practices told Human Rights Watch they had mixed feelings about them. Most said the cleansing and inheritance were not voluntary, but they succumbed so that they could keep their property and stay in their communities.

Women have in almost all, if not all, societies at some point or other been seen as property themselves. The above example of discrimination in terms of women inheriting land and property under customary and religious laws should not surprise us and highlights an issue that is globally prevalent. In terms of inheriting property, almost all societies have discriminated against women. A good example even now is the fact that among almost all remaining royal families, male-preference primogeniture exists – meaning it is the eldest son who is automatically heir to the throne. The law in this regard was finally changed in the UK under the terms of the Succession to the Crown Act 2013. In terms of inheriting property more generally, Jewish law and Islamic law in all variations discriminate significantly against women. The Jewish laws of inheritance, for example, favour men over women in three ways. First, a decedent's daughter is precluded from taking any portion of her father's estate if he is survived by sons or descendants of sons. Second, the mother and the mother's family are not heirs of a decedent. Third, a husband inherits from his wife but a wife does not inherit from her husband. Under Islamic law, broadly speaking, daughters will only inherit half the amount that any sons inherit. Say, for example, a father dies with three sons and two daughters. The sons should inherit equally but in share, double of each of the daughters. Thus in this example, each son would inherit a quarter of the estate and the two daughters a quarter of the estate between them. These examples highlight endemic issues of discrimination against women. Other examples relate to women being considered unclean or impure during, among other times, their monthly menstruation. Thus, for example, women are not permitted to enter religious temples or places of worship during menstruation under many faith systems. The notion of women being impure during menstruation or otherwise and needing to be 'cleansed' was mentioned in passing above. The next example highlights related issues more head on.

9.3.3 Sexual cleansing of women in southeast Africa

In July 2016, the BBC reported across all news outlets a story about a 'man hired to have sex with children'. In some remote southern regions of Malawi, it is traditional for girls to be made to have sex with a paid sex worker known as a 'hyena' once they reach puberty. The act is not seen by village elders as rape but as a form of ritual 'cleansing'. The story is extracted below:

I meet Eric Aniva in the dusty yard of his three-room shack in Nsanje district in southern Malawi. Goats and chickens graze in the dirt outside. Wearing a grimy green shirt, and walking with a pronounced limp he greets me enthusiastically. He seems to like the idea of media attention.

Aniva is by all accounts the pre-eminent 'hyena' in this village. It's a traditional title given to a man hired by communities in several remote parts of southern Malawi to provide what's called sexual 'cleansing'. If a man dies, for example, his wife is required by tradition to sleep with Aniva before she can bury him. If a woman has an abortion, again sexual cleansing is required.

And most shockingly, here in Nsanje, teenage girls, after their first menstruation, are made to have sex over a three-day period, to mark their passage from childhood to womanhood. If the girls refuse, it's believed disease or some fatal misfortune could befall their families or the village as a whole. 'Most of those I have slept with are girls, school-going girls,' Aniva tells me.

'Some girls are just 12 or 13 years old, but I prefer them older. All these girls find pleasure in having me as their hyena. They actually are proud and tell other people that this man is a real man, he knows how to please a woman.'

Despite his boasts, several girls I meet in a nearby village express aversion to the ordeal they've had to go through. 'There was nothing else I could have done. I had to do it for the sake of my parents,' one girl, Maria, tells me. 'If I'd refused, my family members could be attacked with diseases – even death – so I was scared.' They tell me that all their female friends were made to have sex with a hyena.

Aniva appears to be in his 40s (he's vague about his precise age) and currently has two wives who are well aware of his work. He claims to have slept with 104 women and girls – although as he said the same to a local newspaper in 2012, I sense that he long ago lost count. Aniva has five children that he knows about – he's not sure how many of the women and girls he's made pregnant. He tells me he's one of 10 hyenas in this community and that every village in Nsanje district has them. They are paid from $4 to $7 (£3 to £5) each time.

An hour's drive down the road, I'm introduced to Fagisi, Chrissie and Phelia, women in their 50s and custodians of the initiation traditions in their village. It's their job to organise the adolescent girls into camps each year, teaching them about their duties as wives and how to please a man sexually. The 'sexual cleansing' with the hyena is the final stage of this process, arranged voluntarily by the girl's parents. It's necessary, Fagisi, Chrissie and Phelia explain, 'to avoid infection with their parents or the rest of the community. We have to train our girls in a good manner in the village, so that they don't go astray, are good wives so that the husband is satisfied.'

I put it to them that there's a much greater risk that these 'cleansings' will themselves spread disease. According to custom, sex with the hyena must never be protected with the use of condoms. But they say a hyena is hand-picked for his good morals, and therefore cannot be infected with HIV/Aids.

It's clear, given the hyena's duties, that HIV is a huge risk to the community. The UN estimates that one in 10 of all Malawians carry the virus, so I ask Aniva if he is HIV-positive. He astounds me by saying that he is – and that he doesn't mention this to a girl's parents when they hire him.

As our conversation continues, Aniva senses that I am not impressed. He stops boasting and tells me that he does fewer cleansings than before. 'I still do the rituals here and there,' he confides. Then he tells me: 'I am stopping.'

All of those involved in these rituals are aware that these customs are condemned by outsiders – not just by the church, but by NGOs and the government as well, which has launched a campaign against so-called 'harmful cultural practices'.

'We are not going to condemn these people,' says Dr May Shaba, permanent secretary of the Ministry of Gender and Welfare. 'But we are going to give them information that they need to change their rituals.' Parents who have had more education than others may already choose not to hire a hyena, I am told. But the female elders I spoke to remain defiant.

'There's nothing wrong with our culture,' Chrissie tells me. 'If you look at today's society, you can see that girls are not responsible, so we have to train our girls in a good manner in the village, so that they don't go astray, are good wives so that the husband is satisfied, and so that nothing bad happens to their families.'

According to Father Clause Boucher, a French-born Catholic priest who's lived in Malawi for 50 years and is now its pre-eminent anthropologist, the rituals date back centuries. They stem from age-old beliefs about the need for children to be passed into the 'heat' of adulthood by a sexual act, he says. In the past, when girls tended not to reach puberty until they were 15 or 16, this would often have been carried out by a selected future husband. Today it's more likely to done by a paid sex worker, a hyena, and there's no shame attached to that.

Father Boucher points out that the efforts to change this sexualisation of children have been stubbornly resisted in remote southern areas, despite more than a century of Christianity and 30 years of the Aids epidemic. In most of the country – and particularly in areas close to the cities of Blantyre and Lilongwe – 'sexual cleansing' is rarely if ever practised.

In Malawi's central Dedza district, hyenas are only ever used to initiate widows or infertile women, but the Paramount Chief Theresa Kachindamoto – a rare female figurehead in Malawi – has made the fight against the tradition a personal priority.

She is trying to galvanise other regional chiefs to make similar efforts. In some other districts, like Mangochi in the east of the country, ceremonies are being adapted to replace sex with a more benign anointing of the girl.

In Nsanje, though, there is little effort to bring about change. With Malawi one of the poorest countries in the world, and suffering from growing reports of rural hunger, it's not a policy priority.

In a remote village, I meet one of Aniva's two wives, Fanny, along with his youngest baby daughter. Fanny was herself widowed before being 'cleansed' by Aniva with sex. They married soon after.

Their relationship looks strained. Sitting next to him, she admits shyly that she hates what he does, but that it brings necessary income. I ask her if she expects her two-year-old to be undergoing initiation too in perhaps 10 years from now. 'I don't want that to happen,' she says. 'I want this tradition to end. We are forced to sleep with the hyenas. It's not out of our choice and that I think is so sad for us as women.' 'You hated it when it happened to you?' I ask.

'I still hate it right up until now.' When I ask Aniva too whether he wants his daughter to undergo sexual cleansing, he surprises me again. 'Not my daughter. I cannot allow this. Now I am fighting for the end of this malpractice.' 'So, you're fighting against it, but you are still doing it yourself?' I ask. 'No, as I said, I'm stopping now.'

Further to the story being published, Eric Aniva was arrested on the orders of Malawian president Peter Mutharika. A presidential spokesman said Aniva could be charged with defiling children and exposing them to HIV. He said, 'Harmful cultural and traditional practices cannot be accepted in this country…All people involved in this malpractice should be held accountable for subjecting their children and women to this despicable evil.' In November 2016, the *Guardian* newspaper reported that Eric Aniva had been sentenced. The report is extracted below.

Court convicts Malawi 'hyena' who had sex with over 100 women

A Malawian man accused of having sex with more than 100 girls and women in a series of traditional cleansing rituals has been convicted by a court of 'engaging in harmful practices'.

Eric Aniva, who has said he is infected with the HIV virus, was prosecuted after publicly speaking about his role as a 'hyena' in a BBC documentary.

Custom in some parts of southern Malawi demands that a man, known as a 'hyena', is paid to have sex with bereaved widows to exorcise evil spirits and to prevent other deaths occurring.

At the request of a girl's parents, the 'hyena' is also paid to have sex with adolescents to mark their passage to womanhood after their first menstruation.

The ritual, which many Malawians says is rarely practised today, is believed to train girls to become good wives and protect them from disease or misfortune that could fall on their families.

After an international outcry, President Peter Mutharika ordered Aniva's arrest in July.

In the first case of its kind, Aniva, 45, was found guilty on two counts by magistrate Innocent Nebi after a one-day trial in a packed courtroom in the district of Nsanje.

'It is clear … that the state has proved beyond reasonable doubt that the accused was engaging in harmful practices,' the magistrate said on Friday.

'I find you guilty and convict you accordingly,' he said, adding that sentencing would be on 22 November. Aniva faces a maximum of five years in jail.

The state produced six witnesses against Aniva, who pleaded not guilty.

The magistrate said the court had concluded that 'sexual cleansing violates the dignity of widows'.

State prosecutor Chiyembekezo Banda demanded a long prison sentence for Aniva, saying he was probably responsible for the spread of HIV.

Malawi is one of the worst affected countries in the world, with 27,000 deaths from Aids-related illnesses and 9% of the adult population infected with HIV.

Michael Goba Chipeta, Aniva's defence lawyer, told the court his client should not be jailed. Chipeta appealed for Aniva to not be used as 'a sacrificial lamb', saying 'the publicity he has attracted is punishment enough'.

Before being led by police to his cell, Aniva said: 'I am not worried about being convicted. I think I will be given a suspended sentence.' His second wife, Sophia, who was in court, was in tears and declined to speak to the press. Aniva is said to have had sex with at least 104 women and girls, some as young as 12, in a ritual that lasts three days. He said each family paid him a fee of between $4 and $7 (£3.25–£5.70).

Activity 9.1

a. What inherent problems with the structure of Kenyan society and law tend to militate against women's property rights?

b. What is customary law? Are there any particular problems with customary law as far as women's rights are concerned?

9.3.4 Customary law

The above example relating to 'hyenas' illustrates that, while such customary practices may continue in certain parts of a country, there is clearly change afoot and the state has intervened to try to penalise those who are hired as sex workers. It is of course possible to argue that the state only intervened when the matter received widespread negative publicity. However, one can clearly detect in the opinions expressed by the wife and indeed the 'hyena' that the practice seems to be one destined to become even more isolated in time.

Activity 9.2

When you have some time, please read An-Na'im, A. 'State responsibility under international human rights law to change religious and customary laws' in Cook, R. (ed.) *Human rights of women: national and international perspectives*. (Philadelphia: University of Pennsylvania Press, 1994) pp.167–88 (available on the VLE), paying particular attention to pp.174–82. This piece concerns state responsibility under international human rights law to change religious and customary practices.

What does An-Na'im suggest in relation to the authority of customary law? Why is an understanding of the basis of customary law important for a human rights lawyer or activist?

Summary

Women's rights are an integral part of human rights. Women's rights guarantee the inherent dignity of women but are also relevant to the struggle against poverty. Women face structured disadvantages in many if not all countries of the world, although we have tended to concentrate in this section on the developing world. We have also seen that furthering the protection of women's rights involves complex issues of social change. It is necessary that advocates of human rights do not approach cultures in a high-handed way and seek to engage in constructive and sensitive cross-cultural dialogues in order to break down resistances to those changes that are necessary to empower women.

9.4 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

9.4.1 Overview of CEDAW

CEDAW results from the work of the Commission on the Status of Women (CSW). The CSW was established by a resolution of the Economic and Social Council by Council resolution in 1946. (For a much more detailed account of the work and development of the CSW, see Arat. 'The Commission on the Status of Women' listed in the Further reading.) The CSW was, at first, only a sub-commission of the Commission on Human Rights, but its role was enhanced as the UN began to appreciate that the UDHR and 1966 Covenants were not effective in promoting women's rights. From 1949–59, the CSW created a number of documents that covered women's rights in various areas; it was increasingly felt that there was a need for a coherent and consistent approach to the issue. The Declaration on the Elimination of Discrimination against Women was adopted in 1967. As a Declaration, the document was a statement of principle and did not have the force of a treaty. In the early 1970s, however, as the awareness of the scale of discrimination against women became increasingly obvious, the CSW argued that a treaty was necessary. The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979. We will examine its enforcement mechanisms below.

CEDAW begins with a reference back to the Charter of the United Nations, thus connecting the idea of the rights of women with the fundamental ideas of dignity and human worth that underlie that document. The paragraph goes on to make reference to the Universal Declaration of Human Rights and the central prohibition of discrimination. The prohibition on discrimination clearly underlies the idea that men and women are equal in worth and dignity. However, despite states parties subscribing to the standards set out in the Declaration, and undertaking the obligations contained in the International Covenants, 'extensive discrimination against women continues to exist'. This means that women are not enjoying human rights, and are not participating in society on equal terms as men. Moreover, the burden of poverty presses unduly on women who may have less access to food, health, education and employment opportunities than men. CEDAW then makes a reference to the new international economic order. This UN initiative was an attempt by developing nations to redress the inequities of the world economy. The Convention asserts that this will 'contribute significantly towards the promotion of equality between men and women', and thus associates the struggle for women's rights with the broader struggle for economic justice. Other reference points are specified, and thus the championing of the rights of women is inseparable from the struggle against 'apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination'. This is in turn linked to the valorisation of state sovereignty. One can appreciate that, in the context of colonialism, the need to privilege the nation state was important; indeed, 'social progress' is explicitly linked to the right to self-determination and international respect for the sovereignty of those new states emerging from colonial domination.

The introduction then turns to address the specific role that women play. CEDAW states that women make a 'great contribution…to the welfare of the family and to the development of society'. Their role, however, has not been recognised, and the 'social significance of maternity and the role of both parents in the family and in the upbringing of children' has been insufficiently protected. It is important to note, though, that this 'special role' that links women to the family and the home 'should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'. The burdens and responsibilities of the family, then, should not fall disproportionately on women: society as a whole should be organised in such a way as to involve men and women in equal measures in the tasks associated with the family. The problematic nature of this goal is articulated very clearly by the next paragraph: 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'. It is easy to appreciate that this objective may lead to clashes between human rights and cultures that seek to preserve the 'traditional' role of women.

9.4.2 Content of CEDAW

Part I

Article 1 contains a definition of discrimination against women; the term

> shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This definition of discrimination covers both direct and indirect discrimination – for examples and explanation see the discussion earlier. It is worth noting that discrimination on the basis of marital status is directly prohibited (i.e. any requirement that a person should be married, or not married).

Article 2 moves from a general definition to cover the ways in which discrimination is to be combated. Note how the obligation rests with the state party to:

- incorporate anti-discrimination principles in the constitution and in legislation
- deploy sanctions if necessary to achieve the goal of equality
- require public authorities to act in a non-discriminatory way
- repeal penal legislation that is discriminatory.

Article 3 can be read alongside Article 2. It states that 'all appropriate measures' will be taken to further the fundamental rights and freedoms of women. **Article 4** states an important caveat: measures promoting women's rights shall not themselves be considered discriminatory. Moreover, they must not amount to the 'maintenance of unequal or separate standards', as these are in themselves discriminatory. However, adoption of special measures to protect maternity is not to be considered discriminatory.

Article 5 places further duties on states parties. First, the article places an obligation to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. This is accompanied by a duty to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children. Underlying this obligation is the assertion that the best interest of the children is the primary consideration in all cases.

Article 5 thus requires a significant input from the state in creating the conditions for a social realignment that breaks down those conditions that have kept women out of public life, or treated them as second-class citizens. This requires action on

stereotypical ideas of the roles of women and men, and a significant programme of education in relation to the role of the family. This broad set of goals could be achieved through legislation, but, to be successful, such a programme would have to be accompanied with education.

Article 6 is brief. It moves from a consideration of the family to two other areas where women have been oppressed. It places a duty on states parties to 'take all appropriate measures…to suppress all forms of traffic in women and exploitation of prostitution of women'.

Part II

Part II of CEDAW elaborates in more detail the rights contained in Part I.

Article 7 concerns voting rights and public participation. States parties undertake to ensure that women, like men, can 'vote in all elections and public referenda…and be eligible for election to all publicly elected bodies'. States parties must also guarantee that women can 'participate in the formulation of government policy' and its implementation and hold public office. Women must also be allowed to 'participate in non-governmental organisations and associations concerned with the public and political life of the country'.

Article 8 elaborates these provisions to an international level, placing an obligation on states parties to ensure that women have 'the opportunity to represent their governments at the international level and to participate in the work of international organisations'.

Article 9 moves on to a different but related concern. CEDAW places the right of nationality in the context of the problems faced by women. The right to 'acquire, change or retain…nationality' should be enjoyed equally by men and women. However, in relation to women, states parties must ensure that 'neither marriage to an alien nor change of nationality by the husband during marriage' should 'automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'. In the second paragraph, states parties grant women equal rights with men 'with respect to the nationality of their children'.

Part III

Article 10 relates to the right to education. It addresses various issues that have tended to restrict the rights of women to enjoy equal opportunities in this area. Paragraph (a) concerns itself with conditions for career and vocational guidance, with particular reference to promoting the opportunities of women in rural as well as urban environments. The Article is detailed, as it elaborates an educational culture that does not operate on the provision of unequal and separate standards. Para.(b) thus specifies that women must have access to the same premises, facilities, teachers and curricula as men; later paragraphs stress that there must also be equal access to grants and opportunities for physical education. Article 10 also elaborates the need to break down stereotypical ideas about the role of women in education. Thus, states parties must work towards:

> The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.

Another broad policy goal is specified at para.(f). States parties must work towards the 'reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely'. In other words, states must make a special effort to counter the pressures on girls to leave education. Family planning is also made part of this general approach to education in para.(h).

Article 11 moves from education rights to employment rights. The Article restates the basic prohibition on discrimination and then goes on, at 1(a), to assert the right to work as 'an inalienable right of all human beings'. This assertion relies on the fact that work is itself the access to civic status, and a wage in turn should allow the generation

of personal resources. To be forcefully deprived of the opportunity to work is to be deprived of the benefits that come with working. Historically, and in the present day, preventing women from working, or from working in specific sectors or fields, was and is effective in limiting life opportunities and maintaining the subordinate status of women. Article 11 is then specific about how employment rights are to be protected. These methods include 'the application of the same criteria for selection in matters of employment', and at (c), the right to choice of profession, promotion, job security and all the benefits incidental to employment. Employment rights are further specified to include the right to equal remuneration (d), the right to social security (e), and the right to safe working conditions (f). The second part of the Article concerns the employment rights of pregnant women. Paragraph 2(a) prohibits discrimination on the grounds of pregnancy or maternity leave; (c) makes it a duty of states parties to provide 'the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life'. Paragraph (d) states that special protection must be provided for pregnant women at work. The third part of the Article mandates a review of legislation in the 'the light of scientific and technological knowledge'.

Article 12 guarantees equal access to health care for women and men, as well as requiring states parties to 'ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation'.

Women's rights are distinctive to the extent that they recognise the special health care needs of women; indeed, this is one important area where women differ from men. These are outlined as the biological factors that relate to women's reproductive role and also the 'higher risk of exposure to sexually transmitted diseases that women face'. But these differences are not just biological. We know that socio-economic factors vary for women. For example, women are often exposed to different forms of violence, which can affect their health. Girls and women of all ages are often vulnerable to sexual abuse, placing them at risk of physical and psychological harm and unwanted and early pregnancy. Some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability.

It may also be the case that women may be deterred from seeking medical advice in relation to contraception, abortion or when victims of sexual or physical violence because of the stigma sometimes attached to such matters.

Article 13 further elaborates the prohibition on discrimination in relation to 'economic and social life'. More specifically, women and men must have equal access to family benefits, the right to bank loans and credit, and the right to participate in cultural life. This Article seems somewhat underdeveloped. The access to finance, loan facilities and credit is increasingly important to the structure of the contemporary social world in both the developed and the developing world. For instance, one can only run a business if one can access credit facilities. It is somewhat strange that the right to work and the right to education, for example, are so explicitly presented, whereas the right to financial services is so underdeveloped. Perhaps this reflects the situation at the time of the drafting of the Article; this is one area where a more thorough articulation of the right may be useful.

Article 14 perhaps addresses a reality that is more pressing in the life of women in the developing world than the developed world, as economies in the former are more dependent on mass employment in agriculture than the latter. The Article places a duty on states parties to take into account the 'particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families'. This means that special regard must be given to women's work in the 'non-monetised sectors of the economy'. In other words, women are disproportionately represented in informal and unregulated areas of economy as a result of their subordinate status. The Article goes on to specify objectives that must be addressed. States parties must combat discrimination in rural areas, and ensure that women 'benefit from rural development'. More specifically, women must be encouraged 'to participate in the elaboration and implementation of development planning at all levels'. The rights covered above in relation to education and training

are then reiterated; but other areas of participation are also elaborated. For instance, women must be enabled to 'organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment'. Article 13 is then repeated in a slightly revised version: women must be enabled to 'have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes'. The final paragraph specifies that women must also 'enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications'.

Part IV

Part IV addresses the legal and social status of women.

Article 15 addresses the equality of men and women before the law. The second paragraph requires states parties to provide identical legal capacity to women and men in civil matters: 'in particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals'. As a corollary of this, states parties must ensure that all contracts and other private legal documents that deprive women of capacity are null and void, and must ensure that men and women have the same rights of movement, residence and domicile. This point has been made before, but it is worth repeating. The guarantee of legal capacity is a central human right; indeed, a case could be made for it being the essential human right. If anything, a human right expresses the conjunction of humanity with legal capacity. To be deprived of humanity is to become right-less, to have no legal capacity. Thus, human rights must, at base, assert an essential connection between human being and the civic identity that the law enables.

Article 16 elaborates this notion of equal rights and legal capacity in relation to a specific area of law: marriage and divorce. Discrimination against women must be eliminated in these areas by providing women and men with the same rights to enter into marriage with free consent and by maintaining a legal system that gives men and women the same rights during marriage and in the event of its dissolution. This would also cover rights over children, irrespective of marital status, including rights over guardianship, wardship, trusteeship and adoption of children. The last paragraph of the Article is interesting as it suggests an essential link between the rights of women and children: 'the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.

Part V

Part V of CEDAW moves from substantive rights to certain institutional and procedural concerns.

Article 17 sets up the Committee on the Elimination of Discrimination against Women (CEDAW) staffed by 'experts of high moral standing and competence in the field covered by the Convention'. Elected by states parties from among their nationals in a secret ballot and serving in a personal capacity (consideration being given to both geographical distribution and to the representation of 'different forms of civilisation as well as the principal legal systems'), the members of the Committee are empowered, by **Article 18**, to consider reports submitted to them by the Secretary-General of the United Nations. These reports must cover 'the legislative, judicial, administrative or other measures' that states parties 'have adopted to give effect to the provisions of the present Convention'. States parties must also report on the progress they have made in implementing the Women's Convention.

Article 21 goes on to detail the powers and duties of CEDAW. Reporting annually through the Economic and Social Council to the General Assembly, the Committee makes recommendations based on the reports that have been submitted by states parties. In turn, the Secretary-General transmits the reports of the Committee to the Commission on the Status of Women for its information.

Article 22 empowers 'the specialised agencies' to make reports to the Committee.

Part VI of the Women's Convention concerns itself with a number of technical matters, which will not be discussed here.

Under **Article 29** of the Convention, two or more states parties can refer disputes about the interpretation and implementation of the Convention to arbitration, and if the dispute is not settled, it can be referred to the International Court of Justice. This procedure is subject to a large number of reservations and has never been used.

As noted above, by and large, the Women's Convention does not add a great deal in substantive legal terms to the ICESCR and ICCPR: a state that is party to them will either expressly or implicitly already owe many of the obligations contained in the Women's Convention. For example, Article 2(2) of the ICESCR and Article 2(1) of the ICCPR, as noted above, oblige states to extend rights without discrimination on various grounds including sex. The Women's Convention is much more important in its allocation of attention, resources and expertise to the issues it tackles rather than the development of *per se* new human rights standards. The last issue is worth elaboration in that while the Women's Convention may not initially set new standards or set down new obligations, human rights treaties evolve in their interpretation – thus the Women's Convention is a forum for the development of innovations relating to human rights issues that specifically relate to women. We will return to this shortly. Another key thing to note with the Convention is the fact that it contains different types of rights and that the enforcement of those various rights is entrusted to a specialist committee, which must interpret and apply all of them. We will also return to this shortly.

9.4.3 The Optional Protocol

The Women's Convention also has an Optional Protocol (OP). This was adopted in 1999 and came into force in 2000. It is important to note that the OP was adopted 20 years after the Convention itself. This is because the Women's Convention was perceived primarily as an 'economic and social rights treaty' and thus only to be supervised by the State Reporting procedure. Notwithstanding the legacy of distinct treaty regimes at the global level for civil and political rights, on the one hand, and economic and social rights on the other (as we have already covered in the guide), the later drafting of 'issue-specific' human rights treaties again highlighted that much of the purported distinction between these rights is artificial. This became particularly clear in the negotiation and drafting of the Women's Convention even though the final compromise on supervision did not include a petition system. The OP to the Women's Convention is further recognition that all rights are capable of determination by, at the UN level, a quasi-judicial mechanism. The OP's Articles, so far as they concern us, are explained below.

The Protocol begins by asserting the competence of the Committee on the Elimination of Discrimination against Women to receive and consider communications in accordance with Article 2. **Article 2** provides that communications may be submitted by or on behalf of individuals or groups of individuals who are claiming to be victims of a violation of Convention rights. **Article 3** specifies that communications must be in writing and cannot be anonymous. Communication can only be received by the Committee if the communication concerns a state party that is a signatory to the Protocol. In other words, the Committee would not be able to consider a communication if it came from an individual or a group from a state party that was a signatory to the Convention but not the Protocol.

Article 4 states that the Committee will only consider a communication if it can make sure that all available domestic remedies have been exhausted. There is an exception to this rule. A communication could be considered if all domestic remedies had not been exhausted but the application of such remedies was subject to an unreasonable delay; or indeed it was unlikely that the available remedy would be effective. There are other grounds of inadmissibility, as follows.

The Committee shall declare a communication inadmissible where:

a. the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement

b. it is incompatible with the provisions of the Convention

c. it is manifestly ill-founded or not sufficiently substantiated

d. it is an abuse of the right to submit a communication

e. the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the state party concerned unless those facts continued after that date.

Article 5 empowers the Committee to request a state party to take interim measures while a communication is being considered. These measures must prevent 'irreparable damage to the victim or victims of the alleged violation'. This does not apply, however, when the Committee is merely considering the admissibility of a communication. Interim measures thus only become available once a communication has been declared admissible.

Article 6 makes it a condition of the Committee bringing a communication to the attention of the state party concerned (confidentially) that the complainants consent to the disclosure of their own identity. Once the state party has received the communication, it has six months to submit to the Committee 'written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that state party'.

Article 7 stresses the confidential nature of the proceedings before the Committee. Article 7, para.4 provides that once the state party has received the views of the Committee, it has six months to provide a written response that specifies any action taken in the light of the views and recommendations of the Committee.

Article 8 allows the Committee to conduct an inquiry and to report urgently to the Committee where there is evidence of 'grave or systematic violations by a state party'. Such an inquiry may involve a visit to the territory of the state party concerned, and it results in a report to the Committee, which in turn transmits these findings to the state. Once the state party has received this report, it has six months to submit its observations to the Committee. Paragraph (5) provides that these inquiries are confidential and consensual.

Article 9 specifies that a report to the Committee may contain details of the measures taken to respond to the issues raised by the inquiry.

Article 10 provides that it is possible to derogate Articles 8 and 9. **Article 11** places a duty on states parties to take 'all appropriate steps' to make sure that those communicating with the Committee are not ill-treated.

The Optional Protocol thus includes two procedures: the communication procedure and the inquiry procedure. The communication procedure allows individuals and groups to complain to the Committee about violations of rights. The inquiry procedure enables inquiries to be made into grave or systematic abuses of human rights by experts. The Protocol has been in force for a number of years now and some of the jurisprudence is discussed and extracted in Alston and Goodman, pp.202–05 and 217–19.

9.4.4 Additional enforcement mechanisms

In 1994, the then Commission on Human Rights created, by Resolution 1994/45, the post of Special Rapporteur on Violence Against Women, and created procedures whereby information could be obtained from governments on cases concerning alleged violence against women. It is also worth remembering that mechanisms under different treaties may be employed. Communications can be made under the first Optional Protocol to the ICCPR relying upon Article 26, ICCPR, which is the

free-standing provision on non-discrimination. Article 26, ICCPR provides that men and women are equal before the law and that the law must guarantee effective protection against discrimination. This procedure was used in *Broeks* v *Netherlands*, where a Dutch Unemployment Benefits Act was successfully challenged on grounds of discrimination. The HRC's Opinion was so controversial that the Netherlands seriously considered denouncing the ICCPR and the Protocol. Discrimination or violence against women may also fall under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination, or Article 22 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We will examine these Conventions later in the guide.

9.5 Analysis of some rights in CEDAW, their interpretation and state attitudes

It is worth noting that more states have made reservations to the Women's Convention than to any other human rights treaty. It is not just the number of reservations, it is the sweeping nature of those reservations. To take a few examples. Brunei Darussalam's reservation states:

> The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam…

Oman's reservation states that it is not bound by:

> …provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman…

Finally, Pakistan's declaration on accession noted:

> The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.

It is important to ask yourself, have these states actually accepted any legal obligations by becoming party to the Women's Convention? What, if anything, does this suggest about the resistance to women's rights at state level?

Notwithstanding the approach of some states, there is little doubt that the Women's Convention has been interpreted in interesting and useful ways by CEDAW. An example is General Recommendation No. 19 on violence against women, adopted in 1992. We have referred above to the Special Rapporteur but that is distinct from the Convention. There is no specific provision in the Convention that prohibits violence against women, and in human rights parlance, violence against a person's physical integrity, if it reaches a certain threshold of severity, would normally be considered to constitute inhuman or degrading treatment as prohibited, *inter alia*, by Article 7 of the ICCPR. In General Recommendation No. 19, the CEDAW Committee notes:

> Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) [t]he right to life; (b) [t]he right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) [t]he right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) [t]he right to liberty and security of person; (e) [t]he right to equal protection under the law; (f) [t]he right to equality in the family; (g) [t]he right to the highest standard attainable of physical and mental health; [and] (h) [t]he right to just and favourable conditions of work.

Violence against women thus relates to nine different provisions of the Women's Convention, Articles 2, 3, 5, 6, 10, 11, 12, 14 and 16. With a view to tackling the issue, the General Recommendation provides a level of detail that is striking. It sets out 22 recommendations for states parties, many of which entail significant obligations. For example:

> States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.

To give effect to this recommendation, which relates broadly to the right to health, some states parties would, *inter alia*, have to challenge certain customs, practices and perceptions concerning the role and place of women in society; decriminalise abortions in certain circumstances; ensure adequate information entered the public domain about family planning; and make certain aspects of health care accessible or at least more affordable for all.

In the absence of the Women's Convention and the work of CEDAW, such detail and attention to such an issue would not have been forthcoming. This is illustrative of the value of the Women's Convention. Although violence against women can come within the ambit of other UN human rights treaty bodies, the focus on private violence (i.e. violence not carried out by state agents) and reproductive rights are, among a significant number of others, issues that other treaty bodies simply will not in practice tackle, yet they are hugely important in the context of women being able to enjoy their rights and to be treated with respect and dignity.

9.6 Feminist criticisms of the Women's Convention

Numerous feminists have been critical of the Universal Declaration, ICCPR and Women's Convention. Feminist critiques of the Universal Declaration have made a number of points. There have been criticisms of Article 16 because it valorizes a notion of the family that is both unclear, and, in relation to Article 25(2), ill-thought-out. Criticisms of the ICCPR raise the issue that the reporting system does not deal properly with violations of women's rights. Criticisms of the Women's Convention address the fact that it has led to a 'ghettoization' of women's rights issues. Furthermore, in comparison with other human rights bodies, the enforcement mechanism is considered poorly funded.

Are these criticisms fair? Clearly any assessment of these claims would depend on a detailed study of the reports under the ICCPR; it would also be necessary to look at the figures for the budget of various UN agencies before one could assess the claim that CEDAW is underfunded. One would also have to bear in mind gender mainstreaming and other recent developments before one could make an overall assessment of these claims. It is important for you to consider in this context the article by Nussbaum in the Further reading at the end of this chapter as it provides a useful and broad feminist critique of the Women's Convention.

Summary

In this section we have looked at the substantive rights contained in CEDAW. We have also considered the enforcement mechanisms that exist under the treaty.

FURTHER READING

- **Holmat, R. 'The CEDAW: A holistic approach to women's equality' in Hellum A. and H. Sinding Aasen (eds) *Women's human rights: CEDAW in international, regional and national law*. (Cambridge: Cambridge University Press, 2013) [ISBN 9781107538221] pp.95–123. The chapter tackles some of the arguments about CEDAW and its approach to equality and the value it adds.**

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain the nature of women's rights as human rights including feminist critiques of international law**
- **outline the Article of the Convention for the Elimination of All Forms of Discriminations against Women (CEDAW).**

Activity 9.3

Go to the CEDAW section of the OHCHR's website. Find the Concluding observations of the Committee with regard to two or three states that interest you. You can choose any states you wish. Read the conclusions carefully.

- **Do you think that they show the Committee engaged in constructive dialogue? Do you feel what is asked is realistic?**

No feedback provided.

9.7 The Women's Convention and states parties: two case studies

In this final section of the chapter, we will consider two case studies to examine the practical problems faced and approaches adopted by certain states when it comes to the Women's Convention. It is not to suggest that the two states – Singapore and Nigeria – are indicative of problems faced by all states; rather, the case studies seek to highlight some of the problems that are encountered.

9.7.1 Singapore

The Republic of Singapore became a signatory to the Women's Convention in 1995. In 2015, coinciding with the 20th anniversary of its accession, Singapore submitted its fifth periodic report to CEDAW. The Committee considered all reported related matters at the end of 2017. To date, this is the last of Singapore's reports the Committee has considered. The report, as all others before it, pointed out the multicultural/religious nature of Singapore with, according to the 2010 census, 74.3 per cent Chinese, 13.3 per cent Malay, 9.1 per cent Indian, and 3.3 per cent comprising other ethnic groups. The main religions in Singapore are Buddhism, Christianity, Islam, Taoism and Hinduism. The 2010 Census showed that 33 per cent of the resident population aged 15 years and over were Buddhists, 18 per cent were Christians, 15 per cent were Muslims, 11 per cent were Taoists and 5 per cent were Hindus in terms of religious faith. This multiracial composition influences the legal system. As a multireligious society, Singapore has two legal regimes that govern marriage and divorce – civil law and Muslim law. The respective legislation comprises the Women's Charter and the Administration of Muslim Law Act (AMLA). Civil law applies to non-Muslims, whereas the AMLA applies to Muslims. Recognising their duties under Article 12, the government pointed out that the Constitution guarantees equality before the law. At a policy level, equal opportunity based on merit is central. Various impressive policy and legislative initiatives have been made to further recognise women's rights and these are set out in the report. The evolutionary and progressive (in the sense of achieving progress as opposed to progressive nature of obligation) nature of Singapore's commitments to women's rights is set out. This is especially so when it comes to the Muslim minority, and the personal laws that apply to them, as this has been an issue of contention between Singapore and CEDAW in the past. Singapore in its 2015 report emphasised that it has started to take a stronger role in the management of religious affairs. The report notes how the practice of Muslim law varies among countries and that a Majlis Ugama Islam Singapura (Islamic Religious Council of Singapore) known as MUIS had been established. This body is independent and composed of Muslim scholars, appointed by the president of Singapore to deliberate on issues affecting the administration of Muslim law, and monitors the practice of Muslim law in Singapore. The Fatwa (juristic decision) Committee of the MUIS meets regularly to discuss points of Muslim law, review current practices and recommend new measures to ensure that Muslim religious practices in Singapore 'remain progressive'. This can be seen in terms of its reservations to Articles 2 and 16 of the Convention. Singapore partially withdrew its reservation against Articles 2 and 16 in June 2011. Singapore has continued to retain a reservation against specific elements of Articles 2 and 16, so as to allow the operation of Muslim law in Singapore. Muslim law, as set out in the AMLA, is administered by various agencies including the MUIS, Syariah (Sharia) Court and a Registry of Muslim Marriages (ROMM). Thus, for example, although the AMLA provides for polygamy (for men only), all applications for polygamous marriages are reviewed by ROMM. Only applicants deemed able to meet certain requirements are allowed to take a second

wife. The first wife may voice her objection to ROMM. If the application is approved and the first wife is dissatisfied with ROMM's decision, she may go to the Appeal Board. Subsequent to the second marriage, the first wife may also file for divorce on the ground of her husband's inequitable treatment. As a result, only one in every 300 Muslim marriages registered in Singapore between 2009 and 2014 was polygamous.

Singapore's reports and the CEDAW's Concluding Comments over 20 years highlight an evolving engagement over that period of time. There are clearly many positive developments that have taken place in Singapore although CEDAW remains concerned at some of the inequities. Thus, for example, polygamous marriage is only permissible for men. It would be interesting to consider what CEDAW's position would be if the law in Singapore allowed polygamous marriage for all – the Women's Convention requires non-discrimination or equality, depending on the provision in question – as its role is not to pass judgment on the substance of the law *per se*.

9.7.2 Nigeria

If we turn to Nigeria's country report, we can see that the issues raised by women's rights in Africa's most populous nation are somewhat different from those in the Republic of Singapore. Nigeria ratified the Women's Convention in 1985 and the Optional Protocol in 1999. CEDAW considered Nigeria's 7th and 8th periodic reports in 2017. At the time of writing, no further reports have been considered. The fact that periodic reports are considered together is not unusual, it highlights the time lag of the state reporting system in practice. Many issues are recurrent if one takes a holistic view of CEDAW's Concluding Observations with regard to Nigeria. The issues we see commented on in the 7th and 8th report were also commented on in the 4th and 5th reports, for example, as well. Much has happened in the intervening years – not least the rise of Boko Haram in the north of the country. CEDAW has commented on this but also recognises the challenges Nigeria faces in tackling the rise of this particular version of Islamic fundamentalism. Considering the 7th and 8th reports, CEDAW observed that advances had been made in the protection and enhancement of women's rights. The continuation of democratic rule was not commented upon by the Committee – it was something that certainly could not have been taken for granted in the past. Continuing democratic rule has been beneficial to the protection of all rights, including women's rights. Attention was drawn to laws that prohibited female genital mutilation, child marriage, violence against all persons and discrimination on the basis of AIDS or HIV. The Committee also welcomed Nigeria's efforts to improve its institutional framework trying to eliminate discrimination against women and promoting gender equality.

However, there continued to be profound misgivings about the operation of a tripartite legal system and a governance process that impeded the implementation of policy. In Nigeria, there are three legal systems in operation: Islamic Sharia law, customary law and common law. The reason for this is in part historical but problems of coherence between these three jurisdictions make for difficulties in common standard-setting.

The Nigerian Constitution does provide for freedom from discrimination but many states in the Nigerian federation remain committed to traditional gender roles that are, from the perspective of CEDAW, discriminatory. Moreover, there are inconsistencies within legal traditions. For instance, whereas some provisions of Sharia law practised in the northern states of Nigeria are not compatible with CEDAW, other provisions are. An example would be s.239 of the Zamfara State Sharia Penal Code Law 2000. This punishes the trafficking in women. As far as customary law is concerned, the southern states' practices such as widowhood rites and inheritance rights remain discriminatory. These problems are exacerbated by social attitudes. The Committee noted the importance of the film and television industry in tackling gender stereotypes and that they should seek to tackle stereotyping.

Although the Committee did not highlight the matter in consideration of the 7th and 8th reports, it has in the past noted that there were problems with property rights. In 2004, it was estimated that around 90 per cent of registered land and properties

was in men's names. Property rights are also complicated by the tripartite legal system and by general ignorance of the existence of rights and social exclusion. Some states in the south of the country did not even allow women to own land and other properties. Under customary law, wives remain as slaves to their husbands and in-laws. Many widows in southern and eastern parts of Nigeria have no protection, and their rights are seriously abused. Under the Sharia legal system, widows are accorded more rights. If their husbands die, they are allowed an in-house compulsory mourning period of four months and 10 days to determine whether they are pregnant. After the compulsory mourning period, if found not pregnant, women are free to remarry. Widows under the Sharia law inherit their husband's properties together with their children. In allowing a tripartite system, Nigeria, by respecting its communities' rights and demands, often undermines those of individuals, in this case women. It is undeniably a difficult balance to strike.

Activity 9.4

What general impression of the enforcement of women's rights are suggested by the report from Singapore and by that of Nigeria?

How is the situation in Nigeria different from that in Singapore?

Reminder of learning outcomes

By this stage you should be able to:

- **explain the operation of the Optional Protocol to CEDAW.**

9.8 Declaration on the Elimination of Violence against Women

The Women's Convention as noted above is silent on violence against women although CEDAW has sought to tackle the matter in General Recommendation 19. Although the Women's Convention is silent on an explicit condemnation of violence against women, the core principles of the Treaty clearly prohibit it. The need to combat such practices led in 1993 to the General Assembly adopting the Declaration. It was felt that this was necessary to build on the programme announced in Nairobi, to counter the widespread use of violence against women and to produce a clear statement of women's rights in this area. The resolution of the General Assembly that proclaimed the Declaration effectively put the whole issue of violence in context. It asserted that 'violence against women is a manifestation of historically unequal power relations between men and women', and 'is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'. Violence against women is all-pervasive. It may be that certain groups of women such as those 'belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence', but the issue of violence against women 'cut across lines of income, class and culture'.

We can examine some of the key Articles.

Article 1 begins with a definition:

> violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Violence is thus understood in a broad sense – it covers psychological as well as physical harm and includes threats of violence as well. Note that it covers both public and private life and so would apply to domestic violence as well as violence taking place in the public sphere. The definition is expanded by **Article 2**. The first paragraph applies to violence practised against women in what could be seen as a private or at least family-oriented context. Thus violence against women includes:

> physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

The second paragraph moves away from this context, to consider violence in a wider 'social' sense:

> physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

That violence can include 'harassment and intimidation' builds on the definition of Article 1. Thus prostitution, to the extent that it is forced, would constitute violence against women. Consensual prostitution, in itself, would presumably not constitute violence against women. The third paragraph addresses violence condoned by the state:

> Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.

After Article 3, which stresses the coherence of the Declaration with the International Bill of Rights, Article 4 returns to this concern with the state.

Article 4 states that nations that are signatories to the Declaration should condemn violence against women and should not use 'custom, tradition or religious consideration' to avoid their obligations with respect to its elimination. This duty extends far beyond merely legislating against violence. One of the problems with the enforcement of human rights norms is that merely legislating is never enough, as patterns of social behaviour have to be changed. Thus, the Article provides that states must: '[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.' This includes legislation, research and policy initiatives.

Acknowledging the need for a concerted international effort, **Article 5** concerns the UN and provides that it should encourage regional cooperation, using the UN system to advance coordinated programmes both to set standards and take action against violent practices.

The fact that the Declaration does not contain an enforcement mechanism has of course been remedied to some extent by the appointment of the Special Rapporteur on Violence Against Women. It is also worth noting that there have been developments at the regional level to address violence against women. In the context of the Council of Europe, for example, the Istanbul Convention Against Violence Against Women and Domestic Violence, 2011. The treaty is in force but it is noteworthy that Turkey (which hosted the conference that adopted the Convention) denounced it in 2021.

Activities 9.5 and 9.6

9.5 Consider from the readings what the discussion suggests about the nature of violence against women.

9.6 What is the role of the Declaration on the Elimination of Violence against Women? Has anything happened subsequently at a regional level that may make a difference? (Hint: look at the Council of Europe website – www.coe.int/en/web/istanbul-convention/home?)

Summary and conclusion

Perhaps one of the defining features of women's rights is their relative subordination to a supposedly more universal idea of human rights. Accounting for this takes us to the core of the problem. Why is it that the International Bill of Rights is relatively silent on the abuses of women's rights? One reason may be that even within the UN the importance of women's rights has been played down, and although this is perhaps

changing, there is still the sense that enforcement mechanisms remain weaker in relation to women's rights, and that patriarchal cultural attitudes remain ingrained and resistant to change. In this chapter we have examined CEDAW and its Optional Protocol; we have also looked at the Declaration on the Elimination of Violence against Women and the role of the Special Rapporteur. We have seen that these institutions and treaties represent a major development in protecting women's rights but that a great deal must still be done.

Further reading

- **Merry, S.A. 'Women, violence and the human rights system' in Agosin, M. (ed.) *Women, gender and human rights: a global perspective*. (New Jersey: Rutgers University Press, 2001) [ISBN 9780813529837] pp.83–98 (available on the VLE). Merry's work provides an argument that the human rights system is a 'quasi-legal system' (p.84) and explores what this means with reference to preventing violence against women.**
- **Wright, S. 'Human rights and women's rights: an analysis of the UN convention on the elimination of all forms of discrimination against women' in Mahoney, K. and P. Mahoney (eds) *Human rights in the twenty-first century*. (Dordrecht: Martinus Nijhoff, 1993) [ISBN 9780792318101] pp.75–89 (available on the VLE).**

Wright presents an overview of the ideas that structure the Convention, and locates it in the struggle against poverty and social exclusion.

- **Nussbaum, M. 'Women's progress and women's human rights', *Human Rights Quarterly* 38(3) 2016, pp.589–622.**

Nussbaum seeks to examine the role of international law, especially CEDAW, in promoting women's rights. Nussbaum considers international human rights law to lag behind the women's movement but still to be of some utility.

Reminder of learning outcomes

By this stage you should be able to:

- **summarise the Declaration on the Elimination of Violence against Women**
- **explain the role of the Special Rapporteur on violence against women**
- **appreciate the cultural issues relating to the enforcement of women's rights.**

Sample examination question

'Women's rights are human rights.'

Discuss.

Advice on answering the question

This seemingly simple statement reveals, on closer inspection, some complex and subtle issues. In terms of an approach to this question, the invitation to 'discuss' might be best answered with a broad agreement to the statement. The link between women's rights and human rights has been asserted by numerous documents and one might want to consider some of these in detail. The Preamble to the Women's Convention, for example, or the Vienna Declaration would be germane. However, if women's rights are human rights one would also have to account for the relative weakness of protection for women's rights and the absence of rights that reflect the specific harms suffered by women in the International Bill of Rights. From this perspective, women's rights are something a little less than the universal rights of 'man'. Building this argument might involve making use of some of the feminist critiques of international human rights law that we considered, and also some detail on the enforcement mechanisms under the Women's Convention and the Protocol, the reservations from these treaties and the refusal to sign the Protocol. Positive developments would have to be put in the context of those resistances to recognising the full and equal humanity of women that are present in patriarchal cultures throughout the world.

NOTES

10 The prohibition of racial discrimination

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Introduction

In the previous chapter we examined the prohibition of discrimination on the basis of sex. In this chapter we move on to another issue-specific matter: that of discrimination on the basis of race. The International Convention on the Elimination of All Forms of Racial Discrimination (1965) precedes the Women's Convention; indeed, it precedes the 1966 Covenants as well, having been adopted almost exactly a year before them and coming into force in 1969, seven years before the Covenants did. The Race Convention is therefore the first of the UN Human Rights Treaties as that term is used, and the Committee on the Elimination of Racial Discrimination (CERD), which the Convention establishes, is the longest established of the UN human rights treaty bodies. The Race Convention is a product of its time but the issues it addresses continue to resonate; circumstances change, forms of racism evolve or new issues come to the fore. The 1965 Convention and the commitment to anti-racism in human rights law have their historic roots in the struggle against the racial order of colonialism and general revulsion at the anti-Semitism and race hatred of the Nazi regime. The key trigger, however, for the Race Convention was apartheid, a form of late colonialism in South Africa. Apartheid (which literally means separateness or segregation in Afrikaans) has now formally been brought to an end in South Africa. Human rights, as we have noted on a few occasions, must evolve, otherwise they lose relevance. In the context of continued discrimination on the basis of *inter alia* race against migrants and those seeking asylum, the increasing rise of 'Islamophobia' in the West, continued anti-Semitism, and the historic and contemporary marginalisation of indigenous peoples, the specialised and focused work of CERD is as important now as it has ever been.

This chapter will initially focus on colonialism in Africa as a particular form of racism and the legacy of this and its subsequent impact on human rights principles. Colonialism clearly stretched beyond the African continent but we shall limit our study to the impact of colonialism in Africa. We will then consider some of the more contemporary issues – such as the functioning of the Race Convention, but we will especially examine indigenous peoples and their rights and how the law has evolved in this regard. This is useful to us for a number of reasons. First, it highlights how racism can perpetuate inequality. Second, it highlights how a marginalised peoples can have their rights increasingly recognised. Third, it shows us how racial discrimination may need to be tackled more broadly than just non-discrimination to overcome historic injustices.

Returning to colonialism: there were some who perhaps earnestly believed in the mission to civilise. Kipling famously wrote a poem, 'The white man's burden', which has usually been considered to be a justification for imperialism; as has the work of certain geneticists, for example, Sir Francis Galton, who claimed the intellectual superiority of Europeans compared to other races. But we should not overlook that international law also has biases – it legalised colonialism. European public law, which evolved to become the public international law we have today, historically distinguished between the civilised (Europeans), barbarians (a few non-European empires) and savages (primarily African, American and Australian tribes). Barbarians could be civilised but savages could not. Savages could be colonised – and their territory was not deemed worthy of recognition in the community of states. Even now, the Statute of the International Court of Justice in Article 38 refers to 'civilised nations', as discussed in Chapter 1.

To see how this played out historically – the Treaty of Tordesillas of 1494 was agreed upon to split non-European lands between the Portuguese and Castilians (the majority of modern-day Spain), with all lands found west of a line drawn down the Atlantic Ocean belonging to Castile and all those to the east to Portugal. This was endorsed by a Papal Bull issued a few years later. The Treaty of Tordesillas is why Castile sought to and did conquer most of the Americas (modern-day Brazil is the exception as the line drawn crosses it, and thus Portugal was able to claim it and consolidated the claim through expeditions) and the Portuguese went east via Africa (establishing colonies in modern-day Angola and Mozambique, for example) and then on to modern-day India (Goa and Cochin, for example), Malaysia (Malacca) and China (Macau). The peoples living in these territories were defeated or annihilated and there was little,

if any, regard for their rights and claims. Thus, the civilising mission, in reality fervent, Catholic evangelicalism with the claim that the aim was to save savages from eternal damnation, was essentially the total exploitation of entire territories and their peoples for the sole interests of the colonial powers. European colonialism, which was a global phenomenon, lasted for just under half a millennium. French, Dutch and British territories in far flung corners of the globe – the remnants of their empires – continue to exist throughout the globe. The end of the Second World War, however, signalled that European colonialism in its traditional form was no longer sustainable. Although the ending of the European colonial empires is a long and complex story, the UN and the USA in association with the various liberation struggles by colonised peoples were key players in bringing colonialism to an end. The UN became the central forum for challenging colonial empires; as states became independent, they in turn lent their support within the UN to others seeking liberation. However, racism and discrimination are not just a product of colonialism. Racism continued to be a feature of the post-war political order, one of the starkest examples being the apartheid regime in South Africa. However, it would also be wrong to see racism entirely as a product of colonialism. This raises complex issues but we will see that attention has been drawn to problems of racism in modern states that do not have a recent history of colonial control – a good example is discrimination against the Roma (an itinerant people historically from the Indian subcontinent but who have lived in Europe for centuries) in numerous European countries.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **outline the basic provisions of the International Convention on the Elimination of All Forms of Racial Discrimination**
- **describe the political context of the Convention**
- **explain the role of UN sanctions in ending apartheid in South Africa**
- **describe the evolution of the Convention**
- **discuss the recognition of indigenous rights.**

Core text

- **Bantekas and Oette, Chapter 10 'Group rights: self-determination, minorities and indigenous peoples', Section 4.**

Essential reading

- **Heyward, M. 'The permanent forum in indigenous issues' in Mégret and Alston, pp.291–306 (available via the Online Library).**
- **Thornberry, P. 'The Committee on the Elimination of Racial Discrimination' in Mégret and Alston (eds), pp.309–38 (available via the Online Libary).**

10.1 A brief history of colonialism, apartheid and racial segregation

The struggle against racism at the global level was a struggle against a 'colonial world order'. The development of anti-discrimination measures took place against the backdrop of empires that had previously used both violence and law to impose social and economic structures in colonial outposts. Therefore, to understand the historical relevance of anti-discrimination rights, we need to begin with examining a world order that was inherently discriminatory. We also need to briefly examine the civil liberties struggle in the USA. While a broad ideology of human rights is important, it is hard to show that the Convention is itself central. This is because, at least as far as the 'civil liberties struggle' in the USA is concerned, it predates the Convention. This is notwithstanding the fact that discrimination against African Americans and Latinos is still endemic in parts of the USA and the law enforcement and judicial system have repeatedly been shown to treat them less favourably than whites. The events of 2020 and the re-emphasis on 'Black Lives Matter' highlight this yet again. We will

return to this. The Race Convention and the impetus to create it was not central to the civil rights movement of the 1960s in the USA. The USA was in a strange position in this regard – it had itself overthrown British colonialists with the Revolutionary War but had subsequently itself acquired colonial territories. The president of the USA, Woodrow Wilson, had at the Versailles Peace Conference (at the end of the First World War) championed 'national self-determination' as one of his 'fourteen points' and supported the end of European colonialism and rule by 'peoples', but the USA still had the formal and practical segregation of African Americans from whites until the 1960s.

The role of the Convention in hastening the end of the European colonial empires is perhaps more marked; it is also important to the international pressure that helped bring an end to the apartheid regime in South Africa. However, once again, we need to observe the importance of ideologies that were somewhat different to claims for universal human rights. Colonial history concerns more than the activities of Europeans in Africa but, for the purposes of this chapter, we will focus on this region of the world. The first attempts by European powers to exploit the resources and manpower of Africa took place in a period running from the 16th to the 18th centuries. The second phase of colonialism roughly corresponds with the 19th century. At the Conference of Berlin in 1885, for example, European powers agreed between themselves the division of Africa, although in reality it was about recognising each other's existing occupations. Direct appropriation was replaced by regimes of treaties and trading agreements. The third phase is that of the more formal colonial rule of the 19th and early 20th centuries. This latter phase could be seen as concluded, or redefined, by the breaking up of empires and the emergence of the new sovereign states. The development of law and colonialism differed widely and was largely influenced by the traditions of the colonial powers. For instance, if one compares the British and the French colonial or dominion territories in Africa, one finds that law was used very differently.

Although it is tempting to generalise, this sketch of colonialism should not be seen as an attempt to homogenise the different histories of the different parts of the world that were included in European empires. To understand the development of colonial policies, it is important to understand that colonial empires did not deprive 'natives' of all their rights. Rather, dualistic systems were developed. Customary and religious law applied to the 'natives' and Western law applied to the colonists themselves. But these 'customary' laws had their limits. Thus, for example, British rule in the Asian sub-continent meant that Muslims, Hindus, Sikhs, etc. were governed by their respective religious laws in matters such as birth, marriage, divorce, inheritance and death but by 'secular' rules when it came to, for example, commerce. It is ironic to note that much of the modern 'Muslim family law' that still exists in India, Pakistan and Bangladesh, for example, is a direct product of British attempts to codify the law as part of their colonial venture. As Mahmood Mamdani in his groundbreaking study (*Citizen and subject: contemporary Africa and the legacy of late colonialism* (Princeton University Press, 1996)) argued, the law was designed to include the colonial subject into institutions that guaranteed their subordinate status. European powers thus developed systems of indirect rule that would allow a small group of administrators to control the vast conquered or acquired territories.

In the later phase of colonialism, indirect rule was further developed to allow experiments with devolution of power but its continued elaboration was interrupted by the revolutions and struggles that achieved independence for the former colonial territories. The achievement of independence by former colonised territories was achieved through political struggle. Although the work of the UN and the USA was important, it would perhaps be something of a misrepresentation to suggest that it was the notion of universal human rights that was a major factor. Nationalism and, to some extent, socialism were key ideological influences. International pressure brought to bear against colonialism and the increasing costs of running empires in the post-war period were also significant factors. Indeed, as far as the later struggles against colonial empires were concerned, such as those in the Portuguese Empire in Africa, the influence of the new Member States in the UN and agitation around universal human rights were important factors in building international opposition to the remaining colonial orders and inspiring the struggles themselves.

The struggle against colonialism was also a struggle against apartheid. Although this Afrikaans term, which means 'separateness' or segregation, has been used to describe the white minority regimes in South Africa, it could equally apply to the racial segregation that existed in Southern Rhodesia (now Zimbabwe) until 1980 or so and the United States, and it only began to be successfully challenged in the post-war period. There is a strong argument to be made that some of the laws now being applied by Israel in the 'Occupied Palestinian Territories' and Israel proper that differentiate between the rights of Israelis and Palestinians or Jewish Israelis and Arab Israelis also amount to apartheid – although Israel strongly contests this. (See, for example, the discussion by former US President Jimmy Carter, *Palestine: peace not apartheid.* (New York: Simon & Schuster Ltd, 2006). At the time, President Carter's description was hugely controversial. But in 2021 the ground-breaking reports by Human Rights Watch endorsed by a number of other 'local' NGOS entitled *A threshold crossed* reignited the argument. In earlier discussions, we looked at the role of NGOs and the move by Human Rights Watch is a bold but also a principled one. The report is robust and its findings irrefutable.)

Returning to the USA, linking colonialism with the history of racism in the USA raises many difficult issues that are outside the scope of this chapter. However, it could of course be briefly pointed out that the slave trade was central to the early phase of colonialism and thus the presence of slaves in America can be linked to the colonial economic system. When we turn to look at the apartheid regime, we will also reflect upon its links with colonialism. Any study of the civil liberties struggle in the USA highlights that the key factor in dismantling racism is political agitation.

Some scholars have seen the USA as fundamentally based on racism. (See, for example, Bell, D. *Race, racism and American law.* (Boston: Little, Brown and Company, 2008).) For instance, it has been argued that the perpetuation of slavery was a compromise that allowed the foundation of the American constitutional government. From the drafting of the constitution in 1787 to the Hayes-Tilden Compromise of 1877, the right to property was repeatedly prioritised above black freedom. From the end of the Civil War until the present, a pattern can be traced that shows that any black advance was effectively crushed by a white backlash, and persistent and deep-rooted racism meant that black rights were always compromised by other economic or social interests. The experience of the 'first reconstruction' – the time from the end of the Civil War in 1865 to 1877 (see Crenshaw, K. et al. (eds) *Critical race theory*. (New York: The New Press, 1995) p.939) – was repeated in the fate of the civil rights movement. In both cases, formal equality was stated in law but economic and social dispossession still existed.

The dismantling of segregation in the USA can be largely seen as driven by the civil liberties movement and domestic political initiatives. In particular, the litigation by the National Association for the Advancement of Colored People (NAACP) used the law to attack injustices and discrimination against black people. Again, it would be hard to show that ideas of international human rights were central, although the rights enshrined in the US Constitution were fundamental in legal strategies and in playing a larger ideological role. The history of American anti-discrimination law can be divided into broad phases. The first phase, from 1954 to 1965, is marked by the case of *Brown* v *Board of Education* [1945] 347 US 483 in which the Supreme Court ordered an end to segregation in state schools.

In the second phase, successful litigation showed that the law was able to address substantive issues of disadvantage. One of the landmark cases was *Griggs* v *Duke Power Co* [1971] 401 US 424, a Supreme Court decision under the Civil Rights Act of 1964 concerning discrimination in the workplace. The Court widened the definition of intention to discriminate and in effect forced employers into adopting positive discrimination schemes. Significant progress was also made in education. However, these advances were reversed after 1974. This was as a direct result of the success of the earlier anti-discrimination law. The official line was that the problem had now been solved and vigorous positive discrimination was not needed – indeed, any further measures would contravene the equality provision of the Fourteenth Amendment of the Constitution (under which the early anti-discrimination cases had been decided). More recent cases to this end include the 2014 judgment of the Supreme Court in

Schuette v *Coalition to Defend Affirmative Action* [2014] 572 US, where the measures adopted by several states against the use of affirmative action in school admissions were upheld.

It is thus necessary to qualify the linearity of the 'we shall overcome narrative', the epic tale that starts with slavery and ends with the proper integration of African Americans into American society. Linked to this narrative is a peculiar ideology: an 'evolutionary' narrative of almost inevitable progress. The centrality of the integrationist approach has led to the marginalisation and misrepresentation of a different tradition linked to the names of Malcolm X, the Nation of Islam, the Black Panthers and to militancy. The mainstream narrative focuses on Rosa Parks and Martin Luther King Jr – although Muhammad Ali managed over time to cross from the marginalised to the mainstream. This alternative position can be referred to as the 'black nationalist critique'. In its most crude form, it insists that black people will never be accepted, and that secession, separatism and resistance are preferable to integration. The militant demand for a separate black homeland should be understood as a 'symbol…that race consciousness constitutes African-Americans as a distinct social community in much the same way that national self identity operates to establish the terms of recognition and identity in a "regular" nation' (Crenshaw, K. et al. (eds) *Critical race theory*. (New York: The New Press, 1995) p.137); as Bell puts it: 'America…is a white country which means that flourishing black institutions of any kind are unnatural, suspect and not to be encouraged' (Bell, D. *Race, racism and American law*. (Boston: Little, Brown and Company, 2008) p.48).

Although a commitment to combating racism is now part of US domestic policy, it is clearly wrong to suggest that the problem has been eradicated from US society. The 'Black Lives Matter' movement was started in 2012 in response to the fatal shooting of a young African-American, Trayvon Martin, by George Zimmerman, a (white) neighbourhood watch volunteer in Florida. Zimmerman was initially not charged with any offence; he was subsequently charged but then acquitted, provoking national outrage. Although no longer US President, the election of Donald Trump in 2016 on, in part, a racist platform, the murder of George Floyd in May 2020 and the subsequent reawakening of the Black Lives Matter movement made it clear that race and racial politics are very much still a live issue in the USA. Equally, we cannot overlook the fact that the USA had a black president between 2008 and 2016; the first major Western democracy to have an elected leader from a racial minority. In the USA, and indeed in any society, it is not simply a question of white discrimination against black people. This would hugely oversimplify the problem and obscure the sense in which different racial groups are mutually hostile. What can be suggested, however, is that the civil liberties struggle of the 1950s and 1960s was particularly successful in bringing to an end the more obvious forms of segregation and racism in the USA.

Activity 10.1

'Although the statement of a prohibition on discrimination is an important human right, historical struggles against colonialism and racism suggest that other factors are certainly influential and may, in fact, have been more important.'

Discuss.

Summary

This section has focused on the background to the Convention. We have looked at the nature of colonial empires and argued that, generally, and certainly in the later phase of colonialism, they were based on systems that accorded 'natives' rights. These rights, however, were inferior to those enjoyed by European colonialists. Thus, the struggle against discrimination is both a struggle against being denied rights altogether, and against being accorded lesser rights. We have also considered the civil liberties struggle in the USA and attempted to assess the extent to which other ideologies such as nationalism played an important part in struggles against colonialism, racist segregation and apartheid.

Further reading

For an earlier account of the differences between the British and French colonial experiences, see:

- **Crocker, W.R. *On governing colonies: being an outline of the real issues and a comparison of the British, French and Belgian approach to them*. (London: G. Allen and Unwin, 1947).**

More recent studies include:

- **Gifford, P. and W.R. Louis (eds) *France and Britain in Africa: imperial rivalry and colonial rule*. (New Haven, CT & London: Yale University Press, 1971) [ISBN 9780300012897].**
- **Kent, J. *The internationalisation of colonialism: Britain, France, and black Africa 1939–1956*. (Oxford: Clarendon Press, 1992) [ISBN 9780198203025].**

For an engagement with the aftermath of colonialism, see:

- **Asiwaju, A.I. (ed.) *West African transformations: comparative impacts of French and British colonialism*. (Ikeja, Nigeria: Malthouse Press, 2001) [ISBN 9879780231460].**
- **Davidson, B. *The black man's burden: Africa and the curse of the nation state*. (London: James Currey, 1992) [ISBN 9780852557006].**
- **Morris-Jones, W.H. and G. Fischer (eds) *Decolonisation and after: the British and French experience*. (Oxford: Routledge, 1980) [ISBN 9780714630953].**

10.2 The International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD came into force in January 1969. It was part of the UN's attempt at tackling the issue of racial discrimination; in 1963, the UN had made a Declaration on the Elimination of All Forms of Racial Discrimination. Equally important was the earlier Declaration on the Granting of Independence to Colonial Countries and Peoples of December 1960.

Two other international instruments were influential in the drafting of the Convention and the principles upon which it rested: the Convention Concerning Discrimination in Respect of Employment and Occupation adopted by the International Labour Organization in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960.

The Race Convention begins by affirming the core principles of human rights: that all human beings must be treated with dignity and equality. This is then linked to the central principle of anti-discrimination law: all are entitled to equal protection by the law from discrimination and incitement to discrimination. These principles are then placed in their historical context to give a strong sense of the role of the UN in the reconstruction of the global order after the Second World War. The Convention was born out of the struggle against colonialism, and the practices of segregation, apartheid and discrimination on which the colonial empires were based.

As discussed above, the colonial empires were not based just on the acquisition of territory. They were founded on racial ideologies that stressed, at least in the early colonial period, the inferiority of those who had been colonised. It was necessary to 'help' those who had not had the benefits of European civilisation. For instance, Sir Fredrick Lugard in his classic work on the British mandate in Africa stated:

> It was the task of civilisation to…establish courts of law, to inculcate in the natives a sense of individual responsibility, of liberty, and of justice, and to teach their rulers how to apply these principles…I am confident that the verdict of history will award high praise to the efforts and the achievements of Great Britain in the discharge of these great responsibilities…I am a profound believer in the British Empire and its mission in Africa.
>
> (Lugard, F. *The dual mandate in British Tropical Africa*. (London: Frank Cass, 1965) p.5.)

This approach clearly demonstrates a racist attitude as it assumes the innate inferiority of those he called 'natives'. As we saw in the brief historical account earlier, these ideas became increasingly outdated and questionable in the post-war period, although their influence did persist. It is against this background that we need to appreciate that

one of the Convention's main purposes is to mobilise international opinion against 'the manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation'.

ACTIVITY 10.2

What are the foundational ideas of the Convention?

10.2.1 Part I of the Convention

Article 1 defines discrimination:

> The term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This broad definition is clarified by the next two paragraphs: the interpretation of racial discrimination in the Convention does not apply to the distinctions states have to make between citizens and non-citizens, or to the law relating to nationality or citizenship, unless of course these areas of law are racially discriminatory. The final paragraph of the Article stresses the need for positive discrimination programmes, and asserts that if such a programme is intended to secure '[the] adequate advancement of certain racial or ethnic groups or individuals…as may be necessary…to ensure' that 'groups or individuals [have] equal enjoyment or exercise of human rights and fundamental freedoms', it would not be seen as discriminatory.

Another caveat is necessary, given the existence of segregation in some societies. Article 1(4) states that the need for affirmative action cannot be linked with the provision of 'separate rights for different racial groups'. This principle reflects the fact that apartheid and segregationist regimes, such as those in the USA and South Africa, did not so much deprive sections of their populations (defined in racial terms) of rights; racial groups did have rights but within systems that stressed that white, black and coloured groups should exist separately. Very often official ideologies that black or coloured people were 'equal but separate' meant that such people had 'rights' to inferior schools, houses and employment. Thus, affirmative action was aimed at inclusiveness: the creation of a society of equals. The Article envisages that this will be a finite process, for such programmes are only to be in place until 'the objectives for which they were taken have been achieved'.

Article 2 goes to the heart of the protection against discrimination that the Convention offers. To make sense of the following analysis, it is necessary to remember that the Convention places duties and obligations on states parties. However, to effectively combat discrimination, it is necessary to ensure that private parties do not act in a discriminatory way. The question is, how to achieve this? Paragraph 1 of the Article sets out the obligations of a state party as follows: to 'condemn racial discrimination' and to 'undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms'.

a. These are the core obligations that apply to a state party and all other public authorities under its control. A state party must 'engage in no act or practice of racial discrimination against persons, groups of persons or institutions' and must 'ensure that all public authorities and public institutions, national and local…act in conformity with this obligation'.

b. They prohibit states parties from sponsoring or supporting racial discrimination.

c. They address how a state will achieve these ends: through a review of national law, and a rescinding or amending of those laws that are discriminatory.

d. They broaden the obligation of the state. Alongside the previous paragraph, it provides the means for changing law and policy so that they are not discriminatory: 'each state party shall prohibit and bring to an end, by all appropriate means,

including legislation as required by circumstances, racial discrimination by any persons, group or organisation'.

e. The final sub-paragraph moves from negative duties to positive obligations: states parties must encourage 'integrationalist multi-racial organisation' and support other groups and programmes aimed at breaking down racial divisions. Article 2(4) repeats the essence of Article 1(4) (see above).

Article 3 returns to the problem of segregation and apartheid. States parties undertake 'to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'. The Article addresses both those nations that continued segregation and apartheid practices, and the reality in federal nations, such as the USA, where some states may be segregationist. The federal power must act in such a way as to bring to an end such practices.

Article 4 elaborates Article 1(d). A state party is required to 'condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form'. This positive duty also encompasses the creation of civil and criminal penalties to punish the 'dissemination' and 'financing' of racist propaganda and racially motivated violence. Racist groups can be prohibited and public authorities shall not be allowed to promote discrimination. This provision raises interesting questions relating to 'freedom of expression', especially its relationship with Article 19, ICCPR, where the Human Rights Committee has sought to allow 'hate speech' as a part of the 'marketplace of ideas' approach it has adopted to free expression.

Article 5 lists the kinds of rights necessitated by equality before the law that are to be enjoyed by all people. These include, as well as the core right of equality of treatment before courts and tribunals, the security of the person from violence and political rights (such as participation in elections, rights to stand as a representative and to have access to public services).

Article 6 reaffirms this right but changes the emphasis slightly in providing a right to an effective remedy. Article 5 also outlines what civil rights have to be guaranteed: the right to freedom of movement, within and between countries; the right to nationality; to free and uncoerced marriage; property rights; freedom of conscience, religion and thought and freedom of expression. Finally, economic, social and cultural rights are detailed. These include the right to work, the right to form and join trade unions, and the right to housing, education and participation in cultural activities. The last right is worth quoting in full:

f. The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

This right of access stresses that the reality of racism is the exclusion of people from facilities that should be shared by all citizens. It is hardly surprising that the civil liberties struggle in the USA began with protests (by Rosa Parks among others) against segregated transport. The way in which the law is to be used to end to such practices is elaborated in Article 7, which stresses the need for 'immediate and effective measures' in education.

Summary

This section has reviewed Part 1 of the Convention. We have looked at Articles 1–5 and seen that as well as containing the definition of racial discrimination, they place certain obligations on states parties to refrain from discriminatory practices and to ensure that legislation and policy prohibit discrimination in general.

10.2.2 Part II of the Convention

Part II of the Convention moves from substantive rights to describe the power and duties of the Committee on the Elimination of Racial Discrimination (CERD). **Article 8** states that the Committee shall consist of 18 members, elected by states parties from

their nationals, serving in a personal capacity. The composition of the Committee is also meant to reflect an equitable geographical distribution and a representation of different legal and social traditions. It is more or less the standard provision in UN Human Rights for the supervisory committee that is set up to consider compliance.

Article 9 requires states parties to meet various reporting commitments: within one year of the treaty entering into force for the country concerned, the state party must produce a report detailing the 'legislative, judicial, administrative or other measures' that the state party has taken to further the goals of the treaty. After the first report has been submitted, a state must make a further report every two years, and the Committee can request further information from states parties. The Committee itself must report annually to the Secretary-General and may make 'suggestions and general recommendations' that are based on an examination of the reports from states parties. States parties can comment on such reports to the Committee. As we have seen in earlier chapters, the UN Human Rights Treaty Body reporting system is suffering from systemic and endemic problems. Notwithstanding this, there is significant value in the reporting system and we will examine below some examples of how it has functioned with regard to certain states.

Article 10 empowers the Committee to create its own rules of procedure.

Article 11 is an important enforcement mechanism if a state party is in breach of the Convention. It allows another state party to bring to the attention of the Committee the activities of the states party in breach. The Committee can then remit the communication to the party concerned, and, within three months of such a communication, the party must return to the Committee explanations that clarify the matter and show what remedy, if any, has been awarded. If this does not resolve the matter to the satisfaction of both states parties, then either state has the right to remit the matter to the Committee for a second time if the Committee has ascertained that all available domestic remedies have been exhausted. **Article 12** would, in these circumstances, allow the Committee to appoint an 'ad hoc Conciliation Commission'. Once the Commission has considered the matter, it sends the Committee a report detailing its recommendations. The Committee, in turn, transmits the findings of the Committee to the states parties, who must inform the Committee whether or not they accept the decisions of the Commission. If the decision is not accepted, **Article 22** would then allow the matter to be sent to the International Court of Justice, or for another mode of settlement to be agreed. To date, this procedure has not been used, although Ukraine did seek to rely on the ICERD in a case against Russia before the ICJ, which declined jurisdiction.

Article 14 sets out the individual communication procedure. Although it is optional, ICERD is distinct from most other UN Human Rights Treaties in that the procedure is in the treaty itself and not in additional protocol. The procedure enables a state party to declare that it recognises the competence of the Committee to receive individual communications from individuals who are within its jurisdiction. Communications must relate to violations of the Convention that have not been remedied in national law. There are various admissibility grounds although these are distinct from some of the other UN Human Rights Treaties.

The Committee must confidentially bring to the attention of the state party any communication that it has received alleging a violation of the Convention. The Committee does not reveal the identity of the complainants. The state party must respond to the Committee within three months with an explanation and a statement of the remedy provided, if indeed one was. However, before the Committee can consider a communication, it must be sure that the complainant has exhausted all available domestic legal mechanisms and remedies; or that the provision of a remedy has been delayed unjustifiably. Such was the novelty of this procedure that the last paragraph of this Article provides that it is only to come into operation when at least 10 parties to the Convention make the relevant declarations.

To see how the process has worked in practice we can consider the opinion of CERD relating to a complaint submitted by Kamal Quereshi (CERD 027/2002), a Danish

national and a member of the Danish parliament. Mr Quereshi alleged that he was a victim of a violation by Denmark of Articles 2, 4 and 6 of the Convention. The complaint came out of the refusal of the regional public prosecutor to prosecute members of a Danish political party who had made various allegedly discriminatory statements. Mr Quereshi was also alleging that Denmark had failed to discharge its positive obligation to take effective action to examine and investigate reported incidents of racial discrimination. The Danish government argued that Mr Quereshi had failed to exhaust all the available domestic remedies; however, the Committee found that the petitioner had exhausted domestic remedies and the communication was admissible. In relation to the substance of the communication, those making discriminatory statements had been punished. Certain statements had been found not to constitute discrimination under the relevant law. For instance, one of the statements had related to 'foreigners'. The Committee decided that:

> …regardless of what may have been the position in the state party in the past, a general reference to foreigners does not at present single out a group of persons, contrary to Article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin.

However, at the same time, the Committee felt that it was necessary to draw the attention of the Danish government to a General Recommendation that concerned non-discrimination against non-citizens; but this did not amount to a breach of the Convention. On a broader point, the relationship between individual communications and state reporting is an important one. In CERD's Concluding Observations adopted in 2002 relating to Denmark, it stated as an area of concern:

> The Committee is aware of reports of an increase in hate speech in Denmark. While it acknowledges the need for balance between freedom of expression and measures to eradicate racist abuse and stereotyping, the Committee recommends that the state party carefully monitor such speech for possible violations of Articles 2 and 4 of the Convention. In this regard, the Committee invites the state party to take particular note of paragraphs 85 and 115 of the Durban Declaration and Programme of Action respectively, which highlight the key role of politicians and political parties in combating racism, racial discrimination, xenophobia and related intolerance. Political parties are encouraged to take steps to promote solidarity, tolerance, respect and equality by developing voluntary codes of conduct so that their members refrain from public statements and actions that encourage or incite racial discrimination.

State Reports and communications feed into one another and each procedure can inform the other, as we discussed in Chapter 5. Here, however, CERD did not draw a firm link between them as it considered the complaint and the provisions of ICERD did not justify that.

A very notable trend has been the use of inter-state actions in the context of ICERD. Inter-state petitions are uncommon in the context of human rights treaties but the provisions of ICERD have been used by states. Two communications were brought by Qatar against the UAE and Saudi Arabia respectively. The communications were brought using Article 11 of the ICERD – which notes that: 'If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.' The communications were deemed admissible in this case but the tensions between Qatar and its neighbours were resolved diplomatically between the parties. The communications thus did not proceed to conclusion even though the CERD considered they were admissible and that it had jurisdiction. Qatar had also instituted proceedings against the UAE before the International Court of Justice using Article 22 of the ICERD. After a lengthy process, in 2021, the ICJ found it did not have jurisdiction to hear the case on its merits. This is not the first time the ICJ has had the ICERD invoked before it – Georgia also brought a case against Russia in 2011 but it was not heard on the merits. Ukraine has also brought a case against Russia at the ICJ in 2017, following Russia's invasion of Crimea (a part of Ukraine). At the time of writing, the case has not been decided on its merits. Again, this case relies in part on the ICERD.

ACTIVITY 10.3

What is the Committee on the Elimination of Racial Discrimination, and how can it enforce the rights contained in the Convention?

10.2.3 Part III of the Convention

The most important part of Part III relates to reservations. However, reservations that are 'incompatible with the object and purpose' of the Convention are not permitted. A reservation would be considered incompatible if at least two states parties objected to it. **Article 20** provides that the Secretary-General must send to states parties that are or may become parties to the Convention, reservations that have been made. Any state party can inform the Secretary-General that it does not accept the reservation.

10.2.4 The ICERD in action

As noted above, CERD has been functioning longer than any of the other UN human rights treaty bodies. Its practices and approach have developed substantially over time and we will see how shortly. As we also discussed when looking at the Women's Convention, the main purpose of the ICERD is to eliminate discrimination, albeit on the basis of race as opposed to gender. ICERD covers civil and political rights as well as economic and social rights. **Article 5** requires states parties to:

> prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:…e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions; (iii) The right to housing; (iv) The right to public health, medical care, social security and social services; (v) The right to education and training; (vi) The right to equal participation in cultural activities…

Article 5 does not of itself create or impose any economic and social rights (or civil or political) obligations; it assumes that such rights are already recognised in the domestic law of each state party. There is no reference in Article 5 or elsewhere in the ICERD to the progressive implementation of rights. Thus, the obligation to eliminate discrimination is an immediate one. An important contribution CERD has made to human rights jurisprudence is to develop substantive rights through the prism of non-discrimination. This is apparent from the Committee's practice, both in some of its General Recommendations and the system of individual petitions. For example, General Recommendation No. 27 on Discrimination against Roma. In this, CERD noted that states parties must, *inter alia*:

> 21. take the necessary measures to ensure a process of basic education for Roma children of travelling communities, including by admitting them temporarily to local schools, by temporary classes in their places of encampment, or by using new technologies for distance education
>
> …
>
> 32. take the necessary measures, as appropriate, for offering Roma nomadic groups or Travellers camping places for their caravans, with all necessary facilities
>
> 33. ensure Roma equal access to health care and social security services and to eliminate any discriminatory practices against them in this field
>
> 34. initiate and implement programmes and projects in the field of health for Roma, mainly women and children, having in mind their disadvantaged situation due to extreme poverty and low level of education.

Without the level of detail set out in such Recommendations, states parties would not be clear as to their obligations, and the position of those such as indigenous persons and Roma would not improve unless a series of explicit obligations was set, against which the actions of states parties could be measured.

If we analysis the practice of CERD over a 20-year period between 1990 and 2010, it is clear that CERD has, as evidenced by some of its General Recommendations (known as General Comments by the Human Rights Committee but normatively the same practice), identified certain groups or peoples who are systematically marginalised in societies and ensured that they are part of a detailed dialogue. Depending upon the state party in question, members of CERD have asked searching questions and in the Concluding Observations commented upon the relevant rights of, in particular, indigenous peoples, Roma, ethnic and other groups or minorities, and migrant workers. We will be looking at indigenous peoples in more detail shortly but before doing so, we will look at a few examples of State Reports. This is useful for two purposes. First, it is another examination of the practical operation of a UN Human Rights Treaty Body under the State Reporting procedure. Second, it highlights some of the contemporary issues CERD is discussing with states parties.

10.2.5 State Reporting and some contemporary issues

The United Kingdom

In August 2003, CERD issued its Concluding Observations on the 16th and 17th periodic reports of the United Kingdom submitted under Article 9. There was general praise for various pieces of legislation that shifted the burden of proof to the alleged offender (to show they had not discriminated) and broaden the definition of indirect discrimination (refer to Chapter 9 if you need to refresh your memory as to what this is). The changes that had been made were prompted largely by the racially motivated murder of a black teenager, Stephen Lawrence, and the subsequent failure to obtain a prosecution. This is an infamous case. The first report into the police failing found that there was no evidence that racism had significantly contributed to the failures to make arrests. However, the Lawrence Inquiry was far more critical. It accused both the Police Complaints Authority (PCA) and the police of failing to understand the problem of discrimination. It was not limited to the acts of a few 'rotten apples', who 'let the side down' (The Lawrence Inquiry, 1997 6:14). The Lawrence Inquiry stressed the institutional nature of the racism that was endemic in the police. There was what was described as a 'cultural failure', referring to the culture of the institution not the UK as a whole. The Committee was positive about the legislative changes and policy initiatives that were being undertaken to deal with these problems. Among other issues, the Committee also expressed misgivings about the treatment of ethnic minorities and asylum seekers, in particular the way in which the Press Complaints Commission was ineffective in dealing with the way in which certain newspapers stirred up general antagonism towards asylum seekers.

When examining the UK's compliance eight years later in 2011, some of the same concerns were expressed again. However, CERD welcomed the enactment of the Equality Act 2010 (which prohibits all sorts of grounds of discrimination such as race, religion, disability, sex and sexual orientation) as a landmark improvement in anti-discrimination legislation. It also welcomed the establishment of the Equality and Human Rights Commission under the Equality Act 2006.

The Committee was concerned, however, at reports 'of an increase in virulent attacks on, and negative portrayal of, ethnic minorities, immigrants, asylum seekers and refugees by the media in the state party'. Further:

> [the]Committee regrets the increased use of 'stops and searches' by the police which disproportionately affect members of minority ethnic groups, particularly persons of Asian and African descent…The Committee is concerned that these measures may not only encourage racial and ethnic stereotyping by police officers but may also encourage impunity and fail to promote accountability in the police service for possible abuses.

The Committee further recommended reform of the asylum system and terrorism law which it considered was discriminatory. Anti-terrorist and security legislation was seen as having 'a negative impact on certain groups such as Muslims and ha[s] contributed to an increase in Islamophobia'. Issues continue to resonate with the Committee over time. In 2016, the Committee examined the UK's 21st, 22nd and 23rd periodic reports.

The Committee welcomed a number of initiatives aimed at tackling racial hatred and the '2020 Vision', which aimed to increase the number of black people and those from ethnic minorities at university. The Committee expressed grave concerns, however, about the spike in hate speech related to immigrants in the run up to the Brexit debate in 2016. Similarly, it was concerned as to how persons identifying as Muslim were disproportionately targeted by anti-terrorism legislation; while those who were black were more likely to be subject to 'stop and search' by the police seeking to tackle crime.

In 2019 the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance published her report after a visit to the UK in 2018 (A/HRC/41/54/Add.2, available at: https://undocs.org/A/HRC/41/54/ADD.2). The Special Rapportuer is not a part of CERD but there is, of course, an overlap in their work. We have noted this issue above. In the Special Rapporteur's report it was noted, '[t]he structural socioeconomic exclusion of racial and ethnic minority communities in the United Kingdom is striking' (para.20). Further, at para.35 it was noted:

> 35. Many of the communities and organizations with whom the Special Rapporteur consulted highlighted the devastating racial impact of criminal justice law and policy in the United Kingdom. The Lammy Review, an independent study commissioned by the Government, captures the national picture in this regard, providing an overview of how at every stage of the criminal justice process – from stops-and-searches to sentencing – racial and ethnic minority communities are targeted disproportionately. It also highlights the complex picture of differential disparity within racial and ethnic minority communities. For example, Blacks make up 3 per cent of the United Kingdom population but in 2015/16 accounted for 12 per cent of the adult prison population and more than 20 per cent of children in custody. Other racial and ethnic minority groups were also overrepresented but to a lesser degree. The Lammy Review highlights the overrepresentation of Gypsy, Roma and Traveller children in secure training centres, and a striking increase in Muslim prisoners across different ethnicities from about 8,900 to 13,200 over the past decade. Muslims, who are about 5 per cent of the United Kingdom population, now make up about 15 per cent of the prison population. This dramatic rise is not associated with terrorism offences.
>
> 38. …particularly with respect to the differential treatment of racial and ethnic minorities in the criminal justice system, 'there is currently no evidence-based explanation for these disparities'. The findings … should not be assumed by any means to reflect proven disparate levels of criminality among racial and ethnic minorities. For example, Whites are more likely to have drugs found on their person during stops and searches, but Blacks are eight times more likely to be subject to such stops. There can be no question that a pervasive and officially tolerated culture of racial profiling is at work in certain police forces, and that racial and ethnic minority children and youth are among the most vulnerable…
>
> 45. The Special Rapporteur has received information indicating that sustained and pervasive discourses vilifying Islam and Muslims persist in the British media and even among the political leadership, and that Islamophobia has taken firm root in the United Kingdom. She notes that the prevalence of Islamophobia in the United Kingdom was also highlighted by a previous mandate holder in 1996 … the more recent counter-terrorism laws and policies … have vastly exacerbated Islamophobic sentiment, these problems have historical precedents.

The above gives just a flavour of the recurring issues over a period of time in the context of one state party to ICERD.

Activity 10.4

Find three states parties to which you have a connection – where you live, study or where some of your family live, for example – and examine their State Reports and also the CERD's Concluding Observations.

All documents can be found at: www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx

No feedback provided.

Summary

This section of the chapter considered the role and function of the Committee on the Elimination of Racial Discrimination. We have seen that states parties must report to the Commission, and that one state party can report another party in breach to the Committee. We also examined the procedure whereby individual complaints could be considered under the Convention.

10.3 Indigenous rights – tackling entrenched and systematic discrimination

Core text

- **Bantekas and Oette, Chapter 10 'Group rights: self-determination, minorities and indigenous peoples', Section 4.**

Essential reading

- **Heyward, M. 'Permanent forum on indigenous issues' in Mégret and Alston (eds), pp.291–306 (available via the Online Library).**

One of the categories of persons who had not really been envisaged as being protected by ICERD were indigenous peoples. ICERD was drafted, in part, as a response to colonialism but many of those who were victims of the horrors of colonial exploitation were silent during the debates as their voices had been so marginalised. It is estimated that there are more than 370 million indigenous people spread across approximately 70 countries worldwide. So over one in three countries in the world has indigenous peoples. They are seen as practising unique traditions, retaining social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Indigenous people are broadly speaking the descendants of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. Those who subsequently arrived became dominant through conquest, occupation, settlement or other means. To take some examples, indigenous peoples include 'Native Americans' in, *inter alia*, Canada, the USA, Mexico, Brazil and Chile; the aboriginal peoples of Australia; the Maoris of New Zealand and some of the 'tribal peoples' living in Malaysia and Indonesia. These are just a few examples but CERD had started to address the issue in a systematic manner with many such states over time. In 2007, CERD elaborated its approach in detail and adopted General Recommendation No. 23 on Indigenous Peoples. This was an important development as it was evidence of significant and sustained recognition of the systematic discrimination that existed against such peoples across the entire globe by a major UN Human Rights Treaty Body. Developments under the ICERD were not in isolation, however, as there was broader recognition of indigenous issues in other UN fora. Key and most important was the adoption, also in 2007, of the UN Declaration on the Rights of Indigenous Peoples. Although adopted as a 'declaration', the process and engagement with many states and indigenous peoples has already led many states and scholars to conclude that a number of the provisions are representative of legal obligations (see, for detailed discussion, Barelli, M. *Seeking justice in international law: the significance and implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge, 2016)).

10.3.1 The 2007 Declaration

It is important to note that in light of the diversity of indigenous peoples, an official definition of 'indigenous' has not been adopted within the UN system and there is not such a definition in the Declaration. Instead, an understanding of the term is based on:

- self-identification as indigenous peoples at the individual level and accepted by the community as their member
- historical continuity with pre-colonial and/or pre-settler societies
- strong link to territories and surrounding natural resources

- distinct social, economic or political systems
- distinct language, culture and beliefs
- forming non-dominant groups of society
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

The Declaration thus does not seek to define indigenous peoples – instead it promises to try to bring some degree of justice to indigenous peoples by affirming a set of rights and principles that address the majority of human rights problems such peoples have faced. Considering the diversity of such peoples, it is of little surprise that these rights and principles are varied. But it is also important to stress that seeking to protect such peoples required innovative approaches and the capacity to understand collective rights, cultural rights and the right to self-determination as understood by such peoples. Self-determination is a difficult issue for states, especially if it is internal as that threatens the very existence of the state, but in this context it refers not to new states but greater autonomy within the state. In its 46 Articles the Declaration covers a variety of issues as is to be expected. The underlying themes of the Declaration are equality and non-discrimination and both are repeatedly referred to. To understand this, we will examine two provisions of the Declaration to see how they seek to protect indigenous peoples and how they also recognise their different choices.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
   (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities
   (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources
   (c) any form of forced population transfer which has the aim or effect of violating or undermining any of their rights
   (d) any form of forced assimilation or integration
   (e) any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

   ...

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 8 is important in that it sets out a number of obligations – some of which are followed up in further detail in subsequent provisions of the Declaration. What is critically important from our perspective is the fact that there is a prohibition on assimilation. Indigenous peoples have had their cultures deemed inferior to that of colonialists or those who subsequently arrived – and thus there has been an attempt to eradicate it. Australia, Canada, the USA, New Zealand, to take a few examples, are states that have at times in the past sought to forcibly eradicate the culture of the indigenous peoples living in those states. In Australia, for example, there was an official state policy to forcibly take children away from Aboriginal families and have them housed and brought up by white (settler) families so that Aboriginal culture would

over time be eradicated – these children are the so-called 'Stolen Generations'. This policy of assimilation lasted from the 19th century to the late 1960s. In 2008, Australian Prime Minister Kevin Rudd made a formal apology for the past wrongs caused by successive governments on the indigenous Aboriginal population. He apologised in parliament to all Aborigines for laws and policies that 'inflicted profound grief, suffering and loss'. The apology was not accompanied by any redress or restitution, however. Such policies, indeed any policy that seeks to forcibly eradicate the culture of indigenous peoples, are prohibited under the Declaration – as it seeks to end the policy/perception among states that indigenous culture is inferior to the culture of the dominant community and its culture.

Article 28 is hugely significant – it is an obligation to put right historic wrongs that were carried out on the basis of discrimination; indeed, often simply not considering indigenous peoples human. The terms used are striking. There is a right to redress that can include restitution or, 'when this is not possible' just, fair and equitable compensation. This is for the land (and resources) that they have owned, occupied or used and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. There is no time limit here, and how to prove historic occupation in some cases is likely to be impossible; less so in others. What about where land has been found to be mineral rich – such as the Ogoni lands in Nigeria, which we discussed in Chapter 8? Does it mean a share of the wealth even if other land, without such resources, is provided in return? Further, there is reference to 'free, prior and informed consent'. These are modern terms being used in contexts that are often historic. During the colonial era, treaties were often entered into that purportedly offered consideration of some sort in return for land. There are many such treaties but they were hardly between two consenting equal parties – they were often agreed (quite literally) at the end of a gun barrel, with treaties and other legal documents seeking to establish title procured under extreme duress.

Notwithstanding the above uncertainties, which will no doubt be subject to litigation and clarified over time, the Declaration is an enormously significant step forward as it seeks to put right, to the extent they can, historical wrongs which were motivated by discrimination on the basis of race, among other grounds.

Summary and conclusion

This chapter has considered the International Convention on the Elimination of All Forms of Racial Discrimination. We have looked at the political and historical background to the Convention in the struggle against colonialism. A number of sections of the chapter analysed the content and structure of the Convention and we considered the role of the Committee on the Elimination of Racial Discrimination in enforcing the treaty. We also considered some examples of reports made by states parties under Article 9. In the final sections of the chapter, we looked at Indigenous Rights – a very important development in international human rights law and a development which has its genesis in systematic racial discrimination against such peoples.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the basic provisions of the International Convention on the Elimination of All Forms of Racial Discrimination**
- **describe the political context of the Convention**
- **explain the role of UN sanctions in ending apartheid in South Africa**
- **describe the evolution of the Convention**
- **discuss the recognition of indigenous rights.**

Sample examination question

'The Convention on the Elimination of All Forms of Racial Discrimination was adopted to combat apartheid in South Africa and is of no real relevance to the modern world.'

Discuss.

Advice on answering the question

There are two parts to this question, and it would probably be wise to agree with the first but not with the second. The first part of the question demands an outline of the Convention and the role that it plays; it would also be necessary to show that the Convention represents the first systematic attempt to produce a catalogue of rights aimed at prohibiting racial discrimination. Addressing the second part of the question is more difficult. The Convention has played and continues to play an important role in many states, but in some senses it fails to tackle the injustices caused by racial discrimination. The 2007 Declaration on Indigenous Peoples is a landmark development in that regard. Race was a key factor in colonialism, but indigenous peoples have been discriminated against for a variety of reasons – in modern contexts, however, it is race. The 2007 Declaration seeks to try and put such wrongs right but it is limited to people defined as indigenous, not, for example, the descendants of those forcibly removed from one part of the world to the other.

11 The prohibition of torture and ill treatment under international law

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Introduction

In this chapter we go beyond some of the enforcement and theoretical issues we have been looking at and further consider how all this manifests itself in practice. The prohibition of torture is an obligation *erga omnes*, meaning it is a norm in which all states have a legal interest and an obligation to act. This also means it exists in customary international law as well as in various treaties. In fact, the prohibition of torture is procedurally the best protected of all rights. From a legal perspective, torture is not only a breach of human rights but an abuse of due process and ultimately incompatible with the idea of the rule of law. Torture is an expression of power in its rawest and crudest form. The prohibition of torture is thus a commitment to the restraint of power. We also know, however, that torture is extremely widespread. The way in which the enforcement mechanisms are used and against whom displays clearly that certain strategies are at play. The aims of this chapter are to appreciate the legal and philosophical issues as to what is prohibited, as well as the effectiveness (or lack thereof) of the elaborate enforcement machinery that exists and how it has been used.

A key consideration for us will be the UN Convention Against Torture (UNCAT), adopted by the UN in 1984. The Convention requires that states parties declare torture illegal, and they are prevented from using claims to 'exceptional circumstances' or 'higher orders' as justifications for torture. It allows those accused of torture to be tried by any state party, or extradited to face trial in the country where the torture allegedly took place. The Convention also allows the investigation of allegations of torture if it appears that torture is being systematically practised by a state party. But the Convention is one part of a complex web of measures and procedures, and there is also a complex and controversial jurisprudence to consider. This chapter and the associated readings pull these themes together.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **explain the philosophical and moral issues surrounding the prohibition against torture**
- **outline the basic provisions of the UN Convention Against Torture**
- **describe the role of the Committee Against Torture**
- **explain the function of the Optional Protocol**
- **analyse the jurisprudence of the ECtHR concerning aspects of Article 3 ECHR**
- **analyse the jurisprudence of the Human Rights Committee concerning aspects of Article 7 International Covenant on Civil and Political Rights.**

Essential reading

Part One: The moral arguments

- **Ignatieff, M. 'Moral prohibition at a price' in Roth, K. and M. Worden (eds) *Torture: does it make us safer? Is it ever OK?* (New York: New Press, 2005) [ISBN 9781565849716] pp.18–27 (available on the VLE).**
- **Ginbar, Y. *Why not torture terrorists? Moral, practical and legal aspects of the 'ticking bomb' justification for torture*. (Oxford: Oxford University Press, 2008) [ISBN 9780199540914] pp.3–30 (available on the VLE).**

Part Two: The legal dimension

- **Ferstman, C. 'Integrity of the person' in Moeckli et al. (eds).**
- **Bantekas and Oette, Chapter 8 'Civil and political rights', Section 3 and Chapter 17 'Human rights and counter-terrorism'.**
- **De Schutter, Chapter 6 'Derogations in time of public emergency'. (This reading is broader than the aims of this chapter of the module guide, so it is only worth reading if you have a particular interest; therefore it is not essential and noted here for reference only.)**

ECHR

- **Article 3 ECHR.**
- **Mowbray, Chapter 5 OR**
- **Rainey, McCormick and Ovey, Chapter 9 'Prohibition of ill-treatment' (available on the VLE) OR**
- **Harris, O'Boyle, Bates and Buckley, Chapter 3 'The European Court of Human Rights: Organization, practice, and procedure' (available on the VLE) AND**
- **Application No. 5856/72, 25 April 1978, *Tyrer* v *United Kingdom*. Please ensure you also read Gerald Fitzmaurice's dissenting opinion.**
- **Application No. 25803/94, 28 July 1999, *Selmouni* v *France*.**
- **Application No. 37201/06, 28 February 2008, *Saadi* v *Ital*.**
- **Application No. 8139/09, 9 May 2012, *Othman (Abu Qatada)* v *United Kingdom*.**

  The above cases can all be easily found at the website of the ECtHR: www.echr.coe.int/Pages/home.aspx?p=home&c=

International Covenant on Civil and Political Rights

- **Articles 7 and 10 ICCPR.**
- **General Comment No.20 of the Human Rights Committee.**

UNCAT and the European Convention for the Prevention of Torture

- **UNCAT 1984 – Articles 1–16 – skim others and the Optional Protocol to the Convention 2002 – please skim through all of it.**
- **European Convention for the Prevention of Torture 1987 – please skim through all of it.**
- **Joseph and Castan, Chapter 9 – please do not read the discussion in Chapter 9 relating to Article 10 ICCPR. Beyond knowing of its existence, you do not need to consider Article 10 and how it has been interpreted, only that it exists. The discussion on Article 7 ICCPR in this chapter also addresses UNCAT and the relevant jurisprudence.**

Further reading

- **Alston and Goodman, Chapter 3 'Civil and political rights', Section D 'Norm regression: the torture prohibition' and Chapter 5 'National security, terrorism and the law of armed conflict', especially Section E 'Torture and diplomatic assurances'. (Some of this may feel a little dated when read now but actually it is as relevant as ever since the law/position has not moved on.)**
- **Cavanaugh, K. 'On torture: the case of the "hooded men"' (2020) 42 *Human Rights Quarterly* 519–44.**

11.1 Prohibiting torture and other forms of ill treatment

The prohibition of certain forms of ill treatment is central to every treaty relating to civil and political rights. Not only that, it is always one of the first substantive rights protected in each such treaty. Each such treaty states that the right cannot be derogated from at a time of emergency, nor do any of the treaties permit limitations to the prohibition. The fundamental idea of human rights clearly implies that torture is unacceptable. The 'inherent dignity of the human person' is the foundation of the prohibition, but there are also other sources that support this general principle. Beyond that, no treaty prohibits only torture. Inhuman, cruel and degrading treatment or punishment are among the other terms used and acts prohibited. Such terms would not be used unless there was a rationale behind their additional use, thus some distinction needs to be drawn. The jurisprudence to be examined addresses this distinction. It is important for you, however, to critically

engage with the jurisprudence, and the discussion will highlight some key issues. We will start with UNCAT. Although it was adopted after the other provisions, it has been hugely influential in the developing jurisprudence of the ECtHR and the HRC. Before examining UNCAT, however, we should consider the moral issues and also the 'practical issues'.

ACTIVITY 11.1

Read the Essential reading under the heading of 'Part One: The moral arguments'.

a. **Why do you think torture is prevalent?**

b. **What contributes to its prevalence?**

c. **What are the moral and practical arguments for and against prohibiting torture? Which do you find more convincing and why?**

d. **Do you think there are scenarios in which torture is justifiable? You have read arguments against the use of torture concerning the 'ticking bomb' scenario. Do you still feel that torture is justifiable (if you thought so)? Give reasons for your answers.**

e. **What do you think is needed to eradicate torture?**

f. **Do you think torture is inevitable?**

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain the philosophical and moral issues surrounding the prohibition against torture.**

11.2 The Convention Against Torture

The Preamble of the Convention places the prohibition on torture in the context of human rights. The fundamental idea of human rights clearly implies that torture is unacceptable. The 'inherent dignity of the human person' is the foundation of the prohibition, but there are also other sources that support this general principle. Article 5 of the Universal Declaration of Human Rights (UDHR), Article 3 ECHR and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) all state that no one shall be subjected to torture, inhuman or degrading treatment or punishment. The UDHR and ICCPR also use the term 'cruel'.

11.2.1 Part I

Article 1 begins with a definition of torture:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

There are thus a number of elements to the definition, and we can ask several questions about the meaning of the words used. First, torture is understood by the Convention as an intentional 'act'. This suggests that an omission to act could also constitute torture, if this omission was intentional. The intention is directed towards particular purposes: obtaining information, punishment, intimidation, coercion or discrimination. In all instances, torture could be used either on the immediate victim or as a means of punishing, intimidating, discriminating against or obtaining information about a third party. The nature of the act has to be such that it causes 'severe pain and suffering'. This suggests that an act that does not come up to this threshold of pain and suffering might not constitute torture. The definition is broad

enough to cover both physical or mental pain and suffering, and so could cover, for instance, interrogation techniques that do not necessarily cause physical pain, but cause mental pain and suffering. Note, however, that the alleged acts of torture have to have an official nature: the 'pain and suffering' have to be inflicted either directly by or with the 'consent or acquiescence' of a 'public official' or someone acting in an official capacity. In this sense, torture that was inflicted in a private capacity, without either direct or indirect official sanction, would fall outside of the Convention, although it may constitute an offence under the relevant national law.

There is an important caveat provided by **Article 1**: Torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. It would appear, then, that provided that 'pain or suffering' is a 'lawful sanction', the act would fall outside of the Convention. This element of the definition effectively licenses 'pain and suffering' if done pursuant to lawful orders. This provision was included as a compromise so as to secure the agreement of numerous states where corporal punishment is still widely used. The amputation of hands and whipping, for example, cannot constitute torture so long as they are sanctions provided for by law and carried out further to due process. Further, they will not be acts of torture, notwithstanding the severe pain and suffering they cause, as they are not intended to induce a confession or the extraction of information. Thus we can see that while certain acts of ill treatment will reach the threshold to amount to torture, they will not be 'torture' for the purposes of the Convention unless various other criteria are also met.

Article 2 effectively gives the Convention horizontal as well as vertical effect. Horizontal effect describes the way in which international law, which is primarily directed against states, and thus vertically effective, can give rise to duties that apply to non-states parties. Thus, by Article 2, states parties are under a duty to 'take effective legislative, administrative, judicial or other measures' to prohibit acts of torture in any territory under their control or jurisdiction. A state is thus under a duty to enact legislation that makes it illegal for private individuals to commit acts of torture. Articles 2(2) and 2(3) go to the heart of the Convention:

> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
>
> 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

These paragraphs state important principles that address two major justifications that have been given to justify torture. Thus, there can be no defence of extraordinary circumstances, nor the excuse that the official carrying out the acts of torture was acting on orders from a superior. Article 2 also points to one of the foundational principles of the Convention. UNCAT is a 'jurisdictional Convention'. This means that it aims to prohibit torture and to ensure that torture is unlawful in domestic law, and that acts of torture are punishable. As we will see from the provisions below, evidence or information obtained by torture is inadmissible. The aim is to eradicate the 'utility' of torture.

Article 3 deals with the principle of *refoulement* (a French word meaning to return, or to 'turn back'). We will consider this further later in the chapter, and when we examine the law relating to refugees in Chapter 14. But the basic principle is that a person should not be returned to the country from which they have fled if there is a real risk that they will be subject to ill treatment which breaches a certain level of severity. Thus, a state cannot 'return or extradite' a person if there are 'substantial grounds for believing that he would be in danger of being subjected to torture'. Article 3(2) elaborates how such grounds would be determined. The state intending to return the individual must take into account 'all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights'.

Article 4 should be read alongside Article 2. This Article obliges a state party to 'ensure that all acts of torture are offences under its criminal law' and that attempts

to commit acts of torture and 'complicity or participation in torture' are similarly outlawed. **Article 5** elaborates the measures that a state must take to prohibit torture. Prohibitions on torture must cover offences that are committed on board 'ships or aircraft' that are registered in the state, torture committed in territories under its control, and must also allow the prosecution of alleged offenders who are nationals of the state in question. A state has a discretion as to whether it creates offences that allow victims who are nationals a remedy in law. These two provisions are key parts of the operative crux of the Convention. Article 4 criminalises torture, Article 5 obliges states to exercise their jurisdiction (power or authority for these purposes) over those who commit torture.

Articles 6 to 9 further elaborate the measures that must be taken against those who are alleged to have committed acts of torture. **Article 6** clarifies the obligations that a state party has to detain an alleged perpetrator of torture who is in its territory. A state party, in whose territory the alleged torturer is present, must take that person into custody, or otherwise assume control over the alleged perpetrator. After a preliminary investigation into the facts of the case, the alleged perpetrator must be helped to communicate with the authorities of the state of which he is a national; or, if a 'stateless person', a representative of the 'state where he usually resides'. The state detaining the alleged perpetrator must also report to the detainee's nation or relevant authorities the fact of the detention, and indicate whether or not it intends to prosecute under its national laws. These technical provisions are necessary to work out the mechanisms that relate to prosecutions for torture. **Article 7** states that the detaining government can either extradite the alleged perpetrator or prosecute under the relevant national laws. Should the state choose the latter option, then the alleged perpetrator must be accorded due process and a fair trial. **Article 8** relates to the extraditable nature of acts of torture. The offences that are covered in Article 4 must be treated as extraditable offences and deemed to be part of any treaties of extradition between the relevant states parties. **Article 9** provides that states shall cooperate with each other to the best of their abilities in prosecuting offences of torture. These articles, between them, universalise jurisdiction when it comes to torture. Thus a person can commit an act of torture anywhere in the world and can be tried by any state. The aim of these provisions when read together is to ensure there is no impunity for a torturer. There is of course the issue of what benefit or interest there is to a state to prosecute a perpetrator who has committed such acts, but there are a number of examples of states parties prosecuting such persons. In 2013, for example, the British authorities prosecuted a Nepalese army colonel for acts of torture committed in Nepal against Nepalese nationals. The colonel was resident in the UK. The difficulty of such prosecutions was laid bare when, after a trial costing over £1 million, the defendant was acquitted. It is likely that only in the case of high-profile or infamous torturers will there be enough accessible evidence to secure a prosecution in such situations. On this issue see the discussion of the Pinochet case later in the chapter.

Article 10 shifts the focus of the Convention from measures that apply to the prosecution of torture offences to the obligations of the states parties to 'ensure' that the prohibition on torture is widely publicised among those parties who 'may be involved' in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

The following Articles contain provisions that relate to the way in which a national legal system must respond to allegations of torture. **Article 11** requires a state party to keep the matters specified under Article 10 under 'systematic review' and **Article 12** ensures that any allegations are promptly and impartially investigated. **Article 13** gives a victim of an alleged act of torture the 'right to complain' to competent authorities. The Article goes on to provide that both alleged victim and perpetrator must be 'protected against ill treatment' while the investigation is ongoing. **Article 14** is a strong statement of the rights to redress that must be provided by national law:

1. Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

The prohibition on torture that obligates a state party thus gives rise to a right not to be tortured, and to be able to obtain a remedy if the fact of torture is proven. This right to a remedy extends to compensation in the event of the victim's death. Moreover, the right not to be tortured extends to the kind of evidence that may be used in court. **Article 15** provides that statements made as a consequence of torture should not be used as evidence in proceedings against the person who has been tortured; however, a statement extracted by torture could be used against the alleged torturer as evidence that a statement was made as a result of torture.

Article 16 relates back to Articles 10 to 13. It provides that these earlier provisions apply equally to actions that fall short of the definition of torture provided by Article 1, but which are 'acts of cruel, inhuman or degrading treatment or punishment'. These acts must have been carried out by public officials, or those acting in public capacities.

Activity 11.2

a. What obligations are covered by Part I of UNCAT?

b. Do you agree with the definition of torture that has been adopted?

11.2.2 Part II

As with the structure of the other Conventions that we have examined, UNCAT moves in Part II from substantive principles of protection of rights or definitions of key terms, to the creation of an overseeing body. Thus, **Article 17** establishes the Committee Against Torture. Article 17(1) describes the Committee as staffed by a body of experts elected by states parties but serving in their personal capacities. The remainder of the Article, and **Article 18**, go on to describe in detail the composition of the Committee and the procedures that relate to the appointment of its members.

Article 19 requires states parties to submit reports to the Committee that detail the measures undertaken to honour their commitments under the Convention. States parties must submit an initial report within a year of the Convention entering into force in their law, and subsequently every four years. On considering the report, the Committee may make general comments, and these are then remitted to the state party in question.

Article 20 gives the Committee another important power. However, it is worth noting that the procedures under this Article must be conducted confidentially, and with the cooperation of the state party in question. If the Committee is in receipt of 'reliable information' that suggests that there are 'well-founded indications that torture is being systematically practised in the territory of a state party', the Committee has the power to 'invite' the relevant state to 'cooperate in the examination of the information'. The Committee may, under this Article, decide to conduct a 'confidential inquiry' into the matters alleged, and may even, with the agreement of the relevant state, visit the relevant territory. The Commission must send its findings to the state party, as well as any comments or recommendations.

Article 21 contains another enforcement mechanism. A state party may declare that it recognises the right of the Committee to consider communications that allege that a state party is not fulfilling its obligations under the Convention. The allegation is, first of all, to be resolved by the states concerned; if this does not take place, either party to the dispute may remit the matter to the Committee. If the Committee ascertains that 'all domestic remedies have been invoked and exhausted', then it can decide to mediate in the dispute. The Committee must then, within 12 months, issue a report determining that the matter has been resolved or noting that it has not been resolved.

Article 22 allows a state to declare that it recognises that the Committee can receive individual communications from alleged victims of torture. Providing that an individual communication is not anonymous or an abuse of process, the Committee must bring it to the attention of the relevant state party. After receiving the report, the state party has a six-month period in which it must submit a reply and clarify the matter. There are other important provisos. An individual communication can only be considered if (a) the same issue is not being dealt with under another international procedure, and (b) all domestic remedies have been exhausted by the alleged victim or have been unreasonably prolonged or are likely to be ineffective. The Committee must communicate its views to the state concerned, and the individual who has brought the communication. As is clear from the reading for this chapter, the Committee has considered many communications and has developed a large and sophisticated body of jurisprudence, in particular relating to obligations concerning Article 3.

ACTIVITY 11.3

What are the major concerns of Part II of UNCAT?

11.3 The Optional Protocol

There is, under the Convention, an Optional Protocol (OPCAT) adopted in December 2002 by the General Assembly of the United Nations. This builds on Articles 2 and 16 of the Convention that oblige each state party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishments. The Protocol establishes a system of 'regular visits' to be undertaken to 'places where people are deprived of their liberty' and establishes a Subcommittee (SPT) to monitor the Protocol. The Protocol requires states parties to set up and maintain domestic bodies and National Preventive Mechanisms (NPMs) that are empowered to visit places of detention, and, if necessary, to take action against breaches of the Convention. The Subcommittee has been very active, visiting places of detention such as prison cells, police stations and mental health institutions, namely those places where state-sanctioned or tolerated abuse is likely to take place. The Subcommittee has made numerous reports and recommendations to states parties. The Protocol is a proactive mechanism – it seeks to prevent abuse. It does not aim to pass judgment on states parties as such; rather, it aims to assist them to comply with and fulfil their obligations. The Subcommittee has made a significant contribution to efforts to eradicate torture but faces very clear challenges going forward.

Every year the Chairperson of the Subcommittee submits an annual report to the General Assembly. It is clear from the reports that the Subcommittee engages in a constructive dialogue with states parties on reducing the risk of torture or ill treatment (based on visits to places where persons may be deprived of their liberty as noted above); advises and assists states parties in the establishment of their NPMs and engages with NPMs in the furtherance of their work; and seeks to cooperate with other international, regional and national bodies and agencies engaged in activities related to torture prevention.

While UNCAT has attained significant global ratification with 170 or so states parties, OPCAT is now in force in just over half that number, with 90 states parties. The complementarity of the Convention and Protocol is important for torture prevention. In 2014, the Subcommittee undertook seven visits: to Azerbaijan, Ecuador, Maldives, Malta, Nigeria, Nicaragua and Togo. In 2015, it visited seven further countries: Guatemala, Italy, Nauru, the Netherlands, the Philippines, Turkey and Brazil. In each of the subsequent years the number of visits was similar. In 2019 the SPT visited eight states, including the UK, Switzerland, Costa Rica, Sri Lanka, Palestine, Senegal, Ghana and Cape Verde. In 2020 and 2021, due to COVID-19, there were no visits after March 2020. The Subcommittee cannot realistically increase its work and number of visits any further unless there is a far greater level of resources devoted to it, and there is no indication of that happening. With 90 or so states parties and seven or eight visits per year, visits can only be made on a 10- or 11-yearly cycle, which compares very badly indeed to the reporting cycles of the treaty bodies we have examined, which are

between two and five years, and a four-yearly cycle for Universal Period Review. As the number of states parties increases, the time lag will become greater. Considering the point of OPCAT is prevention, this will make it harder for the Subcommittee to fulfil its objectives. A clear shift in approach has been the shortening of visits. In its early years, visits by the Subcommittee lasted at least a week. The more recent documentation shows that the length of many recent visits is considerably shorter and focuses on a limited number of issues, such as the establishment or functioning of the NPM or of the situation of a particular category of detainees. For example, the 2015 visit to Italy focused almost entirely on migrants and how refugees were being detained. While the choice of priority may make sense, as is always the case, having such a focus inevitably means that many other issues concerning prevention remain under-explored. In 2019, the visit to Liberia lasted three days; that to Ghana, five days and to the United Kingdom, 11 days. Clearly, the SPT is also adjusting its visits to the size of the state and seeking to focus on the issues that are most pressing.

The Subcommittee's mandate is to provide for the unannounced visiting of any place within a state party where the Subcommittee believes that persons may be deprived of their liberty. This means that both the timing of, and the places to be visited, are to be decided upon by the Subcommittee. A number of states have started questioning the timing of Subcommittee visits, as the annual reports make clear, but this is in no way a global problem and is limited to a relatively small number of states. At the same time, it is clear that the number of NPMs established and functioning under the OPCAT system continues to rise. It is also clear that the Subcommittee feels that the quantity and quality of the NPMs' work is also improving. Although there is a great deal still to be done, the Subcommittee has made noteworthy strides forward in trying to eradicate torture.

Summary

This section has considered UNCAT. We have considered both the substantive Articles, and those that create the Committee Against Torture. We have also reviewed the enforcement powers that the Convention grants to the Committee, and examined the terms of the Optional Protocol and its operation.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the basic provisions of the UN Convention Against Torture**
- **describe the role of the Committee Against Torture**
- **explain the function of the Optional Protocol.**

11.4 The Committee Against Torture in action

Two of the pressing issues before the Committee Against Torture in recent years have been the *refoulement* of persons, where such persons are thought to be involved in terrorist activities, and the detention of suspects in certain conditions. The jurisprudence on aspects of these issues is addressed in the readings but it is worth examining some of the exchanges and concluding observations and recommendations of the Committee concerning the USA. This is not only so as to get a more holistic view but also to highlight how pressure and the work of human rights bodies such as the Committee can compel positive change even among the most intransigent states parties. Once we have examined the USA we will look at the Committee in action in the context of the UK and how it was, *inter alia*, central in a very important case involving a notorious military dictator, General Pinochet of Chile.

11.4.1 The Committee Against Torture and the USA

The USA has been one of the central actors in the so-called 'war on terror'. The war on terror can perhaps be understood, at least in a basic sense, as the response of the USA and its allies to the attacks on New York, Washington and Philadelphia on 11 September 2001. President Bush presented the war on terror as an expression of law and justice.

However, it was and is essentially a military response, including, *inter alia*, the invasions of Afghanistan and Iraq. The Committee considered the position of the USA in 2000 when certain issues had not come to the fore. After 2001, concern started to focus on the use of torture at the US facility at Guantánamo Bay (in Cuba) which accommodates detainees defined as 'enemy combatants' who were captured in Afghanistan and a number of other places. Under international law, the USA is required to treat these detainees (including civilians) as prisoners of war, unless a competent tribunal rules otherwise and either charges them with criminal offences or allows their release. (We will consider this further in Chapter 15.) Any persons detained at Guantánamo, at any point in time, have been entitled to various rights and to not to be held without trial. Although the number of persons held at Guantánamo has decreased over time, there were, at the end of 2018 (the last date for which the State Department has publicly issued data), still 40 or so captives there. Around 800 or so persons have been held there in total. Concerns about the treatment of Guantánamo detainees must be seen alongside other initiatives. One practice has been 'rendition' or the 'outsourcing of torture': the transfer or return of suspects to countries where they will face torture and inhuman and degrading treatment. It is widely considered that countries such as Poland, Egypt, Malaysia and Pakistan made facilities and interrogators available for the extraction by torture of information needed in the war against terror. These issues are discussed in more detail in the readings from Alston and Goodman. The Committee had the opportunity to consider these issues in 2006 and then again in 2014. The UNCAT has not considered the position in the USA since then. In 2006 (CAT/C/USA/CO/2, 25 July 2006), the Committee tackled a number of issues head on and noted, *inter alia*, with regard to the USA:

14. The Committee regrets the state party's opinion that the Convention is not applicable in times and in the context of armed conflict, on the basis of the argument that the 'law of armed conflict' is the exclusive *lex specialis* applicable, and that the Convention's application 'would result in an overlap of the different treaties which would undermine the objective of eradicating torture'…

    The state party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction and that the application of the Convention's provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its Articles 1 and 16.

15. The Committee notes that a number of the Convention's provisions are expressed as applying to 'territory under [the state party's] jurisdiction' (Articles 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the *de facto* effective control of the state party, by whichever military or civil authorities such control is exercised. The Committee considers that the state party's view that those provisions are geographically limited to its own *de jure* territory to be regrettable.

    The State party should recognize and ensure that the provisions of the Convention expressed as applicable to 'territory under the state party's jurisdiction' apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.

16. The Committee notes with concern that the state party does not always register persons detained in territories under its jurisdiction outside the United States, depriving them of an effective safeguard against acts of torture (Article 2).

    The state party should register all persons it detains in any territory under its jurisdiction, as one measure to prevent acts of torture. Registration should contain the identity of the detainee, the date, time and place of the detention, the identity of the authority that detained the person, the ground for the detention, the date and time of admission to the detention facility and the state of health of the detainee upon admission and any changes thereto, the time and place of interrogations, with the names of all interrogators present, as well as the date and time of release or transfer to another detention facility.

17. The Committee is concerned by allegations that the state party has established secret detention facilities, which are not accessible to the International Committee of the Red Cross. Detainees are allegedly deprived of fundamental legal safeguards, including

an oversight mechanism in regard to their treatment and review procedures with respect to their detention. The Committee is also concerned by allegations that those detained in such facilities could be held for prolonged periods and face torture or cruel, inhuman or degrading treatment. The Committee considers the 'no comment' policy of the state party regarding the existence of such secret detention facilities, as well as on its intelligence activities, to be regrettable (Articles 2 and 16).

The state party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such conditions constitutes, *per se*, a violation of the Convention. The state party should investigate and disclose the existence of any such facilities and the authority under which they have been established and the manner in which detainees are treated. The state party should publicly condemn any policy of secret detention.

The Committee recalls that intelligence activities, notwithstanding their author, nature or location, are acts of the state party, fully engaging its international responsibility.

18. The Committee is concerned by reports of the involvement of the state party in enforced disappearances. The Committee considers the state party's view that such acts do not constitute a form of torture to be regrettable (Articles 2 and 16).

    The state party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention.

19. Notwithstanding the state party's statement that '[u]nder U.S. law, there is no derogation from the express statutory prohibition of torture' and that '[n]o circumstances whatsoever…may be invoked as a justification or defense to committing torture', the Committee remains concerned at the absence of clear legal provisions ensuring that the Convention's prohibition against torture is not derogated from under any circumstances, in particular since 11 September 2001 (Articles 2, 11 and 12).

    The state party should adopt clear legal provisions to implement the principle of absolute prohibition of torture in its domestic law without any possible derogation. Derogation from this principle is incompatible with paragraph 2 of Article 2 of the Convention, and cannot limit criminal responsibility. The state party should also ensure that perpetrators of acts of torture are prosecuted and punished appropriately.

    The state party should also ensure that any interrogation rules, instructions or methods do not derogate from the principle of absolute prohibition of torture and that no doctrine under domestic law impedes the full criminal responsibility of perpetrators of acts of torture.

    The state party should promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates.

20. The Committee is concerned that the state party considers that the non-refoulement obligation, under Article 3 of the Convention, does not extend to a person detained outside its territory. The Committee is also concerned by the state party's rendition of suspects, without any judicial procedure, to states where they face a real risk of torture (Article 3).

    The state party should apply the non-refoulement guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to states where they face a real risk of torture, in order to comply with its obligations under Article 3 of the Convention. The state party should always ensure that suspects have the possibility to challenge decisions of refoulement.

21. The Committee is concerned by the state party's use of 'diplomatic assurances', or other kinds of guarantees, assuring that a person will not be tortured if expelled, returned, transferred or extradited to another state. The Committee is also concerned by the secrecy of such procedures including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured (Article 3).

    When determining the applicability of its non-refoulement obligations under Article 3 of the Convention, the state party should only rely on 'diplomatic assurances' in

regard to states which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The state party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements. The state party should also provide detailed information to the Committee on all cases since 11 September 2001 where assurances have been provided.

22. The Committee, noting that detaining persons indefinitely without charge constitutes *per se* a violation of the Convention, is concerned that detainees are held for protracted periods at Guantánamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention (Articles 2, 3 and 16).

    The state party should cease to detain any person at Guantánamo Bay and close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any state where they could face a real risk of being tortured, in order to comply with its obligations under the Convention.

23. The Committee is concerned that information, education and training provided to the state party's law-enforcement or military personnel are not adequate and do not focus on all provisions of the Convention, in particular on the non-derogable nature of the prohibition of torture and the prevention of cruel, inhuman and degrading treatment or punishment (Articles 10 and 11).

    The state party should ensure that education and training of all law-enforcement or military personnel, are conducted on a regular basis, in particular for personnel involved in the interrogation of suspects. This should include training on interrogation rules, instructions and methods, and specific training on how to identify signs of torture and cruel, inhuman or degrading treatment. Such personnel should also be instructed to report such incidents.

    The state party should also regularly evaluate the training and education provided to its law-enforcement and military personnel as well as ensure regular and independent monitoring of their conduct.

24. The Committee is concerned that in 2002 the state party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that 'confusing interrogation rules' and techniques defined in vague and general terms, such as 'stress positions', have led to serious abuses of detainees (Articles 11, 1, 2 and 16).

    The state party should rescind any interrogation technique, including methods involving sexual humiliation, 'waterboarding', 'short shackling' and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.

The candour and clear approach of the Committee towards the USA was commendable. It tackled the issues head on. The US representatives were robust in their defence of the USA's policy and practice but the breaches and their scale were clear. By 2014, when the Committee again considered the situation, certain noteworthy developments had occurred. The US Supreme Court in *Boumediene* v *Bush* (553 US 723 of 2008) had determined the extraterritorial application of constitutional *habeas corpus* rights to aliens detained by the military as enemy combatants at Guantánamo Bay. This meant that under US Constitutional Law, they could not be detained and were entitled to certain rights. The Committee considered the broader developments as well.

10. Extraterritoriality

The Committee welcomes the state party's unequivocal commitment to abide by the universal prohibition of torture and ill treatment everywhere, including at Bagram [note: a former Soviet base in Afghanistan where many notorious abuses took place] and Guantanamo Bay detention facilities, as well as the assurances that United States

personnel are legally prohibited under international and domestic law from engaging in torture or cruel, inhuman, or degrading treatment or punishment at all times and in all places. The Committee notes that the state party has reviewed its position concerning the extraterritorial application of the Convention and stated that it applies to 'certain areas beyond' its sovereign territory, and more specifically to 'all places that the state party controls as a governmental authority', noting that it currently exercises such control at 'the United States Naval Station at Guantánamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft'. The Committee also values the statement made by the state party's delegation that the reservation to article 16 of the Convention, whose intended purpose is to ensure that existing United States constitutional standards satisfy the state party's obligations under article 16, 'does not introduce any limitation to the geographic applicability of article 16', and that 'the obligations in article 16 apply beyond the sovereign territory of the United States to any territory under its jurisdiction' under the terms mentioned above.

However, the Committee is dismayed that the state party's reservation to article 16 of the Convention features in various declassified memoranda, which contain legal interpretations of the extraterritorial applicability of United States obligations under the Convention, issued by the Department of Justice Office of Legal Counsel between 2001 and 2009, as part of deeply flawed legal arguments used to advise that interrogation techniques, which amounted to torture, could be authorized and used lawfully. While noting that those memoranda were revoked by Presidential Executive Order 13491 to the extent of their inconsistency with that order, the Committee remains concerned that the State party has not yet withdrawn its reservation to article 16 which could permit interpretations incompatible with the absolute prohibition of torture and ill-treatment.

The Committee reiterates ... that the State party should take effective measures to prevent acts of torture, not only in its sovereign territory, but also 'in any territory under its jurisdiction'. In that respect, the Committee draws attention to its general comment No. 2 (2007), in which it recognizes that 'any territory' includes 'all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to 'any territory' in article 2, like that in articles 5, 11, 12, 13 and 16 [of the Convention], refers to prohibited acts committed not only on board a ship or aircraft registered by a state party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State party exercises factual or effective control' (para.16).

The state party should amend the relevant laws and regulations accordingly, and withdraw its reservation to article 16, as a means of avoiding wrongful interpretations.

11. Counter-terrorism measures

The Committee expresses grave concern over the extraordinary rendition, secret detention and interrogation programme operated by the United States Central Intelligence Agency (CIA) between 2001 and 2008, which comprised numerous human rights violations, including torture, ill-treatment and enforced disappearance of persons suspected of involvement in terrorism-related crimes.

While noting the content and scope of Presidential Executive Order 13491, the Committee regrets that the state party only provided scant information about the now shuttered network of secret detention facilities, which formed part of the high-value detainee programme publicly referred to by President Bush on 6 September 2006. It also regrets that the state party did not provide information on the practices of extraordinary rendition and enforced disappearance, nor on the extent of the abusive interrogation techniques, such as waterboarding, used by the CIA on suspected terrorists. In that regard, the Committee is closely following the declassification process of the United States Senate Select Committee on Intelligence report on the CIA Detention and Interrogation Programme (arts. 2, 11 and 16).

The Committee recalls the absolute prohibition of torture contained in article 2, paragraph 2, of the Convention: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.' In that regard, the Committee draws the state party's attention to its general comment No. 2 (2007), in which it states that exceptional circumstances

include 'any threat of terrorist acts or violent crime as well as armed conflict, international or non-international'.

The Committee urges the state party to:

Ensure that no one is held in secret detention anywhere under its de facto effective control. The Committee reiterates that detaining individuals in such conditions constitutes, per se, a violation of the Convention (CAT/C/USA/CO/2, para.17);

Take all necessary measures to ensure that its legislative, administrative and other anti-terrorism measures are compatible with the provisions of the Convention, in particular the provisions of article 2;

Adopt effective measures to ensure, in law and in practice, that all detainees are afforded all legal safeguards from the very outset of the deprivation of their liberty, including the safeguards mentioned in paragraphs 13 and 14 of the Committee's general comment No. 2 (2007).

The Committee calls for the declassification and prompt public release of the Senate Select Committee on Intelligence report on the CIA secret detention and interrogation programme, with minimal redaction ...

12. Inquiries into allegations of torture overseas

The Committee expresses concern over the ongoing failure on the part of the State party to fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad, evidenced by the limited number of criminal prosecutions and convictions. In that respect, the Committee notes that during the period under review, the United States Department of Justice successfully prosecuted two instances of extrajudicial killings of detainees by Department of Defense and CIA contractors in Afghanistan. It also notes the additional information provided by the State party's delegation regarding the criminal investigation undertaken by Assistant United States Attorney John Durham into allegations of detainee mistreatment while in United States custody at overseas locations. The Committee regrets, however, that the delegation was not in a position todescribe the investigative methods employed by Mr. Durham or the identities of any witnesses his team may have interviewed. Thus, the Committee remains concerned about information before it that some former CIA detainees, who had been held in United States custody abroad, were never interviewed during the investigations, which casts doubts as to whether that high-profile inquiry was properly conducted. The Committee also notes that the Justice Department had announced on 30 June 2011 the opening of a full investigation into the deaths of two individuals while in United States custody at overseas locations. However, Mr. Durham's review concluded that the admissible evidence would not be sufficient to obtain and sustain convictions beyond a reasonable doubt. The Committee shares the concerns expressed at the time by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment over the decision not to prosecute and punish the alleged perpetrators. It further expresses concern about the absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel, including the destruction of the 92 videotapes of interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri that triggered Mr. Durham's initial mandate. The Committee notes that, in November 2011, the Justice Department had decided, based on Mr. Durham's review, not to initiate prosecutions of those cases (arts. 2, 12, 13 and 16).

The Committee urges the state party to:

(a) Carry out prompt, impartial and effective investigations wherever there is reasonable ground to believe that an act of torture and ill-treatment has been committed in any territory under its jurisdiction, especially in those cases resulting in death in custody;

(b) Ensure that alleged perpetrators of and accomplices to torture, including persons in positions of command and those who provided legal cover, are duly prosecuted and, if found guilty, given penalties commensurate with the grave nature of their acts. In that connection, the Committee draws the state party's attention to paragraphs 9 and 26 of its general comment No. 2 (2007);

(c) Provide effective remedies and redress to victims, including fair and adequate compensation, and as full rehabilitation as possible, in accordance with the Committee's general comment No. 3 (2012) on the implementation of article 14of the Convention by states parties;

(d) Undertake a full review into the way in which the responsibilities of the CIA were discharged in relation to the allegations of torture and ill-treatment against suspects during United States custody abroad. In the event that investigations are reopened, the state party should ensure that any such inquiries are designed to address the alleged shortcomings in the thoroughness of the previous reviews and investigations.

The change in approach by the US authorities is noteworthy but the limits of what was achieved should not escape our scrutiny either. President Obama vowed repeatedly to close the facility at Guantánamo Bay but found himself unable to do so. President Trump did not feel under pressure to take any action. Indeed, his administration showed disdain for the UN human rights treaty bodies as well as the UN more broadly. Whether President Biden will adopt a different approach remains to be seen but it seems unlikely.

11.4.2 UNCAT before the UK courts

It was noted above that the UK is one of a relatively small number of states parties that have undertaken prosecutions under UNCAT relating to those who have committed acts of torture while abroad against non-nationals of the UK, although in the example discussed the prosecution was unsuccessful. The Convention has been central before the UK courts in a series of high profile cases. We will examine a few of them. We are not concerned here with the enforcement mechanisms under the Convention and how states (such as the USA) have responded, but with the way in which UNCAT has been cited in national law and has been used in litigation.

Some of these cases further illustrate the problems involved in prosecutions for torture. The first set of cases focuses on the question of whether or not General Pinochet could claim immunity from prosecution, and thus prevent his extradition from the UK to Spain where he would face torture charges. The Pinochet case shows that prosecution is far more complex than simply bringing charges against an individual. It reveals the problems that are attendant on bringing charges against former heads of state who may claim immunity from prosecution, and may not be in the territory where the acts of torture were allegedly committed.

The background to the litigation is that during a private visit to the UK for medical treatment in October 1998, General Augusto Pinochet Ugarte, former Head of State and dictator of Chile was arrested by the police on an international warrant issued by a Spanish judge. General Pinochet assumed power after a military coup in 1973. His regime was notorious for human rights abuses that took place between 1973 and 1990. It is thought that 4,000 civilians 'disappeared' or were murdered by the Chilean secret police. Torture was widely practised. The arrest warrant alleged the murder of Spanish citizens in Chile during the military regime established after the military coup that bought Pinochet to power and further charged Pinochet with the crimes of genocide and terrorism. The main charges in the warrant were that Pinochet had not himself taken part in torture or murder, but that he had used the state to that end. The Crown Prosecution Service, acting on behalf of the Kingdom of Spain, applied for General Pinochet's extradition to Spain. In October 1998, the Spanish judge issued a more detailed second arrest warrant, charging Pinochet with *inter alia* torture and conspiracy to torture. The issue came before the House of Lords in November 1998. Five Law Lords decided (*R* v *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 1)* [1998] 37 ILM 1333 – known as *Pinochet No 1*) by a majority of three to two that the immunity of a former Head of State was confined to acts performed in the legitimate exercise of his official functions, and that these did not include torturing political opponents. Lord Steyn cited examples of torture practiced by the Pinochet regime:

> The most usual method was 'the grill' consisting of a metal table on which the victim was laid naked and his extremities tied and electrical shocks were applied to the lips, genitals, wounds or metal prosthesis; also two persons, relatives or friends, were placed in two metal drawers one on top of the other so that when the one above was tortured the psychological impact was felt by the other; on other occasions the victim was suspended from a bar by the wrists and/or the knees, and over a prolonged period while held in this situation electric current was applied to him, cutting wounds were inflicted or he was

> beaten; or the 'dry submarine' method was applied (i.e. placing a bag on the head until close to suffocation), also drugs were used and boiling water was thrown on various detainees to punish them as a foretaste for the death which they would later suffer.

Lord Nicholls argued that:

> It hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a Head of State. All states disavow the use of torture as abhorrent, although from time to time some still resort to it…International law recognises, of course, that the functions of a Head of State may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture…are not acceptable conduct on the part of anyone. This applies as much to Heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.

It followed that since the acts of torture were an offence under UK law, the applicant could not claim immunity from the criminal process, and this included extradition. However, in an unprecedented move, this decision was set aside by a House of Lords Committee in December 1998 (*R* v *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 2 All ER 272) because of the disqualification of one of the majority judges, Lord Hoffmann. Lord Hoffmann had failed to disclose the fact that he had served as a director of Amnesty International (AI) and AI was an intervener in the case. The fact that the decision was a 3:2 majority was key. A 5:0 or 4:1 decision may not have led to such an outcome. But there was a possible perception of bias – there was no claim there was bias on Lord Hoffmann's part – and for that reason *Pinochet No 2* set aside the judgment in *Pinochet No 1*. *Pinochet No 2* did not decide that *Pinochet No 1* was incorrect in law – simply that the judgment had to be set aside and the issues and matters reconsidered by a new and differently constituted panel of judges. Thus in March 1999 a new panel composed of the seven most senior Law Lords again considered the matter and this time rejected Pinochet's claim to immunity in respect of charges of torture by a majority of six to one (*R* v *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] UKHL 17, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827). However, a majority of five Law Lords found that English courts had no jurisdiction over torture offences committed by foreigners abroad before the enactment of s.134 Criminal Justice Act 1988 by which the UK had implemented UNCAT into domestic law. Once these issues had been resolved, the Stipendiary Magistrate, having received the answers he needed, ruled that Pinochet could be extradited to Spain with regard only to charges relating to torture. The Chilean government, which had intervened in *Pinochet No 3* in order to assert immunity on behalf of General Pinochet, requested in October 1999 that the then Home Secretary, Jack Straw, consider releasing Pinochet on medical grounds. A subsequent medical examination established that Pinochet was unfit to stand trial and in March 2000 the Home Secretary ordered the release of Pinochet and he immediately returned to Chile. Upon landing he seemed to have undergone a miraculous recovery and appeared to be in good health. Pinochet died of ill health caused by old age in 2006.

While Pinochet did not stand trial for his human rights abuses in Spain, *Pinochet No 1* and *No 3* are fundamentally important in stressing how domestic law sought to give effect to UNCAT. In subsequent cases before the House of Lords (as it was at the time), UNCAT was again central. In the context of the war on terror, the UK has been one of the closest allies of the USA and concerns have been expressed about aspects of government policy relating to torture. It is worth noting at this point that opposition to torture in English law has existed for centuries and long before the UK became party to UNCAT. The UK in its periodic report to the Committee Against Torture in 2004, for example, stressed that the common law has prohibited torture since the 17th century. The Treason Act 1709 definitively stated that no one accused of a crime could be tortured, and, alongside this Act, both the common law and the Offences Against the Person Act 1861 criminalised the act of torture. The law against torture was updated when the UK acceded to UNCAT by s.134 Criminal Justice Act 1988. This made it an offence for a public official or someone acting in a public capacity to commit

torture or engage in cruel, inhuman or degrading treatment or punishment. Criminal liability attaches to the act of torture under this section irrespective of the nationality of the alleged torturer, or where in the world the offence was committed. This is the universalisation of torture.

The commitment to outlawing torture in domestic law and honouring international obligations must be seen in the light of more recent legal reforms as part of the ongoing response to international terrorism. The response of the UK government to the terrorist attacks of September 2001 had a number of aspects but the one we will deal with is the enactment of Part 4 of the Anti-terrorism, Crime and Security Act 2001. This part of the legislation has now been repealed but it is important to our understanding of how the UK courts considered UNCAT in domestic law. The powers enacted in Part 4 were immigration powers rather than the creation of new criminal offences. Part 4 allowed the Home Secretary to detain foreign nationals under suspicion of involvement in terrorism if they were believed to be a risk to the UK's national security. The detention of foreign nationals had to be under such circumstances that they could not be deported from the UK if this would have exposed them to the possibility of torture. This would have put the UK in breach of both Article 3 UNCAT and Article 3 ECHR (we will examine this further below). Detained individuals could, however, appeal to the Special Immigration Appeals Commission (SIAC). Because it was dealing with very sensitive matters involving state security, the Special Immigration Appeals Commission (Procedure) Rules 2003 allowed the Commission to receive and consider evidence that would not be admissible in a court of law. This could include evidence obtained by torture by officials acting for foreign governments. It did not allow evidence obtained by torture perpetrated by UK officials. Evidence obtained by torture is, however, deemed inadmissible by Article 15 UNCAT, the relevant part of which states: 'Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.' The admissibility of such evidence by SIAC came before the House of Lords in *A* v *Secretary of State for the Home Department (No 2)* [2005] UKHL 71. The Court of Appeal had considered the issue and ruled as follows on this particular point: Article 15 UNCAT had not been incorporated by any validating statute into, nor was it a part of, domestic law. As there was no rule prohibiting evidence obtained by torture elsewhere, SIAC could consider it. Although there were clear differences between the approaches adopted by the different judgments in the Court of Appeal, it is clear that the basic line of argument was that a constitutional principle prohibits torture. However, provided that the state did not directly or indirectly procure or collaborate in that torture, and providing that the Secretary of State was acting in good faith, then such evidence may be admissible. This is because the Secretary of State has a responsibility for national security, and the common law principle that all relevant evidence is admissible in a trial to ascertain innocence or guilt seems to nullify the prohibition on evidence obtained by torture.

When the House of Lords considered the matter they reversed the decision of the Court of Appeal. The House of Lords held that evidence obtained by torture was unreliable and 'incompatible' with a principled administration of justice. As such, evidence obtained by torture, no matter whether or not this was by a third party outside of the UK, was inadmissible in court. The House of Lords also went on to consider the use of such information in the detention or arrest of a person ordered by the Home Secretary. Although the Home Secretary did not act 'unlawfully' in making use of 'tainted' information in these executive decisions, the Commission reviewing the reasonableness of the Home Secretary's suspicion could not admit evidence obtained by torture (although it could admit 'a wide range of material' which would not be inadmissible in 'judicial proceedings'). Furthermore, as those detained pursuant to the Home Secretary's decision had 'only limited access' to the evidence that was being used against them, it was necessary to use a specific approach to the issue of the burden of proof in deciding whether or not a statement had been obtained by torture. In these circumstances, if a detainee was able to show a 'plausible reason' that evidence was obtained by torture, then the Commission had to 'initiate relevant inquiries'. The correct approach was to be found in Article 15 UNCAT. Under

the Convention, if, on the balance of probabilities, evidence has been obtained by torture, it should not be admitted. However, if the Commission was in doubt as to whether evidence had been so obtained, the evidence should not be admitted.

What is important here is the fact that Article 15 UNCAT was not directly incorporated into UK domestic law. But as UNCAT was the key international treaty in this regard, reference to it when considering evidence obtained by torture was unavoidable and the House of Lords did so repeatedly in supporting their view that such evidence should not be admissible.

Summary

In this section we have examined UNCAT in action. We have done this through examining the exchanges between the USA and the Committee Against Torture over a number of years in light of the USA's role in the so-called war on terror. We have further examined the role played by UNCAT in English law through a number of cases, namely *Pinochet* and *A* v *Secretary of State,* and seen how UNCAT has made a profound difference to the way judges consider the matters before them.

ACTIVITY 11.4

a. To what extent is torture evidence admissible in an English court?

b. If evidence is obtained through torture by foreign actors in a foreign territory and the UK is not complicit in it in any way but simply receives that information, why should it not be deemed admissible before a court/commission/tribunal to establish someone's guilt or innocence?

11.5 Expulsion and the threat of torture

In this final section we are going to consider an issue we have mentioned in passing on more than one occasion. Article 3 UNCAT specifically prohibits the expulsion, return or extradition of a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture. It should be noted it extends to a prohibition where there is a risk of **torture**, not inhuman treatment, for example. Article 7 ICCPR and Article 3 ECHR do not refer to the principle of non-return but had been interpreted to that end by the Human Rights Committee and European Court of Human Rights. The Human Rights Committee's approach has changed over time as can be seen by *Kindler* v *Canada* and later *Judge* v *Canada*. These communications, among others, are discussed in the reading. The context of these two communications, however, is the use of the death penalty for capital crimes committed in the USA by persons who fled to Canada to escape prosecution. The controversy relating to such communications is easy to see. You have persons strongly suspected of committing serious crimes in the USA entering a state (in these communications, Canada), yet Canada may not be able to return them to the USA as they will face the death penalty. Canada, however, is in most scenarios unlikely to be able to prosecute the persons either as the rules on jurisdiction under international law would only allow Canada to prosecute such persons if it had some connection to the crime committed in the USA, for example, if the victim was a Canadian national. Thus Canada has someone highly likely to have committed a serious crime elsewhere residing in its territory, but it cannot prosecute that person, and it cannot return that person either. Normally such an 'undesirable' would not be admitted to a state or would be expelled upon discovery of their misdeeds, but here the state cannot do so. In essence, such persons may be able to escape liability for the crimes they have committed. If a person in the USA wished to commit a capital crime, why not do so and then flee to Canada? Of course, the federal state of the USA concerned may agree to waive the use of the death penalty to secure the return, but if they do not, then return may be prohibited.

In the context of ICCPR there have been twists and turns, as covered in the reading, but in the context of ECHR, the ECtHR has long interpreted Article 3 by prohibiting return. Cases such as *Soering* v *United Kingdom*, *Chahal* v *United Kingdom* and *Saadi* v *Italy* are covered in the readings and we will return to some of them shortly. In a later

chapter we will examine the law relating to refugees; *refoulement* (the prohibition of return) is a central principle under the 1951 Geneva Convention Relating to the Status of Refugees. Refugee status, however, requires the satisfying of certain key criteria and, if satisfied, certain rights are attached to it. An individual who does not satisfy the criteria still cannot be returned, however, if there is a real risk of torture in a country which seeks that individual's extradition, usually the state of nationality. In the context of the war on terror, this became a major issue. Let us take an example.

Suppose a Jordanian national is involved in activities in Jordan deemed to be 'terrorist' by the law in Jordan. The individual seeks to overthrow the regime as he disagrees with the Jordanian state's policies on various matters of a political nature. The individual flees to the UK before he is charged with any crimes in Jordan. In the UK, he seeks political asylum as a refugee, which is granted. While in the UK, he continues his activities supporting plans to overthrow the regime in Jordan. The Jordanian authorities ask the UK to extradite the individual to Jordan so he can face charges. Jordan, however, is well known as a state where torture is widespread and tolerated, if not encouraged, by sectors of the authorities. Article 3 ECHR would prohibit the UK from returning the individual to Jordan if there was a real risk of him being exposed to torture. But such individuals may be perceived, rightly or wrongly, to be a threat to the UK as well. It is for such reasons that states like the UK entered into Memorandums of Understanding with countries such as Jordan, stipulating that such individuals can be returned if the UK receives adequate assurances that the individual will not be tortured and that evidence obtained by torture will be deemed inadmissible in any trial. The example is not purely hypothetical – it is inspired by a very controversial and protracted case which was eventually considered by the ECtHR – Application No. 8139/09, 9 May 2012, *Othman (Abu Qatada)* v *United Kingdom*. The case is a part of your reading. It is a long and complex case but builds upon earlier, well-established jurisprudence. It is worth reflecting on parts of the earlier jurisprudence so as to detect any change in the approach of the ECtHR in *Othman* in light of the heightened security risks being faced by European states in the current geopolitical climate.

The first noteworthy case for our purposes is Application No. 14038/88, *Soering* v *United Kingdom*. Here the person in question was a German national wanted by the authorities in Virginia, USA, for the murder of his girlfriend's parents. He was in the UK and the question was whether he could be extradited from the UK to Virginia, where he would be exposed to 'death row syndrome'. It is worth noting that at the time of the ECtHR's decision in 1989, there was no absolute prohibition on the use of the death penalty among Council of Europe states as there is now, further to the adoption of Protocol 13 ECHR. At para.91 of its judgment the Court set out the basic principle:

> …the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3…and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3…In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

What is important here is that the prohibition to extradite does not refer to torture only – it is drawn more broadly than that. On the basis of the facts, it was not the death penalty itself that was the issue but 'death row syndrome'. As the Court concluded at para.111 on the basis of the facts: 'having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.' Accordingly, the Secretary of State's decision to extradite the applicant to the USA would, if implemented, give rise to a breach of Article 3. In the later 1996 case, Application No. 22414/93, *Chahal* v *United*

Kingdom, the issue relating to terrorism was clearly coming into focus. Here, a Sikh nationalist, who was residing in the UK, was due to be deported by the UK to his native India. The deportation was ordered on the ground that his continued presence in the UK was unconducive to the public good for reasons of national security, including the fight against terrorism. Mr Chahal (who was one of a number of applicants in the case) had been arrested in the UK on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, in the UK. He was released without charge for this matter but the UK government considered him to be directly supporting Sikh terrorists in India and he had numerous terrorist-related convictions for his activities in India. Mr Chahal claimed, however, that if returned to India he would be tortured by the Indian security services due to his activities and well-known support for Sikh separatists. The UK government had sought and received assurances from the Indian government that no harm would come to Mr Chahal if he was returned to India. Having considered numerous human rights reports concerning police torture in India (especially in Punjab, where the majority of India's Sikhs live and where there was most unrest and persecution of Sikhs at the time) and the impunity with which police torturers acted, at para.107 the Court concluded that due to:

> …the attested involvement of the Punjab police in killings and abductions outside their state and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere, the Court finds it substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India.

Chahal was controversial in the sense that the UK considered Mr Chahal's presence in the UK to be unconducive to its national security but it was still unable to return him to India. It is clear from these two cases that the prohibition of ill treatment contrary to Article 3 is absolute, so much so that it prohibits deportation regardless of what the person in question may have done. The war on terror was fully engaged in 2008 by the time of Application No. 37201/06, 28 February 2008, *Saadi* v *Italy*. Here, the applicant was considered by the Italian authorities to be involved in terrorism and was imprisoned for some time. Saadi was a Tunisian national and had also been convicted in absentia to 20 years imprisonment in Tunisia for terror-related activities. The Italian authorities sought to return him to Tunisia but due to the risk of torture sought various assurances that he would not be subject to ill treatment which would breach Article 3. Very interestingly, the UK intervened in the case and asked the Court to reconsider its earlier jurisprudence as discussed in part above.

The UK government argued in *Saadi* that the principle in *Chahal* that, in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons including the protection of national security, had caused a great many difficulties for contracting states by preventing them in practice from enforcing expulsion measures. The UK further argued that it was unlikely that any state other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. The UK further noted that it was frequently impossible to use confidential sources or information supplied by intelligence services to secure convictions. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement, provided only partial protection. The UK conceded that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute but asked the Court to reconsider its approach. The UK argued that, in cases concerning the threat created by international terrorism, the approach followed by the Court in *Chahal* had to be altered and clarified. The UK stressed the following:

1. The threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2 (right to life).

2. National security considerations must influence the standard of proof required from the applicant. Thus, if the respondent state produced evidence that there was a threat to national security, stronger evidence had to be provided to prove that the applicant would be at risk of ill treatment in the receiving country. In particular, the individual concerned must prove that it was 'more likely than not' that he would be subjected to treatment prohibited by Article 3.

3. Contracting states could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention. Although, in *Chahal*, the Court had considered it necessary to examine whether such assurances provided sufficient protection, it was probable that identical assurances could be interpreted differently – it depended on the third state in question and the facts.

The Court rejected these arguments. It strongly asserted at para.127 that:

> Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation…As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct…the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.

The Court then set out its position on the facts as follows:

> 137. The Court notes…that States face immense difficulties in modern times in protecting their communities from terrorist violence…It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.
>
> 138. Accordingly, the Court cannot accept the argument…that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory state and treatment that might be inflicted by the authorities of another state, and that protection against this latter form of ill treatment should be weighed against the interests of the community as a whole…[P]rotection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule…It must therefore reaffirm the principle stated in Chahal…that it is not possible to weigh the risk of ill treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a state is engaged under Article 3, even where such treatment is inflicted by another state. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account…
>
> 140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security stronger evidence must be adduced to prove that there is a risk of ill treatment…such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof…On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3…
>
> …
>
> 146. …the Court considers that in the present case substantial grounds have been shown for believing that there is a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention if he were to be deported to Tunisia…
>
> 147. The Court further notes that…while the present application was pending before it, the Italian government asked the Tunisian government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment

> contrary to Article 3 of the Convention. However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad…It was only in a second note verbale, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to 'the relevant international treaties and conventions'. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.
>
> 148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.
>
> 149. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

Saadi is very important in a number of respects. The Grand Chamber strongly reaffirmed the absolute nature of Article 3 – in particular the idea that the behaviour or activities of the applicant are irrelevant. The British government's argument that a balance needed to be struck between the state's responsibility to protect its own population and their well-being and life (Article 2) against the applicant's interests was rejected out of hand. Finally, the notion that the degree of risk of torture had to be higher and more certain where there are national security risks was also rejected. The Court referred to the difficulties states face in fighting terrorism but remained steadfast.

Activity 11.5

'In light of the "war on terror", in the *Saadi* case the European Court of Human Rights unnecessarily hampered the ability of states to effectively deal with those who pose a threat to national security.'

Discuss.

Subsequent to *Saadi*, *Othman* dealt with similar issues. Abu Qatada (also known as Othman) became an infamous preacher in the UK and a hate figure for parts of the media who focused huge amounts of energy on him. Efforts to remove him were protracted and prolonged but ultimately the ECtHR upheld his deportation to Jordan. If you have not already done so, please read *Othman*.

Activity 11.6

a. **In light of *Saadi*, why did the ECtHR uphold the UK's sending of Abu Qatada to Jordan?**

b. **What was different: the risk of torture; the assurances; the behaviour of the applicant?**

c. **Does *Othman* represent a softening of the ECtHR's approach to extraditing/returning to other countries those suspected of terrorism? Do bear in mind it is a chamber decision and not one of the Grand Chamber, as in *Saadi*.**

Summary and conclusion

In this section we have looked at one of the most controversial aspects of the prohibition on ill treatment – the prohibition on return of those who face a real risk of torture or ill treatment in a third state. It is not the returning state that is carrying out the ill treatment but it is deemed to be a foreseeable consequence of their actions. Some states are frustrated by this but the approach taken by the ECtHR accords with the absolute nature of the prohibition.

Further reading

- Moeckli, D. '*Saadi* v *Italy* – the rules of the game have not changed' (2008) 8 *Human Rights Law Review* 534.

Reminder of learning outcomes

By this stage you should be able to:

- analyse the jurisprudence of the ECtHR concerning aspects of Article 3 ECHR
- analyse the jurisprudence of the Human Rights Committee concerning aspects of Article 7 International Covenant on Civil and Political Rights.

Sample examination question 1

'The "war on terror" has effectively showed that certain Western powers are willing to countenance torture. This shows the real weakness of the international protection of human rights in this area.'

Discuss.

Sample examination question 2

Alexistan and Murad are (fictional) neighbouring states with a shared culture and language but with a history of tension between them. The border region between the two states is mountainous and certain stretches are not clearly demarcated and it is not unknown for shepherds to inadvertently cross from one country into the other. Tensions between Alexistan and Murad have been heightened in recent months due to a number of terrorist attacks in Murad, which the government of Murad blames on insurgents trained in Alexistan or supported by the government of Alexistan. Some of the terrorist acts were carried out by individuals who crossed into Murad disguised as shepherds.

Three months ago, two shepherds, Jai and Veeru, who are Alexistani nationals, crossed into Muradian territory with their sheep. Muradian troops arrested them, suspecting that they were either Alexistani spies or terrorists. Jai and Veeru were initially taken to the nearest police station in Murad, where they were held in a police cell and questioned to determine if they were spies or terrorists. Jai was slapped around the face quite a few times and called an Alexistani pig by a police officer – pigs are considered very unclean in Alexistan. Jai was subsequently hit over his feet with a police truncheon and some of the bones in his toes and feet were broken, causing pain and discomfort. He was not provided with any immediate medical assistance. Veeru was then put in a cell on his own. There were no toilet or washing facilities there and Veeru was not provided with a change of clothes. After several weeks in detention, both Jai and Veeru were blindfolded and put on board an aeroplane. They were taken to an island off the coast of Murad. The island is not part of the recognised territory of Murad and the officials who transported them and those who detained them on the island spoke a language Jai and Veeru did not understand. While on the island, Jai and Veeru were subjected to severe beatings causing long-term injuries but their interrogators and beaters were not from Murad, although Jai and Veeru occasionally heard talking in the background in the language that is common to Alexistan and Murad. After three weeks of questioning and beatings, Jai and Veeru were blindfolded again and eventually found themselves on a small boat approximately 20 miles off the coast of Alexistan and left to their own fate. They were eventually picked up by a fishing boat, which took them back to Alexistan.

Alexistan and Murad are both parties to the 1966 International Covenant on Civil and Political Rights, the (First) Optional Protocol to the Covenant, the 1984 United Nations Convention Against Torture and participate in the Universal Periodic Review. Assuming, where relevant, all domestic remedies have been exhausted, advise Jai and Veeru as to any rights that may have been violated and the possible avenues of redress that the aforementioned mechanisms may provide.

ADVICE ON ANSWERING THE QUESTION 1

This question falls into two parts: one demands a discussion of torture in the war on terror, and the other requires some discussion of the mechanisms for protecting human rights in this area. The question is also asking for an assessment of the extent to which the protection of human rights takes second place to political prerogatives. With regard to the protection of human rights, you should briefly outline the key Articles of the Convention, the powers of the Committee and the work under the Optional Protocol. As the discussion above and the reading suggest, the reports of the USA to the Committee have either evaded certain points, asserted that regrettable and isolated incidents of torture have taken place or asserted sovereign rights to protect the state and its citizens. The change in approach of the USA over time suggests that where the international community draws attention to certain acts, state attitudes can change. The UK has seen UNCAT being relied upon before domestic courts and limiting, for example, the admissibility of evidence obtained by torture.

With regard to the 'weakness' of human rights protection at this level, it is worth highlighting the range of measures that can be used with regard to torture. They are comprehensive, and when international commitments are reinforced by domestic courts they can make a substantial difference. But a further issue is whether the absolute prohibition is realistic. The UK's arguments in *Saadi* highlight that some states seek a more nuanced, flexible approach which does not restrict them so much in the 'fight against terror'.

ADVICE ON ANSWERING THE QUESTION 2

This is at first sight a complex scenario but once it is broken down into digestible chunks, it can be systematically and logically tackled. It is, as always, important to read the scenario carefully so that you understand the scope of the advice you are to give and with regard to which matters. One matter is rather easy to deal with. The scenario notes: '[a]ssuming ... all domestic remedies have been exhausted, advise Jai and Veeru as to any rights that may have been violated and the possible avenues of redress which the aforementioned mechanisms may provide'. The mechanisms referred to are: 1966 International Covenant on Civil and Political Rights, the (First) Optional Protocol to the Covenant, the 1984 United Nations Convention Against Torture and the Universal Periodic Review. It is rather easy to discount the Universal Periodic Review as it does not, and is not, intended to provide redress to individuals. Thus, although you may wish to discuss the system very (very) briefly, that is the most you should do – you can simply state that the UPR does not provide individual redress and that is what you are being asked to advise on.

The ICCPR, its Optional Protocol and the UNCAT are much more important in this context and should be the focus of your analysis. Start with the UNCAT. It obliges states parties to take certain steps and defines torture in Article 1. Further, states are required to, inter alia, outlaw torture in their domestic law, not admit evidence obtained by torture and states may accept the obligation (under Article 22) to permit individual communications – although you are not told whether this obligation has been accepted. Inter-state petitions are also possible but again you have not been advised whether such an obligation has been accepted. It is also important to note that a number of the key obligations under UNCAT only relate to acts that are considered to amount to torture as defined by Article 1 of UNCAT. Article 16 does impose obligations with regard to acts that amount to inhuman or degrading treatment or punishment. However, those obligations are not as extensive as those that relate to acts considered to amount to torture.

With regard to the ICCPR, Article 7 is key. This is important as Article 7 extends to torture, inhuman and degrading treatment or punishment. The Optional Protocol provides for a system of communications and thus also a remedy to a wronged individual. The State Reporting system under the ICCPR, while important, does not provide a remedy. Inter-state petitions are compulsory under the ICCPR but none has ever been brought.

There is no right or wrong way to tackle the sequence of facts set above. You should do so in a manner that is logical but it is also important to be comprehensive so that all issues are addressed. When reading through scenarios, it is as important to note what is stated as what is not stated. Some things will be expressly stated, others may be implied but it is important not to make assumptions that cannot be sustained. If you do make an assumption, it is worth stating briefly in your answer that you have done so. Problem questions are written with care and attention and thus need to be read with a similar degree of care. In this scenario, for example, there is a use of language on several occasions that is ambiguous or there is a nuance you should pick up on. Thus, you are not told whether Jai and Veeru are indeed terrorists or not. Does this make a difference to the responsibility of Murad? Even if it does not, it is worth highlighting this matter as it is an issue of contention and displays your awareness of the issues.

Next, it is worth looking at the following few sentences: 'Jai was slapped around the face quite a few times and called an Alexistani pig by a police officer. He was subsequently hit over his feet with a police truncheon and the bones in his toes and feet were broken, causing pain and discomfort. He was not provided with any immediate medical assistance. Veeru was then put in a cell on his own. There were no toilet or washing facilities there and Veeru was not provided with a change of clothes.' Clearly the level of ill treatment Jai and Veeru suffer differs. Jai is insulted and humiliated but is it enough to cross the threshold – is the slapping and calling of names racially motivated – and does this make a difference? Having his feet beaten is serious but the consequences are described as 'causing pain and discomfort' – it is not described as severe or extreme pain, which are the terms associated with ill treatment that amounts to torture. He is not given immediate medical treatment – but you are not told if it is adequate treatment or if the delay causes more problems or pain. Does the omission to treat him immediately amount to a violation? Veeru's ill treatment differs. This clearly does not amount to torture and almost certainly not to inhuman treatment either. As it lasts for several weeks, it probably will amount to degrading treatment.

The final paragraph raises several issues. First, being taken to an island by what seem to be third-party nationals. There are issues of jurisdiction here and these sort of practices – unlawful rendition – have come to the fore as part of the 'war on terror' and need to be discussed. Jai and Veeru are subjected to ill treatment on the island that would probably amount to torture but the implication is that the perpetrators are not nationals of Murad. Does Murad have any responsibility? The answer is of course yes. Otherwise states could 'contract out' human rights abuses. These issues are addressed in the guide. There is the implication of Murad's complicity in the actual ill treatment due to the common language being spoken in the background and it would not make any sense for it to be persons from Alexistan.

The final issue is the abandoning of Jai and Veeru on a small boat approximately 20 miles off the coast of Alexistan and leaving them to their own fate. This raises interesting issues. Jai and Veeru are abandoned in what are international waters (states can exercise full jurisdiction 12 miles out to sea) but it is obviously close enough to give them a realistic chance of getting back to Alexistan. There is no jurisprudence directly on this matter and you would be given credit for any reasoning and logic that is submitted on this point.

So in all, this is a complex factual scenario but ensuring that you read it carefully, understand clearly what is required of you and then break down the facts and deal with them in a logical manner will ensure you do as well as you can on the question.

NOTES

12 The rights of the child

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Introduction

Children's rights are not somehow 'additional' to human rights; rather, like women's rights, they are the application of the key principles of human rights to a sector of humanity that is considered in need of special protection. Yet, rights for children raise interesting questions. Children do not have the maturity to make many decisions for themselves. Parents or guardians clearly have rights as well, and there is a balance to be struck. Children are the most vulnerable in all societies and it is clear that children cannot be treated in the same way as adults, thus a specific regime is needed. To take some examples: it is obvious that children commit crimes, be it, for example, theft, crimes of violence or crimes of a sexual nature. But to subject them to the same legal process as an adult, which they probably will not understand, and to incarcerate them in prison with adults exposes them to physical danger. Children with the advantage of modern weaponry are capable of being extremely efficient soldiers in situations of armed conflict, yet their emotional immaturity leaves them more vulnerable to being compelled to commit abuses. Finally, children, especially female children, are at very significant risk of sexual abuse and exploitation; this is especially pronounced in situations of armed conflict or internal strife. These select few examples highlight the additional vulnerability of children and why they have been deemed in need of specific legal protection. The main human rights treaty in this area is the 1989 United Nations Convention on the Rights of the Child. We shall review the powers of the Committee on the Rights of the Child in overseeing the implementation of the Convention and then examine a number of key issues to highlight some of the problems that arise.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the basic provisions of the Convention on the Rights of the Child**
- **explain the functions of the Committee on the Rights of the Child**
- **explain the main issues relating to bonded labour**
- **explain the main issues relating to child soldiers**
- **outline the main issues relating to juvenile justice.**

Core text

- **Bantekas and Oette, Chapter 12 'Children's rights' (available on the VLE and the Online Library).**

Essential reading

- **Detrick, S. (ed.) *The United Nations Convention on the Rights of the Child.* (The Hague: Martinus Nijhoff, 1992) [ISBN 9780792316718] pp.19–30 (available on the VLE).**
- **The United Nations Convention on the Rights of the Child and all three Optional Protocols.**

Further reading

- **Ganguly Thukral, E. and A. Kumar Asthana, 'India' in Liefaard, T. and J.E. Doek (eds) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence.* (London: Springer, 2015) [ISBN 9789401794459] pp.31–52.**

12.1 The Convention on the Rights of the Child

Children's rights are an inherent part of the UN system. Specialised bodies such as UNICEF (United Nations Children's Fund – www.unicef.org), which was established in 1946 by the General Assembly as an emergency aid and assistance programme for children, are important actors at the global level in seeking to protect children, their rights and other interests. Children's rights have long been a focus of international concern. The predecessor to the United Nations, the League of Nations, was instrumental in the adoption of the Geneva Declaration of the Rights of the Child 1924. Article 25 of the Universal Declaration of Human Rights 1948 makes reference to the 'special care and assistance' that is due to mothers and children and, clearly, the right to education in Article 26 is of particular relevance to children. Article 24 ICCPR and Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are also important in this context. During the 1970s and 1980s a number of other documents of international importance relating to children were adopted:

- the Declaration on the Protection of Women and Children in Emergency and Armed Conflict 1974
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (The Beijing Rules)
- the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children 1986.

Such documents, while important, did not provide a comprehensive, legally binding catalogue of children's rights and there had, over time, been building up pressure for such a catalogue of rights. A working group was thus set up by the UN Commission on Human Rights to draft a Convention. This consisted of government and UN representatives, members of NGOs (such as Save the Children) and delegates from the International Labour Organization (ILO), UNICEF and the World Health Organization (WHO). The presence and role of NGOs was especially noteworthy as it was the first time they had such an instrumental role in the drafting of a major UN human rights treaty. In total the drafting process lasted 10 years. The Convention on the Rights of the Child was adopted by a General Assembly Resolution in November 1989. Such was the impetus behind the Convention that it came into force in September 1990 and has, since then, been the most ratified of all international human rights instruments. As of April 2021, every UN Member State was party to it except for the USA (which has various constitutional incompatibilities with the Convention but has signed the Convention).

The child and the family

The preamble to the Convention includes a paragraph that affirms the family as 'the fundamental group of society' and asserts that 'the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. We have already read criticism from a feminist perspective on the emphasis on the family. Feminists argue that the family can itself be a place of oppression; and we will return to this issue as we continue to consider children's rights; but it is worth pointing out at this stage that there are many connections between women's rights and children's rights. In particular, one of the major problems is that cultures often contain customs and beliefs about children that, like those that relate to women, see a child as under the care and protection of a male adult. Thus, any universal statement of the rights of the child must take account of 'the importance of the traditions and cultural values of each people'. We are aware that there are problems when such customs are inconsistent with human rights and resistant to change (see Article 24(3) in this context). If we are aware that children's rights raise similar problems to women's rights, we also have to take into account the fact that children's rights raise a specific set of issues.

One of the problems for children's rights is that if one asserts that the family is a 'natural environment', it becomes difficult to understand that the family may also be the source

of the problem of children's oppression and abuse. This is a complex argument. It is not suggesting that the family should somehow be 'reformed' or abolished. Rather, it attempts to point out a key issue for children's rights, an issue that is inherent in the very notion of the rights of the child. Precisely because the child is not mature, it is dependent on care in the way that able-bodied adults are not. As the preamble goes on to state: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

How does one ensure that the carer does not become an abuser? Given that the care relationship involves unequal power, and abuse is always a question of a stronger party imposing its will on a weaker party, it would seem that there is an inescapable pathology to the family. The Convention must, then, assert that it is concerned with nurturing a 'family environment' that has an 'atmosphere of happiness, love and understanding'; moreover, it recognises that abuses of children's rights are a global problem in both the developing and the developed world: 'in all countries in the world, there are children living in exceptionally difficult conditions'.

12.2 An overview of the Articles of the Convention

Part I

Article 1 provides a definition: 'a child means every human being below the age of eighteen years'. A child is thus defined by a lack of majority; in this sense, the child is outside of the law, deprived of legal status and something less than an adult. The exception to this rule, that majority can be attained earlier than 18 if a national law so allows, does not affect this general principle that a child lacks majority. In this sense, children's rights belong to those that are otherwise deprived of full legal being.

Article 2 places what we could call both a negative and a positive duty on states parties. States parties must both respect and ensure compliance with the rights contained in the Convention without any form of discrimination towards a child or the child's parents or guardians. Furthermore, children must be protected from the discrimination or 'punishment' that is inflicted upon the child's parents or guardians. Article 2 thus reveals another key theme in the structure of children's rights: given that the child is linked to the family, to protect the child, it is necessary to protect the child's parents or guardians.

Article 3 articulates a key principle: 'the best interests of the child'. This principle is to govern all dealings with children whether by public or private actors; however, it is immediately qualified. The best interests of the child, or at least as it relates to 'protection and care', must take into account 'the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. Presuming that it is possible to determine the best interests of the child, these best interests, if determined by a public or private agency, could easily conflict with the 'right' of the parents or guardians to determine themselves what is best for 'their' child. We will see that other Articles (Articles 9 and 19) are intended to resolve some of these difficult concerns. What the 'best interest' of a child is, is a contentious issue. On what basis should such an approach be defined and applied? What is considered to be in a child's best interests in one culture or context may be considered to be detrimental to the child in another. The Committee on the Rights of the Child has had to draw a base line here, and above that afford states parties considerable latitude.

Article 3(3) outlines a positive duty that places an obligation on a state party to ensure that agencies and institutions responsible for the well-being of children conform to standards 'established by competent authorities'. This is elaborated by **Article 4**, which specifies that states must ensure that social, economic and cultural rights are enforced to 'the maximum extent of their available resources'. Of course, the power to determine that either no or few resources are available means that a state party could dramatically limit the effectiveness of this Article.

Article 5 returns to another key concern: the location of the child in the family, and the need for a cultural sensitivity to children's rights given the customs that pertain

to family life. Thus, states parties are ordered to 'respect' the 'responsibilities, rights and duties' of parents/guardians, and to take into account that the family could itself be broadly defined to include those beyond the parents/guardians of the child. The extended family itself has a 'right' to provide 'appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'. Article 5 thus recognises in a slightly different way that the rights of the child are qualified by the rights of those who have responsibility for the child.

Article 6 repeats the key human rights principle that the child has an 'inherent right to life', and the following Articles, in returning to rights with which we are already familiar, elaborate what the right to life means in terms of a civil and legal identity. It could be said, then, that the Convention is not just concerned with bare life, but with a life that is defined and determined by the law.

Thus, **Article 7** is a right to registration (expanded by **Article 8**) which is linked to the right to a name and a nationality and the right to be nurtured; a right to 'know and be cared for by his or her parents'. Once again, though, this right is potentially qualified by the second paragraph, which leaves the implementation of the rights in the first paragraph to 'national law'. Article 6 could be read alongside **Article 12**, which could be seen as a due process right, or a guarantee of a right to a hearing for a child who is 'capable of forming his or her own views'.

Article 9 provides detail to the general principle that the child is to be cared for by and within the family. The first paragraph places a duty on states parties to make sure that a child is not 'separated from his or her parents against their will'. That this principle addresses the will of the parents, rather than of the child, shows that children's rights are dependent on the rights of the child's parents. However, this principle is also qualified: a child can be removed against the will of his or her parents 'when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. Thus, the state is able to act in circumstances when a competent agency external to the family determines that the parent's rights should be overridden. However, such is the seriousness of such a decision that it is protected by due process guarantees. The reference to judicial review above suggests that any decision to remove a child from his or her parents must be open to review by a court; the second paragraph gives a different due process guarantee; the right of 'interested parties' to be involved in any proceedings. Should a child be removed from his or her parents, then there is a residual right to 'maintain personal relations and direct contact with both…on a regular basis'. Furthermore, the state has a duty to provide information concerning the whereabouts of a parent, if separation has been a result of 'any action initiated by a state party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the state)'. **Article 10** further elaborates this right, relating it to the right of movement of family members between states.

Article 11 prohibits the 'illicit transfer and non-return of children abroad'. This is a complicated matter which has been dealt with by other treaties, key among them is the 1980 Hague Convention on International Child Abduction. International child abduction is an enormously problematic issue and the subject of private international law/conflict of law rules. We cannot, unfortunately, examine this issue further on this module.

Articles 13 to 17 relate the classic civil liberties to the child. Thus, **Article 13** concerns right to freedom of expression; **Article 14** guarantees the right to freedom of thought, conscience and religion, although the rights and duties of parents to 'provide direction' to the child are also guaranteed; **Article 15** recognises the rights of the child to freedom of association and to freedom of peaceful assembly; **Article 16** concerns rights to privacy and **Article 17** the right to access of information from the media.

As pointed out above, children's rights are inseparable from the rights and duties of parents, and these are given further consideration in **Article 18**. This Article gives parents and guardians 'common responsibilities for the upbringing and development of the child'; and the best interests of the child is the basic standard in

any understanding of what upbringing and development mean. States have to make sure that parents are well supported in their parenting role, and this extends to taking appropriate measures 'to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible'.

Article 19 is at the core of the Convention. It places a duty on states parties to make sure that legislative and administrative measures are undertaken to ensure that the child is protected from physical and mental abuse, 'neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. Article 19 thus relates back to Article 9. Together these Articles specify the obligations of the state, and those instances where state action is in the best interests of the child, even if the parents/guardians believe otherwise. Once a child is in the care of the state, **Article 20** would apply. This grants special protection to a child 'deprived of his or her family environment' and covers 'foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children'. Arrangements for the care of the child have to take into account the child's ethnic, cultural, religious and linguistic background.

Articles 21 to 23 relate to children in certain special situations. **Article 21** applies to those states parties that permit or recognise adoption. It lays down a series of duties that are meant to safeguard the best interests of the child in such a situation. **Article 22** places a duty on states parties in relation to the refugee status of children and **Article 23** relates to the rights of mentally or physically disabled children.

Articles 24 to 28 elaborate certain social and economic rights as they pertain to children. **Article 24** recognises the right to 'the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. This translates into a series of specific duties. States parties must take action to diminish infant and child mortality rates; make sure children receive health care, with an emphasis on primary health care; alleviate disease and malnutrition through the provision of food and clean water; and provide pre- and post-natal health care. Paragraph 3 lays down an obligation to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.

Article 25 elaborates these rights even further and relates to a right to competent health care.

Article 26 changes the focus from health care to the 'right to benefit from social security, including social insurance' and places a duty on states to ensure the realisation of this right.

Article 27 could be read as a classic articulation of a social and economic right. It provides that states parties should recognise the child's right to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. The 'primary responsibility' for the delivery of these ends lies with the parents; but parents must be assisted in these duties by the state, which must 'provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing'. This duty extends to taking measures to secure financial support for a child from parents.

Article 28 concerns the right to education. The right to education, on the basis of equal opportunity, contains a list of more specific duties: the state must provide general and compulsory primary education; it must also 'encourage' the provision of accessible general secondary and vocational education. Within education, the state must discourage drop-outs, and ensure that discipline is consistent with other human rights.

Article 29 mandates the form of education. It must address, among other matters, 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'; respect for human rights, for his or her own culture and other cultures; and, above all, prepare the child for 'responsible life in a free society'.

Article 30 relates to the right of the children of minorities to be educated in such a way as to 'enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language'.

Article 31, the right of the child to rest and leisure, clearly extends beyond education and links through to Article 32. **Article 32** is another key provision in that it prohibits the economic exploitation of the child. The prohibition of exploitation extends to any work that 'is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health', and states parties must take both legislative and educational measures to achieve this end. More specifically, states parties must mandate a minimum employment age and regulation of the hours and conditions of employment, and they must ensure that these standards are effectively applied.

Article 33 links together a right to health care and a right to protection by providing that states parties must take measures to ensure that children do not use illicit drugs and are not involved in either the production or trafficking of illegal drugs.

Article 34 protects children from 'sexual exploitation and sexual abuse'. States parties are given a number of duties to ensure that children do not take part in 'unlawful sexual activity' and are not involved in prostitution or pornography.

Article 35 prohibits trafficking in children. It is now supplemented by a Protocol which we will examine later.

Article 36 is a general provision requiring states parties to protect children from 'all other forms of exploitation' that 'are prejudicial' to their 'welfare'.

Article 37 relates to various due process guarantees that concern sentencing and criminal law with regards to children. As well as restating the generic rights (prohibition on torture and arbitrary arrest; guarantee of a right of access to the courts) it articulates a key principle: children should be treated as such in the criminal justice system. For instance: 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances'. The rights of the child in the criminal justice system are expanded at much greater length in **Article 40**.

Article 38 concerns armed conflict. In keeping with general humanitarian norms that relate to non-combatants, states must guarantee that children under the age of 15 do not take part in warfare, and thus must not be recruited into the armed forces.

Article 39 also relates to armed conflicts, but is much broader. States parties must make sure of the physical and psychological recovery of child victims of 'neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment'; or armed conflicts.

Part II

In looking at Part II of the Convention, we will concentrate on those Articles relating to the Committee on the Rights of the Child, which is set up by **Article 43**. The Committee consists of 18 experts (the Convention refers to 10 but this has changed over time due to the workload) elected by states parties but serving in their personal capacity. Under **Article 44**, states parties are under a duty to submit to the Committee reports on the steps they have taken to implement Convention rights. Reports must be submitted within two years of the Convention entering into force, and thereafter every five years. Article 45 provides that the specialised UN Agencies, such as UNICEF, have a right to representation before the Committee to provide advice on the implementation of the Convention. This Article also states that the Committee can make recommendations to the General Assembly which request that the Secretary-General undertakes studies on specific issues relevant to children's rights. The Committee can make suggestions and general recommendations based on information received pursuant to **Articles 44 and 45**. These can be addressed to any state party and also reported to the General Assembly, together with comments, if any, from states parties themselves. This is generally the standard UN reporting procedure we have examined numerous times before.

Part III of the Convention contains various technical provisions that we will not consider.

12.3 The Communications Protocol

Under the Convention itself, there is no power for the Committee to consider individual communications. The Committee was the last of the major UN human rights treaty bodies to be given the legal power, at the end of 2011, to consider communications under a Protocol on a communications procedure. In the absence of such a power in the past it has been theoretically possible to raise a concern about children's rights before other UN human rights treaty bodies with the jurisdiction to hear individual complaints. This, however, has not proved easy in practice. The Communications Protocol to the Children's Convention is an important development. As was the case with the Women's Convention, while the Children's Convention protects all types of rights, enough states perceived it to be an economic and social rights treaty that they were not willing to consider a communications procedure at the time. With the adoption of the Communications Protocol at the end of 2011, all major UN human rights treaty bodies now have the power to consider communications.

The key provisions of the Protocol for our current purposes are **Articles 5 to 7**, which deal with admissibility. They note:

Article 5

Individual communications

1. Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a state party, claiming to be victims of a violation by that state party of any of the rights set forth in any of the following instruments to which that state is a party:

   (a) the Convention

   (b) the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography

   (c) the Optional Protocol to the Convention on the involvement of children in armed conflict.

2. Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

Article 6

Interim measures

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the state party concerned for its urgent consideration a request that the state party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 7

Admissibility

The Committee shall consider a communication inadmissible when:

(a) the communication is anonymous

(b) the communication is not in writing

(c) the communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto

(d) the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement

(e) all available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief

(f) the communication is manifestly ill-founded or not sufficiently substantiated

(g) the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the state party concerned, unless those facts continued after that date

(h) the communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.

There is nothing particularly novel in these provisions; they are more or less the standard provisions on admissibility in UN Human Rights Treaties. Article 6 on interim measures is noteworthy as it affords the power to the Committee to order interim measures to avoid irreparable damage to the victim's situation. Such a power does not exist in the older UN communication procedures but has been developed in practice by, for example, the Human Rights Committee. Article 6 is thus an interesting development in that states are now expressly willing to agree to such measures. The Children's Rights Committee between 2017 and the end of 2020, for example, dealt with just over 50 communications. From these, we can tell that the provisions are being interpreted in practice so as to further flesh out the substantive provisions of the Convention. In its approach, the Committee has not departed radically from the practice of the other treaty bodies and, of course, it already has their lessons to pay heed to.

The quasi-judicial nature of an individual communication is made express in **Article 11** when it notes that 'the state party shall give due consideration to the views of the Committee, together with its recommendations', making clear, if there was ever any doubt, that the views of the Committee in this context are not strictly legally binding.

Articles 12 and 13 provide the Committee with two further key powers. **Article 12** is the standard inter-state communication procedure which is present in the equivalent other UN Human Rights Treaty instruments. **Article 13** is the 'newer' inquiry procedure; this is not in the older instruments but is present in the newer ones such as the Communications Protocol to ICESCR. It is worth examining these provisions in some detail. They note:

Article 13

Inquiry procedure for grave or systematic violations

1. If the Committee receives reliable information indicating grave or systematic violations by a state party of rights set forth in the Convention or in the Optional Protocols thereto on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict, the Committee shall invite the state party to cooperate in the examination of the information and, to this end, to submit observations without delay with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the state party concerned, as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the state party, the inquiry may include a visit to its territory.

3. Such an inquiry shall be conducted confidentially, and the cooperation of the state party shall be sought at all stages of the proceedings.

4. After examining the findings of such an inquiry, the Committee shall transmit without delay these findings to the state party concerned, together with any comments and recommendations.

5. The state party concerned shall, as soon as possible and within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

6. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present Article, the Committee may, after consultation with the state party concerned, decide to include a summary account of the results of the proceedings in its report provided for in Article 16 of the present Protocol.
7. Each state party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in the present article in respect of the rights set forth in some or all of the instruments listed in paragraph 1.
8. Any state party having made a declaration in accordance with paragraph 7 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General of the United Nations.

Article 14

Follow-up to the inquiry procedure

1. The Committee may, if necessary, after the end of the period of six months referred to in Article 13, paragraph 5, invite the state party concerned to inform it of the measures taken and envisaged in response to an inquiry conducted under Article 13 of the present Protocol.
2. The Committee may invite the state party to submit further information about any measures that the state party has taken in response to an inquiry conducted under Article 13, including as deemed appropriate by the Committee, in the state party's subsequent reports under Article 44 of the Convention, Article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography or Article 8 of the Optional Protocol to the Convention on the involvement of children in armed conflict, where applicable.

The practice of the Committee with regard to the inquiry procedure has, at the time of writing, yet to be worked out. If it follows the approach adopted by other UN human rights treaty bodies, however, it will be entirely confidential. The above provisions also make our first reference to two substantive Optional Protocols to the Children's Convention – those on the Sale of Children, Child Prostitution and Child Pornography and the Involvement of Children in Armed Conflict. We will examine these next.

12.4 The substantive Protocols

The Children's Convention is unique among the UN Human Rights Treaties in that it has had two substantive Protocols adopted to supplement it in addition to a procedural one. Of the other such treaties only ICCPR has a substantive Protocol, that on the death penalty. The Children's Convention is different in that states parties have sought to use it as a forum and to use the Committee with an eye to addressing issues which have always existed but the form and scale of which has evolved.

12.4.1 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000

The sexual exploitation and abuse of children has been problematic in all societies since time immemorial. Child pornography, as is the case with all pornography, has taken on a different scale due to technology. The issue of child prostitution has taken on a different dimension in more recent years due to the trafficking of children for the purposes of sexual exploitation. Trafficking is the notion of persons being forcibly removed from their homes so that they can be exploited by others. Child prostitution is rife in many countries and takes on a different dimension when there is endemic sex tourism. This is when adults, usually males from Western developed states, travel to certain developing countries – parts of South East Asia are particularly notorious – to have paid-for sex with children. They do so as such activity is criminal in their home states but, due to corruption and inefficient policing, in developing countries they are unlikely to be caught or prosecuted. Under international law, it is possible for a state to

criminalise any behaviour when carried out abroad by one of its nationals and the UK, among others, has now legislated so that any UK national who has sex with a child in a developing country can be prosecuted upon return to the UK.

The Protocol in its provisions sets out a number of definitions and obligations which are imposed upon those states who become party to it. That much is to be expected but what is most striking is the obligation upon states as to how the criminal justice system is to treat the children who are victims of such practices. Article 8 of the Protocol states:

Article 8

1. States parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:
   (a) recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses
   (b) informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases
   (c) allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law
   (d) providing appropriate support services to child victims throughout the legal process
   (e) protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims
   (f) providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation
   (g) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.
2. States parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.
3. States parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.
4. States parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.
5. States parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences.
6. Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

These amount to a series of significant and onerous obligations upon states but they are essential if those who perpetrate such abuses are to be punished. In some, if not all, countries they require substantial reform of the criminal procedure. Further, they also will require the establishment of institutions, for example, to provide 'appropriate support services to child victims throughout the legal process'. As we will see in the discussion on juvenile justice below, such obligations can be problematic to implement for some states.

12.4.2 Optional Protocol on the Involvement of Children in Armed Conflict

In comparison to the Optional Protocol above, the Protocol on the Involvement of Children in Armed Conflict is far less complex. As noted above, modern weaponry allows a child to become an efficient killer in the context of armed conflicts. Most

modern armed conflicts, however, are not between states but rather between a state and insurgents. The Protocol thus has the simple aim to ensure that those enlisted to serve in the military are at least 18 years of age. The Preamble provides the context for the Protocol and more or less all we need to know:

> Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development,
>
> …
>
> Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict,
>
> …
>
> Noting that Article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier,
>
> Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,
>
> Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, *inter alia*, that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities,
>
> …
>
> Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard.

Having seen the Protocol and what it seeks to achieve, we will below be examining the practical issue of child soldiers in the context of an infamous conflict.

12.5 The Children's Convention in action

The aim here is to undertake a brief examination of how the Convention has been interpreted in practice. As mentioned above, it contains both civil and political as well as economic and social rights, although it does not seek to identify which provisions fall into the latter category. However, Article 4 draws a distinction between economic and social rights and the other rights protected by the Convention. It begins by providing that states parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention, and goes on to add that with 'regard to economic, social and cultural rights, states parties shall undertake such measures to the maximum extent of their available resources, and where needed, within the framework of international cooperation'. Unlike Article 2(1) ICESCR, Article 4 Children's Convention does not explicitly refer to such rights being achieved progressively, but rather, at least textually, to their protection immediately to the maximum level a state party can afford.

According to the Committee, the standard to which economic and social rights must be protected by a state party to the Convention only has to be 'progressive' in the sense that the standard must rise as the state develops not only economically but also socially and culturally. That does not mean that there is no immediate obligation.

In its General Comment No. 5 the Committee has insisted upon the interdependence and indivisibility of all of the rights within the Convention. The impact of this approach can be seen in a number of the substantive general comments that the Committee has adopted. For example, in General Comment No. 3 of 2003 on children with HIV, it was noted:

5. The issue of children and HIV/AIDS is perceived as mainly a medical or health problem, although in reality it involves a much wider range of issues. In this regard, the right to health (Article 24 of the Convention) is, however, central. But HIV/AIDS impacts so heavily on the lives of all children that it affects all their rights – civil, political, economic, social and cultural. The rights embodied in the general principles of the Convention – the right to non discrimination (Article 2), the right of the child to have his/her interest as a primary consideration (Article 3), the right to life, survival and development (Article 6) and the right to have his/her views respected (Article 12) – should therefore be the guiding themes in the consideration of HIV/AIDS at all levels of prevention, treatment, care and support.

The Committee's 'holistic' approach towards the different rights is further assisted by the manner in which some, but certainly not all, of the CRC's provisions are drafted. For example, Article 6 on the right to life states:

1. States parties recognize that every child has the inherent right to life.
2. States parties shall ensure to the maximum extent possible the survival and development of the child.

While Article 6(1) is in all relevant respects identical to the first sentence of Article 6(1) ICCPR, Article 6(2) of the Children's Convention adds another dimension to the right. In its General Comment No. 6 which in part discusses Article 6, the Committee notes:

11. Children have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word. State obligation to realize the right to life, survival and development also highlights the need to give careful attention to sexuality as well as to the behaviours and lifestyles of children, even if they do not conform with what society determines to be acceptable under prevailing cultural norms for a particular age group. In this regard, the female child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information. Effective prevention programmes are only those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, life skills, and to preventive measures.

In its General Comment No. 7 of 2005 it further stated as far as Article 6 is concerned that:

10. Article 6 refers to the child's inherent right to life and states parties' obligation to ensure, to the maximum extent possible, the survival and development of the child. States parties are urged to take all possible measures to improve perinatal care for mothers and babies, reduce infant and child mortality, and create conditions that promote the well-being of all young children during this critical phase of their lives. Malnutrition and preventable diseases continue to be major obstacles to realizing rights in early childhood. Ensuring survival and physical health are priorities, but states parties are reminded that article 6 encompasses all aspects of development, and that a young child's health and psychosocial well-being are in many respects interdependent. Both may be put at risk by adverse living conditions, neglect, insensitive or abusive treatment and restricted opportunities for realizing human potential. Young children growing up in especially difficult circumstances require particular attention. The Committee reminds states parties (and others concerned) that the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play (Articles 24, 27, 28, 29 and 31), as well as through respect for the responsibilities of parents and the provision of assistance and quality services (Articles 5 and 18). From an early age, children should themselves be included in activities promoting good nutrition and a healthy and disease-preventing lifestyle.

It can be seen that the Committee has taken a progressive approach to some of the provisions we have briefly examined and has emphasised the interrelationship of all

rights. It is one of the few UN Treaty Bodies with the mandate to do so and the petition system is providing greater opportunity for the Committee to elaborate in detail the obligations of states parties.

ACTIVITY 12.1

a. **What are the general principles of the Convention?**

b. **How does the Convention protect the human rights of children?**

c. **Why have certain nations not ratified the Convention?**

d. **How valuable do you consider the Protocol on the Sale of Children, Child Prostitution and Child Pornography?**

We turn now to examples of the abuses of children's rights. To some extent, it is slightly misleading to label the following areas 'abuses of children's rights'. Although they clearly show that children are not being respected, they could equally be seen, more generally, as problems of structural and endemic poverty, the social dislocations brought about by armed conflict or issues of national development. One must keep this in mind: it is the essential context of the abuse of all human rights.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **describe the basic provisions of the Convention on the Rights of the Child**
- **explain the functions of the Committee on the Rights of the Child.**

12.6 Child labour

Children provide a significant portion of the world's workforce. Figures from the ILO and NGOs suggest that in the developing world somewhere between 250 million and 500 million children are in employment, with the greatest majority being in Asia, a quarter or so in Africa and the vast majority of the remainder in Latin America. Primary sectors of employment are agriculture and domestic labour, although there is also some employment in trade and services, and a small amount in manufacturing and the construction industry. This is not to condemn all forms of child labour; however, it is necessary to look at the context and examine the conditions of employment and the educational opportunities available to the child. Human rights groups have long drawn attention to the worst areas of employment for children: some areas of concern have been silk production in India, the carpet and leather industries in Pakistan and the part played by children in the sugar industry in El Salvador. Most notorious have been bonded labour (which relates to both adults and children), poor and dangerous working conditions and the denial of the freedom of movement.

12.6.1 Bonded labour

Bonded labour takes place when a family receives an advance payment (often a very small sum of money) and agrees to carry out some work in return for the debt. The workplace is often structured so that 'expenses' and/or 'interest' are deducted from earnings in such amounts that it is almost impossible to repay the debt. Let us take examples of industries in certain South Asian countries where bonded child labour is endemic. In Nepal it is widespread in agriculture, but also exists in brick kilns, the carpet industry, plantations and domestic work. In India it is endemic in agriculture; the gem industry; the carpet industry; the match and firework industry; silk weaving; flower growing; silver work; bidi rolling; the manufacturing of brassware, footwear and bangles; brick kilns; domestic work; stone quarries and in the industry that produces locks. In Pakistan it is endemic in agriculture, domestic work, the football industry, the carpet industry, brick kilns, shoe making and stone/brick crushing. In parts of India and Pakistan in certain industries, in particular the brick industry, generations of families have remained bonded as they have been unable to repay a debt. That is, a child's grandfather or great-grandfather was promised to an employer many years earlier, with the understanding that each generation would provide the employer with a

new worker – often with no pay at all. This is slavery in all but name, and international human rights law considers it so. In 2017 the Human Rights Committee (CCPR/C/PAK/CO/1 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PAK/CO/1&Lang=En) in its consideration of Pakistan's first report, for example, noted on the issue:

> 43. The Committee is concerned...by the high number of children engaged in labour under hazardous and slavery-like conditions, particularly in the brick kiln industry and domestic settings, and the insufficient labour inspections of child labour. It is also concerned that perpetrators are rarely brought to justice and victims do not receive adequate assistance and rehabilitation services (arts. 2, 6, 7, 8, 24 and 26).
>
> 44 ...It should also take all measures necessary to put an end to child labour by rigorously enforcing the laws on child labour and strengthening labour inspection mechanisms.

The issue of child bonded labour takes us to the core of the problem. This is not the case of a child taking a part-time job to assist the family's income. Rather, it is a form of slavery that reflects conditions of extreme poverty that blights generations. The child is effectively owned by the employer. Bonded labour may be a feature of those societies that are marked by poverty, but poverty must be understood in a broad sense. Thus, bonded labour tends to occur when people generally lack resources: this can mean a failure of access to credit and welfare or lack of employment for adults, but could also include discrimination against groups that exacerbate this general lack of social capital. The children of those who experience bonded labour are likely to become bonded labourers themselves. The problem is compounded by pressures that keep wages low, so that people are forced to borrow from their employers and then pledge their children's labour as a means of repaying the debt. In this sense, bonded labour creates a vicious circle: because there is a supply of cheap bonded labour, wages for adults are also suppressed. Bonded labour is thus a self-sustaining social and economic phenomena. Some researchers have also suggested that bonded labour is more likely in those places where social and economic relations are marked by caste and hierarchy.

The law relating to bonded labour is not just to be found in the Convention. It was made illegal by the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956. Some other important sources include Article 8 ICCPR, which explicitly prohibits slavery and servitude, and Article 7 ICESCR, which contains a guarantee of labour rights that are inconsistent with bonded labour. The ILO has also adopted a number of Conventions in this regard: Forced Labour Convention 1930 (No. 29); Abolition of Forced Labour Convention 1957 (No. 105); Minimum Age Convention 1973 (No. 138); and Worst Forms of Child Labour Convention 1999 (No. 182).

Note: The work of the ILO on bonded and child labour is exceptionally informative and of terrific value, and you are strongly advised to consider some of the reports on their website. You can find them here: www.ilo.org/newdelhi/areasofwork/child-labour/lang--en/index.htm

12.6.2 Child labour in India

There is clearly a body of international law that prohibits the worst forms of the practice, or at least attempts to regulate child labour. Structural problems, enforcement problems, a lack of education and poverty are, however, major impediments to eradicating practices. Consider the case of India. It is not known precisely how many children work but numerous NGOs put the figure in excess of 100 million; this is almost 10 per cent of the entire population of India. In 2015, the co-winner of the Nobel Peace Prize, Kailash Satyarthi, was awarded the prize for a selfless life spent dedicated to helping child labourers in India. The most detailed credible NGO report on child labour in recent years is now a little dated but still of very significant value: Human Rights Watch Report: *The small hands of slavery; Bonded child labor in India,* available at www.hrw.org/legacy/reports/1996/India3.htm We gain a sense of the problem, and an indication of the economic importance of child labour, from the following extract:

> Apart from agriculture, which accounts for 64 per cent of all labor in India, bonded child laborers form a significant part of the work force in a multitude of domestic and export industries. These include, but are not limited to, the production of silk and silk saris, beedi (hand-rolled cigarettes), silver jewelry, synthetic gemstones, leather products (including footwear and sporting goods), handwoven wool carpets, and precious gemstones and diamonds. Services where bonded child labor is prevalent include prostitution, small restaurants, truck stops and tea shop services, and domestic servitude. (Part 1: Summary)

Child labour is not restricted to one area of the economy, although agriculture accounts for the greater proportion of child labourers. It is not without significance that agriculture is the largest sector – such populations are predominantly rural, the least educated and the most exposed to famine and poverty in general. Child labour is, however, not local and it is spread throughout different sectors, from the production of leisure goods to prostitution.

India is a party to and has ratified all conventions mentioned, including ILO Convention No. 138 Concerning Minimum Age for Admission to Employment and Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. The latter is one of the most widely ratified treaties in all international law, with over 180 ratifications as of December 2020. India's inability to ratify the Convention until 2017 speaks volumes about the scale of the problem that it is now trying to tackle.

Indian domestic law does contain prohibitions on bonded labour and in the last 30 years the country has adopted a significant amount of domestic legislation dealing with the problem, thus there are clearly initiatives to try and tackle the issue. Some relate to compulsory education, so that parents must send their children to school as opposed to relying upon their labour. Moreover, bonded labour is in breach of certain constitutional rights. There has also been litigation in Indian courts that has successfully led to obligations on states to identify the illegal employment of children and punish employers.

So, why does bonded labour persist to such a degree in India? We have identified some factors above. A lack of genuine political will is one of the major issues. Although there has been a high level of commitment to action at the policy level, as noted above, these policies have not, on the whole, been translated into meaningful programmes of action on the ground. Although a Central Advisory Board on Child Labour (Ministry of Labour and Employment Resolution No. S.27019/93-CL Concerning the Composition of the Central Advisory Body on Child Labour – adopted November 2011) has been created, the Board infrequently provides credible figures. Other obstacles to enforcement include corruption and neglect of duty among officials. In the Asian subcontinent as a whole, many powerful feudal landowners are senior politicians or government officials and thus there is a reluctance to enforce rules against them, even if there is the desire among some. Such individuals also have a strong economic incentive in continuing the perpetuation of the system. There are clearly limitations in making high-caste and local landowning officials accountable in the identification of bonded labour and the enforcement of standards. Significant problems relating to the bribery of local officials are also prevalent. Bribery is endemic, from top officials through to magistrates and judges. It also must be pointed out that bonded labour is drawn from particular castes in Indian society. Across India the vast majority of bonded labourers are Dalits or Muslims. Both groups are marginalised and their state of economic dependency is such that, when combined with the threat of, or actual, violence, it prevents them from reporting abuses against them – including being held in bondage – or from getting justice if they do.

Within the Hindu caste system, the Dalits, or the untouchables, are the lowest members of society. Performing the most menial of jobs, they are condemned to poverty and social exclusion. Many Muslims are converted Dalits. Despite the fact that India is a democratic nation, the caste system and anti-religious discrimination,

and the poverty and exclusion associated with both, persist. It is worth noting that caste systems exist throughout the world but are particularly widespread in the Asian subcontinent, being widely practised in, *inter alia*, Nepal, India, Pakistan and Bangladesh.

12.6.3 India's reports to the CRC

India is party to the Children's Convention and both its substantive Protocols. The issue of child labour and the economic exploitation of children has been a constant theme in all the periodic State Reports India has submitted and the Committee has considered. The initial report of India, for example, stressed the country's commitment to children's rights, and stated that the infrastructure was now in place to make a difference. Moreover, there was a National Plan of Action and a commitment to monitor progress. The report also pointed out that the rights of children would improve if the general rights of families also improved. The second periodic report placed children's rights in the general context of the battle against poverty and pointed out that high mortality rates, malnutrition and illiteracy remain problems. It also highlighted that India (then) had over 400 million children below the age of 18. This represents the largest child population in the world. The report stressed the commitment to making elementary education universal. Later reports have highlighted some of the legislation and institutions that have been adopted and, as was noted above, there does seem to be a commitment at the level of the national government. An issue that has repeatedly been highlighted, however, is that India's federal structure and the devolution of power to states has led to problems with enforcement of such laws and the functioning of bodies such as the Central Advisory Body on Child Labour. Recent Children's Rights Committee Concluding Observations (CRC/C/IND/CO/3-4) relating to India on the issue of child labour noted:

> 81. The Committee reiterates its serious concern that, despite some efforts made by the state party, there is still a large number of children involved in economic exploitation, including child labour in hazardous conditions, such as in mining, bonded labour in the informal sector as domestic servants and in agriculture (CRC/C/15/Add.228, para.72).
>
> 82. In line with its previous recommendations (CRC/C/15/Add. 228, para.73), the Committee recommends that the state party:
>
> (a) expedite the adoption of the Child Labour (Prohibition and Regulation) Amendment Bill, 2012, and develop a comprehensive strategy to prevent and eliminate all forms of child labour, including imposing sanctions against individuals involved in child labour, including establishing a database on the types and extent of child labour, most of which occurs in the informal sector, such as domestic work, but also in mining and quarries, which constitutes hazardous work
>
> (b) consider ratifying International Labour Organization (ILO) Conventions No. 138 concerning Minimum Age for Admission to Employment, No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and No. 189 concerning Decent Work for Domestic Workers
>
> (c) develop technical cooperation with the ILO International Programme on the Elimination of Child Labour, in this regard.

These reports and the Committee's Concluding Observations suggest that advances are being made, but very significant entrenched problems and interests still remain. India was last before the CRC in 2014.

Activity 12.2

Bonded labour continues to play a significant role in the Indian economy despite the nation's commitment to eradicate it. Why do think this is so, and do you think such practices can be fully eliminated?

12.7 Child soldiers

Child soldiers are part of armies and militias in many nations of the world. Some child soldiers are abducted and forced to fight; others join to escape poverty or abuse. Both girls and boys are involved in combat, although girls are also taken as 'wives' by commanders and sexually abused (the sexual abuse of boys has become increasingly apparent in recent years but as a whole remains under-reported and under-explored). The problem is particularly acute in parts of Africa, most notably in the war zones in the Congo, DRC, Liberia and Sierra Leone. The Lord's Revolutionary Army, a guerrilla organisation originating in the north of Uganda, is also notorious for its use of child soldiers. Child soldiers are also part of armies in Colombia, Myanmar and the Lebanon. In Colombia, both government and rebel forces have made use of significant numbers of children; in Lebanon, children have been forced to join the South Lebanon Army. Child soldiers are not only subjected to the traumas of combat, they have also taken part in war crimes and massacres. After conflict is over, child soldiers are not retrained, and remain traumatised; indeed, peace treaties often do not even recognise that child soldiers have been involved in the fighting.

As with bonded labour, a legal framework exists to prohibit the use of child soldiers. As noted above, in 2002 the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict came into force. This outlaws the use of children under 18 in armed forces, whether state-run or irregular. Convention (182) of the ILO also prohibits the recruitment of children under 18 into armies. Furthermore, under the Rome Statute of the International Criminal Court, recruitment of children under 15 is considered a war crime. The 1999 African Charter on the Rights and Welfare of the Child also accords with these international standards. Under the African Charter, 18 is the minimum age for recruitment into the armed forces. We will briefly examine two situations involving child soldiers: Congo and West Africa.

To understand the role of child soldiers in the Congolese conflict, which is illustrative, it is necessary to have a basic understanding of the causes of conflict in this country. A power struggle within the Democratic Republic of the Congo (DRC) involving neighbouring countries triggered the 'First Congo War' in 1998. Forces loyal to the President of the Congo, Laurent Kabila, overthrew the dictatorial regime of Mobutu Sese Seko in 1997. The armed conflict began a year later, when Kabila acted against Rwandan forces who had aided him in his coup. Burundi, Rwanda and Uganda all share a border with the DRC and relied on the presence of Rwandan troops for their own security. At the same time as these nations became embroiled in this conflict, other neighbouring nations – Zimbabwe, Angola, Chad and Namibia – mobilised to assist forces loyal to Kabila. The civil war killed five million people between 1997 and 2003. This vast central African country continues to be hit by waves of violence, rebellions, protests and political turmoil, leading to worries that a new civil war is never far away. In recent years, the security situation has deteriorated markedly as government authority has collapsed, emboldening rival militia groups which hold sway over large areas of territory, often competing for the DRC's rich resources. The humanitarian situation is dire. In 2019, more than 13 million Congolese needed humanitarian aid, twice as many as in 2018, and 7.7 million face severe food insecurity, up 30 per cent from 2018. In 2019 more than 4.5 million people were displaced, the highest number in the DRC for more than 20 years. Conflict in the Congo has consistently been driven by attempts to control the nation's abundant natural resources and tensions between the ethnic groups that make up this massive nation.

It is against this backdrop of regional conflict (the conflict in DRC is known as Africa's First World War) that we have to appreciate the issue of the mobilisation of child soldiers. Some efforts have proved successful in demobilising child soldiers, with inputs from local NGOs, the United Nations Development Programme and UNICEF. However, all factions in the conflict relied on child soldiers. As far as government forces are concerned, the Congolese Armed Forces (FAC) as of 2019 still had child soldiers. They have made many promises over time to demobilise but this process is proceeding very slowly, if at all. The problem is complicated because numerous militias also made or make use of child soldiers, such as *Mai-Mai* and the

Rassamblement congolais pour la démocratie-mouvement de libération (RCD-ML). The alliance of groups opposed to the government has also recruited child soldiers. There is evidence that one of these groups, the *Union des patriotes congolais* (UPC) made use of children as young as seven and that forced conscriptions have taken place. Other local militia groups have organised to defend their land and villages from opposition militias. These local groups have also relied on child soldiers. The problem has been exacerbated by the intervention of other East African nations in the Congolese conflict. Rwandan and Burundian armed forces have also made significant use of child soldiers.

The other region we will study is West Africa, where there have been conflicts in Côte d'Ivoire, Liberia and Sierra Leone. Establishing the causes of the conflict in this region is difficult, as there are many factors. Order in Sierra Leone had been undermined for a long period before the civil war broke out in 1991. Factions engaged in civil conflict in neighbouring Liberia began to intervene in the fighting in Sierra Leone, further complicating the situation. The conflict is now over and peace prevails but the legacies of the conflict still blight the nation. A Special Court for Sierra Leone, backed by the United Nations, was established to deal with the many atrocities committed during the conflict. The Special Court has now been formally wound up but a residual court continues to function. The Special Court indicted a number of former leaders of armed guerrilla groups for conscripting child soldiers. Charles Taylor, the former president of Liberia, appeared before the Special Court for Sierra Leone in April 2006. He was charged with various war crimes and crimes against humanity that included responsibility for militias who made use of child combatants. Liberian and Liberian-controlled forces were particularly active in recruitment in Monrovia, especially in the period before Taylor stepped down as president that was marked by an intensification of the fighting. It was alleged that Taylor sponsored 'small boys units'. The Liberian government claimed that the young soldiers had volunteered to fight out of a sense of patriotic duty. However, popular demonstrations in Monrovia in 2003 showed that this was not the case. Groups fighting against the Liberian government, and allegedly backed by Sierra Leone and the US, were also found to be using child soldiers and labourers, particularly in the northern part of Liberia. Eyewitness accounts reported child soldiers actively taking part in fighting, but also carrying ammunition and supplies. Other groups recruited in the Côte d'Ivoire for soldiers to fight in Liberia.

The judge at the Special Court for Sierra Leone, which was based in The Hague, found that Taylor did not command the rebels, as the prosecution had alleged, but that he, *inter alia*, sold diamonds for, and supplied weapons and fighters to Sierra Leone's Revolutionary United Front rebels, who were notorious for hacking off the hands and legs of civilians and recruiting boys during their decade-long conflict. Taylor was considered to know that the rebels were committing atrocities against the civilian population and thus shared criminal responsibility. He was sentenced to 50 years' imprisonment, which he is now serving in the UK, which agreed to host him. As mentioned above, the civil war in Sierra Leone has come to an end. UN missions to the country have said that progress has been made in demobilising child soldiers and reintegrating them into society. There have, however, been serious problems with funding, and the scale of the task is exacerbated by the refugee problem and the economic and social problems occasioned by the civil war.

Activity 12.3

What common factors can you see in the use of child soldiers in different conflicts?

12.8 Children in the criminal justice system

In turning to consider juveniles in the justice system, we are primarily concerned with matters of criminal justice. The guiding principles of children's rights in this area, resting on notions of the inherent dignity and rights of the child, stress rehabilitation rather than punishment. We will see, though, that countries persist in treating children as adults, and breaching these guiding principles.

The fundamental principles contained in the Beijing Rules are based on securing the well-being of the juvenile in the criminal justice system. Policy initiatives are

recommended which 'reduce the need for intervention under the law', and juvenile justice needs to be thought of as part of a 'comprehensive framework of social justice'. Rule 5.1 specifies that measures taken in relation to a juvenile offender are proportionate to both the circumstances of the 'offender and the offence'. This is especially pertinent in those 'status offences' under national legal systems where the behaviour attracting criminal sanction is wider than that for adults. The examples given are 'truancy, school and family disobedience [and] public drunkenness'. The principles go on to recognise and confirm the relevance of due process guarantees for juveniles. (The Beijing Rules, G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).)

As well as stressing the general principles contained in the Beijing Rules, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990)) stress that detention for juveniles should only ever be a punishment of 'last resort' and any prison sentence or deprivation of liberty must be 'for the minimum period possible'. Perhaps the most useful statement of policies regarding juvenile justice are provided by the Riyadh Guidelines, the United Nations Guidelines for the Prevention of Juvenile Delinquency (G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990)). These guidelines stress the importance of integrating young adults into society: 'By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes'. Thus, the response of any criminal justice system should be to understand the reasons for deviance. Punishment may be necessary, but the emphasis is on understanding why an offence has taken place, and reorientating individuals to less anti-social attitudes.

Breaches of these standards can be found across the spectrum of law enforcement and in all countries of the world. Abuses begin once children are under the control of the police. One particularly extreme example, as reported by the United Nations Special Rapporteur on Extrajudicial Executions, was evidence that, in 1998, up to 800 children had been murdered by the police in Honduras. In 2017, the then Special Rapporteur on Extrajudicial Executions noted that the context of violence and insecurity in Honduras puts children and adolescents in a particularly vulnerable position. A civil society organisation reported to the Rapporteur that there were about 80 deaths of children per month between January 2014 and December 2015. Security forces had been involved in the killing of some of these children.

Also in Latin America, the Inter-American Court of Human Rights made an order against Guatemala relating to the murder of street children by the police. In Paraguay, a human rights group also reported that children were being held with adults in overcrowded prisons and were victims of ill-treatment, including punishment by solitary confinement.

To highlight how difficult an area of law this is, and to illustrate the resistance in some quarters and some broader issues such as cultural relativism, we will examine a Pakistani judgment from the Lahore division of the Punjab High Court, *Farooq Ahmed* v *Pakistan* (2005) PLD 15.

At the time of writing the case is still pending before the Pakistan Supreme Court so it will be interesting to see what approach it adopts, if it ever hears the petition. The case relates to the validity of the 2000 Juvenile Justice System Ordinance (JJSO). The JJSO was adopted in 2000 by the military regime of Pervez Musharraf. The JJSO was a well-intentioned attempt to undertake some much-needed and long overdue reforms to the Pakistani criminal justice system as it relates to children. The JJSO set out in 15 sections a series of measures which were intended to reform the juvenile justice system and in part also help Pakistan comply with some of its obligations under, *inter alia*, the Convention on the Rights of the Child. The massive level of investment that was and still is needed to give practical effect to the JJSO has simply not been forthcoming, but the JJSO was adopted and brought into force nevertheless. The JJSO requires, *inter alia*, that: a child be defined as someone under the age of 18; each child, regardless of means, accused of the commission of an offence be provided with free legal assistance paid for by the state; juvenile courts be established. Further, it sets out some of the procedures for those courts: no adult and child shall be jointly tried; there is an

assumption of privacy where children are being tried; and the arrest, bail and detention conditions of children are to differ from those of adults. In terms of punishment the JJSO makes clear that no child shall be executed for a crime committed while under the age of 18, be ordered to carry our labour during any time spent in detention, be put in fetters or administered corporal punishment. The use of handcuffs is limited to those circumstances where there is a reasonable risk of escape.

The case related to the following facts. Two persons were accused of sodomising and subsequently killing the eight-year-old son of the petitioner, Farooq Ahmed. Further to the two accused submitting to the trial court that they were juveniles, based upon their school leaving certificates, they were afforded the rights and protection set out in the JJSO, in particular that they could not be executed, a sentence routinely passed in such cases. The petitioner filed a complaint before the Lahore division of the Punjab High Court that the accused were not juveniles but rather adults and thus not entitled to any of the protections afforded by the JJSO. Further, the petitioner argued that the JJSO itself was defective and challenged its validity.

The Lahore division of the Punjab High Court heard the petition in December 2004 and further to giving a significant number of reasons as to why the JSSO should be 'struck off the statute book', decided accordingly to do so. The Pakistan Supreme Court in early 2005, however, suspended the judgment of the Lahore High Court subject to a final determination by it, and the JJSO is currently in force in Pakistan despite the decision of the Lahore High Court. Notwithstanding the domestic legal obligations entailed in the JJSO, as the Children's Rights Committee itself has noted more generally, 'serious economic challenges, catastrophic drought conditions…the armed conflict that is taking place in some regions, the high number of refugees…as well as a high population growth rate all seriously impede efforts in Pakistan to give practical effect to such legislation'.

The Lahore High Court, *inter alia*, also cited the following reasons for striking down the JJSO: Pakistan's legal and social development was not advanced enough to withstand the demands of the JJSO, nor 'was the rights-based approach appropriate in Pakistan'; the age identified to achieve majority, 18, was arbitrary and unjustifiable; many of the provisions were badly drafted; poverty, a hot climate and the 'consumption of hot and spicy food all lead towards speedy physical growth and an accelerated maturity' which necessitated that there cannot 'be one yardstick' for all juveniles; the JJSO in requiring children be tried separately from adults and also be granted bail on different grounds from adults was 'impracticable'; the rights of the victims of crimes were being sacrificed by granting the rights in the JJSO to children accused of crimes; and the JJSO was widely being abused with criminals either claiming they were under the age of 18 or children committing crimes on behalf of their families knowing that as they were under 18 they would not be subject to the death penalty.

With regard to the first of these grounds – a rights-based approach is not appropriate – it is difficult to see how a court in Pakistan can logically adopt such an approach. A series of fundamental rights, hence a 'rights-based' approach, are set out in the first substantive chapter of the Constitution of Pakistan. Pakistan as a state has played its role in the development of international human rights standards, although there are of course significant grounds for disagreement as to what certain of those rights should be and how they should be framed. Read in isolation, this approach is a rejection of rights *per se*. However, if the reasoning given by the Court is considered holistically it is more accurate to consider its approach strongly relativist not rejectionist.

Human rights as defined in the treaties we have been examining extend to all by virtue of their being human and cannot be denied due to some alleged wrongdoing. The basic premise is that there is no discrimination between individuals on grounds which cannot be objectively justified. Impoverishment, a spicy diet and a tropical climate have never, as far as is known, been considered by any UN Human Rights Treaty Body or regional human rights court to be grounds, either individually or collectively, upon which to treat some individuals differently from others. Nor is there any credible medical evidence to suggest that such factors speed up the development and maturity of an individual in any part of the world. A child is a child everywhere,

regardless of wealth, climate and diet, and is entitled to be protected according to internationally agreed standards entailed in treaties to which a state is party.

The real crux of the problem from a children's rights perspective, however, is that though the JJSO has been 'on the books' there has been neither the systematic institutional reform nor the commitment to allocate the resources needed to ensure the JJSO's full effect. This is a critical point. The provisions relating to the prohibition on the passing of certain sentences, such as the death penalty or the administration of corporal punishment, do not require new procedures or institutions as they are prohibitive in nature. Measures needed to give effect to some of the guarantees in the JJSO, such as that relating to differing bail conditions for children, are also relatively easy to implement. Others, however, such as those relating to probation – which would require the setting up of something like a probation service – require significant reform and ongoing investment of resources. There is something to the argument that Pakistan's level of economic development does not easily lend itself to, for example, providing legal aid. Indeed, the ICCPR does not require free legal assistance, only access to a translator if one is needed, while the Children's Convention is vague as to this matter, only stipulating the provision of appropriate assistance. The JJSO therefore goes beyond the treaties' required minimum standards in requiring free legal assistance to children. But state-funded legal aid simply does not exist in Pakistan. In terms of reforming, to the extent needed, the court structure and providing legal aid, as the JJSO's provisions require, those are undeniably enormous undertakings and require a long-term strategy accompanied by massive investment.

The above case study highlights very neatly for us a number of issues. While the relativist argument of the Punjab High Court was mistaken, implementing some of the obligations entailed by the Children's Convention, in this example, relating to juvenile justice, require massive investment, infrastructure and procedural changes. These are not easy to implement and such measures will invariably, in some contexts, be abused and face resistance. The Children's Committee in its 2016 evaluation of Pakistan's compliance with the Convention (the last such) noted as much and urged Pakistan to give effect to its obligations in this and all other regards and, in the context of juvenile justice, placed great emphasis on the JJSO being given effect.

Activity 12.4

Imagine that you are a judge due to sit on the Supreme Court hearing in the *Farooq Ahmed* case. Write a brief one-page judgment using children's rights arguments as to why you feel the JJSO is (or is not) a valid measure.

No feedback provided.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the main issues relating to bonded labour**
- **explain the main issues relating to child soldiers**
- **outline the main issues relating to juvenile justice.**

Sample examination question

'Although the Convention on Children's Rights is described as the most ratified of international human rights instruments, abuses of children's rights are still widespread. How can this situation be accounted for?'

Discuss.

Advice on answering the question

Any answer to this question would do well to agree with all parts of this statement. It is indeed accurate to describe the Convention in this way. That it has been so widely accepted does suggest a general level of acceptance of the principles that it contains, and a couple of paragraphs of the essay should outline the key principles of the Convention, and outline the functions of the Committee. The key to the Committee's role is its commitment to constructive dialogue with states parties. This approach may also encourage a broad engagement with the principles of the Convention at a national level. The second part of the quotation is also accurate. The essay should outline the degree of abuse and violation of children's rights, perhaps choosing to focus on one of the areas outlined above. The third part of the statement is possibly the most difficult part of the question. The reasons why children's rights continue to be abused are complex. However, it is possible to suggest that the main problems relate to the breakdown of civil institutions that could protect rights in instances of armed conflict, the broader context of endemic poverty, and the persistence of cultural and economic patterns that will take a long time to change, if they change at all.

NOTES

13 The right to religious freedom

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Introduction

In this chapter we take a comparative look at a right which in itself is not controversial, but which has become increasingly part of a battleground for ideas and caught up in the cross-fire of geopolitics. Having studied regional human rights machinery earlier in this guide, we will consider some of the contrasts in approach and the recent jurisprudence that has been adopted in relation to religious rights and freedoms.

The protection of certain religious freedoms and beliefs has, since time immemorial, been a source of concern and tension within states as well as in relations between them. Throughout history, examples can be found of states and empires tolerating the beliefs of others within their territory so as to avoid a constant state of conflict and insurgency. For example, under the Edict of Milan (313 CE) the Emperor Constantine granted religious freedom to Christians. Imperialistic expansion which conquered territory occupied by those with other beliefs demanded a pragmatic approach to ensure the sustainability of the entity in question. One can see this at various times in, for example, Ancient Persia and the Roman, Moghul, Ottoman and British empires. It is also the case that from antiquity, treaties between empires which sought to protect religious freedoms can be found. The Religious Peace of Augsburg of 1555, for example, in the aftermath of the Reformation, sought to protect religious freedoms in Europe and ease tensions between Protestant and Catholic princes. Such treaties, however, were primarily about tolerating others, which is very different from respecting them, and the contribution of modern international law has, in part, been the attempt to move from tolerance towards respect in this regard.

There are currently many provisions which seek to protect religious freedoms and beliefs. We will start with an examination of those provisions with universal application and then of those that exist in the regional context.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the history of the right to religious freedom**
- **explain the provisions relating to the right to religious freedom**
- **explain the main issues of contention during the drafting of the provisions on the right to religious freedom**
- **explain the approaches adopted by the Human Rights Commission to the right to religious freedom and some aspects of its jurisprudence**
- **explain aspects of the approach adopted by the ECtHR to the right to religious freedom and some of the problems with that approach**
- **explain the limitations to the right to religious freedom**
- **understand the broader context in which the right to religious freedom is currently being contested.**

Essential reading

- **Evans, M. 'The relationship of religion and human rights' in Sheeran and Rodley (eds), pp.581–96 (available in VLeBooks via the Online Library).**
- **Joseph and Castan, pp.562–89 (available on the VLE and in Oxford Scholarly Authorities in International Law via the Online Library).**
- **Harris, O'Boyle, Bates and Buckley, Chapter 12 'Article 9: Freedom of thought, conscience, and religion' (available on the VLE).**

13.1 Universal provisions protecting religion and belief

Human rights treaty provisions relating to religious freedoms usually come in two forms, those that protect the right to believe itself and those that seek to prohibit discrimination, either generally or in the context of certain articulated rights, on the basis of an individual's religion or belief. We have examined the latter in Chapter 9 when looking at discrimination – although there we focused on discrimination on the basis of gender. Indeed, as will be seen, the engagement between human rights provisions and religion has been a restricted one concerned with, on the one hand, religion as a part of thought, conscience and expression and, on the other, non-discrimination on the basis of religion.

Unlike other specific grounds of discrimination, for example, gender and race, there is no right-specific treaty as far as religion and belief are concerned; the initial 1962 United Nations General Assembly proposal was for preparation of draft declarations followed by conventions on both religious intolerance and racial discrimination. A declaration on race was adopted in 1963 and the Race Convention was adopted in 1965. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was finally adopted in 1981. To date, no convention concerning religion has been adopted, and it has been widely argued that even now the time is not ripe for such a convention. It is improbable that in the short to medium term any such treaty will be adopted.

13.1.1 The Universal Declaration of Human Rights

Provisions which seek to protect religion and belief at the universal level can either be found in general treaties or in formally non-binding documents. As far as the latter are concerned, both the Universal Declaration of Human Rights 1948 (UDHR) and the Declaration on the Elimination of Discrimination Based on Religion or Belief 1981 seek to protect religion and belief. Of course, the UDHR has been followed up with the two legally binding 1966 Covenants, and the 1981 Declaration, as noted above, has not been. The UDHR and the 1981 Declaration are, however, both closely connected to the 1966 Covenant on Civil and Political Rights, with the UDHR heavily influencing the relevant provisions of the Covenant and the 1981 Declaration further consolidating aspects of the Covenant.

The UDHR deals with religion and belief specifically, in the context of non-discrimination more generally, and also in the context of certain specific rights. Article 2 UDHR is the general non-discrimination clause and protects 'all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion…or other status'. Article 16, in the context of the right of men and women to marry and found a family, also specifically prohibits discrimination on the basis of religion, even though the reference to religion or the other grounds mentioned legally adds little, if anything, to the prohibition in Article 2. Although Article 19, which protects the right to freedom of opinion and expression, is also of relevance, the key provision is Article 18, which states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18 cannot be examined in isolation from Articles 29 and 30, which are the limitation clauses. Article 29(2) in particular notes:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The drafting of Article 18 has been the basis of much debate and disagreement. It is clear from the drafting that certain tactics were used to avoid disagreement — for example, the freedoms themselves were not defined — thus ensuring no philosophical

and ideological conflict. Indeed, a key point of disagreement concerned the right to change religion or belief. It is clear from the *travaux préparatoires* (preparatory work) that a number of somewhat contradictory statements were made by the Saudi Arabian representative, Jamil Baroody, and these are the primary source of the confusion. Which of his statements has been given greater weight has influenced the conclusions that commentators have reached regarding the right to change religion. However, a reading of all the documents can only lead to the conclusion that there was essentially an irreconcilable difference between, on the one hand, the representatives of not only Saudi Arabia but also of some (but certainly not all) of the other Muslim states present who did not wish to refer explicitly to such a right, and, on the other, the representatives of other states who considered such a right to be essential.

A Saudi proposal to amend Article 18 and remove express reference to the right to change religion or belief was defeated. One can only draw the conclusion that while there was final agreement as to the text, there was little agreement as to what it actually meant. Saudi Arabia was one of only eight states to abstain from the adoption of the UDHR. Its objection to Article 18 has always been considered to be central to its decision to abstain.

13.1.2 The International Covenant on Civil and Political Rights

Some of the debates over the wording of Article 18 UDHR were played out again during the drafting of what became Article 18 of the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 18 of the Covenant as adopted states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

As is also the case with the UDHR, the ICCPR refers to religion or belief either expressly or in implied terms in a number of other provisions. Article 2 imposes an obligation upon states to prohibit discrimination on various grounds, including religion and other opinions (but not expressly belief), in the context of the rights recognised by ICCPR. Article 24 seeks to guarantee a right to necessary measures of protection from the family, society and state, and that these are to be secured without any discrimination on the basis of *inter alia* religion. The key provision other than Article 18, however, is Article 26, which is the general non-discrimination clause. Article 26 states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion…or other status.

Unlike Article 14 ECHR, as will be discussed below, Article 26 ICCPR is a free-standing non-discrimination clause. The negotiations over Article 18 ICCPR were particularly drawn out and difficult. Freedom of religion alongside freedom of thought and opinion has been argued to form the very nucleus of the ICCPR, as it is based upon the philosophical assumption that the individual as a rational being is master of his or her own destiny. From this perspective it is essential that such a right is effectively protected and inconceivable that it would not be included. A legally binding provision was only possible though because, as was also the case with Article 18 UDHR, the wording of Article 18 ICCPR has always meant different things to different states.

One of the key areas of disagreement was again the right to change belief or religion. Article 18(1) of the Covenant as adopted is far less clear in this regard than UDHR in that the required compromise more clearly had to reflect the very different perspectives of states. Thus the wording refers to 'freedom to have or to adopt a religion or belief of his choice'. Some states with large Muslim majorities, such as Egypt and Saudi Arabia, strongly opposed express reference to the right to change religion, as this would in their view encourage proselytising, missionary and atheistic activity. For the representatives of some other states, however, the right to change religion was an inherent part of the right. Thus, a compromise between these opposites was needed to gain adoption.

The lack of consensus on the right to change religion has subsequently been further reinforced by some of the reservations which have been entered to Article 18 by Islamic states, although there is little consistency in state practice in this regard. Some states such as Saudi Arabia, which was very active in the drafting of Article 18, are not party to ICCPR. Of those Islamic states that are parties to the ICCPR, the reservations entered by some of them, and equally the absence of reservations entered by others, displays an inconsistency of so-called Islamic approaches. Although it is indicative only and not conclusive in this regard, neither the Cairo Declaration on Human Rights in Islam nor the Arab Charter on Human Rights refers to the right to change religion. The provisions of both the Cairo Declaration and the original version of the Arab Charter which deal with 'religious freedom' are at variance with those in the documents discussed elsewhere in this chapter – we have looked at these documents earlier in the guide. Article 30 of the Revised Arab Charter in protecting the right to religious freedoms also makes no reference to the right to change religion, although the provision and text as a whole are more in accordance with the ICCPR than the previous version of the Charter.

Article 18 ICCPR is noteworthy in a number of other regards. First, it is one of the few provisions from which no derogation is allowed in times of public emergency under Article 4. Article 18 distinguishes between thought, conscience and religion in that it is only the freedom to manifest one's religion or beliefs that may be subject to those limitations which are prescribed by law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others; an exhaustive and closed list. The limitations enunciated in Article 18 are more restrictive than those in other provisions of ICCPR, to which it is closely connected. For example, Article 19, the right to hold opinions, and Article 21, the right to assembly, can be limited on grounds of 'national security', which does not apply in the case of Article 18. Furthermore, limitations can be imposed upon the right to manifest religion only where the fundamental rights and freedoms of others, not **any** rights and freedoms, are at stake.

13.1.3 The 1981 Declaration

The third and final text under discussion here is the 1981 Declaration on Religion or Belief. Strictly speaking, the Declaration is not a source of legal obligation. What is particularly telling about the Declaration is that in the 16 years between 1962 and 1978, the then Commission on Human Rights, due to differences between states, managed to adopt only the title to and preamble of a draft declaration. It is important to emphasise that the Declaration does not as such seek to protect the right to religious freedom; it is primarily concerned with prohibiting discrimination on the grounds of religion and belief. Whereas the ICCPR *inter alia* prohibits discrimination and seeks to protect religious freedom, the Declaration's genesis, as noted above, lay in complementing what became the Race Convention, and thus the rationale was prohibiting discriminatory treatment, not promoting religious freedom. The Declaration contains only eight articles, of which six are operative. Article 1 is similar but not identical to Article 18 ICCPR – there is no fourth paragraph as there is in Article 18, but the right to religious education is expanded upon in Article 5 of the Declaration. Most importantly, Article 1(1) of the Declaration differs from Article 18(1) by noting that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 18(1) ICCPR refers in the second sentence to the right to adopt a religion, and there is no reference to whatever belief of his choice; that word is absent. This form of wording is also present in the third preambular paragraph to the Declaration and was adopted both in the preamble and in Article 1 as a compromise. Two key changes were needed to secure agreement on the preamble and on Article 1. Islamic states demanded that the original draft of the preamble, which was much closer to Article 18 UDHR, be changed so that references to the 'right to choose, manifest and change one's religion or belief' were omitted. The term 'whatever' was inserted at the request of the Central and Eastern European bloc so as to re-emphasise that the 1981 Declaration protects all forms of belief, such as atheism, and not just theistic ones.

The wording adopted in Article 1 of the Declaration shows there has not been and still is no consensus among states that the right to religious freedom includes the right to change religion or belief. The manner in which the issue was purportedly resolved in the drafting of the Declaration was by the insertion of Article 8. This states that nothing in the Declaration 'shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights'. Equally, if not more, important is what was left out of the Declaration which affects the application of Article 8. This provision allows those who insist on the right to change religion to argue that, as it was already protected by Articles 18 of the UDHR and ICCPR, the 1981 Declaration does not detract from that. For those states which have consistently argued that Article 18 ICCPR, the one provision in question which is legally binding, does not protect the right to change religion, the wording in Article 1 of the Declaration is a reiteration of their position. States at the time of drafting took and continue to take Articles 1 and 8 of the Declaration to mean various things.

ACTIVITIES 13.1–13.4

13.1 What are the broad approaches to religion as a human rights issue?

13.2 Are there other approaches you think could be adopted?

13.3 Why do you think rights related to religion are contentious?
No feedback provided.

13.4 How valuable do you consider the 1981 Declaration to be?

13.2 Regional provisions protecting religion and belief

Notwithstanding the very different role that religion plays in the legal systems of states in Europe, Africa or in the Americas, negotiation of the treaty provisions protecting religious freedoms in regional human rights treaties has, in many respects, been straightforward. Some problems have been avoided by recognising that any attempt to define certain terms such as religion, belief or protected manifestations would be futile.

13.2.1 The ECHR and religious freedom

In the context of the Council of Europe, what became Article 9(1) ECHR was subject to very little, if any, discussion or disagreement during the drafting process. Article 9(1), as adopted, is strikingly similar to the very earliest proposed drafts and states that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

It was always the intention of the drafters of the ECHR that Article 9(1) should closely resemble Article 18 UDHR, which was adopted less than two years earlier. This was realised, as the two are almost identical. Much more difficult was the drafting of Article 9(2), the limitation clause, and the right to education, which was finally adopted as Article 2 of the First Protocol to the Convention as opposed to part of Article 9. Article 9(2), as adopted, states that:

> [f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

This differs from both Article 29(1) UDHR and also Article 18(3) ICCPR. ICCPR is also more extensive in the protection it affords religious freedom, in that Article 15 ECHR allows Article 9 to be derogated from in 'time of war or other public emergency threatening the life of the nation', and this extends to both the right to have a religion or belief (in theory at least) as well as manifestations of it.

As is the case with the other treaties and declarations discussed above, the ECHR also contains a non-discrimination clause, Article 14, which prohibits discrimination in the enjoyment of the rights and freedoms set forward in the Convention on various grounds including religion, political, or other opinion. Unlike Article 26 ICCPR this is not a free-standing right but in essence reads a non-discrimination clause into each of the substantive rights set out. The Council of Europe in 2000 adopted Protocol 12 to the Convention, which seeks to provide a free-standing right not to be discriminated against on the same grounds as those articulated in Article 14, and although it has not been widely ratified, the Protocol has now come into force. Beyond these provisions there is nothing else in the European Convention system which directly seeks to protect religious freedom or prohibit discrimination on the grounds of religion or belief.

13.2.2 The Inter-American system and religious freedom

The Inter-American system, as we noted in Chapter 7, has two documents of normative value, the American Declaration of the Rights and Duties of Man 1948 and the American Convention on Human Rights 1969. The Declaration in Article III states that:

> [e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

When it came to drafting a legally binding provision, as was the case with the Council of Europe, the Organization of American States was able, due to its greater social and cultural homogeneity, to relatively quickly agree on the basics of the religious freedom provision. The American Convention also maintains the same approach as all the other declarations and treaties discussed so far, in that it is only concerned with religion in the narrow sense of it being a part of free thought, conscience and expression and also a ground for non-discrimination. The latter can be seen in Article 1 of the Convention, which imposes an obligation upon all states parties to extend all rights in the Convention to all without discrimination, with one of the protected grounds being religion. With regard to religious freedom itself, as protected in Article 12 of the American Convention, the absence of definitions is again notable. As a treaty finalised after the ICCPR, and with a number of states having actively participated in the drafting of both texts, the similarity between the content and structure of the two provisions is unsurprising although there are also a few noteworthy differences.

Article 12, which protects freedom of conscience and religion, states:

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Importantly, unlike the ICCPR, there is in the American Convention express recognition of the right to change religion.

13.2.3 The African Union and religious freedom

In Article 2 the African Charter has a non-discrimination clause where religion is one of a number of protected grounds. It also has a specific provision on religious freedom, Article 8. Of the legally binding provisions discussed so far, Article 8 is the shortest. It states that:

> [f]reedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 8 is actually a fair and pragmatic compromise considering the religious, ethnic, cultural, and social heterogeneity of the continent, the political concerns of African leaders, the need for a document that reflected 'African realities', and 'African perceptions' of rights. The second sentence of Article 8, '[n]o one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms', is the least stringent limitation clause discussed so far. To date there have been no cases heard by the African Court on Article 8.

ACTIVITY 13.5

How do the regional treaty provisions relating to religious freedoms differ in approach from each other, and from the documents of universal application?

No feedback provided.

13.3 The right in practice

The discussion below will focus on a few key cases and primarily concentrate on those concerning limitations on manifestation which involve religious dress. The petitions discussed below should not, however, be seen as being fully illustrative of the approach of the Human Rights Committee or the ECtHR towards religious manifestation. The petitions concerning dress, however, illustrate tendencies in the reasoning of these bodies and are useful to us for that purpose. There is no relevant jurisprudence from either of the African or Inter-American systems.

13.3.1 The practice of the Human Rights Committee

There is, rather surprisingly, a relative lack of jurisprudence concerning Article 18 ICCPR. To date, just over 40 or so petitions have raised issues central to the provision; most have been declared inadmissible. The Committee's approach to Article 18 has been set out in General Comment No.22:

> 2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.
>
> 3. The freedom to manifest religion or belief may be exercised 'either individually or in community with others and in public or private'. The freedom to manifest religion

or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts given direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, inter alia, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

…

5. The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including, inter alia, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18 (2) bars coercions that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as for example those restricting access to education, medical care, employment or the rights guaranteed by Article 25 and other provisions of the Covenant are similarly inconsistent with Article 18 (2)…

…

8. Article 18 (3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms or others. The freedom from coercion to have or to adopt a religion or belief and the liberty of the parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, states parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Article 18. The Committee observes that paragraph 3 of Article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition…

9. The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers…

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of the ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedom under Article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

General Comment No.22 covers a significant number of issues, but it cannot escape notice that the key underlying theme of the Committee's approach is non-discrimination on the basis of religion. This is not the core of Article 18, which is about freedom of religion or belief. The Committee compounds the right to religious freedom

with non-discrimination very clearly in paragraph 2, for example: religious freedom for 'new' religions should not lead to discrimination. Freedom of religion, however, is about much more than non-discrimination. What is clear from the general comment is that the Committee construes the right to religious freedom through the prism of non-discrimination and thus says relatively little about the core of the right itself.

The manner in which the Committee has tried to address matters can be seen in four key petitions. The first is a petition decided in 1989 brought against Canada by Karnel Singh Bhinder. This petition involved a claim brought by a turban-wearing Sikh against Canada on the ground that he, as a federal worker, was obliged under national legislation to wear a 'hard hat' to protect him from injury. He would not comply with this obligation and, as a consequence, his employment was terminated. The Committee analysed the issue from the perspective of both Articles 18 and 26 and noted:

> Whether one approaches the issue from the perspective of Article 18 or Article 26, in the view of the Committee the same conclusion must be reached. If the requirement that a hard hat be worn is regarded as raising issues under Article 18, then it is a limitation that is justified by reference to the grounds laid down in Article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion under Article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

The Committee's reasoning is deeply unsatisfactory. The Committee did not provide any evidence as to how the different provisions related to one another or as to how it sought to balance the objectives of the legislation with the rights of the individual. If Bhinder is considered in light of General Comment No.22, especially paragraph 3 (above), which was adopted only four years later, and in light of the fact that this was one of the relatively few petitions under Article 18 which the Committee had at that stage considered, then the Committee's conclusion is not what one would expect.

In the second petition, *Raihon Hudoyberganova* v *Uzbekistan*, which was decided after General Comment No.22 had been adopted, and which also involved the wearing of distinctive clothing or head coverings, in this case a hijab, the Committee did find Uzbekistan in violation of Article 18 of the Covenant. Here the applicant was excluded from university due to her refusal to remove her hijab. The Committee in its reasoning noted that:

> …the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18, paragraph 2…As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion…was based on the provisions of the Institute's new regulations. The Committee notes that the state party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of Article 18, paragraph 3. Instead, the state party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban…In the particular circumstances of the present case, and without either prejudging the right of a state party to limit expressions of religion and belief in the context of Article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the state party, that there has been a violation of Article 18, paragraph 2.

Uzbekistan probably should have been found in violation of the Covenant because it did not provide justification for the limitation on the individual's rights. The law in

Uzbekistan made clear that Uzbek nationals could not wear religious dress in public places. It is difficult to see how banning the voluntary wearing of a hijab in public in all circumstances could be both proportionate and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others under Article 18(3). It can be argued that the Committee did not have to engage in such analysis because the absence of any reasoning for the restriction did not necessitate it. But the Committee found that Uzbekistan violated the Covenant under Article 18(2) and that its position amounted to coercion. The Committee's reasoning suggests that it adopted this approach because Uzbekistan did not seek to justify the necessity of its measures but rather sought to justify the expulsion of the victim from university because of her refusal to comply with the ban on the hijab. Yet, surely the analysis and outcome should have centred on Article 18(3) and not rested solely on Article 18(2). The Committee's reasoning again highlights the fact that it interprets manifestations of religion or belief broadly and also that the 'context' in which restrictions are imposed upon manifestations will be important. This suggests a 'margin of appreciation' or area of discretion for the state, but that margin should be very limited in light of the fact, as discussed above, that Article 18 is a non-derogable and fundamental right within the Covenant scheme. The final petitions before the HRC, to be discussed, highlight the narrow scope of the margin of appreciation as far as Article 18 ICCPR is concerned. In two petitions decided together in 2018, *Yaker* v *France* and *Hebbadj* v *France*, the Human Rights Committee found that France violated the human rights of two women by fining them for wearing the niqab, a full-body Islamic veil. The decisions posed identical legal questions and thus were considered concurrently. The Human Rights Committee received the two complaints in 2016, after two French women were prosecuted and convicted in 2012 for wearing articles of clothing intended to conceal their faces in public. France, as we will see further below, in 2010 adopted a law stipulating that 'No one may, in a public space, wear any article of clothing intended to conceal the face.' The law has the effect of banning the wearing of the full Islamic veil in public, which covers the whole body including the face, leaving just a narrow slit for the eyes. The Human Rights Committee found that the general criminal ban on the wearing of the niqab in public introduced by the French law disproportionately harmed the petitioners' right to manifest their religious beliefs, and that France had not adequately explained why it was necessary to prohibit this clothing. Proportionality or the lack of it was key to the Human Rights Committee's approach when considering Article 18 ICCPR.

Further, the Committee was not persuaded by France's claim that a ban on face covering was necessary and proportionate from a security standpoint or for attaining the goal of 'living together' in society. The HRC, while acknowledging that States could require that individuals show their faces in specific circumstances for identification purposes, considered that a general ban on the niqab was too sweeping for this purpose. The Human Rights Committee also concluded that the ban, rather than protecting fully veiled women, could have the opposite effect of confining them to their homes, impeding their access to public services and marginalising them. Members of the Human Rights Committee were careful though not to criticise the notion of secularity nor to be seen to condone the wearing of the veil, which a number of the members of the Committee considered discriminatory towards, and oppressive of, women.

The approach of the Human Rights Committee and the outcome it reached must be contrasted with the judgment of the ECtHR in *SAS* v *France* discussed below.

13.3.2 The ECtHR and religious freedoms

Kokkinakis v *Greece* was the first key case relating to Article 9 ECHR decided by the Court and this was in 1993. The interpretation of Article 9 has essentially thus been decided during the last 30 years or so. Since then there has been a huge rise in the number of cases before the Court, which raise issues under Article 9. It is of course not possible to discuss all, or even much, of the jurisprudence, but again, an attempt will be made to discuss a small number of cases which provide a flavour of the Court's approach. The starting point is *Kokkinakis*, as the Court sought to set out some general principles in that petition.

Kokkinakis v *Greece* (Application No. 14307/88) [1993] ECHR 20

Mr Kokkinakis, born into a Greek Orthodox family, had become a Jehovah's Witness and was arrested more than 60 times and interned and imprisoned on several occasions for proselytism (trying to convert people to your faith). He sought to challenge his convictions for proselytism on the basis of various Convention rights, including Article 9. With regard to Article 9, in general terms, the Court noted:

> 31. …freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9 (art. 9), would be likely to remain a dead letter.
>
> …
>
> 33. The fundamental nature of the rights guaranteed in Article 9 para.1…is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11…that of Article 9…refers only to 'freedom to manifest one's religion or belief'. In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

Ultimately the Court found that Greece had violated Article 9, as the laws that had led to the arrest and convictions of Mr Kokkinakis were not proportionate to the legitimate aim pursued. What the Court was in essence trying to do was to balance the right of Mr Kokkinakis to manifest his faith by seeking to bring others within the fold with the right of the state to protect others from such activities.

Article 9(2) does allow limitations 'for the protection of the rights and freedoms of others' to be placed on manifestations of faith. Article 9(2) considers 'worship, teaching, practice and observance' to be acceptable manifestations. The Court thereby considered some forms of manifestation to be 'improper' but did not seek to explain which other manifestations, if any, were 'acceptable', what the boundaries of acceptable manifestations were, and how it was going to strike the balance between the rights of individuals and the rights of the state. The Court simply considered that the Greek courts did not specify what was improper about Mr Kokkinakis's behaviour, and that was the basis for the breach of Article 9.

Under Article 9(2), limitations on manifestations of belief are permissible 'for the protection of the rights and freedoms of others', a vague and open-ended justification. As noted above, in the Covenant system this ground is also present, but it is specifically limited to **fundamental** rights and freedoms and not **any** rights or freedoms. While in some circumstances limitations are perfectly justifiable, the approach of the Court in some cases after *Kokkinakis* also displays a tendency to give too much latitude to the state and not enough freedom to the individuals involved to make rational choices, which is part of the reasoning of the right to religious freedom in the first place.

Dahlab v *Switzerland* (Application No. 42393/98) ECHR 2001-V

In *Dahlab* v *Switzerland*, which was declared inadmissible by the Court (see Chapter 6 regarding inadmissibility), the issue was the right of a convert from Catholicism

to Islam to wear an 'Islamic headscarf' during her employment as a primary-school teacher in a public school in Geneva. The applicant converted to Islam while already employed as a school teacher. After about five years of wearing the headscarf, to which there had been no objection by anyone involved, a senior government official sent a letter to the applicant requesting her to stop wearing the headscarf while carrying out her professional duties, as such her conduct was incompatible with s.6 of the Public Education Act. This decision was subject to various appeals but ultimately upheld by the Swiss Federal Court, and, further to that, an application was made to the ECtHR invoking Article 9 ECHR.

The ECtHR accepted that the measure in question was prescribed by law and that it had a legitimate aim. With regard to the latter, the Court noted that, 'the measure pursued aims that were legitimate for the purposes of Article 9(2), namely the protection of the rights and freedoms of others, public safety and public order'. The final question was whether the measure was 'necessary in a democratic society'. Here the Court again reiterated that states have a margin of appreciation (area of discretion) subject to 'European supervision, embracing both the law and the decisions applying it', that is, whether the measures taken at the national level were justified in principle and were proportionate to the legitimate aim pursued. To determine this, the Court weighed the requirements of the protection of the rights and liberties of others against the conduct of the applicant. The European Court approved of the Swiss Federal Court's approach, in which it had taken into account the nature of the profession of state school teachers, who were seen both as participants in the exercise of educational authority and representatives of the state, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the state education system against the freedom to manifest religion. The ECtHR noted that it is:

> …very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.
>
> Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

The Court's reasoning is in many senses unsatisfactory. While the Court accepted that the applicant had difficult choices to make, in considering the legitimate aims pursued by the measures, the Court referred on a number of occasions to public safety and public order. While these are enumerated grounds in Article 9(2), there was no indication that the applicant's wearing of an Islamic headscarf posed any threat to public order or indeed the safety of anyone, including the applicant. It is also very difficult to reconcile the first paragraph of the Court's judgment, extracted above, with the principles underlying the Convention. Here, the Court develops the notion of 'passive proselytising'; while it was correct for the Court to highlight the vulnerability of the children, a point it reiterated, there was also no evidence or any suggestion that the applicant sought to abuse her influence over the children or to convert them.

The Court had also stated in *Kokkinakis* and restated in *Dahlab* that the rights in question are 'one of the foundations of a "democratic society"' and that '[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it'. But in *Dahlab* the Court stated that it considered the Islamic imposition of a headscarf on women to be 'difficult to reconcile' with the 'message

of tolerance, respect for others and, above all, equality and non-discrimination'. Yet, it failed to give any weight to the fact that the applicant of her own choice converted to Islam and wore the headscarf as a matter again of her own choice. The Court's emphasis on the role and discretion of the state at the expense of fundamental individual rights can equally be seen in *Leyla Şahin* v *Turkey*.

Leyla Şahin v *Turkey* (Application No. 44774/98)

The applicant in this case, Leyla Şahin, was a Turkish national who was a medical student at Istanbul University. In 1998, the university prohibited the wearing of Islamic headscarves. Şahin considered it her religious duty to wear a headscarf and refused to comply with the ban. In a 2004 judgment, the Chamber held that there had been no violation of Article 9. Later in 2004, the case was referred to the Grand Chamber under Article 43(2). Şahin's argument was that the prohibition was a breach of Article 9, and an unjustified interference with her right to education under Article 2 of Protocol 1. She was also alleging violations of Articles 14 and 9 as the prohibition forced students to choose between education and religion and discriminated between believers and non-believers. She was also relying on arguments that alleged breach of Articles 8 and 10.

The Court argued that there had been no breach of Article 9. As the interference in religious freedom was both justified in principle and proportionate to the aims pursued, it was therefore 'necessary in a democratic society'. The ECtHR relied on a ruling of the Turkish Constitutional Court which had held that freedom of dress was not absolute in higher educational institutions; furthermore, the Court determined that authorising students to 'cover the neck and hair with a veil or headscarf for reasons of religious conviction' in the universities was in breach of Constitution. There were also rulings of the Supreme Administrative Court that had held wearing Islamic headscarves was incompatible with Constitutional principles. The ban on headscarves at the university had been in place long before Şahin had enrolled as a student.

The interference with Şahin's religious freedom was justified from a slightly different perspective. It achieved the legitimate aim of protecting both the rights and freedoms of others, and preserving public order. The values that were protected were those of 'secularism and equality'. The Constitutional Court had repeatedly held that secularism underlay such democratic values as freedom and equality; it also prevented the state from promoting any particular set of religious values, thus maintaining its neutrality. A ban on outward manifestations of faith protected individuals from 'pressure from extremist movements', and also helped to further gender equality.

The Grand Chamber also found that there had been no breach of Article 2 of Protocol 1 for similar reasons. Şahin's argument under Articles 8 and 10 were also rejected as the Court saw them as essentially the same arguments that had been made in relation to Article 9 and Protocol 1. Şahin had not provided sufficient details of her complaint under Article 14 for the Grand Chamber to consider this aspect of her argument.

Arguably this case reflects the commitment to secular values of the Turkish state. A similar issue arose in our final case: *SAS* v *France*.

SAS v *France* (Application No. 43835/11) [2014] ECHR 695

This judgment from the Grand Chamber, handed down in July 2014, considered France's ban on the wearing of the hijab or other such forms of religious dress in public (not just educational institutions). The facts briefly are that in April 2011, SAS, a French woman wearing a face veil, lodged a complaint against the French law which prohibited 'the concealment of one's face in public places' – often called the 'burqa ban'. This is the same law considered in *Yaker* v *France* and *Hebbadj* v *France*, before the Human Rights Committee. The applicant in *SAS* made clear that she did not always wear the face veil but wished to be able to do so when she felt the need for spiritual reasons. She accepted that she was required to remove her face veil when necessary for identity checks. Before the ECtHR, she claimed that the French law violated Articles 3, 8, 9, 10, 11 and 14 ECHR. We are primarily concerned with the Article 9 issues.

The Court's Grand Chamber focused its reasoning on Article 9, together with Article 8 (family life and private life), accepting that 'personal choices as to an individual's

desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life' (see para.107).

The French government argued that the ban aimed to protect public safety and to ensure 'respect for the minimum set of values of an open and democratic society'. This second notion was argued to encompass gender equality, the protection of human dignity and what was argued to be 'respect of the minimum requirements of life in society' which was referred to in French as '*le vivre ensemble*' – literally, living together.

By 15 votes to two, the Grand Chamber found the total ban (known as a blanket ban) unnecessary for the protection of public safety. This was because less restrictive alternatives, as far as the autonomy and choices of women wearing the veil, are available, for example, being asked to show the face in particular situations. However, as to the second aim argued by France, the Court only retained the aim of 'living together' and decided that the way in which a country organises its society and how people interact and live together falls within a wide 'margin of appreciation', which consequently led to not finding a violation of the Convention.

The judgment is disappointing in ways but positive in others. One of the most important and noteworthy aspects of the Court's approach is its departure from its highly criticised stance towards the practice of wearing religious garments by Muslim women. In the cases discussed above, *Dahlab* and *Leyla Şahin*, the Court stated that:

> the wearing of a headscarf…appears to be imposed on women by a precept which is laid down in the Koran and which…is hard to square with the principle of gender equality… it…appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination.

In *SAS*, the French authorities quite naturally sought to rely on the Court's own previous pronouncements, but this time the Court refused to accept it as a legitimate aim. The Court stated:

> …a state party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms…[the Court] is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy. (paras.119–20)

This is important as it emphasises the applicant's autonomy. We have noted above that autonomy is at the core of the philosophical underpinning of the right to religious freedom. The Court refrains from giving a meaning to the way the applicant dressed and the relationship with Islam. The Court gave a clear message to all states parties that they cannot impose their view on women who choose to wear a particular religious dress – although the Court's language is notably loaded – strange but not unusual. Overall, it is clear that the Court in this case does acknowledge the harm done to Muslim women by the ban; that it strips them of part of their identity; that it criminalises what they consider to be a religious obligation; and that not wearing the veil may compel them to stay at home and withdraw from society.

Notwithstanding the above, the Court upheld the ban on the basis of 'living together' – the need for social harmony, tolerance and acceptable pluralism. Although this is not recognised as a ground of limitation under ECHR, especially Article 9, the Court accepted it as a part of the 'protection of the rights and freedoms of others' which is a relevant term in the Convention. The Court's logic is worth considering:

> The Court is…able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. [The Court then considers that] …the notion is flexible and risks abuse. [Therefore the Court will undertake]…a careful examination of the necessity of the impugned limitation (See para.122).

The Court, however, did not engage in any such careful examination as it accorded the state party, France, a wide margin of appreciation. The question thus essentially became about the proportionality of the aim – of living together. The Court's reasoning

and concerns expressed as to the impact upon Muslim women of the ban would suggest that it would find that the ban was not proportionate. But the Court did not do that – in fact it found it proportionate in light of a number of reasons. First, the Court noted that the ban was not prohibiting all religious dress, only the face veil, so it was not broad but rather narrow. So a Muslim woman could still wear a hijab or jilbab/abaya (loose fitting all in one clothing), just not the face veil. Also, the Court noted that only a small number of women wore such a veil. The Court here looked generally at all of society and then Muslim women broadly but did not focus on those who wore the veil and the impact they suffered from the ban. Second, the Court did not consider the penalties for defying the ban – a fine of €150 and a citizenship course – to be punitive. Third was the 'wide margin of appreciation'. The Court noted:

> 154. …the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.

There is a fundamental incompatibility between undertaking a 'careful examination' when you are granting a 'wide margin of appreciation' or discretion to the state party in question. Further, what sort of scrutiny as part of the democratic process led to the adoption of the ban? The Court was well aware of the atmosphere of distrust towards Muslims in France and referred to the context and backlash towards them – the Court emphasised its concern over the Islamophobic comments which were widespread at the time the ban was being debated. Bearing in mind that the ban directly related to a small number of Muslim women (notwithstanding that the Court said it was not about religious dress as such), in the context of France they are a small and vulnerable group who are widely known to be subject to prejudice. This should have meant a careful examination was necessary – and thus narrowed the margin of appreciation.

In *SAS*, the Court did at least depart from its previous rather patronising approach to Muslim women who choose to wear the veil. In *Dahlab* and *Şahin* the Court considered women who wear the veil to be victims of sexual discrimination and compelled to wear the hijab, when on the facts neither woman was being so compelled and they were doing so as an expression of their own will and of their own volition. In these cases the Court simply ignored the wishes of the applicants. This aspect of those decisions has been subject to significant and justifiably sustained critique. In *SAS* the Court did not, to its credit, repeat such comments and perhaps the Court will in future refrain from adopting such an approach to items of clothing which have religious significance.

In sum, the decision is a distinct departure from the ECtHR's jurisprudence in other cases concerning the rights of Muslim women to wear religious attire. The rejection of France's justifications based on gender equality and public safety makes progress towards rectifying some of the criticisms of the ECtHR's earlier decisions in this area. However, the recognition of the concept of 'living together' as a justifiable ground for the restriction of the right to religious freedom is noteworthy. This can be clearly contrasted with the approach of the HRC in *Yaker* v *France* and *Hebbadj* v *France*. Those petitions were decided after *SAS* v *France*. France now finds itself caught between two approaches – that of the HRC and that of the ECtHR. It is not difficult to reconcile the views. The ECtHR found the French law was not in violation of the Convention. The HRC found the same French law was in violation of Article 18 of the ICCPR. France simply has to repeal the law to be in compliance with both treaties. Whether it will do so, remains to be seen. It is finally worth noting that Belgium has now also adopted a law banning the wearing of the hijab in public. Germany and Italy are likely to do so in the coming years.

Activities 13.6 and 13.7

13.6 Do *Dahlab*, *Şahin* and *SAS* suggest that there has been a consistent approach to the religious freedom of Muslim women in European case law?

13.7 Do you think that the rights of Muslim women have become a 'battleground' for contested ideas of rights and liberties in European societies?
No feedback provided.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the history of the right to religious freedom**
- **explain the provisions relating to the right to religious freedom**
- **explain the main issues of contention during the drafting of the provisions on the right to religious freedom**
- **explain the approaches adopted by the Human Rights Commission to the right to religious freedom and some aspects of its jurisprudence**
- **explain aspects of the approach adopted by the ECtHR to the right to religious freedom and some of the problems with that approach**
- **explain the limitations to the right to religious freedom**
- **understand the broader context in which the right to religious freedom is currently being contested.**

Sample examination question

'Religious freedom is an important human right but not a central one.'

Discuss.

Advice on answering the question

Any answer to this question would do well to agree with it. It is indeed accurate to describe the right in this way. This is of course ironic as the right is probably the oldest right in international law and also central to the notion of individual autonomy, which is at the core of a number of philosophical approaches to human rights. But the right has highlighted tensions between certain states. The lack of agreement as to what the right encompasses, for example, the right to convert others and indeed the right to change faith, has meant that the right has not been recognised as an obligation *erga omnes* or *jus cogens*. Similarly, there are debates as to the extent to which the right can be limited and when. Different courts and committees have adopted various approaches. The European Court's jurisprudence, for example, highlights considerations in seeking to accommodate secularism, multiculturalism, gender-based equality and the rights of women to wear certain religious attire, and the cases highlight that the state is accorded significant latitude, but also that the ECtHR is changing its approach. How this has evolved should be explored in your answer.

NOTES

14 The rights of refugees

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Introduction

Many events in recent years – for example, the Soviet invasion of Afghanistan at the end of the 1970s; the break-up of the former Yugoslavia; the brutal and in some cases ongoing conflicts in various parts of Africa, Syria and Yemen; the suppression of the Kurdish minority in Turkey; the systematic killing and targeting of Rohingya in Myanmar and the situation in Afghanistan since 2003 – have led to a huge number of persons seeking sanctuary.

Those who seek refuge from persecution or conflict have existed throughout history. The 'Book of Exodus' in the Old Testament, which is part of the tradition of all the Abrahamic faiths (Islam, Christianity and Judaism), is, whether one considers it truthful or a work of fiction, an example of a narrative of suffering and having to leave one's home to seek sanctuary elsewhere. Many of the so-called founding fathers of the USA were seeking sanctuary. Similarly, Jewish populations were fleeing pogroms in Central and Eastern Europe throughout the 19th and 20th centuries. The biggest mass movement of persons in human history, as a result of the tragic consequences of the partition of India in 1947, is yet another example.

The need for protection when fleeing is, in many regards, the other side of the human rights equation. If human rights protection in a state fails, for whatever reasons, there are a number of legal consequences. Protection is needed from the abuse or conflict. That protection may be afforded by third states if an individual turns up at the border and seeks sanctuary – or, in legal parlance, asylum. That is what we will examine in this chapter. A related question also arises: to what extent do states owe a legal obligation to stop the abuses in the (third) state in which they are occurring? In legal terms this is known as 'extraterritorial' obligations. What we are referring to here are human rights obligations which exist for states in third states and have been accepted by that state by being party to a human rights treaty. So, State A is party to Treaty B. State C is not party to Treaty B. Treaty B is a human rights treaty. What human rights obligations does State A owe in State C's territory is the issue. This is a difficult question which has been subject to complex jurisprudence before numerous human rights treaty bodies and regional human rights courts. (De Schutter addresses this in great detail in Chapter 2 of his textbook but you should not feel the need to read it.) These obligations and refugee protection are two sides of the same coin. In this chapter we cannot explore the issue of 'extraterritorial' obligations so we will concentrate on 'refugees'.

The rights of refugees raise, in a particularly acute form, one of the main issues that has concerned us throughout this guide. It is in the area of refugees' rights that the obligations of the international community are perhaps the most meaningful. Could we speak of an international duty to protect those fleeing persecution; or of those who have been made state-less and right-less? We will see that the UN has attempted to make a duty to refugees a reality, but that there is still great resistance to open-ended responsibility to refugees in most nations of the world.

Refugee law is an intensely political subject. In this chapter, we will see how a 'Europe-centric' solution to the issue has been transformed into a global one. We will focus on the role of the UN Convention Relating to the Status of Refugees 1951 (Refugee Convention) and the 1967 Protocol. However, we need to appreciate that refugees' rights are increasingly being criticised and politicised in all countries where refugees are hosted. Pakistan and Iran over many years hosted the largest populations of refugees in the world – primarily Afghanis. At the end of 2019 (the UNHCR has not updated data for 2020/21 due to COVID-19), Turkey hosted more refugees than any other state. In Africa, in the Great Lakes region, millions of refugees were being hosted during the armed conflicts involving, *inter alia*, the Democratic Republic of Congo (DRC), Uganda, Rwanda and Burundi. In each of these countries, the hosting has been controversial. Millions of Afghanis have lived in Pakistan since the late 1970s but in recent years there has been increasing pressure to repatriate them. Sharbat Gula, the world famous 'Afghan girl' photographed by Steve McCurry for *National Geographic* in 1985, and who inadvertently became a global icon of the suffering of the Afghanis, for example, was in 2016 expelled from Pakistan and repatriated to Afghanistan

further to irregularities concerning her Pakistani identity card. She had spent almost her entire life in Pakistan – yet it was still deemed acceptable, indeed there was a public clamour, for her to be expelled. The Taliban returning to power in 2020 has led to another exodus of persons from Afghanistan. In a different but related way, in 2015 the photograph of the washed-up body on a Turkish beach of a three-year-old Syrian boy, Aylan Kurdi, fleeing the conflict in Syria, stirred to some extent European consciences about the unfolding tragedy in that country. Many other individuals have also perished in recent years in seeking to reach Europe, either from Africa by crossing the Mediterranean in unseaworthy vessels which routinely sink, or by crossing mountains and deserts to reach Western Europe and being abused, victimised and humiliated along the way. The 'Channel crossings' of those seeking to enter the UK by boats has become an issue of intense political contention in the UK. Notwithstanding these tragedies, both destination states (those that refugees wish to reach, such as Norway, Germany, France and the UK) and transit states (those they pass through, such as Greece, Hungary, Serbia and the Czech Republic) have by and large been extremely hostile to such populations. The rhetoric of the Trump Presidency (2016–2020) towards refugees from Latin America ('bad hombres, rapists and murders' and the simply inhumane separation of young children from their parents) tapped into deeply racist and hostile sentiments among many white Americans. A notable exception has been Germany, which agreed to host an additional 1 million Syrians between 2014 and the end of 2016. That measure though was deeply unpopular among many German voters. In almost all, if not all, developed countries, the fate of those seeking asylum has become inextricably intertwined with views as to immigration and the reception of those seeking to move as economic migrants. There are two issues closely related to this. The first is racism, the second is Islamophobia – while these are distinct, they do also overlap. Immigration debates in all developed countries have a degree of racism to them. While of course some welcome immigration, immigration by definition introduces 'outsiders' into a society. Racially and ethnically they may often be the same peoples – but culturally, linguistically and by definition nationality, they will be different from the majority of the established community. That attracts opposition in itself, but that opposition is furthered by increased competition over scarce resources such as housing, education and employment opportunities. It is also worth noting that, in the developed world, there is a demographic dip as populations age and birth rates fall. Those developed economies need migrant labour but aging populations are by and large hostile to change and thus wary of 'outsiders'. This is a significant conundrum.

Concerns about those who migrate are not new either. In the 13th century, King Edward I expelled all Jews from England – a community which had arrived around 200 years earlier. Although the precise reasons for their expulsion are debated, there is little doubt there was resentment against Jews from the local and more established populations. Several hundred years later, the Aliens Act 1905 – the first piece of immigration law anywhere in the world – was introduced by the British Parliament to stem the flow of persons from Europe, but in particular Jewish immigrants who sought sanctuary from persecution in Central and Eastern Europe. There is now no nation state in the world that does not impose immigration restrictions and controls on who can enter and leave it.

In the UK's referendum on EU membership in 2016, one of the central issues for many people was immigration – not only from outside the EU but also from within the EU, in particular from Central and Eastern Europe. Immigration is an issue in almost all countries and those seeking asylum are caught up in the debate. In the US presidential election of 2016, immigration was again a major issue, with Mexicans and Muslims being identified as particularly unwelcome. This theme continued throughout the Trump presidency until it ended in 2020. The second issue is Islamophobia, but this is an issue only in non-Muslim majority states. As we will see, when examining certain statistics below, a fair percentage of those seeking asylum in developed states are Muslims of some description. This feeds into debates about the limits of multicultural societies, distrust of Muslims due to geopolitical tensions, a perceived lack of integration and other related issues as well racism.

As immigration and immigrants are considered 'fair game', so are those seeking asylum, as they are thrown into the debate about undesirable outsiders. As states have made immigration rules more stringent, claiming asylum has become a possible route of entry into such states. Seeking asylum is thus perceived, rightly or wrongly, as the soft underbelly of immigration rules. The Refugee Convention and its merits are caught up in this and it is widely criticised by politicians in the developing and developed world. For instance, in 2001 the then Home Secretary of the UK, Jack Straw, argued in strident terms that the Convention was in need of revision as economic migrants were taking advantage of a state's responsibility to refugees. While, at the time this was novel, this sort of behaviour is now routine.

The topic we are examining is a broad and complex one and it is possible to devote a specialist module to the numerous aspects of the issue. The reading and work set out is extensive but the aim is to highlight the tensions, dilemmas and broader considerations of a complex and contentious issue.

Essential reading

- **Hathaway, J. 'Refugees and asylum' in Opeskin, B., R. Perruchoud and J. Redpath-Cross (eds) *Foundations of international migration law*. (Cambridge: Cambridge University Press, 2012) [ISBN 9781107017719] pp.177–204 (available on the VLE). This is a good introduction to many of the broader issues and it is wise to read it first.**
- **Goodwin-Gill, G.S. and J. McAdam *The refugee in international law*. (Oxford: Oxford University Press, 2021) fourth edition [ISBN 9780198808572] Chapters 2 and 3 (available on the VLE and in Oxford Scholarly Authorities in International Law via the Online Library).**
- **Hathaway, J. *The rights of refugees under international law*. (Cambridge: Cambridge University Press, 2021) second edition [ISBN 9781108810913] Chapter 1 'The evolution of the refugee rights regime' (available in Cambridge Core via the Online Library).**
  This is structured in a less accessible way than Goodwin-Gill and McAdam. Chapter 1, however, is an excellent overview of the history of the legal regimes concerning refugees. It is lengthy but worth your time.
- **Gibney, M.J. *The ethics and politics of asylum: liberal democracy and the response to refugees*. (Cambridge: Cambridge University Press, 2004) [ISBN 9780521009379] pp.23–84 (available on the VLE). This examines the reasoning for state practice towards refugees. A good companion to this chapter is:**
- **Tuitt, P. 'Functions of refugee law' in Tuitt, P. *False images: law's construction of the refugee*. (London: Pluto Press, 1996) [ISBN 9780745307459] pp.5–23 (available on the VLE). Although dated, this chapter is useful in that Tuitt argues that refugee law has more to do with regulating the flow of refugees between states than it does with protecting the rights of refugees.**
- **Storey, H. 'What constitutes persecution? Towards a working definition', *International Journal of Refugee Law* 26 2014, pp.272–85 (available on the VLE and in the Online Library).**
- **Meaning of well-founded fear: *R* v *Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals* [1988] 1 All ER 193 (especially judgment of Lord Keith).**
- **Meaning of persecution: *HJ (Iran) and HT (Cameroon)* v *Secretary of State for the Home Department* [2010] UKSC 31 (especially judgment of Lord Rodger).**
- **Meaning of particular social group: *R* v *Immigration Appeal Tribunal and Another, ex parte Shah*; *Islam and Others* v *Secretary of State for the Home Department* [1999] 2 All ER 545 (especially Lord Steyn).**

  The above cases and many other resources are available at: www.refworld.org/cgi-bin/texis/vtx/rwmain
- **UN Convention Relating to the Status of Refugees 1951 (Refugee Convention) and Protocol of 1967.**

Further reading

- **Edwards, A. 'International refugee law' in Moeckli et al. (eds) (available in VLeBooks via the Online Library). This is a very good discussion drawing out many of the broader themes relevant to this issue and human rights.**
- **UNHCR Statute of the Office of the United Nations High Commissioner for Refugees 1950.**
- ***UNHCR handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees*. UNHCR doc HCR/1P/4/ENG/REV. 3, December 2011; available at www.refworld.org/pdfid/4f33c8d92.pdf**
- **Feller, E., V. Türk and F. Nicholson (eds) *Refugee protection in international law: UNHCR's global consultations on international protection*. (Cambridge: Cambridge University Press, 2003) [ISBN 9780521825740].**
- **UN Audiovisual Library – please consider the lectures entitled 'International migration law' in the 'Lecture series'. These lectures will provide very useful context and background for you.**

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the political and social context of refugees' rights**
- **explain the legal theoretical issues raised by refugees' rights**
- **summarise the basic provisions of the Convention Relating to the Status of Refugees 1951 and the 1967 Protocol**
- **discuss the problems inherent in the test for determining refugee status**
- **identify the provisions that relate to women and girls as refugees and to family reunification**
- **describe the response of the English courts to the test for the determination of refugee status.**

14.1 Thinking about the rights of refugees and migrants

As suggested in the introduction above, the concept of the refugee raises some interesting problems in human rights law. As alluded to on a number of occasions in this guide, international human rights law works on the assumption that the state is the abuser of your rights, and that treaties and custom prohibit the state from certain activities or require the state to do certain things. The abuser of your rights is required to protect them and you must look to the abuser for that protection. Of course, the abuser is not the state in all circumstances – a state can be in breach of its obligations not only through what it does (i.e. torture or kill) but also what it may fail to do. For example, say a woman is subject to extreme violence within the context of the home from her husband or father – she reports the matter to the police but they take no action. The state here may be liable for its omission to protect the woman from domestic violence. But what of when the individual at risk simply cannot trust or rely upon the state to protect him or her? Often, to reiterate, the state is the persecutor. The victim will have to flee the state to survive or to escape torture, slavery and the like.

If we look back over time, it is obvious that human beings have always migrated. The first *Homo sapiens* lived in Africa, but humans now occupy – with the exception of most of Antarctica – all parts of the globe on a permanent basis. The aftermath of conflict, the search for sustenance, escaping from natural disasters and the desire for a better life, among other reasons, mean that humans have always moved and will continue to do so. This is notwithstanding the creation of modern nation states which have stemmed such movements to a greater or lesser extent. States of course are artificial legal abstracts and boundaries have routinely been drawn at the whim of a cartographer's pencil, often with little reference to the realities on the ground, historical practice and the needs of the local population. The Bedouin of the Arabian

peninsula, for example, have had a nomadic lifestyle for millennia and still seek to reach oasis and grazing lands across borders which are less than a century old. Mass movements of populations across sea and land are often discussed as being a recent phenomenon but are not. The subjugation and subsequent settling of the Americas by Europeans is a good example of the above (we discussed this when looking at indigenous rights), one which also involved the forcible movement of millions of Africans as slaves across the Atlantic so as to provide a cheap and almost endless labour supply for those territories.

Migration links into human rights in a number of ways. First, all migrants are entitled to certain human rights (notably some civil and political rights) simply by being within the 'territory' of a state which is party to a human rights treaty. It goes without saying that they cannot be tortured or held in slavery for any reason. Further, an immigrant cannot be denied their right to private life or their right to a fair trial simply on account of being an immigrant – although such rights can be limited for other reasons. Economic and social rights under human rights treaties are more problematic in this regard, and rights to housing, education and social welfare, for example, need not be extended (indeed, they often are not) to migrants in the same way they are extended to nationals. International law generally and international human rights law more specifically by and large permit discrimination on the basis of nationality. If they did not, states could not limit entry to the nationals of other states or provide visa-waivers for nationals of some states but not others.

Second, (economic) migrants – that is, those who cross borders in a regular manner (i.e. they are not what are incorrectly referred to as 'illegal migrants') – are protected by the International Convention on the Protection of the Rights of Migrant Workers. This 1990 UN Convention seeks to specifically protect those who migrate for economic reasons and to work but not with a view to settling permanently in the host state. It is not a Convention we cover in this module but it is a UN human rights treaty with a treaty body like the others we have been studying. If one considers the terrible conditions of South Asian labourers working in the construction industries in many Gulf states, it is clear that migrant workers desperately need the effective protection of such rights and the Convention seeks to protect these workers among many others.

Third, (im)migrants and their descendants have the right not to be discriminated against solely on the basis of their race or ethnicity; this is distinct from nationality. As we have already covered, this is part of the obligation of almost all human rights treaties with regard to the protection of rights contained in those treaties but also more specifically by the 1965 Race Convention, as discussed in Chapter 10.

Finally, there are those who migrate from one state to another to escape persecution. If they satisfy the criteria, they are entitled to the rights set out under the Refugee Convention (or its 1967 Protocol). But if we link the Refugee Convention back to the observation made above that humans have migrated for numerous reasons, including persecution, since time immemorial, we are able to reflect further on an essential issue.

Linking up much of the above we can move forward in our analysis. The movement of persons calls into question the organisation of the world into distinct sovereign territories – states – to which individuals are allied by the accident of birth. The refugee is someone who cannot return to their state of nationality due to the risk they are under. We will come back to this. A person does not have to leave because of the risk – they have to be unable to return to 'their' state. The refugee is a person who is without the protection of their state, and it is the state, in public international law and the Westphalian system, that is the entity with the responsibility to that individual. Thus, those who cannot be and indeed are not protected by the state are without rights – as rights exist against your state of nationality. Nationality is a relationship based upon reciprocal obligations – the social contract. The refugee is thus the outlier, who seeks sanctuary from and in another state. In legal terms, an individual has rights against a state, as the individual has a nexus or connection with the state. This is an essential part of the structure of the current international legal system. Thus, the refugee is exposed to the compassion of a state with which they have little, if any, connection. In this context, it is easy to argue that human rights are not the product of inherent

dignity as we discussed in earlier chapters, but exist purely because a state might grant and recognise them, and those whose rights the state chooses to deprive have little, if any, remedy.

Summary

The focus of this chapter will be on the Refugee Convention and the 1967 Protocol. Despite these international agreements, though, the human rights of refugees are often neglected. This is because by being state-less, refugees fall outside the human rights system as rights obligations rest within nation states. Another central problem is the demonisation of refugees and asylum seekers, and the failure of powerful countries to pledge a significant level of financial support to the system for the protection of refugees.

14.2 The recent history of the refugee

14.2.1 Measures to protect refugees

The roots of the current law relating to the protection of the refugee can be found in the immediate aftermath of the Second World War. The United Nations Relief and Rehabilitation Agency (UNRRA) and the International Refugee Organisation (IRO) were involved in aiding the millions of displaced people in Europe. However, there was not, as yet, a coherent body of refugee law. There were two relevant instruments: the 1933 League of Nations Convention relating to the International Status of Refugees and the 1938 Convention Concerning the Status of Refugees coming from Germany. Although the 1933 Convention contained principles that, as we will see, went on to inform the Refugee Convention, these documents cannot be seen as providing a coherent framework for the protection of the rights of refugees. Indeed, although the 1933 Convention placed duties on signatories to accept refugees, and prohibited their expulsion, the effect of this treaty was severely limited by the fact that those few nations who did sign imposed limitations on its influence.

In the post-war period, the continuing nature of the refugee problem in Europe, and the appreciation that the refugee crisis raised humanitarian and human rights issues, made the UN keen to improve the international protection of displaced persons. The UN High Commissioner for Refugees (UNHCR) was created in 1950 by the UN General Assembly and given a remit that covered the protection of refugees worldwide. One year after the creation of the UNHCR, the Refugee Convention was adopted by the UN. The main reason for the adoption of the Convention was to have a legal instrument containing a general definition of who was to be considered a refugee and thus entitled to protection and their associated rights. This was vastly preferable to the previous system of ad hoc agreements adopted (or not as the case may be) in response to specific refugee situations.

The nature of the Convention reflects the fact that it was largely a compromise acceptable to the parties present when it was drawn up. As with all international human rights, refugee rights place obligations on sovereign states, and states parties were reluctant to commit to obligations that were too broad or interfered too dramatically with their own internal affairs. Thus, the very definition of who is a refugee has a temporal limit. It applies to those who became refugees 'as a result of events occurring before 1 January 1951'. There is also an option to limit the geographical reach of the treaty to events happening in Europe. Both limitations reflect the fact that sovereign states were unwilling to adopt open-ended responsibilities in this area. It is worth elaborating on this. The Refugee Convention is asking states parties to consider an application from any person, anywhere in the world, who wishes to seek refuge and is in the state party's territory. There does not have to be any connection between the state and the individual. For example, a woman fears for her life in Zimbabwe. She seeks to escape. The first aeroplane she can catch is to Sweden and upon arrival there she claims asylum as a refugee. Regardless of the validity of that claim, the Convention obliges the state to consider the application.

If she satisfies the criteria set out in the Convention, the state has to award her refugee status and the associated rights. It is thus a potentially open-ended obligation, in an era when global transport is now affordable and accessible to all, that is a very significant undertaking. The Refugee Convention obliges states parties to potentially assist any person. This is why there was a temporal and geographic limitation, but both of these provide a context and consequently an approach. The 1967 Protocol removes the geographical and temporal limits of the Convention for those states who have accepted it, which the vast majority have. The 1967 Protocol also created a duty for national authorities to cooperate with the UN in the 'exercise of its functions', and in the collection of statistical data relating to the condition of refugees and the status of laws relating to refugees in the signatory state.

A full list of parties to the Protocol and the Convention can be found at: www.unhcr.org/uk/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html?query=Protocol%20Relating%20to%20the%20Status%20of%20Refugees%201967

The Convention is important from a legal perspective because it contains a general definition of the refugee, and also grants them some rights. A central tenet of the Convention is the principle that a nation must not expel or return a refugee (*refoulement*). This principle was contentious at the time of the drafting of the Convention and remains so today. Governments were concerned that they were under an obligation to allow unlimited numbers of persons to claim status as refugees once they had crossed a national border. This is one of the reasons why states shifted the onus to those who provide transport. Thus, for example, under the terms of the Immigration and Asylum Act 1999, any form of transport that arrives in the UK (train, boat, aircraft, etc.) requires the operator of such transport to ascertain correct and valid travel documents and permission to enter the UK. If a person arrives in the UK without such documentation, the carrier is liable to a fine of up to £2,000 per passenger. As such fines per passenger will seriously erode the profitability of a carrier, the onus to keep persons without prior approval from entering the UK has shifted to the transport sector, who thus prevent such persons travelling to the UK in the first place. The UK is very far from alone in adopting such legislation but one of the consequences of such measures is it compels those seeking asylum (as well as any others – such as economic migrants) into using people-smuggling networks, which exposes them to very significant further danger.

Misgivings about a nation's obligations to those who seek refuge are also reflected in the fact that the Convention imposes obligations on refugees to the nation that is protecting them. In this sense, a refugee's rights clearly correlate with a refugee's duties. As was noted above, the Refugee Convention does not exist in an international legal vacuum – other human rights treaties overlap with aspects of the issue concerning those who seek asylum. There are also other, regional instruments that relate to refugees. For example, in Latin America, there are a number of relevant international treaties. Among these documents are:

- the Treaty on International Penal Law (Montevideo, 1889)
- the Agreement on Extradition (Caracas, 1911)
- the Convention on Asylum (Havana, 1928)
- the Convention on Political Asylum (Montevideo, 1933)
- the Convention on Diplomatic Asylum (Caracas, 1954)
- the Convention on Territorial Asylum (Caracas, 1954).

14.2.2 What is a refugee?

Before we examine the Refugee Convention in depth, it is worth thinking in a little more detail about the very idea of the refugee. The distinction between a refugee and a person seeking entry to a country for other purposes of migration is rather arbitrary. From a historical perspective, for instance, it was not until the late 18th century in England that the word 'refugee' was used to describe an individual escaping

persecution; such 'refugees' were then considered 'aliens' as were all those migrating to the UK. More recently, we can see that the word, and indeed the legal concept, has been used rather loosely. In 1968, a large group of persons of Asian descent whose families had moved to what is now Kenya at the behest of the British during colonial times (the British controlled both the Indian subcontinent and large swathes of East Africa), facing discrimination in Kenya, sought to enter the UK; later in 1972 a group of 'Ugandan Asians' also sought entry into the UK. Although a case could be made that these people were refugees fleeing persecution, it was not the way that they were considered by immigration law. In both cases, the Kenyan Asians and the Ugandan Asians were not Kenyan or Ugandan nationals but in actual fact British nationals. Although some such Asians had taken Kenyan and Ugandan nationality, the vast majority had retained their British citizenship at the time those two states achieved independence. They thus had a legal entitlement to enter the UK as British citizens although there was widespread and significant racist opposition to their entry among the general population and government. So much so that the government of the day had to be reminded by the then Attorney General of the UK's legal obligations under international law toward its own citizens. The people were escaping persecution but they had mostly never set foot in the country of their nationality, the UK, due to the legacies and quirks of British colonialism. The treatment of these groups can be compared with the later treatment of Albanians fleeing Kosovo in the 1990s. These people were treated as asylum seekers (for the distinction between refugees and asylum seekers, please see below). One more example is pertinent. From November 2002, all claims for asylum to the UK from countries (which were then) acceding to the EU (Poland, Hungary and Romania, for example) were treated as unfounded. However, from May 2004, nationals from these same countries entered the UK as citizens of the EU. A Polish national, for example, who entered the UK before or after the May 2004 deadline, is regarded as either an EU worker entitled to EU citizenship rights or as a failed asylum seeker. As of 1 January 2021, however, we are likely to see some confusion if a Polish national comes to the UK to seek asylum. They cannot come as EU citizens, with the automatic right to work, but the UK is still likely to consider Poland 'safe' for asylum purposes. These examples suggest that the dividing lines between immigrant or economic migrant and asylum seeker or refugee can be rather blurred.

14.2.3 Refugee or asylum seeker?

The term refugee is somewhat vague, and we must distinguish between a refugee and an asylum seeker. First, the concept of asylum, historically at least, was a privilege of sovereign states. From an international law perspective, this is still the case: it is a state that has the right to grant asylum. What does this mean? A state can demand the return of its nationals in formal extradition proceedings, and another state may choose to grant asylum. This notion that the right to asylum arises between states has been qualified by the Universal Declaration, as Article 14 states the right to 'seek and enjoy' asylum. The meaning of this provision, however, is very unclear.

How does this relate to the Refugee Convention? As noted above, a central tenet of the Convention is the prohibition of *refoulement*. This means that a state cannot return refugees. An obligation not to return refugees does not necessarily equate to a right to asylum. Also note that *refoulement* relates to refugees already on the territory of the state: it does not prevent a state from stopping those seeking sanctuary reaching its borders in the first place. In the contemporary legal context, a refugee is a person who has been deemed by a state party to satisfy the criteria for a refugee under the Refugee Convention. Once that status has been accorded, the person is a 'Convention refugee'. A person who seeks sanctuary and is seeking asylum – in the sense of a place of safety – is an asylum seeker. An asylum seeker is thus a person who has not satisfied the criteria under the Refugee Convention but seeks a determination in one state party or another that he or she does satisfy the criteria set out. This leads neatly onto a final observation – the Refugee Convention does not refer to the number of times a person can submit an application to be considered a refugee. Thus while one person may submit an application in, for example, Italy, if it is unsuccessful he or she is not prohibited by the Refugee Convention from then crossing the border to Switzerland and then submitting an application there. If that was also unsuccessful,

he or she could then keep submitting applications in different states until he or she is successful – if ever they are. The reasons for this are important to understand. First, the Refugee Convention does not establish a 'Treaty Body' in the sense of the UN Human Rights Treaties such as those for the ICCPR or Women's Convention. It is thus for each state party and its courts and authorities to interpret the Convention as they see appropriate – in light of the general obligation of good faith under international law. Various states take different approaches to certain matters and thus an application which is unsuccessful in one state party may, on the exact same facts, be successful in another. Second, the Convention does not require an individual to cross a border to **escape** persecution; it is concerned with the individual who cannot **return** to their state of nationality due to the **risk** of persecution. Although an internationally recognised border must be crossed, the persecution does not have to be the reason for the crossing. Thus, for example, a young man leaves Angola to study to become a doctor and enrols at a university in France. The reason for leaving the state is to study. While in France, a civil war breaks out and a new government takes power in Angola. If the student returns, he will almost certainly be killed by the new government as his family was closely associated with the previous regime. That is the key – the **inability to return**. Finally, the Refugee Convention, having been drafted with a Eurocentric focus and temporal framework, did not envisage either the ease of travel that we now have or the consideration of thousands of applications per year from all parts of the world, thus no need was perceived for a limit on such applications. Host states, such as the Member States of the EU, have agreed rules between themselves so that an unsuccessful application in one EU state prohibits an application in another EU state being considered.

ACTIVITIES 14.1 AND 14.2

14.1 'Although one has to distinguish between refugees, asylum seekers and economic migrants, there is no clear boundary between the terms.' Discuss.

14.2 What does the above analysis of the refugee suggest about the nature of refugee law?

Summary

This section has dealt with the historical and conceptual structure of the idea of the refugee. We have examined the historical development of refugee law which took place immediately after the Second World War in Europe. Although the UNRRA and the IRO provided assistance for displaced peoples, a coherent body of refugee law was only achieved with the Refugee Convention in 1951. Although the Convention could be seen as a compromise, because states were not keen to assume broad responsibilities for refugees, it does contain some important provisions. The Convention provides a general definition of the refugee and a basic set of rights. The Convention states that a nation must not expel or return a refugee (*refoulement*). Further advances mean that there are now a number of measures that relate to the international protection of refugees' rights.

14.3 The Convention Relating to the Status of Refugees 1951 and the 1967 Protocol

The Convention Relating to the Status of Refugees 1951 (Refugee Convention) was adopted by the UN in 1951 and came into force in April 1954. The Preamble states that the Convention 'revises and consolidates' the previous documents that relate to the status of refugees.

Chapter I of the Convention contains general provisions. Article 1 contains a definition of 'refugee'. It is, in part, a technical definition that refers back to previous documents. Thus, a refugee is someone who has been considered a refugee under 'the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization'. These dates are significant as they provide

a link with the past and ensure the continuity of the international protection of refugees who became the concern of the international community at various earlier periods. A person who has been considered a refugee under the terms of any of these instruments is automatically a refugee under the Refugee Convention. This paragraph thus tells us how the Refugee Convention is coherent with other, earlier, conventions.

Paragraph (2) adds significantly to this definition:

> As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

There are a number of elements to this definition. First, it is necessary to explain the importance of the date, 1 January 1951. As explained above, the date is significant because it shows that the states parties who were involved in drafting the Convention were keen to limit their liability to people who had been made refugees during the Second World War, and so include only events that had already happened. States did not want the Convention to create an open-ended responsibility for refugees that would be an ongoing and indefinite burden on national governments. With the adoption of the 1967 Protocol, this definition has lost most of its significance. It is relevant, however, to those states that have signed the Convention, but not the Protocol.

The core sense of the definition is a 'well-founded fear' which must be of 'persecution'. The persecution does not have to have already taken place – but there must be a fear of it which is 'well-founded'. Neither the terms 'well-founded fear' nor 'persecution' are defined and we will return to their interpretation shortly. The reasons for the persecution relate to a broad list of factors that include ethnicity, but also cultural and political concerns. Owing to this fear of persecution, the person claiming refugee status is either 'outside the country of his nationality' and unable or unwilling to return or, in cases where the individual has no nationality, is unable or unwilling to return to the place of 'former habitual residence'. A refugee is thus a person who cannot call on the state with which he or she has an existing nexus (nationality or residence) to protect him or her and thus seeks that protection from another state, which is, in essence, of the person's choosing.

It is also worth noting that an individual can lose refugee status. There are a number of grounds under which this could happen, for instance if he or she 'voluntarily re-avails himself of the protection of the country of his nationality' or the reasons for the fear of persecution no longer exist. The commission of certain crimes can also deprive an individual of refugee status. Included in this list are war crimes and crimes against humanity; 'non-political' crimes committed in the country from which he or she has fled, or if the person has been 'guilty of acts contrary to the purposes and principles of the United Nations'.

Before we move on, we need to examine in detail the meaning of these key words in the Convention. Later in this chapter, we will examine in more detail the approach of the English courts to aspects of the Convention. The meaning of the terms is far from straightforward.

We start with a 'well-founded fear'. This makes the approach of the Convention individualistic and thus relates it to an individual's circumstances. This is critical. The Refugee Convention was the first global treaty to adopt this approach. The earlier method of defining refugees was by category – for example, a person of the Jewish faith living in Germany. Thus, such a person would be entitled to protection due to their fear of harm due to their religion or culture – with that faith being the motive and the harm being death. There is nothing to say that a state cannot of its own volition adopt a group approach to any situation. Angela Merkel, the Chancellor of Germany, for example, in 2015 made clear that anyone from Syria seeking protection in Germany would be afforded refugee status. This highlights a key concept in the Refugee Convention. The Refugee Convention imposes an obligation upon states parties to

grant refugee status to those who satisfy the criteria in the Convention, but it is within the discretion of any state to extend protection to and accord rights to any individual it so chooses. As a rule, however, the Refugee Convention imposes a minimum obligation on states parties and the individual must fear what for now we will call harm. Fear, however, is subjective, and the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore require a personal evaluation of the applicant rather than a judgment on the situation prevailing in the country of origin.

However, the Convention uses the term a 'well-founded fear'. That suggests that there is an objective reason to be fearful. This does therefore necessitate broader information about the situation in the state of origin. There are thus both subjective and objective elements to the test for refugee status. The *UNHCR handbook* explains that the general test for refugee status replaced the previous approach which had been to determine refugee status by reference to categories of person. The Convention test has both a subjective and an objective element: the decision-maker must ask first whether a person applying for refugee status is in fear. This is a subjective test, and relates to the applicant's own understanding of the threat that he or she faces. However, this must be 'well-founded'; and this requires an objective element. There must be objective reasons for the individual's fear. As far as the subjective element is concerned, this requires an assessment of the claimant's credibility. It is necessary to take into account the personal and family background of the applicant, the membership of a particular racial, religious, national, social or political group, the person's interpretation and understanding of the situation, and their personal experiences – in other words, everything that may serve to indicate that the predominant motive for the application is fear. The level of fear must be reasonable although a level of fear which is disproportionate to the facts may still be well-founded. It is important to bear in mind that the manner in which a situation may affect a mature, physically able male will be quite different from how the same situation will affect a ten-year-old physically disabled girl with the mental age of a younger child.

The subjective element demands that the decision-maker take into account the credibility of the applicant, especially when the facts as presented are not clear. The decision-maker must assess the subjective fear of the applicant as an individual, taking into account his or her beliefs, status and ethnicity, and give due weight to the individual's own appreciation of the facts of the situation. Determining the objective element is equally as difficult. Although the decision-maker is not called upon to 'pass judgment on conditions in the applicant's country of origin', as the *UNHCR handbook* notes, it is impossible to consider the applicant's statements in the 'abstract' and the decision must be related to 'the context of the…background situation'. Thus, while a knowledge of the situation in the country of the applicant is not a primary consideration, it is 'an important element in assessing the applicant's credibility' (*UNHCR handbook* para.43). The applicant's own experiences are important in assessing these issues, but so too are the experiences of his or her family, friends, or the ethnic or religious group from which he or she originates. Also important are the laws of the relevant country, and the way in which they are applied.

In this context it is also important to note that, although the Convention envisages that refugee status is normally determined on an individual basis, there is the possibility of cases where whole groups of people have been displaced. In such circumstances it is not possible to make individual determination of refugee status for each person in the group. In this situation it is possible to make a 'group determination' of refugee status: 'each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee'.

Equally important is the meaning of the word persecution. We will see how the English courts have approached the issue shortly. Persecution is not prosecution; it is far more serious. If we consider the Convention holistically and the grounds for persecution, it is clear that the Convention seeks to protect those whose civil and political rights are in danger but even here there is a distinction to be drawn. To be exposed to a threat to a person's life or torture or slavery will much more easily satisfy the test for

persecution than a threat to, for example, freedom of expression. Free expression as a civil and political right, however, is far more likely to be deemed protected – and thus a violation of it, persecution – than say the right to work. In short, persecution is linked to the violation of civil and political rights – the more fundamental the (civil and political) right in question, the more likely it is to be persecution. This raises another important point. A well-founded fear of persecution is examining how likely it is something is going to happen. Past events and previous personal experiences can be indicative but they are not conclusive – there is no requirement to have already suffered harm. This highlights that even after the most careful examination and scrutiny, errors will sometimes be made in a determination. It is a determination of the risk of something happening in the future – there is no definite measuring stick to be used. Further, if one's life is in danger, how probable does it have to be that the person will be killed? Beyond all reasonable doubt, on a balance of probabilities, a 20 per cent chance? This highlights just how difficult a determination of whether the criteria have been satisfied is. Ultimately, everything depends on the individual's circumstances, the precise facts of each case and the credibility of those involved.

Finally, the persecution must be for a Convention reason. These are race, religion, nationality, membership of a particular social group or political opinion. Only one of these grounds – membership of a particular social group – has been contentious before national courts. The others are self-explanatory. We will consider 'membership of a particular social group' below as we examine one of the leading cases on it – *Islam and Shah*.

14.3.1 Defining key terms: the approach of the English courts

We have above examined a number of the key terms in the Convention and what they might mean. We now examine the approach of the higher English courts to these terms. Some other national courts have approached matters slightly differently but the cases we will examine highlight a robust, justifiable approach which has been adopted in good faith. In some instances, these cases are now considered, to the extent they can be, definitive.

(a) Well-founded fear

Please read: *R* v *Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] 1 All ER 193. The *Sivakumaran* case is extremely important and rewards careful reading. The judgment of Lord Keith is very helpful – please pay particular attention to it but do read the entire judgment.

In *Sivakumaran* the House of Lords held that the question of whether or not there was a 'well-founded fear' of persecution within the meaning of Article 1A(2) of the Convention and Protocol was to be determined by an objective test. This had to take into account the circumstances existing in the country of the refugee's nationality. Furthermore, the applicants had to show that there was a reasonable degree of likelihood that they would be persecuted for one of the reasons referred to in Article 1A(2) if they were returned to that country. On the facts, there was no real risk of persecution if the applicants were returned to Sri Lanka, and their asylum claim was unsuccessful. This can be considered a stringent test. The Court of Appeal had adopted a different interpretation of the Convention in this case.

But what standard of proof should be used? This issue, among others, was examined in *Karanakaran* v *Secretary of State for the Home Department* [2000] Imm AR 271 (CA (Civ Div)). You should read this case as well.

Activity 14.3

Read *Sivakumaran* and *Karanakaran* carefully. What did the House of Lords decide the test was for a well-founded fear? Do you prefer the approach of the Court of Appeal or House of Lords? What is the standard of proof in each of the two courts? For example, beyond all reasonable doubt, on a balance of probabilities, more likely than not, or something else? Do you agree with the approach adopted? What these cases as a whole actually show is that the courts approach the issue

of the determination of refugee status as an inquiry into the relevant evidence. The decision-maker must evaluate all the evidence to the standard of proof articulated in *Sivakumaran*. An asylum claim is ultimately a matter of evaluation, not a mathematical or mechanical exercise, and to be considered with the need for protection in mind rather than as an exercise in proving facts to a certain standard. Where can you find evidence of this in the above cases?

(b) Persecution

We have discussed above the idea of persecution and what it might constitute. The Supreme Court judgment in *HJ (Iran) and HT (Cameroon)* v *Secretary of State for the Home Department* [2010] UKSC 31 is especially illustrative. The judgment of Lord Rodger is thorough and well considered and deserves your special attention, but please read the entire case.

ACTIVITY 14.4

Read *HJ (Iran) and HT (Cameroon)* carefully. What did the Supreme Court decide persecution was? Can persecution emanate from private individuals? If so, what is the failure of the state in such instances? If it is possible to avoid persecution (e.g. by not displaying homosexual tendencies in public), why should that entail an obligation on another state to provide protection? Do you consider the approach adopted here is an appropriate one?

No feedback provided.

(c) Meaning of particular social group

As noted above, Convention grounds have not on the whole been controversial. Race, political opinion and so forth have not been contentious as the meaning was never in doubt. The ground which has proved more difficult is 'particular social group'. If human rights treaties of whatever description are to stay relevant, the terms need to evolve and their interpretation needs to reflect that. This is known generally in human rights jurisprudence as the 'living instrument' approach. *HJ (Iran) and HT (Cameroon)* considers 'social group' but the case that really moved the Convention on in this regard in the UK is an older case: *R* v *Immigration Appeal Tribunal and Another, ex parte Shah*; *Islam and Others* v *Secretary of State for the Home Department* [1999] 2 All ER 545. This is a fascinating case which led to a major change in UK law and policy and further in many different states. Please read it carefully but especially important is the judgment of Lord Steyn. It is important to note that this decision led to wide-scale outrage in the UK. So much so, that the then Home Secretary, Jack Straw, publicly condemned the Court's decision and the Convention and committed to having it reformed.

ACTIVITY 14.5

Read *R* v *Immigration Appeal Tribunal and Another, ex parte Shah*; *Islam and Others* v *Secretary of State for the Home Department* carefully. How did the House of Lords approach the issue of defining 'particular social group'? Do you think the approach adopted was one that could reasonably have been foreseen by states when ratifying the Convention? Do you consider the approach to be fair on states parties? Do you consider the approach adopted by the Court creates scope for abuse by those who seek to abuse the Convention?

No feedback provided.

14.3.2 Obligations on states and refugees

After **Article 1**, the Convention goes on to list certain obligations that apply to both states parties and refugees.

Article 2 articulates a set of 'general obligations' that the refugee owes to the country of refuge. These require that she or he conforms 'to its laws and regulations, as well as to measures taken for the maintenance of public order'. It is perhaps best to view this Article as aspirational. As the Convention is an international treaty, and, as the individual has, at best, a problematic status in international law, it is hard to see how

this duty could be enforced against individuals. It is a broad obligation to respect not just the law but also general measures taken to preserve public order.

Article 3 is a duty placed on states parties. They must apply the Convention to refugees without any form of discrimination. Moreover, by **Article 4**, states parties must accord to refugees treatment that is 'as favourable as that accorded to their nationals' in relation to the right to practise a religion. These duties are the minimal obligations that a state owes to refugees. **Article 5** stresses that nothing in the Convention should be interpreted as limiting the 'benefits' that a contracting party might grant to refugees. The Convention sets minimum standards.

The next set of Articles relates to the peculiar legal status of the refugee as a displaced person; an individual in a form of legal limbo.

Article 7 obligates a state party to treat the refugee in the same way that it treats 'aliens generally' (i.e. not as a citizen of the state in which the person is in residence). Once a refugee has been resident for three years, she or he is exempted from reciprocity arrangements that exist between the country of refuge and the nation from which she or he fled. There are further provisions in this Article that protect the rights of refugees in the absence of reciprocity arrangements. Furthermore, **Article 8** provides that if a state party takes 'exceptional measures' against a foreign state, any refugees from that state already within the territory of the state party should not be treated as subject to those special measures. Thus, the refugee is, as far as special measures are concerned, already separated from and treated differently from her or his fellow nationals.

Article 9 is a qualification of this principle. A contracting state can, in 'times of war or other grave and exceptional circumstances', take measures to protect 'national security' in relation to the determination of refugee status. **Article 10** can be read as part of this group of Articles, but it relates to specific circumstances: those displaced in the Second World War and resident in the territory of a contracting party are to be considered lawful residents for the period of their settlement. Article 10(2) contains some further provisions for determining a period of continuous residence, and **Article 11** provides special provisions for refugee seamen.

Activity 14.6

What are the main areas of concern of Articles 2–11 of the Convention?

Chapter II

Chapter II further elaborates the juridical nature of the refugee.

Article 12 provides that the personal status of the refugee is determined by the law of the country in which she or he is domiciled. For those without a country of domicile, personal status is provided by the country in which the person has residence. Any rights which the individual refugee might have acquired, such as rights acquired on marriage, in the country in which she or he was a national must be respected by the country of refuge, subject to whatever formalities that country of refuge imposes. The exception to this principle is that the state would have recognised the right had the individual not been a refugee.

Article 13 provides that the refugee must have rights at least as favourable as those accorded to aliens in relation to the ownership of movable and immovable property, and contractual or property law related rights.

Article 14 relates to artistic rights and rights over industrial property. **Articles 15 and 16** move from property rights to public rights. **Article 15** provides that a refugee has a right of association in 'non-political and non-profit-making associations and trade unions' that is the same as that given to nationals of a foreign country that may be in the territory of the state party. **Article 16** addresses due process and fair trial rights. The Article states that a refugee has to have 'free access to the courts of law on the territory of' the state party.

ACTIVITY 14.7

What are the main features of Chapter II of the Refugee Convention?

Chapter III

Chapter III of the Convention sets out employment rights of the refugee. **Article 17** provides that a state party must allow refugees who are lawfully in its territory 'most favourable treatment' in relation to wage-earning employment as they would allow to nationals of a foreign country who were resident in their territory. However, a state is allowed to put in place restrictions to protect national labour markets. These restrictions would not apply to a refugee from a nation whose nationals would have been exempt from such restrictions; or, a refugee who has been resident for three years in the territory of the state party who has granted him refugee status. A refugee married to a spouse who is a national of the state party would also be exempt; as would a refugee having one or more children possessing the nationality of the state party. There is also a general duty at Article 17(3) that is worth considering in full:

> The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

In relation to self-employment, **Article 18** applies the general principle that a refugee should be treated as favourably as possible. The minimum standard is that the refugee must not be treated less favourably than 'aliens generally in the same circumstances'. As far as the 'liberal professions' are concerned, **Article 19** provides the same principle to those refugees who hold 'diplomas recognised by the competent authorities of that state'.

Chapter IV

Article 20 provides that refugees shall enjoy the same rights with regard to entitlements under a rationing system as nationals. In relation to rights to housing, the state must treat refugees as favourably as possible, and no less favourably than aliens who are lawfully in the contracting parties' territory.

By virtue of **Article 22**, refugees enjoy the same rights to elementary education as nationals. With regard to educational matters other than elementary schooling, a refugee must be treated as favourably as possible, and not less favourably than an alien lawfully resident in the relevant country. **Article 23** provides refugees with the same rights to public relief as nationals.

Article 24 extends to labour legislation and social security. It has vertical effect against the state. Thus, the contracting party must undertake to afford refugees the same protection as nationals in certain areas relating to employment and welfare, to the extent that 'such matters are governed by laws or regulations or are subject to the control of administrative authorities'. Thus, to the extent that these matters are entirely in the hands of private parties, it would fall outside the remit of the Convention. The Article also recommends that there be 'appropriate arrangements' to deal with the acquisition of rights in this area. This Article, then, resembles the ones above, in that it understands the refugee to be able to acquire rights in the country of refuge. Sometimes, though, and for justifiable reasons, these rights or entitlements must fall below those enjoyed by nationals. For instance, Article 24 allows refugee status to be taken into account in assessing benefits or pension rights. It may of course be by virtue of refugee status that a person has not made sufficient payments to receive either full welfare or pension entitlements.

Chapter V

Chapter V includes important administrative measures relating to refugee status. These measures have to take into account the problems a refugee might be experiencing due to displacement or flight from the country where he or she had residence or was domiciled. For instance, the individual might not be able to locate documents to prove identity and entitlement. In this sense, lacking papers and unable to prove his or her identity, a refugee becomes a legal 'non-person'.

Article 25 takes this into account. If a refugee cannot rely on the administrative support of the authorities in the country he or she has left, then the state party in whose territory the refugee is in residence must afford the necessary assistance. The relevant authorities must 'deliver or cause to be delivered…such documents or certifications as would normally be delivered to aliens by or through their national authorities'. These documents must then be treated as official.

Articles 26 to 28 concern freedom of movement. **Article 26** grants freedom of movement to refugees, and **Article 27** provides that a state must issue the relevant documents to enable free movement within the territory. **Article 28** relates to travel documents for movement outside the country. Unless reasons of national security or public order apply, travel documents must be issued.

Article 29 states that refugees cannot be taxed in a way that is different from nationals in the same situation; but this principle does not apply to recovery of costs relating to the issuing of relevant documents.

Article 30 places a duty on a state party to allow refugees to transfer assets which they have brought into a state's territory to another country where they may be resettled.

Article 31 relates to refugees unlawfully in the country of refuge. Providing that such persons report to the relevant authorities, and show that they had good cause to enter the country in question illegally, the state party cannot impose penalties upon them. Such persons would also have to show, however, that they fell within the definition of Article 1, and that 'their life or freedom was threatened'.

According to **Article 32**, once a refugee is lawfully in a territory, the state party cannot expel that person, unless there are grounds of national security or public order. The decision to expel must be made in accordance with the due process of law. Except in extreme situations, a refugee must be allowed to submit evidence to 'clear himself' and must be accorded certain due process rights. There must be the possibility of appeal and representation before the competent authority. Moreover, the contracting state must allow a person facing expulsion a 'reasonable period' to 'seek legal admission into another country'. Article 32 is backed up by **Article 33**, which prohibits *refoulement*. *Refoulement* is the return of refugees to the 'frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The exception to this rule is provided at Article 33(2). *Refoulement* does not apply to a refugee who presents a threat to security, or, having been convicted of a serious crime, represents a 'danger' to the country that is expelling him or her.

Article 34 moves from expulsion to naturalisation. States parties should ensure that refugees are naturalised and assimilated.

Chapter VI

Article 35 provides that contracting parties must cooperate with the Office of the United Nations High Commissioner for Refugees. The contracting parties undertake to provide the UN with reports relating to the condition of refugees in their territories. The report must also cover the implementation of the Convention and the relevant laws and regulations that relate to refugees. Article 35 provides that the contracting states must inform the Secretary General of the laws and regulations that have been enacted or passed to ensure that the Convention applies in national law.

Summary

Chapter III lays out the employment rights of refugees; Chapter IV contains a group of Articles relating to welfare and outlines the legal status of the refugee in relation to various social and economic rights. Chapter V contains the important rule against *refoulement*, as well as major administrative provisions.

Activity 14.8

What are the main provisions in the Refugee Convention and the 1967 Protocol? Do you think the 1967 Protocol, by simply removing the temporal and geographic limits of the Convention, provides an adequate global solution to the issue of refugees?

14.4 Convention refugees and internally displaced persons

There are many individuals who do not come under the protection of the Convention and the 1967 Protocol. As we have noted, the Convention definition requires a number of stringent criteria to be satisfied before an individual can be considered a refugee. Many millions more persons are displaced than are refugees. Many displaced persons flee flooding, earthquakes or other natural disasters, conflict or persecution but do not cross an international boundary as they are unable to. Many states erect barriers to prevent populations from neighbouring states moving there. Such persons are not able to satisfy the criteria of the Convention but still require humanitarian assistance. Persons who move within their own state are known as internally displaced persons or IDPs. The UNHCR often assists such people. We will examine this shortly but it is worth considering all this in context.

At the end of 2019 the UNHCR estimated that there were around 26 million refugees in the world, with a further 4 million or so seeking asylum. By comparison, in 2016 there were 21 million refugees, so the number has increased by a quarter in four to five years. The number of refugees, however, is less than the number of IDPs, who were estimated at the end of 2020 (the last year for figures at the time of writing) to amount to around 48 million people. That number is down significantly, although it has gone up from 42 million in 2019: in 2016 there were 65 million IDPs around the globe. A further 10 million or so persons are stateless. That is almost 60 million people! Notwithstanding the focus in the global media on European states and North America when it comes to those hosting refugees, it is important to put this in context. In 2019/20, Turkey, Pakistan, Uganda, Sudan, Iran, Ethiopia and Jordan hosted the most refugees. Turkey hosted almost 4 million refugees, mostly from Syria. Pakistan hosted 1.4 million refugees, down from over 4–5 million in the past. Where did the largest numbers of refugees hail from? Syria (7 million), Afghanistan (2.7 million), South Sudan (2.3 million) and Somalia (1.1 million). The real numbers, while important, do not tell the whole story. The global burden of hosting refugees is not spread evenly or according to means but is a result of many factors. It is critical to bear this in mind. Consider the following: as noted above, Pakistan hosted 1.4 million refugees – it has an estimated population of around 200 million. While the number of refugees is very high in real terms (in the past it has been as high as 4–5 million in Pakistan), in proportionate terms, it is currently less than 1 per cent of the population of Pakistan. Lebanon by comparison hosted around 1.1 million refugees in 2016. Lebanon has a total population of under 6 million so one person in five was a refugee! The demographic and other impacts of such a large relative population arriving suddenly are enormous. Notwithstanding all this, the number of IDPs far outweighs the number of refugees.

The key thing to note with regard to IDPs is that they do not enjoy a legal regime which is particular to such persons as they come within the jurisdiction and thus responsibility of their own state of nationality. International law does not intervene as such, although of course the state owes obligations to such persons under the human rights treaties to which they are party. The key document here is the 1998 UN Guiding Principles on Internal Displacement. The Principles are not legally binding in their own right but are accepted as setting out coherently in one place state obligations. In the Principles, IDPs are defined in para.2 as:

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.

As noted above, human rights treaties extend obligations to IDPs and the state owes all such obligations to the displaced. However, displacement works against IDPs, as it creates physical, logistical and administrative obstacles to the protection and realisation of rights that simply do not apply to a non-displaced person. For example, a person living in their home does not need shelter as they do not have to leave their property (with the risk that someone else will take it over). It is the technical and legal

complexities of addressing displacement-specific protection and needs that are the core of the problem.

14.5 Women and girls as refugees

Figures from the UNHCR in 2021 continued to show that over the last 20 or so years, nearly half the world's population of refugees is female. However, the proportion of female refugees varies depending on region and the precise nature of the problems that have given rise to a refugee situation. Mass refugee situations tend to produce refugee populations where around half the total numbers are women; considering half the global population is female, that is not surprising. Asylum claims, on the other hand, tend to be made by men rather than women. Over half of the total number of refugees are children under the age of 18, with a little over 10 per cent being children under the age of five. However, these figures tend not to be representative, as the figures come primarily from the developing, rather than the developed, world.

In 1985 the Executive Committee of the UNHCR adopted a conclusion (Executive Committee Conclusion No. 39–85 on Refugee Women and International Protection) which stated that refugee women and girls compose the majority of refugees, and that this leads to special concerns about how best to protect their human rights. This was backed up by Executive Committee Conclusion No. 60 on Refugee Women that called on the High Commissioner to review the development of policy in this area.

Other UN bodies have also been concerned with the fate of female refugees. In 1990, the Economic and Social Council called on governments and NGOs to keep this issue current, and to increase their efforts to protect these particularly vulnerable groups. It is worth remembering that the Convention on the Elimination of All Forms of Discrimination Against Women is also relevant here; in particular, Article 3 stresses the obligation to ensure the advancement of women and the protection of their rights. Policy also feeds into the interpretation of these instruments. The UN is committed to the goals set out in the Nairobi Forward Looking Strategies on the Status of Women that stress the inclusion of women in programmes that are executed in their name.

When analysing the problems faced by refugee women, these are often found to be similar, if not identical, to those faced by women generally. Several forms of physical violence and discrimination against women, for example, are endemic in most, if not all, countries. The particularity of the situation of refugee women is not simply because they are subject to such violations of their rights, but also that they are especially vulnerable to these violations for a number of reasons: they are fleeing persecution; the social disruption caused by flight; sometimes because they have become detached from their families and the protection provided by their communities; and certainly because they are foreigners in an alien environment.

It is necessary then to provide mechanisms that recognise that women face these gender-specific forms of violence and abuse. There are many ways in which this could be achieved. Given the difficulty of talking about sexual violence and abuse, for example, it would be necessary for a state party to ensure that women refugees claiming abuse are interviewed by women officers; if they are indeed victims of such violence, counselling should be provided. Governments should be aware of the need to encourage refugee women to organise their own associations and to draw them into the process of planning and administering refugee communities. There should be a sensitivity to the needs of women in planning accommodation in refugee camps, and ensuring women's safety. The special needs of women and girls in terms of education, health care and provision of food and water should also be made a priority. There are many recorded instances of women not being provided with food in camps or other entitlements unless they provide sexual favours in return. UNHCR guidance and decisions such as *Islam and Shah* as considered above have led to states adopting guidance on the consideration of female asylum seekers. One key consideration in asylum determination is family reunification. Although the Refugee Convention did not provide for the preservation of family reunification, the Final Act of the Conference that adopted the Convention did address the issue. The 1951 United Nations Conference called on governments:

to take the necessary measures for the protection of the refugee's family especially with the view to:

1. ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country
2. the protection of refugees who are minors, in particular unaccompanied children and girls with special reference to guardianship and adoption.

The key principle is that if the head of the family is granted refugee status, then family dependants are accorded similar status. This is widely implemented and respected by states parties. One issue alluded to above, which has in recent years come increasingly to the fore, is that of unaccompanied minors. Disputes over age are not uncommon but it is clear that many families now risk sending children, usually boys, to travel alone thousands of miles so as to seek asylum. For example, in the UK there were over 2,000 asylum applications from such unaccompanied children in the year ending 2015, an increase of nearly 50 per cent from the previous year. Such applications now represent nearly 10 per cent of all applications for asylum to the UK. The UK, as is the case with most European states, will grant asylum to unaccompanied children who enter its territory. The trend is, understandably upwards, as those who are minors (perhaps 15 or 16, for example) are perfectly physically capable of such travel but also those who are perhaps 19 or 20 can claim to be younger. In the absence of accurate or any documentation, the authorities in the host state need to prove the claimant is not a minor.

Further reading

- **Hathaway, J.C. 'Reconceiving refugee law as human rights protection', *Journal of Refugee Studies* 4(2) 1991, pp.113–31. Hathaway's article also relates to a central set of themes in this chapter. If there are significant problems with the structure of refugee law, how might the subject be rethought? One interesting view is the assertion that refugee law must take as its primary focus not the need to accommodate refugees, but the amelioration of the factors that lead to the coerced movement of peoples in the first place. Hathaway links this to other powerful arguments for a reappraisal of the underpinning concerns of the subject. While now dated, the arguments and ideas are as contemporary and relevant as ever.**

Reminder of learning outcomes

By this stage, you should be able to:

- **describe the political and social context of refugees' rights**
- **explain the legal theoretical issues raised by refugees' rights**
- **summarise the basic provisions of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol**
- **discuss the problems inherent in the test for determining refugee status**
- **identify the provisions that relate to women and girls as refugees and to family reunification**
- **describe the response of the English courts to the test for the determination of refugee status.**

Sample examination question 1

'Despite the importance of the Refugee Convention, the rights of refugees seem to be increasingly limited in contemporary politics.'

Discuss.

Sample examination question 2

Borat and Zoltan are nationals of the (fictitious) state of Baron. They are members of a religious minority, the Cohens, which is systematically discriminated against by the majority Frumpsters. There has long been significant unrest in Baron due to tensions between the various religious groups, especially the minority Cohens and

majority Frumpsters. Borat and Zoltan have witnessed numerous acts of random violence targeting Cohens. Such violence has included severe beatings of Cohens for no obvious reason by police officers and arbitrary arrests. Any Cohen arrested can expect to be subjected to mistreatment while in custody. There is also widespread general harassment of Cohens by the police force and also the military who are often involved in law enforcement due to the general unrest in Baron. There have been numerous examples of the burning of the Cohens' places of worship by extremist Frumpster groups but there have never been any arrests of those suspected to be behind such acts. A number of women belonging to the Cohen minority have also been abducted by Frumpster extremists, forced to convert religion and then married off against their will to Frumpster men. Naomi, is one such person. She was subjected to severe domestic violence by her husband. She temporarily escaped and filed a report to the police but they took no action and returned her to her husband.

Borat and Zoltan are both active in the political movement to achieve equality for the Cohens, parts of the movement engage in violence. Neither Borat nor Zoltan has directly been involved in violence although they have never condemned it. Both also raise funds for the Cohen political movement. In the past both have been arrested several times for their political activity and subjected to ill treatment while in custody but ultimately released. In the last month, three leading members of the Cohen political movement have been assassinated by unknown assailants. While at home, Borat receives through the post a letter addressed to him that contains a bullet. Zoltan's house, meanwhile, is raided by the police while he is out of the country on a tour to raise funds for the Cohen's political movement. The police arrest Zoltan's wife and young children and subject them to abuse and threats to harm them but ultimately release them without any physical harm coming to them. The police then order Zoltan's house to be demolished as they claim it has been built without the requisite permission. The police also issue a warrant for Zoltan's arrest for his political activity and seek to charge him with support for terrorism, which carries the death penalty in Baron.

Borat, Zoltan and Naomi are now all outside Baron and have arrived in the (fictitious) State of Sanex. Sanex is party to the 1951 Geneva Convention and its 1967 Protocol as well the 1951 European Convention on Human Rights. They seek your advice with regard to any rights they may have to stay in Sanex.

Advice on answering question 1

This question is calling for a discussion of the Convention in its political context. The essay should begin by offering a direct response to the quotation. It would be reasonable to agree with the statement: the Convention is undoubtedly important, but there are numerous examples of refugees' rights being attacked or limited in recent times. The difficulty with this question is limiting one's answer to illustrative examples; obviously, one could not hope to cover all of contemporary politics in an examination answer.

The statement falls into two parts; one has to assess the Convention, then turn one's attention to the issue of the politics of refugee's rights. The structure of the essay should reflect the fact that the statement raises two main issues. Thus, the first part of the essay should outline the importance of the Convention in providing a coherent statement of refugees' rights; the second part should engage with the limitations on or challenges to the rights of the refugee. In illustrating this point, one could draw information from this chapter, and perhaps focus on the recent reforms to asylum and immigration law in the UK and show how they effectively limit the protection that refugees enjoy. Other examples could be drawn from the crisis in the Sudan. This suggests a failure of the international community to respond at the necessary level. The conclusion of the essay should restate the main thesis, that one is in broad agreement with the statement in the title, and offer a brief recap of the most salient themes in the essay.

Advice on answering question 2

This scenario involves numerous issues that need to be unpicked before advice can be given to Borat, Zoltan and Naomi. It is important to read the scenario carefully so that you understand the scope of the advice you are to give. The final sentence of

the scenario refers to 'any rights they may have to stay in Sanex'. This circumscribes the advice to be drafted so that you do not have to provide any advice with regard to the abuse of any human rights in Baron. You have not been told which treaties, if any, Baron is party to and thus you should not speculate. That would be a waste of time and also would not get you any credit. You are told that Borat, Zoltan and Naomi are all in Sanex, so the treaties to which it is party and its obligations under those treaties are what you need to refer to in advising Borat, Zoltan and Naomi of any rights they may have.

With regard to the ECHR, it is clear that any issue will relate to Article 3 – the prohibition on torture, inhuman and degrading treatment and punishment. In the context of Sanex, the only issue that can relate to its territorial application is if Sanex were to send any of the three individuals back to Baron. With that in mind, we can consider claims under the 1951 Geneva Convention.

It is best to consider each of the three individuals in turn, although certain matters are common to them and you may wish to consider those together – there is no right or wrong approach here, you should approach the matter as you think best.

In terms of what is common, all three are in Sanex. Zoltan did not leave due to any danger he faced but the trigger under the 1951 Convention is that a person has crossed an international border and cannot return to their country of nationality. Thus, the reason for leaving is immaterial in each case. To successfully claim asylum in Sanex, each must prove there is a: (i) well-founded fear; (ii) persecution; (iii) Convention reasons; and that is why they cannot return. You would be well advised to take each of these three criteria and break them down and address the issues with each of the three individuals you are advising. Think about the cases you have studied that consider each of the terms. For example, for a well-founded fear, cases such as Sivakumuran need to be discussed. For persecution, you should consider *HJ (Iran) and HT (Cameroon)* v *Secretary of State for the Home Department*. In Naomi's case you will also need to address whether she is able to claim 'Convention reason' applies. She is of course covered by 'any other social group' further to cases such as *Islam and Shah*, which you would need to discuss. It is much more obvious that Borat and Zoltan come within Convention reasons – political opinion.

The importance of Article 3 ECHR relates to the right of the three not to be sent back to Baron, if their claims for asylum are unsuccessful. There are interesting issues here. Zoltan may be at risk of the death penalty. There are parallels to be drawn here with cases such as *Soering*, *Chahal* and *Saadi*. In Naomi's case, there is the very interesting issue of the potential violence stemming from a non-state actor (her husband). There is no clear jurisprudence precisely on this point and whether she would be protected by Article 3 in such a scenario, although the ECtHR's more general jurisprudence would suggest so.

Thus, as with all problems questions, break down the scenario. Identify clearly who and what you are advising with regard to and then work through the issues and individuals in a logical manner.

15 Dealing with gross atrocities: international humanitarian law, crimes against humanity and genocide

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Introduction

In this final substantive chapter we deal with the very difficult question of how societies recover from gross human rights violations. This is a potentially enormous subject but this chapter tries to pull together a number of threads present throughout this guide. Numerous international law treaties seek to protect human rights, as we have examined in detail. What will be apparent, however, is that the law as it exists is primarily designed to work during times of peace. As we discovered in some of the earlier chapters, the law does continue to apply during times of armed conflict, but all human rights treaties have derogation clauses (see, for example, Article 4 ICCPR and Article 15 ECHR) and these can be and are invoked by states parties when they declare a 'state of emergency'. Equally, however, systemic and gross violations of human rights occur in the absence of conflict in many states. These violations can occur for numerous reasons. Endemic corruption, an absence of the rule of law, despotic regimes, regimes which do not accept much of the corpus of international law concerning individual rights, and pariah regimes are all reasons which individually or in various combinations can contribute to systematic rights violations. Systematic and gross violations of human rights occur daily in Russia, Brazil, the USA, Nigeria, China, Myanmar, Korea, Egypt, Saudi Arabia, India, Pakistan, Mexico, Nepal; the list is all-encompassing and far longer than those states specifically identified. The reasons for such violations and those whose rights are violated and the extent to which they are violated differ in each of these states. There is a key distinction which must be drawn, however. There is a point at which certain human rights violations become so serious that they cross a threshold and international law recognises such acts as being criminal. Consider, for example, the regime of Saddam Hussain in Iraq. The killing of a Kurdish villager on his orders would never entail domestic criminal responsibility – for he who gives the order and those who carried it out – while Saddam's regime was in power. But let us say he ordered the killing of an entire village as it was the home of a political opponent. As a domestic criminal act, it is still an act of murder, but it may well entail criminal responsibility under international law as well if certain criteria are satisfied. Saddam's regime is a good example, and we will look at his trial below as a case study. But there are many other examples as well. In all societies where there are systematic rights breaches, there is at some point or other a period of transition. That **period** of transition needs to coincide with a **process** of transition if that society is to progress and recover from past abuses. If there is no process of transition, past abuses are not confronted and the schisms of society remain. A process of transition can include: perpetrators being brought to account; the truth being made available to the public; victims and the relatives of victims being able to find some closure; the institutions that supported violations being reformed; reparations being paid. All of these measures are the object of much debate. This process (or these processes, as the mechanisms by which societies move forward differ considerably) has become known as transitional justice. Transition is thought necessary to break the cycle of violence and to provide the infrastructure necessary for a stable political future. Many scholars date the idea of transitional justice back to the international military tribunals at Nuremburg and Tokyo after the Second World War. Crucial here is the idea of individual criminal responsibility for war crimes and crimes against humanity. Since 1945 there has been a remarkable surge in transitional justice in the aftermath of gross violations of human rights, each attempting to deal with the specific cultural, political and legal challenges that each specific instance presents. Criminal prosecutions (in domestic, foreign, international and hybrid courts) as well as general amnesties and non-criminal proceedings – such as truth and reconciliation commissions (examples are the South African experience after apartheid or the Gacaca courts in Rwanda after the 1994 genocide) – can all be seen as attempts to attain transitional justice. This chapter seeks to explore aspects of these trends.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **define and assess the basic sources of humanitarian law**
- **describe the nature of war crimes, the crime of genocide and crimes against humanity**
- **explain the role of the ad hoc tribunals for the former Yugoslavia and Rwanda**
- **summarise the role of the International Criminal Court**
- **discuss the trial of Saddam Hussain.**

Core text

- **Bantekas and Oette, Chapter 15 'The application of human rights in armed conflict', Chapter 16 'Human rights and international criminal justice' and Chapter 18 'Human rights obligations of non-state actors', Section 5.**

Essential reading

- **Carey, S.C., M. Gibney and S.C. Poe *The politics of human rights: the quest for dignity*. (Cambridge: Cambridge University Press, 2010) [ISBN 9780521614054] Chapter 7 'Rebuilding society in the aftermath of repression' (available on the VLE). This offers a clear introduction to the main issues and tries to pull them together. It is worth reading this after you have considered the material above.**
- **Statute of the International Criminal Court: www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf**
- **Please watch the three videos on the following website as an introduction to the International Criminal Court: http://legal.un.org/avl/ls/Song_CLP.html**

Further reading

- **Alston and Goodman, Chapter 5 'National security, terrorism and the law of armed conflict', Section C 'The legal framework: public emergencies, derogations and the law of armed conflict'; Chapter 15 'Massive human rights tragedies: prosecutions and truth commissions', beginning of chapter to end of Section B 'The International Criminal Court' and Chapter 16 'Non-state actors and human rights', Section B 'Armed opposition groups'.**
- **Ratner, S.R., J.S. Abrams and J.L. Bischoff *Accountability for human rights atrocities in international law: beyond the Nuremburg legacy*. (Oxford: Oxford University Press, 2009) third edition [ISBN 9780199546671].**
- **Sivakumaran, S. 'International humanitarian law' and Cryer, R. 'International criminal law' both in Moeckli et al. (eds).**

15.1 International humanitarian law (IHL)

IHL is a set of international rules, established by a network of treaties (in many cases also by custom), which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It is the counterpart to international human rights law (IHRL) and the two overlap in numerous key respects, and the relationship between them is critical. IHL protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice. The main treaty sources of IHL applicable in international armed conflict are the four Geneva Conventions of 1949 and their Additional Protocol I of 1977. The main treaty sources applicable in non-international armed conflict are Article 3 common to the four Geneva Conventions and their Additional Protocol II of 1977. There is a further Protocol III to the 1949 Conventions adopted in 2005, which is concerned with the narrow issue of the (ab)use of the symbol of the Red Cross/Red Crescent, which is of critical importance in the context of IHL and providing humanitarian assistance to civilians, the injured and sick. There are also many older treaties dealing with matters

which are a part of the corpus of IHL, primarily the Hague Conventions of 1899 and 1907, which are still relevant in certain contexts. It is also important to stress that there were also two earlier Geneva Conventions from 1929. Although these have been superseded, these conventions applied during the Second World War. Many of the treaty provisions of IHL bind states as the provisions are considered to represent customary international law. There is also a clear relationship between IHL and aspects of international criminal law (ICL); violations of IHL are often violations of ICL and entail individual criminal responsibility which is recognised by international law.

Thus, IHL, also known as the laws of war, is a body of rules and principles which has a complex but important relationship with IHRL and ICL. IHL primarily stems from the Geneva and Hague Conventions that relate to the treatment of combatants and non-combatants in times of conflict. The fundamental basis for the existence of IHL is, rather paradoxically, human dignity. IHL is a recognition that armed conflicts exist and have always done so. But it is the attempt to 'humanise' conflict so that suffering is not unnecessary and that there is a recognition that there are limits to what can be done to others in a situation of conflict. Thus IHL is, like IHRL, based upon an attempt to legally protect the inherent dignity of humankind.

15.1.1 The relationship between IHL and IHRL

We have alluded to this critical and complex relationship above. We need not concern ourselves, however, with the detailed intricacies of this relationship in all its manifestations. But there are aspects we should consider. As noted above, there is a complementary relationship between IHL and IHRL. In some respects, IHRL supplements the norms of IHL by applying in non-international armed conflicts to support any relevant IHL provisions. Thus, for example, in an internal armed conflict, IHRL provisions will govern the treatment, conditions of detention and rights regarding a fair trial of persons deprived of their liberty. IHRL is a much broader body of rules than IHL in terms of its scope. The possible areas of human activity that are regulated by IHRL – the environment, indigenous rights, employment rights, family life and the activity of businesses, for example – are significantly wider than IHL. IHRL is, broadly speaking, progressive, setting minimum standards more clearly with regard to some issues. IHL is more broadly concerned with only setting minimum standards. As alluded to above, states can declare an emergency under IHRL treaties and thus derogate from most but not all obligations, no derogation at all from IHL treaties is permitted. Despite these differences, obviously, in terms of their substance and aim, both IHRL and IHL are concerned with the protection of the inherent dignity and well-being of the individual and to protect them from arbitrary action and abuse. The Genocide Convention is a good example. It is both a human rights treaty and concerned with a policy that is often implemented during an armed conflict and thus (as will be seen below) a key prohibition as part of IHL.

IHRL binds states, as we have repeatedly seen. We have noted that there is a distinction between international and non-international armed conflicts. In the former, IHL binds the states that are engaging in conflict. In non-international armed conflict (also known as internal armed conflict) humanitarian law applies to parties to that conflict, that is, both governmental and rebel forces. Non-state entities, be they individuals or groups, can be held liable for 'grave breaches' of the Geneva Convention. This is different from IHRL, where it is the state and its responsibility that are central. Numerous international tribunals and the ICC have held individuals liable for 'war crimes' committed in conflicts that are not international. It is worth noting here the language of 'war crimes'. That term stems from the notion of 'war' and the term is still widely used in everyday language and indeed (sometimes incorrectly) by lawyers. War as a technical legal state of affairs is prohibited by the UN Charter and no state has declared war in the last 75 years. We may talk of the 'Korean war', 'Vietnam war', 'Iraq war', the 'War in the Balkans' and the 'US-led war in Afghanistan', for example, but these are correctly international or internal armed conflicts. War is a legal status which affects the validity of treaties, concerns issues such as neutrality of third states and so forth, thus it does not exist in these instances. What are usually called 'civil

wars', such as that in Syria since 2011 or Yemen since 2015, are properly called 'internal armed conflicts'. The term 'war crime' is a legal term but relates to certain atrocities committed during what is now armed conflict – it does not require there to be a technical legal state of war, otherwise 'war crimes' could simply be circumvented.

A final distinction can be drawn with regard to how IHRL treaties and IHL treaties are supervised. IHRL treaties often but certainly not always have supervisory bodies, such as the UN human rights treaty bodies or the American Court of Human Rights. National courts also have a key role to play, as does the state itself more broadly. Under IHL treaties, states have a duty to take a number of measures. They must prevent war crimes, for example, and punish anyone convicted of such crimes, protect the Red Cross/Red Crescent symbol and ensure that armed forces are sufficiently advised on humanitarian law. The latter is an interesting but essential obligation. Violations of IHL are primarily committed by the armed forces of a state, thus members of the armed forces need to be made aware of their obligations and receive legal training. Insurgents, however, are unlikely to have any such training and thus there is great scope for abuse due to ignorance, even though that is not a defence, as we will examine below.

Activity 15.1

What are the similarities and difference between IHL and IHRL?

Reminder of learning outcomes

By this stage you should be able to:

- **define and assess the basic sources of humanitarian law.**

15.2 The Geneva Conventions

As noted above, the four Geneva Conventions of 1949 and their Additional Protocols (two from 1977 and one from 2005) are the principal instruments of humanitarian law. The Hague Conventions are also relevant and will be considered below. In this section, we will outline some of the more salient features of the Geneva Conventions and their Protocols.

For clarification, in the following discussion:

- the 'First Convention' means the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949
- the 'Second Convention' means the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949
- the 'Third Convention' means the Geneva Convention Relative to the Treatment of Prisoners of War of 1949
- the 'Fourth Convention' means the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

15.2.1 First Convention: the Wounded and Sick in Armed Forces in the Field

The First Convention is for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949). This is the classic conflict paradigm – between two or more states fighting on land – as Article 2 of the First Convention states, it applies both in peacetime and to all cases of declared war or other armed conflict that may arise between two or more of the signatories or contracting parties. As noted above, a state of war is a technical issue but under the First Convention a state of war exists even if this is not recognised by one of the parties to the conflict. Such a provision is necessary because the recognition of the outbreak of war is a symbolic and legal event. To recognise that a nation is at war is to state that it is at war with another nation. It may be the case that a nation does not want to think of the 'enemy' as a nation as this would

imply a recognition of a political claim to nationhood. Think, for example, of states which refuse to recognise Kosovo, such as Serbia. If Serbia and Kosovo were engaged in armed conflict, for Serbia to declare war against Kosovo would be to recognise it as a nation – something which Serbia has studiously avoided.

The First Convention also applies where there is partial or total occupation of the territory of a signatory nation, even if the occupation of that nation's territory meets with no armed resistance. The First Convention is based on the fact that war takes place between sovereign nations. Shortly we will see that there are important rules that apply to armed conflicts that are not conducted between two nations. The key to the operation of the First Convention is the statement of certain minimum standards that apply to both military personnel and civilians in the event of a conflict. These are detailed in Article 3. It is important to reiterate that Article 3 is common to all four of the Geneva Conventions and it undeniably represents a principle of customary international law and indeed *jus cogens*. Those who take 'no active part in the hostilities' – this includes members of armed forces who have surrendered or are wounded – must 'in all circumstances be treated humanely'. Certain acts, which correlate strongly with certain fundamental civil rights, are prohibited:

a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

b. taking of hostages

c. outrages upon personal dignity, in particular humiliating and degrading treatment

d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

Article 3(2) further notes that the wounded and sick shall be 'collected and cared for'. An impartial humanitarian body, such as the International Committee of the Red Cross (ICRC), may offer its services to the parties to the conflict. In essence, humanitarian assistance providers must be considered independent, impartial and neutral to be acceptable to factions or states involved in armed conflict. This is reflected further in Article 9 which notes that:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organisation may, subject to the consent of the parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

Having specified minimum standards, the First Convention, in Chapter II, lays down certain specific duties. These apply, first of all, to the protection of the wounded and the sick (defined in Article 13). Detailed provisions relate to treatment of the wounded and the sick, the identification and burial or cremation of casualties and the honourable treatment of the dead. The wounded or sick who fall into enemy hands are to be treated as prisoners of war (Article 14). According to Article 12, the wounded:

> …shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Article 12 further stipulates that any priority of treatment of the wounded and the sick must be made on medical grounds, and women are to be given special protection: 'Women shall be treated with all consideration due to their sex. The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care.'

Chapter III of the First Convention goes on to lay down rules in relation to medical units. In the context of the First Convention, their functions are key, as is made clear by Article 19:

> Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

Article 24 takes this further by requiring that:

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Here we can again see the emphasis on neutrality and impartiality – they are not assisting the enemy, they are seeking to limit the suffering of all those affected by the conflict. This is an underlying theme of the provisions in Chapter IV as well as those on the protection of buildings (Chapter V) and medical transport (Chapter VI). Chapter VIII relates to the execution of the First Convention. It places the primary responsibility to uphold the Articles on the commanders-in-chief of the parties to the conflict. The signatory nations also undertake to 'enact any legislation necessary to provide effective penal sanctions' for those who breach the First Convention's Articles (Chapter IX, Article 49). Nations are 'under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts'. Alternatively, those allegedly responsible for breaches of the Convention can be handed over for trial in the courts of another nation, provided such nation 'has made out a *prima facie* case'. The First Convention is careful not to allow persons to be charged of breaching it without adequate due process. But the key issue here is what are the breaches and the nature of the obligation in question? Article 50 outlines 'grave breaches' of the Convention. They involve: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Article 51 makes clear that such obligations are absolute and states cannot evade or agree to evade responsibility between themselves.

From the very brief analysis of the First Convention, it is clear that the underlying principles of it are as follows. There is a recognition that conflict is inevitable. First, in light of the inevitability of conflict, force may only be used against those who themselves use or threaten force, known as belligerents or combatants – such persons are legitimate targets of force. Those who are no longer active combatants, be they citizens or combatants who have been injured and surrendered, must in so far as is possible be spared from attack or violence. There is thus assumed to be a basic distinction between those involved in hostilities and those who are not. In certain situations it may of course be difficult to determine whether or not an individual is a combatant. Given the evolved nature of modern conflict, particularly guerrilla warfare, it is sometimes difficult to make the distinction between combatants and non-combatants. Second, limitations exist on the use of violence in conflict with the aim to strike a realistic balance between, on the one hand, the necessary destruction of the military resources of the enemy, and, on the other hand, the need not to cause the unnecessary suffering, destruction, and loss of life which confers no military advantage. If the balance is not properly struck and hinders military operations, states will not respect the obligations. For this reason, the balance was delicately worked out and agreed upon so that it does not lose touch with military necessity.

Self-assessment questions

1. **What are the sources of IHL?**
2. **Outline the main provisions of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.**

15.2.2 Second Convention: Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

The Second Convention is for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949). The Second Convention relates to the fact that conflict between states will often involve their naval armed forces. To date there have been no armed conflicts at sea involving non-state actors, to whom the Second Convention would not in any case apply. The Second Convention applies at sea. Once such persons as are protected by it are docked, they are then covered by the First Convention, or, if they have become prisoners of war, by the Third Convention. The first key substantive provision of the Second Convention is **Article 12**:

> Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term 'shipwreck' means shipwreck from any cause and includes forced landings at sea by or from aircraft.
>
> Such persons shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.
>
> Only urgent medical reasons will authorise priority in the order of treatment to be administered.
>
> Women shall be treated with all consideration due to their sex.

This provision clearly dictates the basic prohibitions as to what cannot be done to such persons and the protection of their dignity and humanity is first and foremost, as it is in the First Convention. This premise is just as clear if not clearer in the Third Convention.

15.2.3 Third Convention: Prisoners of War

The Third Convention relates to the treatment of prisoners of war (Geneva, 12 August 1949). Prisoners of war (POWs) are defined by **Article 4**. The provision and definition are worth paying close attention to. POWs are defined as falling into specific categories:

1. Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
    a. that of being commanded by a person responsible for his subordinates
    b. that of having a fixed distinctive sign recognisable at a distance
    c. that of carrying arms openly
    d. that of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from

the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The definition provided is broad so as to cover both members of the armed forces of the combatant powers and those who have informally attached themselves to the armed forces or who are working for them in a civilian capacity. The definition of an informal combatant is the most exacting and, in turn, could be divided into those who are members of identifiable militias as well as those who have 'spontaneously' taken up arms. Again, it is important to stress that although the term is Prisoner of War, for a person to be a POW, there does not need to be a declared state of war. In 1982, Argentinian forces invaded the British territories of the Falkland Islands/Malvinas in the south Atlantic, which Argentina also claims. The then UK Prime Minister Margaret Thatcher stated in the House of Commons that as there was no state of war between the UK and Argentina, no captured Argentinian soldiers would be accorded PoW status and the protection afforded by the Third Convention. Upon urgent communication from the legal advisers department in the Foreign and Commonwealth Office, a correction was issued assuring full compliance with the Third Convention. Articles 13 and 14 of the Third Convention specify the standard of treatment for PoWs:

Article 13

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.
>
> Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.
>
> Measures of reprisal against prisoners of war are prohibited.

Article 14

> Prisoners of war are entitled in all circumstances to respect for their persons and their honour.
>
> Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.
>
> Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

Again, the central emphasis is on the fact that POWs must be treated humanely. Failure to do so may constitute a war crime. The Articles seek to protect prisoners from abuse by their captors, and any acts of reprisal or 'public curiosity'. This outlaws the display of prisoners in public or on television or film. An example of such a violation is Saddam Hussain's parading on television of various Western nationals, primarily children, in 1990 just prior to the allied operation to liberate Kuwait further to Iraq's invasion of it.

There are special provisions that apply to conflicts that are not of an international character (i.e. the combatants are not two sovereign nations). Article 3 lists certain minimum standards:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

   To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

   a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

   b. taking of hostages

   c. outrages upon personal dignity, in particular, humiliating and degrading treatment

   d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

   An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

   The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

   The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Section II of the Third Convention considers the treatment of POWs and the conditions of their detention. Article 21 states that POWs may be subject to internment, which is understood as the 'obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter'. Internment does not mean that POWs can 'be held in close confinement'. The exceptions to this rule include situations where close confinement is a penal or disciplinary sanction or where confinement is necessary to safeguard a prisoner's health.

Articles 25–28 lay down detailed rules that relate to the quarters, food and clothing of POWs. Articles 29–32 address the labour of POWs, and the next part of the Convention deals with the labour of POWs. Article 49 states that the detaining power may make use of the labour of POWs (i.e. may compel them to work) provided that they are 'physically fit', that allowance is made for 'age, sex, rank and physical aptitude' and above all, 'with a view particularly to maintaining them in a good state of physical and mental health'. Work is further defined in Article 50: it excludes 'work connected with camp administration, installation or maintenance'. PoWs may do work that falls into the following classes:

a. agriculture

b. industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose

c. transport and handling of stores which are not military in character or purpose

d. commercial business, and arts and crafts

e. domestic service

f. public utility services having no military character or purpose.

The provision on the work/employment of POWs should not surprise us. The issue of prisoner labour in trade agreements such as the WTO has been an issue of debate between states. It is widely accepted that prisoners should work, but in the case of POWs they cannot be used to directly assist the 'war effort' of their captors.

Articles 109–119 are concerned with the termination of captivity. Article 109 compels parties to the conflict to 'send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel'. During the conflict, sick and wounded POWs may be accommodated by neutral powers. Furthermore, certain classes of person should be repatriated directly:

> **Article 110**
>
> (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
>
> (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
>
> (3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

This provision must be considered in conjunction with Article 117, which makes it clear that no 'repatriated person may be employed on active military service'. This makes perfect sense. Why would any state return a person who may then be part of the conflict against them? In essence, this means a state can return a person, have the benefit of not having to 'host' them and also know that person will not be able to pick up arms again.

The key principle underlying the Third Convention is to (again) respect the humanity and dignity of the person, in this case who has become a POW. Such captivity, however, is not meant to be punitive, but its objective is to make the combatant incapable of doing harm and to prevent him/her from re-engaging in hostilities. Detaining powers are under a significant number of obligations regarding POWs. POWs must be treated humanely. They are entitled to physical and moral respect for their persons. The detaining power is responsible for the treatment of POWs. Any person who commits a breach of the Third Convention must be brought before the courts of the nation holding such persons, or they may be handed over for trial to another nation. POWs are entitled to equality of treatment, although they are subject to the disciplinary procedures of the detaining power's armed forces. The Third Convention limits, however, the severity and extent of these disciplinary procedures. POWs may be interned in camps and may be compelled to work, but, again, in conditions and circumstances that are limited by the law. POWs must be maintained in conditions of reasonable safety in quarters that are clean and sanitary; and they may expect medical provision.

Self-assessment questions

1. **What are the categories of detainees who can be considered POWs?**
2. **What duties does the detaining power have to the POW?**
3. **What work may POWs be compelled to undertake?**
4. **Which POWs should be directly repatriated?**

15.2.4 Fourth Convention: Civilian Persons in Time of War

The Fourth Convention relates to the protection of civilian persons in time of armed conflict (Geneva, 12 August 1949). It seeks to protect civilian populations against the consequences of conflict and the military occupation of the territory in which they reside. Parties to a conflict can establish 'safety zones' (Article 14) and 'neutralised zones' (Article 15). Safety zones are designed to protect the 'wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven'. Article 16 stresses that 'the wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect'. Neutralised zones, as established under Article 15, on the other hand, protect wounded and sick combatants or non-combatants, and civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

Other provisions in this part of the Fourth Convention specify that parties to a conflict should endeavour to conclude local agreements to remove wounded, sick, infirm and aged persons, children and maternity cases from besieged or encircled areas (Article 17). Furthermore, civilian hospitals 'may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict' (Article 18). However, the protection that is accorded to hospitals would end if 'they are used to commit, outside their humanitarian duties, acts harmful to the enemy' (Article 19). This Article attempts to balance the obligation to protect civilian hospitals with the realities of warfare: 'protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded'. The militarisation of hospitals is one of the most complex and contentious issues in conflict. In one of the conflicts in the Middle East between Israel and the Palestinians, there has long been an accusation by Israel that Hamas uses hospitals as cover for buildings to store weapons. In 2014, for example, during an escalation in hostilities between Israel and Hamas, Israel struck at least three hospitals in the space of one week in the Gaza strip. This was met with wide-scale international condemnation but Israel defended its actions on the ground that storage of weapons is breach of the obligation not to use hospitals for non-humanitarian purposes. The truth of such matters is always extremely difficult to ascertain.

Parties to a conflict must not target 'convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases' (Article 21). Provisions also apply to aircraft that are being exclusively used to remove the sick and wounded, provided they are flying to routes that have been agreed upon in advance by the parties to the conflict (Article 22). The Convention goes on to cover the 'free passage' of 'consignments of medical and hospital' stores and 'essential foodstuffs'.

The Fourth Convention's primary objective is to protect the civilian population of an occupied territory from atrocities, either to their person or to the territory more generally. An occupying power can very seriously damage the territory it occupies and cause grave and irreparable harm. Consider, for example, the pillage of Kuwait on Saddam Hussain's orders further to the annexation of Kuwait by Iraq in 1990. Upon the Iraqi army's retreat, the Kuwaiti territory, its infrastructure and its environment (due to the setting on fire of oil wells) were all seriously harmed. Articles 27 and 49 are worth more detailed consideration. Article 27 covers the status and treatment of protected persons:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 27 thus seeks both to affirm the special status of protected persons, and to place an obligation on the controlling power to shelter them from military operations. The balancing exercise which pervades the Conventions is apparent in Article 28, however. As it notes: '[t]he presence of a protected person may not be used to render certain points or areas immune from military operations'. This is consistent with the broader duty not to take hostages, and clearly also consistent with the obligation to treat protected persons with dignity and respect.

Article 49 is critical. It seeks to prevent the deportation or transfer of the civilian population. It states:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

For a transfer of protected persons to be legitimate, it must be aimed towards maintaining the security of such persons. If such a transfer is necessary, then the controlling power has the duty to ensure that the displaced persons are properly cared for and accommodated. Returning again to Israel and the Palestinian Territories we can see the relevance of this provision. Israel has occupied certain Jordanian and Syrian territories since 1967. Jordan has given up all its claims to (east) Jerusalem and the West Bank so that a Palestinian State can be established. Israel has, since 1967, systematically moved the Palestinian/Arab population from East Jerusalem and the West Bank and built an enormous number of settlements to house Israelis there. This has resulted in the systematic displacement of Palestinians. In an ICJ Advisory Opinion in 2004, notwithstanding Israel's arguments to the contrary, the ICJ concluded that the Fourth Convention, alongside a number of other IHL and IHRL treaties, bound it. Israel, which has built a wall/fence/security barrier (all terms used by protagonists) was considered by the ICJ to be in flagrant and systematic violation of its obligations under the Fourth Convention as well as, *inter alia*, the ICCPR and International Covenant on Economic, Social and Cultural Rights (see ICJ, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) ICJ Reports, 9 July 2004, para.120 et seq.).

In summary, a civilian is a person not directly involved in hostilities, and a civilian population consists of such persons. The basic rule is that the parties to a conflict should distinguish between civilians and civilian objects on the one hand, and combatants and military objects on the other, and should direct their operations against the latter. The safeguards for the former are operative whether the conflict is of an international character or not, and in whatever territory they may be, whether the war is specifically declared or not, and whether or not a party to a conflict is recognised by the adversary.

Self-assessment questions

1. **Who is a 'civilian'?**
2. **Who are 'protected persons'?**
3. **What are neutralised zones and safety zones?**
4. **What is the position of hospitals in areas of conflict?**
5. **On what conditions can an occupying power remove a civilian population?**

Activity 15.2

The Conventions and Protocols are very lengthy and detailed – you would be well advised to spend some time working through them.

No feedback provided.

Summary

In this section we have looked at the instruments which establish many of the central tenets of international humanitarian law: the four Geneva Conventions of 1949. The First Convention is for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. This Convention sets out certain minimum standards that apply to both military personnel and civilians in the event of a conflict. The Second Convention is for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949). It defines the requirement that those wounded or shipwrecked at sea should be treated humanely. The Third Convention lays down provisions that relate to the humane treatment of prisoners of war. The Fourth Convention covers the protection of civilian persons in time of war (Geneva, 12 August 1949). It contains a number of provisions that seek to protect civilian populations against the consequences of war.

15.3 The 1977 Protocols

15.3.1 First Protocol

Additional Protocol I relates to the 'Protection of Victims of International Armed Conflicts' (8 June 1977) – we shall refer to it as AP I. AP I applies to international conflicts; it has been widely ratified and most of its provisions are accepted as a reflection of customary international law. AP I (and AP II) is a clear reflection of the manner in which armed conflict evolved between the adoption of the Geneva Conventions in 1949 and the late 1970s. The Preamble to AP I notes the need to 'reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application'. The text of AP I is very wide-ranging. It is only possible to examine some of the provisions of the Protocol. Articles 35 and 36 are noteworthy as an example. Article 35 specifies basic rules that relate to methods and means of warfare:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 36 – New weapons

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The ability of states to cause enormous destruction during armed conflict was taken to new levels in the time between the end of the Second World War and the 1970s. The Cold War meant that 'mutually assured destruction' was the last option of both sides – complete destruction of the other side many times over was within the capability of both sides. While such destruction was not part of the capability of all states, the scale of destruction that could be wrought by conventional weapons by most states led in part to the adoption of this provision. The balance being struck is between military objective and necessity and not causing undue harm. Proportionality is thus the key principle here. States are only permitted to use force to the extent necessary to achieve their military objectives. The use of force beyond that is impermissible. This does raise an important and interesting issue. The total destruction or annihilation of a town or city, for example, beyond what is militarily necessary, may serve as a warning to a state as to what may happen to other cities if the conflict continues. In utilitarian terms it is possible to argue that totally destroying a city, causing the

other state to capitulate, may shorten a conflict and thus lead to less loss of life and destruction overall than if the conflict is allowed to continue. Equally, however, it is difficult to measure and assess what may or may not happen. In that regard, AP I takes the approach of not hypothesising and demanding that states do no more harm than is necessary to achieve a military objective with regard to the issue at hand and not in the context of the overall conflict. It is possible to argue with this but considering the overall approach and rationale of IHL, the approach makes perfect sense. This can be seen further with regard to the obligation to adopt precautionary measures which apply to those conducting military operations in Articles 57 and 58:

Article 57 – Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
   (a) Those who plan or decide upon an attack shall:
      (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them
      (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects
      (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
   (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
   (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 58 – Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives

(b) avoid locating military objectives within or near densely populated areas

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

The basic rule in Article 35(1) is that the right of the parties to armed conflict to choose methods or means of warfare is not unlimited. Suffering, injury, destruction or damage cannot be inflicted for personal reasons or for punishment. If there are several

available means of achieving a legitimate military objective, the least harmful should be adopted. However, in the heat of battle it is difficult to oblige a soldier to aim only at non-vital parts of an enemy's body, as a shot in the arm may disable and allow capture which is less destructive than death. But such an approach also presents problems for the soldier as it requires them to be exposed to greater risk. A shot aimed at the torso is more likely to hit something, if it does not kill, than a shot aimed at a shoulder or arm, which is more likely to miss. Notwithstanding this, important conclusions do follow from the principle. This is true notably of the prohibition of the use of means and methods likely to cause superfluous injury or unnecessary suffering. The requirement that a distinction should at all times be made between the civilian population and combatants, and between civilian objects and military objects, and that military operations should be directed only at the latter (see Article 18 of AP I) is derived from the notion that the enemy can be overcome by attacks on such objectives, and that it is therefore not necessary to direct military operations against civilian populations. There is some confusion and disagreement with regard to whether certain infrastructure is civilian or military – is a power station, run by civilians, which supplies power to a town's population including a hospital but also to a factory making weapons, a military target or a civilian target? What of a road bridge over a major river which permits troop movements but also is essential for foodstuffs to be delivered? The increasing industrial and economic integration of states has meant that the category of legitimate military objectives has grown, but the basic rules and reason remain.

The principle of distinction is listed not in Article 35 but in Article 48 on the protection of civilian populations. Another basic rule is introduced in Article 35(3), namely, the protection of the natural environment. This rule is based on the postulate that, for the achievement of the legitimate aim of overcoming the enemy, it is not necessary to use methods which damage the environment. As noted above, this principle does exist in the Conventions but is restated here.

It can be concluded that there are three major categories of restraints which are:

1. aimed at protection against unnecessary suffering
2. aimed at protection against superfluous injury
3. aimed at protecting the natural environment.

The detailed rules which emanate from these basic principles have all developed with full account being taken of the needs of belligerents to be free to use all the methods and means which are rationally required to overcome the enemy. Each has an inbuilt proportionality requirement and thus takes account of 'military necessity' and thus that principle cannot be used as an argument to overcome the principles themselves.

Article 47 AP I relates to a difficult and contentious issue – that of mercenaries. It displays the evolution of thinking and the change of approach since 1949.

Article 47 – Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
    a. is specially recruited locally or abroad in order to fight in an armed conflict
    b. does, in fact, take a direct part in the hostilities
    c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party
    d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict
    e. is not a member of the armed forces of a Party to the conflict, and
    f. has not been sent by a state which is not a Party to the conflict on official duty as a member of its armed forces.

Mercenaries – those who are paid by others to fight not for a cause but for financial reward – are as old as history. Records exist of such persons going back millennia. So it raises the question as to why AP I should deny the right to mercenaries to be POWs and thus denied the basic protection afforded to such persons. It is worth noting that neither under the Hague Regulations 1907, the Geneva Conventions of 1949 nor under customary international law were mercenaries denied the rights of combatants or belligerents. Upon capture mercenaries were always considered POWs, provided that they otherwise met the requirements of the law for such status. Between 1949 and 1977, however, on a global level but in particular in Africa and Asia, there was decolonisation and wars of national liberation. These were exceptionally brutal conflicts, especially in Africa, be they in Algeria, Congo, Nigeria, Angola, Rhodesia (now Zimbabwe) or Kenya. The widespread use of mercenaries and in particular the exceptional brutality with which they conducted military campaigns, especially in Africa – for example, Congo (on behalf of Belgium), Angola (on behalf of Portugal) and Rhodesia (on behalf of the white racist regime of Ian Smith) – led to the view among many states that mercenaries are criminals and that a country employing them or even allowing their recruitment on its territory violates international law. It is interesting to note that those who fight for a cause they believe in, even if not connected to the conflict otherwise by, for example, nationality, are not considered mercenaries as they are motivated by politics and not private gain. One of the problems faced by those who drafted Article 47 was providing a definition of mercenary that would allow a mercenary to be distinguished from legitimate combatants, such as those identified above. It was also necessary to distinguish mercenaries from foreign advisers attached to an army in a military capacity (this is very common), volunteers, and regular soldiers who receive wages in return for their services. There are few cases where individuals are mercenaries as defined but one should be careful here. In the last 25 years or so there has been a rise of so-called 'private military contractors'. These are individuals and companies who advise in conflict zones, provide training to armies, provide security services and so forth. Blackwater are a notorious example of a company assisting the USA in its conflicts in Iraq and Afghanistan and a company associated with the abuse of detainees. Technically, such companies and their employees are not mercenaries as they are not fighting but providing other support, but it is easy to see that this is a very grey area and the line is easily crossed. Even though mercenaries are denied the status of POWs and combatants, this does not mean they can simply be shot – they still benefit from the list of basic safeguards contained in Article 75 AP I. This states:

Article 75 – Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

   (a) violence to the life, health, or physical or mental well-being of persons, in particular:

      (i) murder

      (ii) torture of all kinds, whether physical or mental

      (iii) corporal punishment

      (iv) mutilation

   (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault

   (c) the taking of hostages;

(d) collective punishments

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby

(d) anyone charged with an offence is presumed innocent until proved guilty according to law

(e) anyone charged with an offence shall have the right to be tried in his presence

(f) no one shall be compelled to testify against himself or to confess guilt

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law.

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this

> Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
>
> 8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

This is a comprehensive and impressive list of guarantees in the context of a conflict. It is also very easy to see that there may be those who are not clearly civilians but not clearly entitled to POW status either – the farmer, for example, who picks up a Kalashnikov to defend his family and land when a(nother) state's troops enter his village. This sort of scenario has been commonplace in many conflicts, for example, Vietnam, Afghanistan or Iraq over the last 50 or so years. The issue came to a head with most difficulty in the context of the events of 11 September 2001 and the decision of NATO and the UN to consider that the USA had been the victim of an 'armed attack' under the terms of Article 51 of the UN Charter. This is a large and complex issue and not one we can cover in detail here. But for our purposes, the following will suffice. Further to the September 2001 strikes on New York and Washington there was a state of 'war' for the purposes of the powers of US President George W. Bush. He had the legal authority under domestic law to detain 'enemy combatants' at least until hostilities ceased. According to the approach adopted in light of decisions by the US Supreme Court in the 1940s, 'enemy combatant' subsumes two sub-categories: lawful and unlawful combatants. Lawful combatants were deemed to receive POW status and the protections of the Third Convention. 'Unlawful combatants' were to be denied POW status but they could receive the protection afforded by Article 75 AP I as above. President Bush determined that al-Qaida members were unlawful combatants because (among other reasons) they were members of a non-state actor terrorist group that does not receive the protections of the Third Convention. He additionally determined that the Taliban detainees were unlawful combatants because they did not satisfy the criteria for POW status set out in Article 4 of the Third Convention. This determination was hugely contentious and subject to dispute before US courts, which led to a number of decisions of the US Supreme Court. The issues centred around the rights to be enjoyed by persons deemed 'unlawful combatants' by the USA, some of whom were sent to Guantánamo Bay Naval Base in Cuba and detained at the camp there. The key thing that is clear from the decisions of the US Supreme Court in, for example, *Hamdan* v *Rumsfeld* 548 US 557 (2006) and *Boumediene* v *Bush* 553 US 723 (2008) is the fact that in the context of an armed conflict, persons (whether civilians or combatants – lawful or unlawful) have the right to due process and retain rights and cannot be left in a legal vacuum.

15.3.2 Second Protocol

The full title of the Second Protocol is 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977'. We shall refer to this as AP II. AP II has not been widely ratified and many states have argued against its provisions being considered as customary international law. AP II applies to conflict situations that are not international, that is, those that are internal. The Preamble specifies that these are conflicts that:

> take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Between 1949 and the end of the 1970s it was this sort of conflict that really proliferated on the global level. Inter-state conflict of course still exists but has become less commonplace. Internal conflicts, in particular, armed struggles against colonialism, became commonplace. But one must also be careful in that many internal armed conflicts are internationalised. Consider the brutal conflict in Syria after 2012. Russia, Turkey, Iran, Saudi Arabia and France, for example, are all involved in it in some way or other. Few, if any, conflicts are entirely internal. In any case, AP II adapts many of the provisions that have been considered so far above, and applies them to the

situation of civil war or internal dissent within a state. AP II is far shorter than AP I or any of the four Geneva Conventions. This is indicative of its more contentious nature and also the inability to apply many of the rules to internal conflicts. It is worth noting that AP II does not apply, according to Article 1, to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. In other words, AP II's application is specific to situations where sustained conflict has broken out. One of the criteria, for example, is the control of territory by the insurgents to differentiate the scale of the violence, but in practice that can be difficult to determine in some cases. 'No-go zones' for the police or army due to the probability of attack is not the same as 'control' of territory which is required to be akin to performing the functions of a government, such as law and order. In practice, there is often difficulty in determining when the line from internal disturbance to insurgency has been crossed, but this is a question of fact to be resolved with reference to each situation. States by definition will resist considering the line has been crossed, whereas insurgents will wish to argue it has been as it accords them greater protection and recognition than domestic law may. AP II is essentially based on a fundamental guarantee and this is articulated in Article 4:

Article 4 – Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
   (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment
   (b) collective punishments
   (c) taking of hostages
   (d) acts of terrorism
   (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault
   (f) slavery and the slave trade in all their forms
   (g) pillage
   (h) threats to commit any of the foregoing acts.
3. Children shall be provided with the care and aid they require, and in particular:
   (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care
   (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated
   (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities
   (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured
   (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

We can see that many of the above relate back to issues (for example, the prohibition on child soldiers) which we have considered before. There are also provisions similar to those that relate to the treatment of protected populations in international conflicts, such as that found in Article 17 which relates to the prohibition of the forced movement of civilians.

Summary

The main concern of the Geneva Conventions of 1949 is to humanise conflict, while recognising that is all that can be done – conflict cannot be eradicated. There is to be at all times a distinction between combatants and non-combatants. Non-combatants are entitled to be treated humanely. Military action cannot be taken against non-military objectives. The wounded and sick must be collected and cared for by the party which has them in its power. Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

AP I seeks to update the Conventions to take account of how conflict evolved in practice between the drafting of the Conventions in 1940 and the latter half of the 1970s, especially in the context of wars of national liberation fought within the broader context of Cold War politics. AP II seeks to provide safeguards and minimum standards that relate to internal armed conflicts – a more contentious and contested issue.

15.4 The Hague Conventions

In 1899, the First Hague Peace Conference was convened with the objective of revising the laws and customs of war that had been elaborated at the earlier Conference of Brussels, but had not been ratified. The Conference agreed certain rules that came into force on 4 September 1900. We will examine some of these provisions and the principles that underlie them.

The Conference agreed a Convention (Hague II) with Respect to the Laws and Customs of War. For instance, Section II, Chapter 1 deals with the 'means of injuring the Enemy, Sieges, and Bombardments'. Article 22 states the fundamental principle: 'The right of belligerents to adopt means of injuring the enemy is not unlimited.' Certain declarations were also made. The contracting parties agreed to abstain from the use of bullets that expand or flatten easily in the human body and cause unnecessary suffering. These are known as 'dum-dum bullets'. A normal bullet has a hard shell. When it enters the human body as a projectile it will retain much of its shape and thus generally not cause broader damage if it does not hit a major organ or lead to death through blood loss. For example, a normal bullet to the shoulder or leg will not normally lead to death if treated. A dum-dum bullet has had the hard shell removed or it has not been put on in the first place. The effect is to flatten on impact. Thus a dum-dum to the shoulder or leg will cause far more damage to the limb and normally result in it being blown off the person, leading to far greater injury and blood loss and probably death. Such projectiles cause unnecessary suffering and thus were banned. The contracting powers also agreed to abstain from the use of asphyxiating or deleterious gases. A further Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare came into force in 1928. This is where the ban in international law on chemical and gas warfare stems from. Of course, such prohibited gases have been used. In Iraq, Saddam Hussain's troops poisoned the Kurdish village of Halabja in 1988. In its attacks on Gaza in 2009, Israel used white phosphorus bombs in contravention of international law, although it claimed it was entitled to do so – see the Human Rights Watch Report on the matter. There are numerous reported cases of poisonous gases also having been used in recent years in Syria by troops fighting on behalf of the government of Bashir Al-Assad.

Section III of Hague II applies to the military authority that is exercised over an occupied state. The Convention is realistic in that it recognises that this authority can only extend to those areas that are effectively under the control of the occupying

forces. Under Article 43, the occupying power has the duty to take measures to restore public order. We considered this in passing when examining the ICJ's Wall Opinion above as the ICJ considered Israel to be an occupying power with obligations under Hague II and the Fourth Convention. There is also a duty to respect 'family honour', people's lives and private property. This duty extends to religious convictions. The administration of occupied territory can be financed by the continuation of taxation and revenue policies and practices of the previous government. There is, though, a provision that allows for an extra levy to cover military expenses, but there is a prohibition in Article 50 against punitive taxation. Furthermore, any requisitions demanded for occupying forces shall be proportionate to the resources of the occupied country, and any collection of taxes must be underwritten by order of the commander-in-chief. The occupying power is to be seen as the administrator, rather than the owner, of realty that belonged to the previous government, and the capital of these properties must be preserved. Property belonging to religious and cultural institutions, even if belonging to the state, is treated under Hague II as private property. There is an absolute prohibition on destruction or damage of historic buildings or works of art. Article 56 warns that any such destruction will become subject to legal proceedings.

A distinction is drawn by Hague II, though, between the way in which the occupying power treats the property of citizens and the property of the former government. Generally, whereas citizens cannot be made to swear allegiance to the occupying power or contribute to its military operations, occupying forces can confiscate government and military property and resources. Article 53 allows the occupying forces to take possession of 'cash, funds, and realizable securities' that were 'strictly the property of the state'. This definition must cover government property, but there must be a line drawn between this power of appropriation and the earlier duty (Article 46) that forbids the confiscation of private property. However, Hague II allows the occupying forces to take over all 'depots of arms, means of transport, stores and supplies' that can be used for military purposes. This power extends to the confiscation of both telecommunication mechanisms and transport systems. If these assets belong to private citizens, though, ownership must be restored at the end of hostilities, and compensation paid.

The Second Peace Conference at The Hague continued the development of these laws of war. Conventions were agreed on a variety of subjects, and came into force on 26 January 1910. For instance, Article 1 of Convention IV is concerned with the 'qualification of belligerents':

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. to be commanded by a person responsible for his subordinates
> 2. to have a fixed distinctive emblem recognizable at a distance
> 3. to carry arms openly
> 4. to conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.

This Article states that the laws of war apply not just to armies, but also to less formally organised groups of combatants, provided that they satisfy the conditions enumerated. This classification of combatants was further elaborated by the Geneva Convention that we studied above.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict came into force in 1956. The Hague Conventions thus represent an important foundation for the law of war.

15.5 Crimes against humanity and genocide

As we have seen, grave breaches of the Geneva and Hague Conventions constitute war crimes. Our concern now, however, is with other crimes that have been linked with war crimes: genocide, crimes against humanity and crimes against the peace. We will focus on crimes against humanity and genocide, and we will see that these offences are very different.

15.5.1 The Nuremburg and Tokyo trials

The key moments for the definition of genocide and crimes against humanity were the Nuremberg and Tokyo trials after the Second World War. With the conclusion of hostilities, the allied powers – the USA, the UK, the USSR (which is now truncated into Russia) and France – were unsure how to deal with the Nazi leaders and former regime members who were responsible for atrocities against civilians, war crimes and the Holocaust. Sir Winston Churchill thought, for instance, that those responsible should simply be shot. Other powers, and in particular the USA, believed that those responsible should be dealt with by the due process of the law, and this view ultimately prevailed. The London Charter created the International Military Tribunal that was founded (supposedly) on principles of international law and comprised representatives from the four allied powers. The trials took place at Nuremberg, Germany, from November 1945 to October 1946. The chief prosecutor, Justice Robert H. Jackson, stated the principles on which the tribunal was based were themselves already present in international law; thus the concept of war crimes, crimes against humanity and crimes against peace, although central to the Nuremberg trials, can arguably not be seen as originating in the jurisprudence of this body. The legacy of the tribunal is, however, hugely complex and contested. Although it set an important precedent in relation to the trial of individuals for atrocities and crimes against humanity, there are also important questions about its remit and the scope of international law. The allies were holding accountable those who fought against them for the atrocities they had committed but they were themselves not to be held accountable. If crimes against humanity were committed by the Nazis and Japanese, what of those committed by the Allies? British troops had blanket-bombed Dresden. The USA had dropped atomic weapons on Hiroshima and Nagasaki. The Soviet troops had committed atrocities in Germany against civilians while marching west. The French Vichy regime had been complicit with the Nazis in the murder and extermination of many Jews and those involved in the resistance. All such matters, and many others, were not considered. Having used legal arguments to hold the vanquished accountable, the Allies sought to ignore the applicability to them. Although this does not eradicate the validity of the precedent set, it clearly does diminish it. There is something to the argument that tribunals established after conflict situations are always open to the charge that they are partial and dispense 'victor's justice'. It is as if the defeated are always the perpetrators of war crimes, and the victors are exempt from such charges. It is necessary to assess such claims in the historical and political contexts of the activities of the different courts that have concerned themselves with war crimes and crimes against humanity. For the moment, however, we need to study the crimes defined by the Principles of the Nuremberg trials. Principle VI of the Principles of the Nuremberg Tribunal, 1950, enumerated crimes that were punishable under international law. Crimes against the peace were defined as:

i. planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances

ii. participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

Principle VI described war crimes as:

> Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas,

> killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Crimes against humanity were defined as:

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

We need to examine these in turn. Crimes against the peace derived from the 1927 Declaration on Aggressive War which stated that aggressive war was 'prohibited' and stressed that 'pacific' means must be used to settle disputes between states. In 1928, these principles became part of the Paris Pact for the Renunciation of War, which was an international treaty. Another important source for the concept of crimes against the peace came from Article 227 of the Treaty of Versailles 1919, which had set up an international tribunal to put the German Kaiser (emperor) on trial for a 'supreme offence against international morality'. The Kaiser was never put on trial and lived out his life in the Netherlands. War crimes derive from the sources of law that we have studied above: the Hague Conventions and also the Geneva Conventions both from 1929 (between 1929 and 1950) and then from 1950 onwards when the 1949 Conventions were in force. These Conventions also represent customary international law and are binding on nations whether or not they are signatories to the treaties themselves.

15.5.2 Crimes against humanity

As is clear from the discussion above, crimes against humanity can occur outside of the direct context of conflict, whereas war crimes occur as a result of gross violations of the rules and regulations pertaining to conduct during hostilities. As crimes against humanity is a concept which relates to gross violations of human rights which are deemed to breach a threshold of seriousness, they have not been historically subject to attempts at definition, whereas it has been more straightforward, in relative terms, to define war crimes. Crimes against humanity and war crimes both relate to individual criminal responsibility for the acts in question. They are of modern concern. In the aftermath of the First World War, for example, a special 15-member Allied commission found that the Central Powers had committed numerous acts 'in violation of the established laws and customs of war and the elementary laws of humanity'. The two US members of the commission, however, made clear that there was no concept of the laws of humanity – it was deemed to be a question of 'moral law' lacking any 'fixed and universal standard'. As a result, the Versailles Treaty did not call for any trials against humanity. The Tokyo and Nuremburg Tribunals did refer to it, however. More recently we can see that the statutes that established the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the statute of the International Criminal Court (ICC) all refer to it. We will return to this shortly. Before doing so it is worth returning to some issues we have already discussed elsewhere in this guide relating to crimes against humanity.

As we examined in earlier chapters, crimes against humanity are deemed to be part of *jus cogens* – they are thus normatively superior to other norms in international law. Thus, they constitute a non-derogable rule of international law. The implication of this standing is that they are crimes of universal jurisdiction meaning that all states can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. It is necessary to explain this briefly. Courts normally exercise jurisdiction over persons committing crimes in their own national territory. Over time, international law has recognised various forms of 'extraterritorial jurisdiction'; for us only one of these matters – it is the idea that any state can try any person for certain crimes committed anywhere. These are crimes of universal jurisdiction. Crimes so heinous and objectionable to the international legal order that all states have an interest in their violation and to hold those who commit them accountable. Under IHL, states have a duty to bring to justice those guilty of grave breaches of the Conventions. Under customary international law, national courts also have jurisdiction over at

least genocide, crimes against humanity, slavery and torture. It also means that all states have the duty to prosecute or extradite a person suspected of committing such offences within their jurisdiction and that states have the duty to assist each other in securing evidence needed to prosecute such persons.

This leads us on to what crimes against humanity are. As noted above, there is no one definition but they do all share certain common features. First, they are specific acts of violence against persons irrespective of whether the person is a national or non-national and irrespective of whether these acts are committed in time of war or time of peace. Second, these acts are the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution. Such a policy can also be manifested by the 'widespread or systematic' conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition. Third, the specific list of crimes has been expanding over time. Rape and torture were included in the statutes relating to the former Yugoslavia and Rwanda. The statute of the ICC adds the crimes of enforced disappearance of persons and apartheid. The ICC statute further takes account of atrocities committed in the time leading up to its adoption and thus also contains clarifying language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of population, torture and forced pregnancy. Forced pregnancy, for example, was widespread in the conflict in the former Yugoslavia where Bosnian Muslim women were repeatedly raped by Serbian men until pregnant, so as to make such offspring Serb. Finally, to some extent, crimes against humanity overlap with genocide and war crimes. But crimes against humanity are distinguishable from genocide in that they do not require an intent to 'destroy in whole or in part', as cited in the 1948 Genocide Convention, but only target a given group and carry out a policy of 'widespread or systematic' violations. Crimes against humanity are also distinguishable from war crimes in that they do not only apply in the context of conflict – they apply at all times.

15.5.3 Genocide

In recent years there has been a great deal written on the history of the concept of genocide – as a term, as a crime, as a matter of international law. Raphael Lemkin, who was the lawyer behind the notion of genocide, has also been studied (for a fascinating background, see Sands, P. *East West Street: on the origins of genocide and crimes against humanity*. (London: Weidenfeld and Nicolson, 2016). Lemkin needed a term for the legal concept of destroying human groups so as to reflect the realities of European life between 1933 and 1945. He combined the Greek 'genes', meaning race, nation or tribe, and the Latin 'cide', meaning killing as in 'homicide'. The crime of genocide involves a wide range of actions, including not only deprivation of life but also the prevention of life (abortions, sterilisations) and also devices considerably endangering life and health (artificial death in special camps, deliberate separation of families for depopulation purposes and so forth). All these actions are subordinated to the criminal intent to destroy permanently a human group. This is a very specific intent and immensely difficult to prove. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups. Other legal concepts simply are not encompassing enough. Mass murder or extermination, for example, would not apply in the case of forced sterilisation because the victims were not murdered, rather a people was exterminated over time. Moreover, mass murder does not convey the broader loss to civilisation in the form of the cultural contributions by peoples united by language, religion, ethnicity and so forth. There is no disputing that the notion of genocide had its origins in the need to determine the legal responsibility of the Nazi leaders after the defeat of Germany in the Second World War.

After Nuremberg, further attempts were made to refine the definition of genocide. In 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. The definition of the crime of genocide is found in Articles II and III. Article II states that genocide has two elements:

1. the **mental element**, meaning the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'

2. the **physical element** which includes five acts described in Sections (a), (b), (c), (d) and (e).

A crime must include **both elements** to be called 'genocide'.

Articles II and III need considering.

> **Article II**
>
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group
>
> (b) causing serious bodily or mental harm to members of the group
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
>
> (d) imposing measures intended to prevent births within the group
>
> (e) forcibly transferring children of the group to another group.
>
> **Article III**
>
> The following acts shall be punishable:
>
> (a) genocide
>
> (b) conspiracy to commit genocide
>
> (c) direct and public incitement to commit genocide
>
> (d) attempt to commit genocide
>
> (e) complicity in genocide.

We can see that the Convention ensures that genocide, like all criminal offences, has both a mental and a physical element. The mental element is defined by the 'intent to destroy' and the physical by the list in Article II. Article III then expands the definition by detailing the various acts that can be punished as genocide.

The crime of genocide and proving the intent to destroy has come up in the context of the atrocities committed in both the former Yugoslavia and Rwanda. Both Tribunals have had to address the issue. The ICJ also had to consider the matter in the context of an inter-state dispute between *Bosnia and Herzegovina* v *Serbia and Montenegro* (2007) ICJ Reports p.43. The judgment delivered on 26 February 2007 is of profound importance in the context of the law in this regard. The matter before the Court was a very technical one and related to whether Serbia had committed genocide by killing and ethnically cleansing Bosnian Muslims during the disintegration of Yugoslavia. We do not need to concern ourselves here with the broader issues but can focus on what is genocide and what needs to be proved. During the pleadings, it was clear there was a difference of opinion between the Serbians and Bosnians as to what the burden of proof was. To that extent, the Serbians were successful in that the Court decided there needed to be a 'high level of certainty' as to what happened in light of the seriousness of the allegations. Quite what this means is uncertain but it is certainly more than on a balance of probability. With regard to the relationship between ethnic cleansing and genocide, two terms which have been used interchangeably, the ICJ noted with regard to the former:

> [n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous'. nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. (para.190)

Much of the judgment relates to establishing the mental element of genocide. The ICJ makes clear that it is not enough that the perpetrator possess a discriminatory intent. The Court compares genocidal intent with that of the related crime against humanity

of persecution. In essence, what the Court was doing was examining the mental element – the intention to destroy – through the lens of state responsibility. States do not think for themselves but if there is a policy or plan being implemented that seeks to destroy then that is the closest you can get in this context. In its judgment, the ICJ observed at para.319 that the material element of the crime of genocide may have been present but that it had not been 'conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such'.

Much of the actual killing perpetrated related to events in Srebrenica and more widely. Srebrenica is an infamous crime during the conflict and the Court upheld that genocide had been perpetrated there. On the facts relating to Srebrenica you should consider further the detailed information available at: www.britannica.com/event/Srebrenica-massacre

It is also important to note that in early 2016, Radovan Karadžić, a Bosnian Serbian leader was found guilty of genocide at Srebrenica and sentenced to 40 years in prison by the ICTY. As for the ICJ, however, and the broader Serb policy regarding Bosnians, the ICJ held at paras.276–77 that:

> 276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II(a) of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.
>
> 277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (dolus specialis) on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent (dolus specialis). The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant's contention that the specific intent (dolus specialis) can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs (b) to (e)).

The judgment and approach of the ICJ was welcomed by some and derided by others. It is important to bear in mind that courts and indeed law are only one part of the context of genocide. Such acts start with the dehumanising of the other. Law, however, is our prism and in this context it is important to refer more fully to the other tribunals we have mentioned above: the ICTY, ICTR and the ICC.

Activity 15.3

Try to read the ICJ's 2007 judgment in *Bosnia and Herzegovina* v *Serbia and Montenegro*. Do not focus on the procedural issues but try and understand what the Court was trying to determine with regard only to genocide. Do you agree with the judgment? If not, why not? If so, why? The judgment is available at the ICJI's website: www.icj-cij.org/en/case/91/judgments

Consider the events at Srebrenica. Why was that genocide, but the other matters considered by the ICJ were not?

Distinguish between crimes against humanity, war crimes and genocide.

No feedback provided.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the nature of war crimes, the crime of genocide and crimes against humanity.**

15.6 The International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the Security Council in 1993. The Security Council decided to establish 'an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council'. The Security Council similarly established the International Criminal Tribunal for Rwanda (ICTR) in 1994 so as to 'prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring states, between 1 January 1994 and 31 December 1994'. Both have now been wound up and a mechanism which replaces the ICTY and the ICTR has now been established. The Mechanism for International Criminal Tribunals (the MICT) was established by the Security Council on 22 December 2010, to carry out a number of essential functions of the ICTR and the ICTY, after the completion of their respective mandates. The ICTY and ICTR are still, nonetheless, of importance to us. We will focus more on the ICTY but many, if not all, of the considerations equally apply to the ICTR.

The ICTY's remit was to deal with violations of IHL committed in the fighting and 'ethnic cleansing' occasioned by the break-up of the territories that comprised Yugoslavia. The international community hoped that the Tribunal would assist with the process of reconciliation and reconstruction after the armed conflict. From the outset there have been issues with the perceived legitimacy of the entire process. Time and again individuals have not cooperated with or have challenged the jurisdiction, indeed existence, of the Tribunal. There was a fundamental question as to whether the Security Council has the power to establish such a Tribunal. It has been suggested that there is no competence under Chapter VII of the UN Charter to establish a court to 'maintain or restore international peace and security'. It is now clear that it is accepted that the Security Council does have this power – the ICTY itself held in one of its earliest cases that it does so (see *Prosecutor* v *Tadic*, Appeals Judgment, IT-94-1-A, 15 July 1999) – but it is now also clear that specific ad hoc international mechanisms such as those for Yugoslavia and Rwanda are highly unlikely to be created again in the future. The issue becomes incredibly politicised and subject to the vagaries of the tensions between permanent members of the Security Council. While some states did cooperate with the tribunal, others did not. Serbia, one of the republics that comprised the Federal Republic of Yugoslavia, cooperated to the extent that it handed over to the tribunal Slobodan Milošević, the former president of the Federal Republic of Yugoslavia, and some other major figures. Others, such as Radovan Karadžić, were not handed over, and Karadžić apparently lived in Serbia with his whereabouts known to some elements of the establishment. However, the difficulties faced by the Tribunal can be seen in the fact that Milošević, who died in custody in 2006, did not cooperate with the court. The ICTY's founding statute gave it jurisdiction over war crimes, genocide and crimes against humanity. We can get a sense of the work of the Tribunal if we consider the way it conducted the indictment and hearings against Milošević. Fact-finding in the context of conflict, preparing dossiers and gathering evidence is a painstaking and immensely difficult process. Gathering enough material to press charges and to present a *prima facie* case for an arrest warrant is no easy task. Criticism

of the ICTY is all too easy, until one bears in mind the logistics of the problems that need to be overcome. How many witnesses survive an atrocity? Can they be found? Are they credible? Are they able to relive and recount their experiences? Do they need support and counselling to do so? Take the example of Bosnian women who were systematically raped by Serbian and Bosnian Serb men. These women were raped repeatedly until pregnant. Many gave birth to children conceived by rape. They were shunned by their own communities if it became known they had given birth to such a child. Others had abortions. For such women to come forward and testify was immensely difficult. To travel from Bosnia to The Hague would alert members of their communities that they had been raped, and this was not without consequence for them. A legal process to prove guilt is not a straightforward one at the best of times; several years after armed conflict it often presents insurmountable challenges. This needs to be borne in mind, hence the delay in time and need for massive resources. It is easy to criticise from afar – as many commentators did.

We can see the problems if we consider Milošević and how he was indicted and when and for what. On 24 May 1999, the tribunal indicted Milošević, along with four other senior officials and officers, for war crimes and crimes against humanity committed by Yugoslav and Serbian troops under their command in Kosovo in early 1999. The crimes include the slaughter of hundreds of ethnic Albanians, forcible deportations of hundreds of thousands of people, and persecution based on racial, religious and political identification. The tribunal indicted Milošević a second time on 29 October 2001, for crimes he allegedly committed in Croatia. The indictment charged Milošević with multiple counts of murder, torture, detention, deportation and other atrocities committed during the attempted ethnic cleansing of Croatia from 1991 to 1992. On 11 December 2001, the ICTY issued a third indictment against Milošević for crimes in Bosnia. The indictment includes one count of genocide, one count of complicity with genocide, and an additional 27 counts of war crimes and crimes against humanity arising from the conflict in Bosnia-Herzegovina between 1992 and 1995. The new charges cover the shelling of Sarajevo; the mass murder of thousands of Muslim men and boys at Srebrenica (both UN-proclaimed 'safe areas'); and the Omarska detention camp. Indicting someone like Milošević is like putting together an immensely complex puzzle. If one considers the resources needed to put together such a series of indictments, we can see it is worthwhile for an orchestrator like Milošević, but what of a camp guard or a local commander? And that raises another problem: how long do such bodies function for? Can the legal process hinder the broader process of reconciliation and healing?

In terms of legal developments and application of IHL, the ICTY and ICTR have been profoundly important. The ICTR, for example, was the first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Convention. It also, critically, defined rape in international criminal law and recognised rape as a means of perpetrating genocide. Tribunals such as the ICTY and ICTR are, however, fraught with problems and one can see that they essentially have an almost impossible task. Your reading from Alston and Goodman contains a variety of materials that relate to the ICTY that can be used to elaborate the themes described in this section.

Activity 15.4

Outline the problems faced by the ICTY and the ICTR. How would you seek to overcome these problems? What can such tribunals achieve?

Summary

This section has considered crimes against humanity and genocide. It was argued that the key moment for the definition of these offences were the Nuremberg and Tokyo trials immediately after the Second World War. The Principles of the Nuremberg Tribunal provide definitions of war crimes, crimes against humanity and genocide. However, since 1945 there have been further attempts to clarify the meaning of these offences. A definition of genocide was provided by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Crimes against humanity have

some overlap with genocide, but are understood as essentially a free-standing offence. Although there is no single convention that defines crimes against humanity, there are common elements to all definitions. They require specific acts of violence to be committed against people in times of war or peace; these acts must be the product of persecution against an identifiable group of persons and manifested by evidence of 'widespread or systematic violations'. Precise lists of the crimes that constitute crimes against humanity can be found in the statutes that founded the ICTY and the ICTR. The most complete list is perhaps that contained in the foundational statute of the ICC. War crimes are breaches of the laws and customs of war – and would thus be breaches of the Hague and Geneva Conventions. However, as war crimes are also part of customary international law, a nation would not have to be a signatory of these treaties for its nationals, or indeed non-nationals in its territory or under its control, to be found guilty of war crimes.

We also looked at the ICTY and the ICTR. The former was established by the UN in 1993 to examine violations of humanitarian law and international law committed in the fighting at the time of the breakup of the former Yugoslavia. The ICTR was established to deal with similar breaches of law when the majority Hutu ethnic group committed acts of genocide against the minority Tutsis in Rwanda. Both Tribunals have now been wound up. Their contribution to the process of reconciliation and rebuilding is open to debate.

15.7 The International Criminal Court (ICC)

The work of the ad hoc tribunals added impetus to the drive to create an international criminal court. An attempt in 1937, sponsored by the League of Nations, to create an international criminal court met with failure; furthermore, even though the Genocide and Apartheid Conventions made provision for international criminal courts, Cold War politics meant that this never became a reality. With the thawing of the Cold War, and the initiatives which led to the establishment of the ad hoc tribunals, the foundation of the ICC became a political possibility. The ICC was established in 1998 by the Rome Statute. The jurisdiction of the ICC is limited to the most serious crimes, namely genocide; crimes against humanity; war crimes; and crimes of aggression. Operationally, the terms of the Court's remit have had to strike a balance between its own powers to initiate prosecutions and those of nation states with whom it must cooperate. The Statute of the ICC clearly seeks to strike some difficult balances. The ICC is a complementary mechanism: it is the primary responsibility of states to prosecute and the ICC steps in when states do not or are unable to fulfil their obligations. The ICC statute, overall, represents a highly significant development in two regards. First, in terms of individual accountability and the establishment of a permanent global instrument. Second, in terms of its institutional contribution to the law's implementation and its codification and progressive development of the substantive law. The Court's procedure also reflects aspects of different legal traditions. It is largely drawn from the common law system and thus highly adversarial but allows judges to intervene in a manner similar to the investigating magistrate in some civil law systems. The Statute also reflects what has been learned from the ICTR and ICTY models and seeks to address some of the deficiencies that existed in their Statutes. Among the most noteworthy features of the ICC Statute in this regard are the heightened attention to gender issues; extensive protection for victims, witnesses and sensitive information provided by states; and the Court's power to proceed with a trial even when the accused has pleaded guilty. The foundation of the ICC was thus a key moment in the development of humanitarian law and international criminal law. However, there have been serious problems from the very moment of the Court's foundation; in particular, the refusal of the USA to recognise the Court's jurisdiction. This has been based on a fear that the ICC will bring politically motivated prosecutions against American military personnel. Although the USA signed the Statute under the presidency of Bill Clinton, his successor George W. Bush denounced it. President Obama did not change the approach of the USA and neither did President Trump. President Biden has simply not referred to the matter, at the time of writing. Numerous other key states are not party to the ICC Statute either. Russia, India, China, Pakistan and Israel are examples. Palestine, however, joined the ICC in 2015. In what

became a highly politicised and contentious debate, Palestine sought to become party to the Statute of the ICC. The ICC only has jurisdiction over events in states which are party to it. With Palestine becoming a member, it is possible that Palestinians as well as Israelis will be accountable for events in the Palestinian Territories. In 2021 the ICC determined that it does have jurisdiction over events in Palestine and an investigation into alleged crimes in those territories since 2014 (the relevant time frame) are, at the time of writing, underway. South Africa, on the other hand, in 2016 declared that it was going to renounce its membership of the ICC. The ostensible reason is an incompatibility with domestic law concerning immunity. At the time of writing, this had not been effected. More broadly, however, there is an issue concerning the work of the ICC and the prosecutor and a focus on Africa. At the time of writing, for example, the ICC was using its powers to examine 'situations' in Uganda, the Democratic Republic of the Congo, Darfur (Sudan), Afghanistan, the Central African Republic, Kenya, Libya, Côte d'Ivoire, Mali, Burundi, Bangladesh, Myanmar, Palestine, Philippines, Venezuela and Georgia. Although the situation has improved, as recently as 2019, there were only two non-African situations under consideration. The continuing primary focus on Africa is clear, however. Numerous African leaders have criticised this.

The ICC is again in a most difficult situation. Difficult balances have been struck between states and these can curtail it working. The Security Council has powers to intervene in the work of the Court. States may not cooperate, and the sheer breadth of atrocities committed is surely beyond the remit of one single court. Notwithstanding this, the Court is making an important contribution to the law and holding individuals accountable for violations of IHL. In 2016, for example, the first ever conviction was secured for cultural destruction as a war crime. An Islamic militant who helped destroy the fabled shrines of Timbuktu in Mali was sentenced to nine years in prison (see www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822). While one can argue that this is not a gross violation of the laws of war as compared, for example, to genocide, it is critically important in the development of the law and also as a deterrent to others who desecrate cultural heritage. Think, for example, of the destruction of Palmyra in Syria or the Bamyan Buddhas in Afghanistan. But the issue concerning priorities is still pertinent.

Activity 15.5

Visit the website of the ICC: www.icc-cpi.int Spend some time exploring it and then consider how situations have come before the Court. What situations do you think need to be considered but are not?

No feedback provided.

Further reading

- **Omorogbe, E.Y. 'The crisis of international criminal law in Africa: a regional regime in response?',** ***Netherlands International Law Review*** **66 2019, pp.287–311. This interesting piece examines how African states may respond at the regional level to deal with the perceived legitimacy crisis in international criminal law as far as Africa is concerned.**

Summary

The ICC was established by the Statute of Rome in 1998 and has a jurisdiction over crimes against humanity, genocide and war crimes. Essentially, the ICC supplements existing national jurisdictions over these offences, and will only prosecute if national courts are unwilling or unable to initiate and sustain proceedings. Although the ICC thus represents a significant development in international law, its credibility and importance has been compromised by the USA's reluctance to recognise the court's jurisdiction.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the role of the ad hoc tribunals for the former Yugoslavia and Rwanda**
- **summarise the role of the International Criminal Court.**

15.8 The trial of Saddam Hussain

The final issue we will briefly consider is the trial of Saddam Hussain. Hussain could not be tried by the ICC as it did not have jurisdiction over where and when his crimes were committed. Thus, a different model had to be adopted. This sort of model (Special Tribunals) are domestic tribunals and while some are internationalised (the Tribunal for Sierra Leone is a good example and mentioned in the context of child soldiers in Chapter 12), the Iraqi model is not. In many senses this allows for national 'ownership' of the process and also a sense of accountability. On the other hand, it can become retributive and about revenge against those in power in the past. Each country and situation will be different, and how the balances will be struck will vary. Saddam Hussain's trial provides an interesting example for us as to how such issues **have** been tackled, not necessarily how they **should** be tackled.

As you will no doubt be aware, Hussain was a brutal dictator who controlled Iraq from the late 1960s onwards. He was overthrown further to a US-led invasion of Iraq in 2003. We are not concerned with the legality or illegality of that use of force. After the invasion, an Iraqi Higher Criminal Court was set up to bring to justice those accused of atrocities and certain other crimes committed during the time Hussain was in power. The Court was originally set up as the Iraqi Special Tribunal under the auspices of the Coalition Provisional Authority (in essence the USA) but once power was handed over to an Iraqi government, it set up the Iraqi Higher Criminal Court so as to 'domesticise' the process and bring the Court more firmly within the framework of the Iraqi criminal justice system. Further to Saddam being captured in July 2005 the Court announced that formal charges had been laid against Saddam (and some others) in relation to crimes against humanity committed in the village of Dujail. This related to the deaths of villagers, torture of women and children, the razing of farmlands, and the wrongful arrest of almost 400 Dujail residents in 1982. Subsequently, other charges were laid against Saddam for genocide and crimes against humanity, such as the Anfal operation that killed 100,000 Kurds in northern Iraq in the 1980s. These subsequent charges were never fully determined as Hussain was found guilty of crimes against humanity for the operation in Dujail. The Iraqi Higher Criminal Court found Saddam guilty and sentenced him to death. This was appealed and upheld and he was thus executed in November 2006. The five trial judges were all Iraqis. The trial was held in Baghdad. Saddam conducted part of his own defence and some of his defence lawyers were also killed by assailants. In this context, was it possible for Saddam to receive a fair trial? Was there any doubt he would be found guilty? Also, one must consider, did the process achieve justice? There were thousands, if not millions, of direct victims of Saddam's atrocities. Did these victims have a voice – any sense of justice? One must, however, consider the alternatives. Would an international tribunal sitting in Europe, for example, have been preferable? How would that have delivered justice for Iraqis? Would a hybrid court with some international and some domestic judges have been a better option? For how many crimes could Saddam have been prosecuted? Did keeping him alive for an extended period threaten further and greater instability in Iraq, and thus was executing him quickly better considering the situation in Iraq more broadly? Was the death penalty appropriate? The ICC, ICTTR and ICTY, for example, do not permit it. As should be obvious, there are no easy answers. One can criticise the trial – as many human rights organisations, such as Amnesty International and Human Rights Watch, did. One can also consider the matter in the broader political context of the invasion and the instability prevailing in Iraq at the time.

ACTIVITY 15.6

How would you have held Saddam Hussain accountable? Think of the model, the charges, the role of international human rights standards and so forth.

No feedback provided.

FURTHER READING

- **Bassiouni, M.C. *Crimes against humanity in international criminal law*. (The Hague; London: Kluwer Law International, 1999) second revised edition [ISBN 9789041112224].**

- **Baxter, R.R. 'The duties of combatants and the conduct of hostilities' in *International dimensions of humanitarian law*. (Paris: UNESCO; Geneva: Henry Dunant Institute, 1988) [ISBN 9789231023712].**
- **Hirsh, D. *Law against genocide: cosmopolitan trials*. (London: Glasshouse, 2003) [ISBN 9781904385042].**
- **Lemkin, R. 'Genocide as a crime under international law', *American Journal of International Law* 41(1) 1947, pp.145–51.**

Reminder of learning outcomes

By this stage you should be able to:

- **discuss the trial of Saddam Hussain.**

Sample examination question

'Trials for war crimes are problematic. Legal issues are inseparable from political concerns.'

Discuss.

Advice on answering the question

This question is aiming at the problem of 'victor's justice'. The best way of approaching it is to think carefully about what the question is asking. Do not simply write out everything you know about war crimes. We need to identify, first of all, why war crimes are problematic, and then elaborate on why legal and political issues are bound up together. One might suggest that war crimes are problematic because they are dissimilar to normal criminal trials. The essay should go on to outline what war crimes are, with reference to the different ways in which they can be constituted. War crimes trials are problematic as they tend to take place after conflicts, where the victors hold the defeated to account. This makes it seem as if the victors are using the law to obtain revenge. Another central problem concerns the scale of war crimes trials. These are often much more complex than normal criminal trials, and could also involve atrocities and crimes against humanity. Can the criminal law deal with such extremes of suffering? Another problem relates to the structure of war crimes as criminal offences. Is it right to single out individual commanders when, arguably, there are cultural dimensions to genocide? The essay could elaborate on these themes by referring to specific war crimes trials, and showing how they exemplify these general themes.

NOTES

Feedback to activities

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Using feedback

Feedback is designed to help you judge how well you have approached the activities in the text. It will show you whether you have understood the question, and chosen the correct solutions.

Do not look at the feedback until you have answered the questions. To do so beforehand would be pointless, perhaps even counter-productive. Doing the activities helps you to learn. Checking the feedback helps you to learn more. Remember that 'doing' activities teaches you as much as reading does.

You should reflect on what the feedback tells you, and note down your thoughts in your portfolio.

Chapter 2

Activity 2.1

You should get into the habit of scanning the English-language quality press and a range of journals that cover international affairs.

Activity 2.2

Grotius is important to international law because his work shows an early attempt to argue that the relationships of states should be governed by law. Writing in the early modern period Grotius attempted to show the nature of the rules and principles that would regulate activities of state, in particular in the conduct of war.

Activity 2.3

Koskenniemi describes how in the 19th century relations between European states were based on a search for a balance of power that was regulated by rules and principles.

Activity 2.4

The text describes how the period after the Second World War saw further changes in international law as the remaining European empires came to an end, and international organisations such as the UN came into existence. With the ending of the Cold War, new tensions have been created in international law. Among other events, one could mention the attacks of September 2001, the 2003 invasion of Iraq and also the rise of groups such as ISIS.

Activity 2.5

International human rights law is a form of public international law that relates to the protection of human rights. Although it can be treated as a free-standing subject, it is necessary to see that its grounding principles relate as much to the general principles of international law, as they do to the specific principles that protect and encourage human rights.

Activity 2.6

International law is unlike domestic law. International law regulates the relationships of sovereign states and international institutions like the UN. The nature of international law is thus very different from the subjects of criminal and civil law at a national or domestic level. Although there are sources of international law, there is perhaps a greater degree of uncertainty of the precise parameters of certain concepts than would be found in determining sources of domestic law. The way in which the International Court of Justice operates is also different from the role played by domestic courts. However, one should not over-emphasise these distinctions. Domestic law, as much as international law, is also characterised by discretionary and regulatory systems.

Activity 2.7

We have made reference to Article 38, para.1, of the Statute of the Court. This usefully describes the sources of international law: international conventions, custom, general principles, judicial decisions and the teachings of the most highly qualified publicists. We could also make reference to 'soft law' and decisions and resolutions of international organisations. We will go on to define these sources in detail. This issue of the sources of law is important for the development of the protection of human rights because, as pointed out above, these general sources of international law are also sources of human rights law.

Activity 2.8

No feedback provided.

ACTIVITY 2.9

Treaties are important sources of human rights law because they state obligations that are binding on those parties or nations that have signed the treaty.

ACTIVITY 2.10

There is a complex relationship between customary law and the law of treaties. It may be that a treaty puts customary law in a treaty form, or, it may be that putting customary law in a treaty form modifies customary rules to such an extent as to make a new rule. This is an important question for a human rights lawyer because determining the precise nature of a human right may involve looking both at customary law, treaty law, and the relationship between these two sources of law.

ACTIVITY 2.11

A human rights issue could raise concerns over sources of law because showing that a right exists may mean linking it to a source of international law. If, for example, there were no treaty source for the right, one would have to be able to cite its existence in international law. For instance, although rights for widows exist in one of the Protocols to the African Charter, how would one set about arguing that it should be recognised as a right in international law more generally? One would have to be able to point to customary norms, judicial decisions and/or the writing of publicists. It is unlikely that such a right was *jus cogens*, unless one could argue that it was an element of the principle that outlawed discrimination (see below), perhaps a difficult argument to make. There are general principles of international law, but it is unlikely that these would be entirely helpful in this case. They relate to broader concerns that underlie the structure of international law.

Chapter 3

ACTIVITY 3.1

The main problem with this question is defining the word 'adequate'. From philosophical, social science, political or anthropological perspectives, it may be that a strict legal definition of human rights is not adequate, as it provides a very limited understanding of the concept. Human rights are, in a legal sense, those rights contained in positive documents that can be litigated and which a court will protect. This does not cover those rights in the UDHR that a court will not protect; indeed, these rights can be seen as political rather than legal claims, in that they are statements of what is politically desirable. Thus, the legal account provides a useful working definition, but it does not answer broader questions about the cultural or philosophical nature of rights. Indeed, the whole critique of rights suggests that one of the problems of the UDHR is that it is perceived not as a universal statement, but as one rooted in Western political and cultural traditions. This might suggest that the legal understanding of human rights constantly needs to be supplemented with other understandings of human rights and, as such, is not in itself 'adequate'.

ACTIVITY 3.2

No feedback provided.

ACTIVITY 3.3

Much of what Higgins says is persuasive. She puts her own beliefs on the line. She starts with core issues of hunger and shelter, absolutely central to campaigns against world poverty. She shows that she is highly aware of the charge that universal human rights may just be a way of 'imposing the Western view of things on others'. Crucially, she makes the indisputable point that the human rights project is often welcomed – or, one might add, made use of – by oppressed groups. Her claim that dissent mainly comes from 'states and liberal scholars' has some credibility. States may be anxious to

preserve their sovereignty against external interference – indeed, states are the main targets of international human rights law, whether as violators of rights (e.g. torture) or as failing to enforce international agreements. Second, 'liberal scholars', whether from the North or the South, may be seen as élite groups cushioned from the harshness of everyday reality and prone to pursuing abstract arguments and utopian politics.

Yet in many ways Higgins' formulation embodies – no doubt entirely unintentionally, but that is the point – what critics and dissenters object to about the universalist position.

- the 'human spirit' is very quickly transformed into 'the individual'
- despite the high tone ('spirit', 'transcend') suggesting moral values, the argument is about what individuals 'want' or 'demand' (i.e. a quasi-consumerist basis)
- the immediately appealing references to 'food and shelter' quickly get turned into a specifically Western understanding of religion (as freedom of belief, i.e. a civil liberty) and then into very specific rights about fair trials – very important but hard to claim as human universals
- the claim to speak on behalf of the oppressed is made less impressive by the stereotypical presentation of them as 'the African tribesman' and 'the inhabitant of a Latin American shanty town', classic 'Othering' talk in which 'they' are very different from 'us'.

Activity 3.4

No feedback provided.

Activity 3.5

The approach to rights in Islam is different from that of the UDHR. 'Rights in Islam' are often considered in a religious context and are derived from the central tenets of faith: Allah's revelation to the Prophet in the Holy Qur'an. From this perspective, Islamic rights predate those of other traditions; indeed Islam bestowed rights upon women and children long before similar recognition was afforded in other civilisations. More recently, documents such as the UDHR, the Cairo Declaration and Arab Charter have been drawn up, but it is not possible to speak of an Islamic human rights system that could be compared to the UDHR. Rather, these documents show that the traditional defence of rights in Islam is not entirely incompatible with other traditions. There is a great deal of compatibility between such documents. However, Islamic 'particularism' can be seen in various points of incompatibility. These focus on the defence of the Islamic faith, and thus tend to limit freedom of expression; the preservation of Sharia rules also contains provisions that are incompatible with rights stated in the UDHR. At the same time, it is unwise to see Islam as homogeneous. There are different interpretations of the sacred texts and commentaries that either move towards a greater compatibility with the UDHR, or, indeed, reject it completely.

Activity 3.6

The title is an accurate description of Asian versions of human rights. The argument that they are 'relativist' is only partially helpful. It does suggest that this understanding of rights comes out of a tradition that stresses its difference from the dominant Western tradition. For instance, it prefers values such as the solidarity of the community to an emphasis on individual freedom. However, Asian ideas of rights are also rooted in an attempt to define an Asian 'identity'; and this means that one would do better to consider Asian history and culture as a central component of this claim to a distinct identity, rather than abstract arguments about cultural relativism. Besides, there must be a claim to universalism in any argument about cultural values that are of general relevance. Once you approach Asian ideas of human rights from this perspective, it is clear that the difference between, say, the Singapore School and Chinese Communist idea of rights, are pronounced.

Chapter 4

ACTIVITY 4.1

There is tension between a state's sovereignty and human rights because the latter may make for a limitation of the former. A sovereign state has complete law-making powers in relation to its own citizens. No other state or international agency may intervene in the domestic affairs of that state. However, the concept of international or universal human rights clearly suggests that a state's sovereignty is limited to the extent that it must respect the human rights of its citizens. This means that in those areas where human rights would be infringed or limited, the state has no competence. It also means that the state has a duty to protect the human rights of its citizens. The role of human rights in the UN was limited at first, because it was thought that states would not cooperate, if they saw human rights as a limitation on their law-making power. Furthermore, the UN has to rely on states to respect and protect human rights. In this sense, the UN cannot argue that the two concepts are incompatible. So it is not as if the post-war world sees an increasing realisation that the powers of the sovereign state should be limited in the name of human rights; rather, there is an ongoing sense in which the extent of human rights and the sovereignty of nation states must be negotiated.

ACTIVITY 4.2

Human rights law is a complex, evolving body of thought and practice. It has its roots in Western political and economic history, but is made problematic by the relationship between the developed and the developing world. Consider, for a moment, the way that 'peoples' rights' disrupts the largely Western discourse of human rights because it posits peoples' rights rather than strictly individual ones. This approach has been less accepting of existing international law norms and practices, preferring to focus on the necessary connection between law and political economy. Theories of human rights in Africa have argued that the discourse should privilege peoples' rights or solidarity rights. When this approach makes a claim as to the universal nature of rights, it does so with reference to a set of universal criteria that privileges the need for control over economic resources in the name of a people. Thus, there is a central linkage between the notion of a people's self-determination, and the need to control the resources of a nation state.

ACTIVITY 4.3

If we look at the International Monetary Fund's Articles of Agreement – the treaty that set up the IMF – we will see that it is directed to manage world financial systems. Its powers extend over international monetary cooperation, the maintenance of orderly exchange rate arrangements and the facilitation of world trade. The World Bank lends money to sovereign governments, or for projects guaranteed by sovereign governments.

Bank loans take one of two primary forms: investment for specific projects such as roads, power stations or dams; or lending conditioned on economic and policy reforms by the borrower. Although human rights were never part of the original remits of either organisation, involvement in the economic development of poorer nations has pushed human rights to the fore. Today, both organisations are committed to the Millennium development goals, and see the protection of human rights as an element of the work that they do in the developing world.

ACTIVITY 4.4

Although the primary objectives of these institutions are oriented towards the management of world trade and the world economy, they have, in different ways, begun to appreciate that human rights form a part of their remit. The IMF and the World Bank finance loans to aid the development of the economies of the world's poorer nations. Human rights have increasingly come to be appreciated as central to economic well-being. Human rights are seen as an element in a broad approach to re-structuring economies; one way in which a government can be assessed in terms of its

efficiency is the extent to which it has a functioning legal system that protects human rights. From the perspective of the WTO, there is a similar sense that rights and trade are not incompatible. One could consider, for example, the negotiations of the WTO in the area of anti-HIV/AIDS medicines and intellectual property rights. Although these institutions have all been heavily criticised, we can perhaps see that human rights are increasingly seen to be essential to their various remits.

Activity 4.5

To the extent that both the UN Charter (Articles 55 and 56) and the UDHR (Article 28) provide Articles that either expressly, or by implication, provide for a right to development, then it is clearly possible to affirm that such a right does exist. This argument is strengthened by the existence of the 1986 Declaration on the Right to Development. However, arguing that there is a right to development has always proved controversial. The announcement of the NIEO largely failed to create an international order that would promote development, and critics have suggested that the right to development is either too vague or too politically oriented to be taken as a clearly defined legal idea. Other arguments about the nature of the rights in the ICESCR, while interesting, have also failed to produce a consensus over the terms of the right to development.

Activity 4.6

This is an accurate statement. Civil society groups play a central role in lobbying for human rights, coordinating international campaigns, providing research and advice and publicising human rights causes. They also feed into the creation of human rights norms, as can be seen (for example) by the 1997 Ottawa Conference and the Landmines Treaty. Civil society groups can be immensely influential in obtaining changes in the policy of national governments, and also, affecting international trade talks, as can be seen their opposition to the 1999 Seattle Trade Talks. Critics of the work of these groups have accused them of lacking a democratic mandate, and of influencing the development of human rights in ways that reflect Western agendas. Despite these criticisms, though, it is worth remembering that international human rights law involves states, individuals and civil society groups.

Chapter 5

Activity 5.1

The preamble to the UN Charter outlines the goals of the organisation. In summary, the UN is dedicated to the prevention of war, the promotion and protection of human rights, respect for the rule of law at a national and international level, and the promotion of social progress.

Activity 5.2

The General Assembly can discuss questions or matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the present Charter. The General Assembly can make recommendations to the Members of the United Nations or to the Security Council. The Security Council may take action against a Member State. This can include sanctions, or, in certain extreme cases, military intervention. The Economic and Social Council coordinates the economic, social, and human rights work of the UN. It may make policy recommendations addressed to Member States and other UN institutions. It is responsible for promoting higher standards of living, full employment, and economic and social progress, and encouraging universal respect for human rights and fundamental freedoms. It has the power to make or initiate studies and reports on these issues.

Activity 5.3

It would be wise to disagree with this statement. The rights contained in the Declaration are not incoherent. Indeed, taken together, they build up a coherent set of standards that relate to democracy and the rule of law. There is insufficient space here

to consider all the rights in the Declaration, so it is necessary to show how a group of rights relate to each other, and are coherent with the overall goals of the Declaration. Article 3 states that 'Everyone has the right to life, liberty and security of person'. The values that underlie this Article are relevant for the operation of legal systems. They could be linked with the principle articulated in Article 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

Article 7 states the central equality principle to the law. These values are further elaborated by Articles 8, 9, 10 and 12, which provide more substance for due process and fair trial rights. Due process and fair trial rights are essential in guaranteeing an independent judiciary and court system. These institutions are clearly central to the rule of law in guaranteeing that remedies are available to citizens, and that government is limited and acts in accordance with human rights.

Activity 5.4

There are at least three different interpretations of the role of the rapporteur. The first highlights the fact finding and documentation function of the role; the second sees the office primarily in terms of its prosecutorial/publicity function and the third stresses the conciliation function. This difference of opinion suggests that, like the other agencies and institutions of the UN, the role of the rapporteur is complex and open to different interpretations.

Activity 5.5

The United Nations Human Rights Council was established in 2006 by the General Assembly to replace the former United Nations Commission on Human Rights. The Commission on Human Rights had been responsible for the drafting of the Universal Declaration. The Commission also drafted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These Covenants were adopted in 1966. Aside from standard setting, the Commission was also empowered to become more active in intervening in human rights issues. Over time, however, the Commission became politicised and was increasingly discredited. As a consequence, the Commission was wound up and the General Assembly replaced it with the Human Rights Council. The Council is composed of the representatives of 47 of the Member States of the UN, who are elected to it by the General Assembly. In some respects the Council continues the work of the Commission but in others it is a break from it. The Human Rights Council, much like the Commission before it, is responsible for strengthening the promotion and protection of human rights around the world and for addressing situations of human rights violations and can make recommendations on them. The Human Rights Council also works with the UN Special Procedures established by the former Commission on Human Rights and now assumed by the Council. These are made up of, for example, special rapporteurs, special representatives and independent experts and these monitor, examine and publicly report on thematic issues or human rights situations in specific countries. Among the key innovations of the Human Rights Council system as opposed to the Commission is the introduction of the Universal Periodic Review mechanism which considers on a cyclical basis the human rights situations in all States who are members of the UN. Another key power is the Complaint Procedure which allows individuals and organisations to bring human rights violations to the attention of the Council.

Activity 5.6

No feedback provided.

Activity 5.7

The rights in the ICCPR combine to create a basic set of standards that are to be guaranteed by states who are signatories to the treaties. The rights in the Covenant set standards that cover certain basic civil and political values. For instance, the values of self-determination and non-discrimination are fundamental. The Covenant goes on

to mandate guarantees in relation to both the traditional civil liberties, like freedom of assembly and association, but goes on to cover political participation and the protection of a basic social unit like the family. All the rights that the Covenant covers are coherent with rule of law values.

Activity 5.8

The First Optional Protocol lays down a mechanism for the Committee to consider individual complaints about alleged violations of Covenant rights. To make use of this procedure, individuals must first have exhausted all available domestic remedies. They must then submit a written communication to the Committee. As long as the communication is not an abuse of the process, and not submitted anonymously, the Committee may bring it to the attention of the state party. The state party then has a six month period to submit to the Committee a written statement that clarifies the matter, and specifies what remedy (if any) has been put in place. The main purpose of the Second Protocol is the abolition of the death penalty. The Protocol places an obligation on states parties to take all necessary measures to abolish the death penalty, although certain very limited reservations are possible. States parties must submit reports to the Human Rights Committee, specifying the measures that they have taken to put the Protocol into effect. Furthermore, states parties recognise the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations under the Protocol (Article 4). The Human Rights Committee is also competent to receive and consider communications from individuals.

Activity 5.9

Politics, novelty, acceptability and viability are the key themes for all these questions.

The machinery is quasi-judicial as there is no provision for an oral hearing, or for fact finding. The Protocol refers only to written submissions to the Committee; the hearings or debates between Committee members are confidential and the status of the 'views' of the Committee are also ambiguous. Furthermore, there is no way to enforce a decision of the Committee that the state in question should make recompense. In a judicial process, we would expect no ambiguity as to the legality and binding nature of the HRC's views. The hearing of individual communications by the Committee is a very limited procedure; indeed, it would be very difficult for any organisation to do this on a global scale. The solution seems to be the development of regional mechanisms. These offer advantages in terms of 'logistics, local trust and homogeneity'. In some instances, the Committee appears powerless to act where national authorities consider that the Committee has no authority to interfere in its domestic affairs. However, *Toonan* v *Australia* (488/92) shows that, where national authorities do recognise the authority of the Committee, legislation can be changed.

Political acceptability is the key for (b) and (c), and for (d) it is about states not bringing a petition as they know one will be brought against them in retaliation, so it is about diplomacy and good relations.

On (f) and (g), it is important to bear in mind this is a global mechanism – the workload of State Reports is unbearable as it is and petitions take up even more time for a part-time body such as the HRC. Admissibility criteria need to be interpreted in order to strike a balance so as to allow petitions where there is no other realistic remedy, although this is not how the HRC has always interpreted the ICCPR or approached its role.

Activity 5.10

There are certain points in common between both these Covenants. For instance, Article 1 of the ICSECR, like Article 1 of the ICCPR, stresses the principle of self-determination. This is the foundation of both sets of rights guaranteed by the Covenants. The prohibition of discrimination and the requirement that equality is promoted also flows through the Articles of both Covenants. However, the ICSECR stresses a different (but related) set of rights. Thus, for example, rights to education, housing and health care are peculiar to the ICSECR. The approach of the Covenants is to observe a basic distinction between political and social/economic aspects of human

affairs. As much as this distinction can be maintained, it also involves a rather artificial separation. This is why there is such a degree of overlap between the Covenants.

The other issues relate to Article 2 of each Covenant and the nature of the obligation and finally the Communications Protocols and how they are similar and also differ.

ACTIVITY 5.11

These are key issues that you should consider in your reading. The issue of state reporting ties up with the politics of 'enforcement' and supervision. There are matters of delay, resources, compliance and goodwill among others. Try to understand how these relate to the issue at hand, such as the backlog of reports and consideration and on-going reform.

ACTIVITY 5.12

The aim here is for you to consider the relationship between the differing UN mechanisms: those that are Charter based and those that are treaty based. Clearly, there is an overlap but also competition and not solely complementarity. The two 'systems' may be streamlined to be more coherent but that is not without consequences and political influence and decisions will pay a key role in any reform.

Chapter 6

ACTIVITY 6.1

In the Preamble to the Convention it is noted that the ECHR takes the Universal Declaration of Human Rights as a key point of reference. The Preamble also stresses that the need to promulgate a 'common understanding' of human rights, and 'effective political democracy' are the Convention's founding principles. The Convention is presented as coming out of a tradition that is 'shared' between the different nations of Europe, part of a 'common heritage of political traditions'. The Convention also affirms its belief in the need for the 'collective enforcement' of human rights, and thus can be seen as one of the ways in which European civilisation was to be re-oriented to values that would hopefully prevent the disasters of fascism, communism and war.

ACTIVITY 6.2

Human rights are said to be central to the EU, but it is necessary to remember that the Union started out as a common market, to ease the flow of goods, personnel and services between Member States. This was never an exercise in pure economics, and the European common market has always been linked to ideas about its regulation, and about the rights that protect European citizens. Thus, if one looks at the TFEU, one can find that it does protect certain economic and social rights, such as the principle of equal pay for equal work in Article 141 TFEU. It is also the case that the drafters of the Treaty, and indeed the subsequent structural treaties, have said that they have tried to make sure that the Union corresponds with international human rights norms. In more recent years, there has been increased attention on human rights in the Union. For instance, the Treaty on European Union (TEU) 1993 stresses the role played by 'democracy and the rule of law, and respect for human rights and fundamental freedoms' in the Union's foreign policy. The Charter of Fundamental Rights of 2000 further confirms the commitment of the Union to the creation and sustenance of a coherent, Europe-wide framework of human rights. An issue of contention has been the supremacy of EU law and how it may take priority over the human rights obligations of Member States. If the EU does eventually accede to the European Convention then these issues should be resolved.

The European Social Charter has been the poor relative of the European Convention. It has always existed in the shadow of the ECHR and the obligations it entails as well the method of supervision highlight that it is more difficult to enforce against any reluctant states parties. It is important to bear in mind, however, that in recent years the European Social Charter has undergone something of a revival and is now working

in increasingly effective ways. The key difference to bear in mind with the UN treaty bodies is the system of collective complaints – as opposed to, normally, individual complaints.

Activity 6.3

If we exclude Article 1, which states a general obligation on states parties to respect human rights, and which is strictly not part of Section I, the Articles can be listed as follows: Article 2 states the right to life; Article 3 states the prohibition on torture; Article 4 concerns the prohibition of slavery and forced labour; Article 5 articulates the right to liberty and security; Article 6 covers the right to a fair trial; Article 7 provides that there should be no punishment without law; Article 8 guarantees respect for private and family life; Article 9 is the right to freedom of thought, conscience and religion; Article 10 provides for freedom of expression; Article 11 is the right to assemble and associate; Article 12 is the right to found a family; Article 13 is the right to an effective remedy; Article 14 contains the prohibition on discrimination; Article 15 prevents the derogation from certain Articles; Article 16 allows restrictions to be imposed on the political activity of aliens; Article 17 prevents both states and individuals or groups from claiming 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'; Article 18 seeks to prevent restrictions on one set of rights being used as restrictions on other rights.

Chapter 7

Activity 7.1

The foundational documents are: the Charter of the Organisation of American States, 1948, the American Declaration of the Rights and Duties of Man, 1948 and the American Convention on Human Rights 1969.

The existence of these three foundational documents makes the Inter-American system somewhat complex, as it is based upon two overlapping instruments, namely the American Declaration on the Rights and Duties of Man and the American Convention. For instance, the mandate of the Commission derives from the statue of 1960, and the Convention. If a nation has not ratified the Convention, it may only be subject to the 'old' powers of the Commission rather than the 'new' powers under the Convention.

Activity 7.2

The distinctiveness of the political context of the Inter-American system can be highlighted with a brief contrast with the political context of the European system. Whereas the European system has (generally) overseen since 1945 settled democracies, the Inter-American system has had to cope with the existence of dictatorships in many nations of the region. This has meant that the jurisprudence of the Court reflects the problems of the region: torture, political violence and 'disappearances'; this also highlights the contrast with the jurisprudence of the ECHR.

Activity 7.3

a. Chapter VI of the Convention details the bodies that are to have jurisdiction over human rights. Article 33 describes these as: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

b. Remember that there are the 'new powers' of the Commission and the older powers as well.

Activity 7.4

The Court is empowered to draw up its own constitutional statute, and determine its own rules of procedure (Article 60). Article 57 states that the Commission appears in all cases before the Court. This is elaborated in Article 61: only states parties and the Commission have 'the right to submit a case to the Court'. Article 62 mandates that for

rulings to be binding, a state party must declare that it recognises the jurisdiction of the Court. Article 63 describes the remedies that the Court can provide: this includes compensation and the restitution of rights that have been violated; 63(2) specifies that in instances of 'extreme gravity and urgency' the Court can adopt 'provisional measures' as may be necessary. Article 68 provides that states parties undertake to comply with the judgments of the court. Article 64 states that the court can provide interpretative rulings on the Convention for Member States of the OAS and the OAS's organs.

Activity 7.5

Rodriguez shows the Court developing a jurisprudential understanding of disappearances. Although there was no single international treaty that applied to disappearances at the time, there were a number of statements by the OAS. Furthermore, the practice of 'disappearing' people breached a number of Articles of the Convention: namely, the due process guarantees in Article 7, the right to the integrity of the person articulated in Article 5 and the right to life contained in Article 4. The practice may also mean that a government puts itself in breach of Article 1(1), the obligation to respect rights. Even if breach of 1(1) is not pleaded by the Commission, the Court can take it into account. This is because the Article states a foundational principle: any breaches of specific rights must therefore also breach 1(1). Taking into account 1(1) also allows the Court to 'impute' to states parties any disappearances that they have tolerated through the actions or omissions of public officials. Moreover, 1(1) obligates a state party to 'ensure' the full exercise of Convention rights by all in their jurisdiction. Therefore, the agencies of government must themselves guarantee human rights. States must do everything in their power to prevent violations of rights; and, if a violation is proved, to both restore the right and provide compensation.

Activity 7.6

Read the discussion on the cases carefully and consider what is being asked of the states in question and whether a fair, reasonable and appropriate balance is being struck between the effective protection of rights and when and how states parties should be held accountable. The principle relevant in this area states that before the Court and the Commission can becomes involved in a case, all the domestic remedies available must have been exhausted. This principle respects national sovereignty as it means that international agencies only become involved as a last resort, although Article 25 places an obligation on states to provide remedies. A state could always thus argue that as a remedy is available, neither the Commission nor the Court has jurisdiction. However, if the remedy is ineffective then the victim is denied the assistance of the Court. Under these circumstances, then, the Court argues that the exceptions to Article 46(2) apply and the complainant would not have to show exhaustion of domestic remedies before taking the case to the Commission.

Activity 7.7

The Colombian government has faced serious problems in its ongoing attempts to create a rule of law society. The Commission's report suggests that the central problem might be the failure of the state to achieve the monopoly of violence on which the rule of law is founded. Of course, once the rule of law state is established the power of the state becomes subject to the law, and the state is meant to govern in the best interests of all. The Colombian state has not been able to gain this measure of legitimacy. Rather, various right- and left-wing groups, and criminal gangs, have been able to organise themselves and the state has been largely powerless to prevent large-scale criminal activities and an unacknowledged civil war. To some extent, certain Colombian governments bear the blame for supporting the military against left-wing guerrilla groups, and engaging in clandestine and illegal activities. More recently, governments have attempted to disengage from the military, and create open and transparent institutions, but this has been hampered by various factors. Developments in 2016 and 2017 seem to suggest that with a cease fire in place, in the future Colombia will become a more settled and accountable state with greater respect for human rights.

Activity 7.8

It is fair to say that the Commission and the Court have been engaged in developing a jurisprudence of social reconstruction that provides principles to guide societies that have been riven by conflict to achieve some form of political stability. These principles have been drawn from a variety of international sources, including the so-called 'laws of war' and the Universal Declaration. However, they do of course also draw on the American Convention. In aiding the transition from conflict to peace, the Court and the Commission have stressed the importance of the right to know the truth, at both an individual and personal level, about the atrocities of the past. The Court has relied on Article 25 of the American Convention in this area. Articles 8 and 25 have also been used to provide rights for next of kin to find out the relevant facts and obtain prosecutions of guilty parties. Principles also relate to the creation of amnesty processes. Certain more serious crimes are excluded from pardon, and in relation to those 'imprescriptable' offences, states parties have an obligation to investigate and bring prosecutions. Relevant sources here are Articles are XVIII and XXIV of the American Declaration and Articles 1(1), 2, 8, 25 of the American Convention. The victim's right to reparations is also part of the reconstruction process, which must also include the demobilisation of warring factions, and the reintegration of former soldiers and guerrillas into civil society.

Chapter 8

Activity 8.1

Article 45 of the Charter states that the Commission must both promote and protect human and peoples' rights in Africa. To this end, the Commission has the power to 'collect document, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments'. The Charter also details a 'communication procedure'. An individual, NGO or group of individuals can petition the Commission about rights abuses. A state party can also petition the Commission, if it believes that another state party has violated the Charter. The Commission can only consider a communication once it has ascertained that all local remedies have been exhausted. The Commission may, if it deems it necessary, ask States to provide it with all the relevant information; and when it is considering the matter, it may invite States to make oral or written presentations. The Commission will then determine whether or not there has been a violation of the Charter and make recommendations to the State and to the OAU on what remedies are required. The mandate of the Commission is quasi-judicial and, as such, its final recommendations are not in themselves legally binding on the States concerned.

Activity 8.2

The Constitutive Act contains, as one of the objectives of the African Union, the promotion and protection of human rights 'in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. Lloyd and Murray argue that the AU appears to have a more focused approach to human rights compared to the OAU. For the OAU, the principles of national sovereignty were privileged. Furthermore, the Constitutive Act provides for the promotion of democratic principles and institutions, popular participation and good governance. The commitment to the creation of the African Court of Justice may also help to further develop human rights, as may the social and economic initiatives underlying NEPAD. NEPAD links economic development with human rights.

No feedback provided on second part.

Activity 8.3

The ACHPR is a catalogue of rights that presents itself as distinctively African. There are two aspects of this claim: the Charter articulates 'peoples' rights' and contains a stress on the duties of rights holders. Although neither the idea of peoples' rights, nor the

idea of the duties of rights holders are innovations, the presentation of these concepts in the Charter is distinctive. The roots of the Charter are in the liberation struggle against apartheid and colonialism, which gives the notion of peoples' rights a political edge. These are rights that allow a people to claim political self-determination and sovereignty over their own resources. The concept of duties is interesting. The very idea of rights has always correlated with the duty that is owed to the rights holder. The African Charter stresses, however, that the rights holder has duties towards his or her community that effectively limit the scope of individual rights. This could tend to suggest that the Charter does not envisage that governments themselves abuse human rights. Although perhaps necessary to achieve political solidarity, this concept of duties is perhaps now understood differently, particularly as ethnic groups have claimed the right to secession, or the right to self-government. Developments of a distinctively African human rights law also make more use of due process rights, social, economic and political rights; as well as the first-generation rights contained in the Charter.

Activity 8.4

This question focuses on the ACHPR and its effectiveness. It would be necessary, in the opening paragraphs of an answer, to refer to the enforcement mechanisms provided by the Charter, and to discuss the perceived weakness of the 'soft law' approach that the Charter takes. It would then be possible to use the case of Saro-Wiwa and the Ogoni Eight to show that the Commission has made interventions in domestic politics that have drawn attention to human rights abuses. The essay would have to show that after the execution of the Ogoni activists, both the UN and the Commission found that there had been serious abuses of their rights. The Commission also found that there had been serious abuses of the rights of the Ogoni. Despite the transition from military to civilian rule in Nigeria, the suspension of the operation of the Charter was highlighted. The Nigerian government's response to the Commission showed that they took the problem seriously, and were attempting to make institutional reforms that would go some way to satisfying Ogoni demands, and rectifying the abuses of human rights.

Activity 8.5

To answer this essay, one has to place the Protocol in context. The Protocol does indeed recognise the difficulties faced by women in Africa in the spheres of employment, the family and culture at large, and goes some way to broadening the protection offered by the ACHPR. It would be necessary to show how specific Articles create rights and duties that both protect women and promote their well-being. For instance, widow's rights recognise that certain customs might prevent women from inheriting property, or give men a greater share of inheritance. If this means that a woman could lose land or a right to land, it would clearly contribute to the problem of landlessness and poverty. Widow's rights ensure that the state takes action to prevent this kind of problem. Other areas could, of course, be considered. However, it is also necessary to deal with the issue of whether or not the Protocol has an effective enforcement mechanism. The Protocol does not contain rights that can be litigated, and remedying rights abuses are left in the hands of the state. There are monitoring provisions, but this might also mean that problems persist. To date, the Protocol remains unratified by a great number of African nations; an issue that itself suggests that there may be serious problems in ensuring that these rights take effect.

Activity 8.6

Answering this question would mean providing an overview of the Articles and a discussion of the main principles that underlie them. Thus, as well as dealing with specific provisions, it would also be necessary to discuss provisions such as the best interests of the child, and the need to adapt rights from other international charters to cover children's rights. This would mean discussing the rights that relate to the parent/child nexus, and others problems peculiar to children, such as sexual exploitation and child labour. The essay must also consider the enforcement mechanisms provided for by the Convention. These are essentially 'soft law' and cannot in themselves be litigated before a court. You should consider in some detail the role played by the African Committee of Experts on the Rights and Welfare of the Child.

Activity 8.7

This view of the Convention is broadly correct. The essay would have to cover the two major concerns raised by the question: the extent to which the Convention is an innovation, and the extent to which serious problems have not been resolved. To deal with the first part: the Convention is, to some extent, an innovation. It was based on the 1951 Geneva Convention Relating to the Status of Refugees, and furthered the protection offered by the ACHPR. However, it also made for certain new developments; in particular, the definition of refugee status. To this extent, the Convention is an innovation. It would also be fair to say, however, that problems remain. The Protocol on the Rights of Women suggests that there are gaps in the protection offered by the Convention, and there is also a large gap between 'paper rights' and the practices of African states, which tend to fall short of international standards. The refugee problem in Africa is not going to be solved by Conventions on their own, but only with sustained national and international cooperation in resolving the political, social and economic problems that cause refugee crises in the first place. The present crisis in Darfur suggests that there is still a great deal to be done.

Chapter 9

Activity 9.1

a. There are perhaps three main issues here. The colonial structure of Kenyan land law tended to vest title in men, and the legal system at independence concentrated on equitable distribution of land across ethnic groups. In other words, gender was not an important consideration. The existence of five different legal systems, and the failure to prohibit discriminatory practices, despite a constitutional guarantee, has exacerbated these problems. The figures suggest that women are consistently excluded from social and economic life. They suggest that discrimination against women is structural. In other words, discrimination does not just take place in one area, but across all areas of social life.

b. Customary law is derived from custom and practice. There are many different forms of customary law as each ethnic group may have its own customs. Customary law is recognised by legislation. It would be wrong to think that customary law is necessarily an obstacle to change as customs themselves change. However, to the extent that it is based on social practices that may be deep-seated, then customary law may be resistant to women's rights. This can be seen with ritual practices such as wife inheritance. This custom fulfilled a social function to the extent that it allowed women who were not able to hold land a degree of protection. However, from the perspective of the inherent dignity of women such a custom is in breach of international standards.

Activity 9.2

An-Na'im writes that the authority of customary law derives from a complex mix of social, economic and cultural factors that tend 'to reflect existing power relations within the community'. There may also be a religious input, in that customary law derives from a belief that it has divine sanction. Customary law (perhaps even all law) perpetuates itself through personal and communal identification with these norms, and the social structures they reflect. It may not be necessary to disturb these foundations in order to make advances in human rights provision. The important issue is to allow internal debates to take place within cultures, rather than attempt to impose new norms in a heavy-handed way. An-Na'im stresses the importance of education in changing the popular beliefs that underlie cultural practices. What An-Na'im calls 'external actors', or those outside of the culture, can assist this process through a sensitive engagement in cross-cultural dialogue that does not strengthen the hands of those who are resistant to change in the culture.

Activity 9.3

No feedback provided.

Activity 9.4

The reports from Singapore suggest that in some areas the government of Singapore is working hard to honour its obligations under the Treaty with policy initiatives and legislation that protects women's rights and to enhance their social and economic opportunities. However, this has to be seen against the reservations that the government has inserted into the Treaty. The government argues that these are necessary to preserve the multicultural nature of Singaporean society and to preserve Asian cultural norms. At the same time, measures are being taken to try to ensure broader compatibility, in particular between Islamic law and the Women's Convention.

Women's rights issues in Nigeria raise different concerns than in Singapore. For a start, Nigeria is far more populous than Singapore and geographically much bigger. Issues raised by African culture are also different to those raised by Asian culture; although, at a general level, there are some parallels. Cultural values are inconsistent with women's rights in certain areas. However, both Nigeria and Singapore have plural cultures, in that they recognise jurisdictions that exist alongside that of state law; however, issues of coherence and coordination are more marked in Nigeria. This obviously creates problems of implementation of general standards. The overall impression one receives from the reports is that in some areas progress has been made but profound difficulties arise from the resistance to women's rights. The return to democracy, however, seems to have led to a marked improvement in the overall human rights situation.

Activity 9.5

Violence is a product of the unequal power relations that exist between men and women but these relations are created politically or ideologically and are not biological or somehow determined by reasons beyond our control. To understand violence, then, one has to look at social institutions and the state. However, violence against women should not blind one to the fact that violence also takes different forms, based on race, class or nationality. There is also a problem with the family. Although this can be nurturing, it can also be a source of sexual abuse and oppression. The negative sense of self and self-worth that can hold women back stems from abuse within the family.

Activity 9.6

The Declaration on the Elimination of Violence against Women is a statement of principle that asserts that violence against women is a major abuse of their human rights. Although there is no enforcement mechanism contained or suggested in the Declaration, this is, to some extent, rectified by the creation of the Special Rapporteur, who can receive individual complaints, make country visits and submit annual reports to the Commission.

Chapter 10

Activity 10.1

It would be worth broadly agreeing with this statement. The Convention clearly marks an important threshold in the struggle against racism, and did feed into successful struggles against colonial and apartheid orders. As far as the former is concerned, human rights were important in encouraging international pressure on those European states such as Portugal that sustained empires in the developing world. The Convention was also important in the struggle against the apartheid regime in South Africa. However, it must also be pointed out that the early struggles against colonial regimes predate the Convention. The civil liberties struggle in the US was also largely conducted without reference to the Convention or international human rights. Anti-colonial struggles were motivated by ideologies of nationalism, socialism or Pan-Africanism, or ethnic or religious solidarity; the civil liberties struggle was motivated by a variety of beliefs and ideologies, but has to be seen as a broad political movement. It would ultimately be very difficult to show that these factors were 'more

important' than human rights, but it is necessary to see these struggles as motivated by ideologies that were not entirely based on human rights.

Activity 10.2

The Convention is built on the fundamental principles of human rights: all humans are inherent in rights and dignity. These core values are linked to what could be seen as the central principle of anti-discrimination law: all are entitled to equal protection by the law from discrimination and incitement to discrimination. The Convention then relates these abstract ideals to the need to reconstruct a world order after 1945, and to continue the struggle against those regimes that continued with segregationist or apartheid policies.

Activity 10.3

The Committee on the Elimination of Racial Discrimination is a body created by the Convention to oversee its operation. Article 8 describes the composition of the Committee, and Article 9 requires states parties to submit various reports for the Committee's consideration. A state must submit a first report that describes what steps have been taken to integrate the Convention into domestic law; states parties must then make further reports every two years. The Committee can itself make recommendations based on the reports to the Secretary-General. There are also enforcement mechanisms under the Convention. Article 11 allows a state party to bring to the attention of the Committee the activities of the state party in breach, and the Committee can then ask the party in breach to report on the matter concerned. The Committee can appoint a Conciliation Committee, and, ultimately, remit the matter to the ICJ or to some other agreed forum for settlement. Article 14 creates another enforcement mechanism. It allows a state party to recognise the competence of the Committee to receive individual communications from individuals. Once a state party has recognised individual communications, it must create a body to deal with them. This body also has reporting duties to the Secretary-General of the UN. Individual communications are confidential. Petitioners also have the right to send a communication to the Committee, if the national body has not allowed them to 'obtain satisfaction' within a six-month period.

Activity 10.4

No feedback provided.

Chapter 11

Activity 11.1

The moral and other arguments for and against torture are powerful. As the reading makes clear, one of the great ironies is that torture is widely accepted as an activity that is deemed so repugnant, all consider it to be prohibited yet it remains widespread. The issue is why – in some of the scenarios given, e.g. the ticking time bomb, one can see the temptation to use torture. In other scenarios, it is simply about an abuse of power. There is no right or wrong answer to some parts of the questions but you need to think carefully about the issues being raised.

Activity 11.2

a. Article 1 contains a definition of torture, based on the infliction of severe pain and suffering by or at the instigation of a public official or a person acting in an official capacity. Article 2 obligates states to enact legislation that makes it illegal for private individuals to commit acts of torture; it also prohibits certain justifications of torture: the argument that torture is justified by 'exceptional circumstances' – or the excuse that it has been authorised by a superior officer. Article 3 links the prohibition on torture to a fundamental right of the refugee. A state cannot 'return or extradite' a person to a state if there are 'substantial grounds for believing that he would be in danger of being subjected to torture'. Articles 6–9 detail the way in which states must prosecute those who have allegedly committed acts of torture

and Article 10 places a duty on a state party to publicise the prohibition on torture. The remaining Articles of the section relate to the both the remedies that must be available to torture victims, and, *inter alia*, the fact that torture evidence can never be relied upon, unless it is evidence that an act of torture has been committed.

b. The definition of torture in Article 1 requires certain key criteria to be met. It is a clear compromise to achieve agreement between States. You should consider how the definition could be amended and where you would like to see such changes made. Also bear in mind the impact this may have.

Activity 11.3

Article 17 establishes the Committee against Torture (CAT), and Article 19 goes on to detail the reporting obligations that states parties have to the Committee. A state party who signs the Convention must submit a report to the Committee a year after the Convention enters into force in the country concerned. Reports must then be submitted every four years. The Committee examines the reports and then issues observations and recommendations to the state concerned. Article 20 provides the CAT with the power to 'invite' states parties to 'cooperate' in the investigation of allegations of widespread and systematic torture within the territory of the state. Article 21 provides another enforcement mechanism: the consideration of inter-state complaints. Article 22 allows a state to recognise the right of individual communications to the Committee. Procedures require a state to respond to an individual communication; the Committee can also communicate its views both to the state concerned, and the individual who has brought the communication.

Activity 11.4

There has certainly been a great deal of tension between the courts and the executive over these issues. Conflict initially focused on the 2001 Act. In 'A' the House of Lords asserted review powers over the Act. The government responded with the 2005 Act but the clear position of the House of Lords seems to have put the issue to rest – evidence tainted by torture is not admissible. However, the second part of the activity asks you to consider why such evidence should be prohibited if the UK was not in any way complicit in the evidence being procured by torture. There are interesting moral and philosophical issues here which you should consider.

Activity 11.5

This question seeks to ask you to examine the ECtHR's *refoulement* cases and *Saadi* is used as the focal point as it is clear reaffirmation of the principles relating to the absolute nature of the prohibition in such circumstances. While the Court's approach is attractive from a human rights perspective, if one considers the perspective of the state then what can it do with an individual who is clearly identified as a 'security risk' but with little chance of convicting such an individual due to the rules on jurisdiction? These are difficult issues and delicate balances are involved.

Activity 11.6

This question seeks to ask you to examine the ECtHR's *refoulement* cases and *Othman* and to consider its relationship with *Saadi*. The activity is designed to get you to read and think in detail about the cases in question and the relationship between them. Some of the issues relate back to those referred to above – what can or should states be able do with individuals considered a 'security threat' and what the concept of 'European supervision' means in this context.

Chapter 12

Activity 12.1

a. The Convention is built on four general principles that are articulated in Articles 2, 3, 6 and 12. Article 2 provides a prohibition on discrimination against children, a positive statement of equal opportunity. Article 3 concerns the 'best interests

of the child'. If a public authority acts in relation to a child, that authority must abide by this test. Article 6 states the right to life, survival and development. It is expressed somewhat differently from the Declaration because this right applies specifically to children; development must be understood in a broad sense to include emotional, physical, mental and cultural development. Article 12 specifies that children should be allowed to have opinions, and that these opinions must be considered in matters that concern the child. This would of course include judicial and quasi-judicial hearings.

b. The Convention is a statement of general principles and provides a reference point for human rights standards as far as they relate to children. Once a government has become a signatory to the Convention, it must make sure that it honours the principles contained with the Convention, to the extent that it legislates or provides programmes of action to achieve the goals of the Treaty. Governments must submit periodic reports to the Committee, which can then make recommendations to the General Assembly. These recommendations might request that the Secretary-General undertakes studies on specific issues relevant to children's rights. The Committee can also make suggestions and general recommendations based on information received in the periodic reports, and also call for assistance from other specialist international organisations.

c. As mentioned above, the Convention on the Rights of the Child is the most widely ratified of international human rights instruments. Two nations have not ratified the Convention: Somalia and the USA. The former has not been able to ratify the Convention, because its government is not internationally recognised. The USA has signed the Convention, but has not yet ratified it. There are several reasons for non-ratification: it has been the practice of the US government to concentrate on ratifying one treaty at a time; and currently this is the Convention on the Elimination of All Forms of Discrimination against Women. The reason given for this is that it is necessary to make sure national and federal law is coherent with the Treaty's obligations. However, there may also be a degree of political reluctance to ratify. As we will see below, there are many important areas where state law in the USA remains contrary to the Convention.

d. The substantive protocols are important developments in the evolution of children's rights. It is not that the rights in the Protocols cannot be read in to the Convention, it is about the Protocols focusing the attention of States on certain issues and ensuring they take key steps to seek to eradicate them. Obviously there are other important substantive issues that have not been subject to a Protocol; child labour would be a good example.

Activity 12.2

This statement is an accurate description of the persistence of bonded labour in India. The country's government has committed itself to international human rights standards, and domestic law is, for the most part, in line with these standards. The government has also shown itself, at a policy level, to be committed to the struggle against the economic exploitation of children. However, the persistence of bonded labour can explained by the failure to put either law or policy into effect at a grassroots level. The reasons for this failure are complex, but can be mentioned in outline. There is still a cultural and general acceptance of the practice. Corruption and negligence among officials also makes the practice hard to combat. The groups whose children are involved also tend to be minorities who suffer general discrimination in law and society. The reports of the Indian government to the HRC, CRC and others suggests that the commitment to ending bonded labour continues, and has to be placed in the broader context of the struggle against poverty and national development.

Activity 12.3

It is difficult to describe a pattern looking only at the limited sample above. However, certain tentative conclusions could be reached. Child soldiers are only needed because of conflicts. In this sense, accounting for the use of child soldiers means thinking about why civil wars and regional conflicts begin. This is a difficult question

to answer; but it is necessary to remember that the problem of child combatants does not exist in a vacuum. The phenomenon of child soldiers is related to conditions of poverty. Studies suggest that children are most likely to serve as soldiers if they are poor, separated from their families and deprived of other opportunities. Figures suggest that orphans and refugees comprise a large number of those recruited. But economic or social pressures do not, in themselves, entirely account for children becoming soldiers. Many children are abducted, and forced to serve; for instance, in the north of Uganda. Recruitment applies to both girls and boys. Evidence suggests that in El Salvador, Ethiopia, and Uganda, around a third of the child combatants were girls. Girls (although figures are not available relating to boys) may also be raped. Children do not just serve as front line troops. They may also be forced to take up ancillary roles as porters.

ACTIVITY 12.4

No feedback provided.

Chapter 13

ACTIVITY 13.1

The broad approaches toward religion as a right relate to autonomy and also non-discrimination. The approach adopted makes a difference to the outcome of any complaints concerning the right.

ACTIVITY 13.2

This comes back to how to protect the right – indeed to think about what is the core of the 'right' under examination.

ACTIVITY 13.3

No feedback provided.

ACTIVITY 13.4

The 1981 Declaration's importance lies in what it does not say and further in how difficult it was to agree to. That tells us a great deal about the right – it is a major bone of contention between certain groups or blocs of States.

ACTIVITY 13.5

No feedback provided.

ACTIVITY 13.6

These are three critical cases on the issue of religious freedom and dress. They highlight an evolution in the ECtHR's approach over time and a less hostile approach to religiously inspired rules of dress. At the same time, the cases show the Court giving a wide degree of discretion to states, which is not compatible with its role of supervision.

ACTIVITY 13.7

No feedback provided.

Chapter 14

ACTIVITY 14.1

This statement is an accurate description of a problem that underlies refugee law. First, it would be worth asking why the question asserts that it is necessary to distinguish between these three terms. It is presumably because the law itself creates distinctions between these categories of person, and accords them different rights and obligations. A refugee is rather narrowly defined and cannot be seen as an economic

migrant. A refugee may be considered an asylum seeker, but, it is suggested, there is no automatic right to asylum. So, it would appear that the law does draw a sharp distinction between these classes of person. However, if we look at the problem in a slightly different way, we come to a different conclusion. Again, this suggests that the statement above is accurate, as it suggests that despite the boundaries that the law draws, the concept of the refugee remains somewhat fluid. For instance, the 'Ugandan' and 'Kenyan' Asians who sought entry to the UK in the 1970s were not treated as refugees, although arguably they were. The Albanian Kosovans arriving in the UK in the 1990s were treated as refugees seeking asylum. Such distinctions suggest a great deal about the political climate of the times.

Activity 14.2

One can argue that the mechanisms of human rights, which tend to address and place duties on the sovereign state in which a person has nationality or residence, have already broken down for the refugee. In this sense the refugee is, by being stateless, an international concern. Refugees may be seeking refuge in a country where they do not have nationality. The international community must act in unison to relieve individual countries of the additional duties that accommodating refugees places upon them.

Activity 14.3

We need to begin by specifying the key features of the test. As the main issue relates to the subjective and objective features of the test, we do not need to outline the whole definition. The key features of the test for the purposes of this question are that a person has a 'well-founded fear of being persecuted'; and that this persecution is for 'reasons of race, religion, nationality, membership of a particular social group or political opinion'. This well-founded fear means that a person has placed himself 'outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country'.

As fear is subjective, the definition includes a subjective element. Determination of refugee status requires an evaluation of the applicant's statements. To assess the subjective element, the decision-maker must take into account the individual's personal and family background, his membership of a particular racial, religious, national, social or political group and his own interpretation of his situation. The applicant's fear must be reasonable; exaggerated fear can be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified. However, the fear must also be 'well-founded', and this means that the test also has an objective element.

Feedback is not provided for other aspects of the Activity.

Activity 14.4

No feedback provided.

Activity 14.5

No feedback provided.

Activity 14.6

The 1951 Convention and the 1967 Protocol contain three types of provisions:

a. Provisions giving the basic definition of refugee status. This defines who is a refugee and also outlines when refugee status ceases to apply to an individual.

b. Provisions that outline both the refugee's legal status and the rights and duties that refugees have in their country of refuge. Once a person has been legally declared a refugee, these rights and duties are immediately relevant, although they are not relevant to the initial determination of refugee status.

c. Provisions that relate to the implementation of the Convention and the Protocol for administrative purposes. Consider, for instance, Article 35 of the 1951 Convention and Article 11 of the 1967 Protocol. These documents provide an undertaking by states parties to cooperate with the Office of the UNHCR.

ACTIVITY 14.7

Article 12 provides that the personal status of the refugee is determined by the law of the country in which she is domiciled. Articles 13 and 14 relate to specific property rights, and Article 15 and 16 concern public law rights. These Articles build up the catalogue of rights that the refugee must enjoy.

ACTIVITY 14.8

See above for much of the material that this activity seeks to pull together and consolidate. There is no feedback provided on the last issue – but it is important for you to consider whether the 1967 Protocol by amending the 1951 Convention can provide a 'universal definition'. If not, what is the alternative? It is important for you to consider such matters.

Chapter 15

ACTIVITY 15.1

One can see that IHL and international human rights law are complementary. Both bodies of law attempt to protect individuals, but there are differences. Humanitarian law is more limited than human rights law as it applies only in situations of armed conflict. Human rights law, on the other hand, is of general and universal application at all times. Furthermore, although the sources of IHL are different from those of human rights law, the fundamental concepts are similar. Human rights law seeks to provide norms that stress the worth of the individual human being, and prevent certain forms of treatment that denigrate the dignity of the human being; IHL specifies that, even within armed conflict, the dignity of the human being is to be preserved.

ACTIVITY 15.2

No feedback provided.

ACTIVITY 15.3

No feedback provided on the ICJ case.

On the relationship between crimes against humanity, war crimes and genocide it is important to consider both what distinguishes them from one another and where they overlap. Genocide can be both a crime against humanity and a war crime – it depends on the context. Does it make a difference if something is a war crime as opposed to a crime against humanity? It is important to try and discuss such matters with your tutors, friends or family and think them through so as to ensure you appreciate the issues and nuances.

ACTIVITY 15.4

Both Tribunals were set up by the UN Security Council acting under Chapter VII of the UN Charter. The ICTY and the ICTR had jurisdiction over war crimes, genocide and crimes against humanity. The functions of these bodies related to this jurisdiction, but they also had a role – which is contested – in furthering reconciliation in post-conflict societies. Finally, the bodies also developed the principles of international criminal law, and built a body of practice that will be relevant for the International Criminal Court.

In terms of their problems – they were myriad, as outlined in the discussion, and should look back at that material. It is worth considering if you think that we will encounter such Tribunals again in the future.

ACTIVITY 15.5

No feedback provided.

ACTIVITY 15.6

No feedback provided.

Notes

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