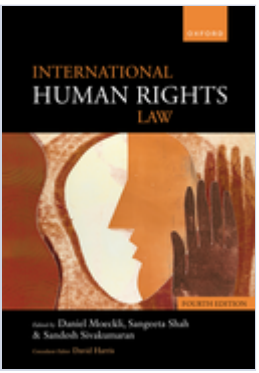

International Human Rights Law (4th edn)
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p. 151

8. Equality and Non-Discrimination

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https://doi.org/10.1093/he/9780198860112.003.0008
Published in print: 01 June 2022
Published online: September 2022

Abstract

The principle of equality and non-discrimination has gained a prominent status in virtually every liberal democratic state as well as in international law. However, what this fundamental rule entails in practice is difficult to establish. The challenge is to give substance to the abstract notion of equality by translating it into concrete legal formulations that clarify which forms of unequal treatment are legitimate because they are based on morally acceptable criteria and which ones are wrongful. This chapter explains how this challenge has been addressed in international human rights law. It first discusses the meaning of equality and non-discrimination and gives an overview of the different norms guaranteeing equality and non-discrimination in international human rights law, followed by an explanation of the concepts of direct and indirect discrimination. The chapter then considers the requirements for a difference in treatment to be justified under international human rights law and sets out the various obligations that the right to equality imposes on states, in particular their duty to take positive action to ensure everyone can enjoy that right.

Keywords: equal treatment, formal equality, substantive equality, international human rights, non-discrimination, direct discrimination, indirect discrimination, positive action, evidence and proof

Summary

The international human rights system is founded on the idea that all human beings have the same set of fundamental rights. Accordingly, almost all general human rights instruments guarantee the right to equality and non-discrimination, and several specialized treaties provide protection against particular forms of discrimination. International human rights law prohibits discrimination in treatment (direct discrimination) as well as in outcome (indirect discrimination), regardless of

whether it is intended or unintended. Yet it also acknowledges that it may sometimes be justified to classify people: differences in treatment or outcome are permissible as long as they pursue a legitimate aim in a proportionate manner. Indeed, the right to equality may require states to treat people differently in order to overcome historical patterns of disadvantage and achieve real equality.

1 Introduction

The notion that all human beings are equal and therefore deserve to be treated equally has a powerful intuitive appeal. It is one of the central ideals of the Enlightenment and at the heart of liberal theories of the state.[1] The US Declaration of Independence of 1776 famously proclaimed that 'all men are created equal', and today virtually every liberal democratic state guarantees equality in its constitution. The principle of equality and non-discrimination has gained a similarly important status in international law. It is included in the key human rights instruments, and the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, describes it as 'a fundamental rule of international human rights law'.[2]

What this fundamental rule entails in practice, however, is difficult to establish. No two human beings are equal in the sense that they are identical. We might be able to say that two people are equal in respect of some measurable characteristic ('they both weigh 82 kilograms'), but they will always be different in some other respects (income, political opinion, and so on). In order to apply the principle of equality we first need to define the relevant ↵ criterion in respect of which people should be judged to be alike or different. And even when two persons can be said to be alike, it might still be questionable whether they should always be treated equally. Furthermore, we need to decide what kind of equality we seek to achieve. Do we mean by equality that people should be treated identically? Or that they should be given the same opportunities? Or that they should be placed in the same position? Equality can be formulated in different ways, and deciding which concept of equality to use is not a question of logic but a political choice. In this sense, equality is an 'empty idea'[3]—it does not answer the questions of who are equals and what constitutes equal treatment. External values, not derivable from the concept of equality, are necessary to answer these questions.

p. 152

The challenge, therefore, is to give substance to the abstract notion of equality by translating it into concrete legal formulations that make clear which forms of unequal treatment are legitimate because they are based on morally acceptable criteria and which ones are wrongful. This chapter explains how this challenge has been addressed in international human rights law.

Section 2 discusses what, in general terms, equality and non-discrimination can be interpreted to mean. Section 3 gives an overview of the different norms guaranteeing equality and non-discrimination in international human rights law. Section 4 explains the concepts of direct and indirect discrimination. Section 5 considers the requirements for a difference in treatment to be justified under international human rights law. Section 6 sets out the different sorts of obligations that the right to equality imposes on states, in particular their duty to take positive action to ensure everyone can enjoy this right.

2 The Meaning of Equality and Non-Discrimination

The terms ‘equality’ and ‘non-discrimination’ have often been used interchangeably and described as the positive and negative statement of the same principle: whereas the maxim of equality requires that equals be treated equally, the prohibition of discrimination precludes differential treatment on unreasonable grounds.[4] In recent years, however, there has been an increased emphasis on the positive formulation. This shift in terminology highlights that equality implies not only a negative obligation not to discriminate, but also a duty to recognize differences between people and to take positive action to achieve real equality.[5] Thus, whereas ‘non-discrimination’ corresponds to the more limited concept of *formal equality*, usage of the term ‘equality’ stresses the need for a more positive approach aimed at *substantive equality*.

2.1 Formal Equality

Formal equality refers to Aristotle’s classical maxim according to which equals must be treated equally or, more precisely, likes must be treated alike.[6] This notion of equality as consistency focuses on the process rather than the outcome: equality is achieved ↵ if individuals in a comparable situation are treated equally, regardless of the result. The values underpinning formal equality are the liberal ideals of state neutrality and individualism, that is, the notion that the state should not give preference to any one group and that people should be treated exclusively on their individual merits and regardless of group membership.

p. 153

However, as noted already, this idea of equality raises the question of when two cases can be said to be alike. It is inevitable that laws and government action classify persons into groups that are treated differently. Under a progressive taxation system, for example, people are treated differently according to their income. In states with a juvenile justice system, people are treated differently according to their age. These distinctions are generally seen as perfectly legitimate because they are based on morally acceptable grounds. Accordingly, at least in common language, the word ‘discrimination’ also has a neutral connotation (‘to discriminate between right and wrong’). But which differences in treatment are legitimate and which ones are not? The principle that likes should be treated alike does not, by itself, answer this question.

There are a number of other problems with the concept of equality as consistency.[7] First, since it is not concerned with the outcome, it does not matter whether two parties are treated equally well or equally badly. Thus, it is compatible with this understanding of equality that a city closes all its swimming pools rather than open its ‘whites only’ pools to black people (‘levelling down’).[8] Second, inconsistent treatment can only be demonstrated if the complainant can find a comparably situated person who has been treated more favourably. Yet for a woman in a low-paid position, for instance, it may be difficult to find a man doing the same job. Third, treating people apparently consistently regardless of their differing backgrounds may have a disparate impact on particular groups. A law which, in the famous words of Anatole France, ‘forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread’ will in fact entrench inequality.[9]

2.2 Substantive Equality

Proponents of a substantive conception of equality recognize that a merely formal notion of equality as procedural fairness can in fact perpetuate existing patterns of disadvantage. Drawing on values such as human dignity, distributive justice, and equal participation, they argue that equality must go beyond consistent treatment of likes. There are two main variants of substantive equality: equality of opportunity and equality of results.

According to the notion of equality of opportunity, true equality can only be achieved if people are not only treated equally but are also given the same opportunities. Like competitors in a race, everyone should be able to begin from the same starting point. Equality of opportunity requires the removal of barriers to the advancement of disadvantaged groups, such as upper age limits for employment that may disadvantage women with childcare responsibilities. According to a broader, substantive understanding of the concept, it may also require positive measures such as training. But equality of opportunity does not aim to achieve equality of outcome. Once the race has started, everyone is treated the same. Thus, while equality of opportunity is to some extent about redressing past discrimination, it also stresses individual merit.

Equality of results goes further than this and aims to achieve an equal distribution of social goods such as education, employment, healthcare, and political representation. ↵ It recognizes that removing barriers does not guarantee that disadvantaged groups will in fact be able to take advantage of available opportunities. Abolishing upper age limits, for example, does not, by itself, ensure that more women with childcare responsibilities will be able to apply for the respective jobs. Equality of results can be understood and achieved in different ways. In its strongest form, it explicitly aims to increase the representation of disadvantaged groups in educational institutions, employment, or public office through preferential treatment and quota systems.

p. 154

These differing conceptions of equality find their reflection in different forms of legal regulation. Formal equality forms the conceptual basis of the requirement of equality before the law and prohibitions of direct discrimination, whereas prohibitions of indirect discrimination are supported by a substantive notion of equality (see Section 4 for the distinction between direct and indirect discrimination). ‘Affirmative action’ programmes (see Section 6) can be justified on the basis of a substantive notion of equality, but they are incompatible with a formal conception of equality as consistency. In any jurisdiction, a range of regulations that reflect different conceptions of equality will be found; no legal system relies exclusively on simply one approach to equality.

3 Equality and Non-Discrimination in International Law

The right to equality and non-discrimination gives concrete expression to the basic idea on which the whole international human rights system is founded: that all human beings, regardless of their status or membership of a particular group, are entitled to the same set of rights. Since it underlies all other human rights, equality is often described not only as a ‘right’ but also as a ‘principle’. The foundational significance of equality is reflected in the fact that it is proclaimed in the very first article of the Universal Declaration of Human Rights (UDHR): ‘All human beings are born free and equal in dignity and rights’.

This section first gives an overview of the different sources of the right to equality and non-discrimination in international law. Next, it considers the scope of these norms: do they guarantee equality and non-discrimination only in the context of other human rights or across the board? Finally, the prohibited grounds of distinction are explored: which groups are protected against discrimination?

3.1 Sources

Article 1(3) of the UN Charter makes it clear that one of the basic purposes of the UN is the promotion of the equal guarantee of human rights for all without any distinction. Numerous instruments aimed at the realization of this notion have been adopted under the auspices of the UN. The general human rights instruments guarantee the right to equality and non-discrimination in several of their provisions: the UDHR in Articles 1, 2(1), and 7; the International Covenant on Civil and Political Rights (ICCPR) in Articles 2, 3, and 26; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Articles 2(2) and 3. As far as the specialized human rights treaties are concerned, at least three of them are specifically devoted to addressing certain forms of discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). The Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) at least partly pursue the same objective and contain explicit provisions on equality and ↵ non-discrimination.[10] The only international human rights treaties without explicit non-discrimination clauses are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

p. 155

The right to equality and non-discrimination is also guaranteed by all major regional human rights instruments: the African Charter on Human and Peoples' Rights (ACHPR) (Articles 2, 3, 18(3)–(4), and 28), the American Convention on Human Rights (ACHR) (Articles 1 and 24), the American Declaration of the Rights and Duties of Man (Article II), the Arab Charter on Human Rights (Articles 2, 9, and 35), the ASEAN Human Rights Declaration (Articles 1, 2, 3, and 9), the European Convention on Human Rights (ECHR) (Article 14 and Protocol No 12), and the Charter of Fundamental Rights of the European Union (Articles 20, 21(1), and 23). In addition, the Inter-American Convention against All Forms of Discrimination and Intolerance provides protection against discrimination based on a long list of criteria, while several specialized regional treaties, such as the Protocol to the ACHPR on the Rights of Women in Africa, the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance, and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, protect against particular forms of discrimination.

Finally, it is now widely acknowledged that, at the very least, the right to non-discrimination on the grounds of race, sex, and religion binds all states, irrespective of their ratification of human rights treaties, because it has become part of customary international law.[11] The Inter-American Court of Human Rights has gone further than this and held that also the guarantee against discrimination on other grounds, including

language, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth, or any other status, forms part of general international law and, indeed, is a norm of *jus cogens* that cannot be set aside by treaty or acquiescence.[12]

3.2 Scope: Subordinate and Autonomous Norms

Non-discrimination provisions can be subdivided into subordinate and autonomous (or free-standing) norms. *Subordinate norms* prohibit discrimination only in the enjoyment of the rights and freedoms otherwise set forth in the respective instrument. An example of a subordinate norm is Article 2(1) ICCPR, which states:

> 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.

Other subordinate norms include Article 2(1) UDHR, Article 2(2) ICESCR, Article 2(1) CRC, Article 7 ICRMW, Article 1 ACHR, Article 2 ACHPR, and Article 14 ECHR.[13] As the ECHR does not contain an autonomous norm in addition to its subordinate provision in Article 14, the jurisprudence of the European Court of Human Rights interpreting it is ↵ of particular importance. According to the European Court, in order to invoke Article 14, an applicant must show that the facts of the case fall 'within the ambit' of another substantive Convention right.[14] However, there is no need to show that there has been *a violation* of that Convention right. A measure that in itself is in conformity with the requirements of a given ECHR right, but is of a discriminatory nature, will violate that right *when read in conjunction with Article 14*. For example, it does not as such amount to a violation of Article 8 ECHR (the right to respect for family life) if a state fails to create a parental leave scheme. However, when a state does create such a scheme, then this is a matter falling within the ambit of Article 8, and there is a violation of that article read in conjunction with Article 14 if, without a legitimate reason, men are denied the right to parental leave while women are granted it.[15]

p. 156

Article 7 UDHR, Article 26 ICCPR, Articles 2 and 5 ICERD, Article 24 ACHR, and Article 3 ACHPR, on the other hand, are *autonomous norms*: they guarantee non-discrimination not only in the context of other rights but in general. For example, Article 26 ICCPR provides:

> 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.

The UN Human Rights Committee elaborated on the scope of this provision in *Broeks v The Netherlands*.[16] Mrs Broeks had been denied unemployment benefits on the basis of legislation that provided that married women could only claim benefits if they could prove that they were 'breadwinners'—a requirement that did not apply

to married men. The Netherlands argued that Mrs Broeks could not rely on Article 26 ICCPR as it could only be invoked in the sphere of civil and political rights; Mrs Broeks' complaint, however, related to the right to social security, which was specifically provided for under the ICESCR. The Human Rights Committee rejected the government's argument, holding that it did not matter whether a particular subject matter is covered by the ICCPR or some other international instrument. It stressed that 'Article 26 does not merely duplicate the guarantees already provided for in Article 2' but instead 'prohibits discrimination in law or in practice in any field regulated and protected by public authorities'.[17] The Committee confirmed this finding in its General Comment 18.[18] Thus, states parties to the ICCPR have a general obligation neither to enact legislation with a discriminatory content nor to apply laws in a discriminatory way.

As noted already, the ECHR only contains a subordinate non-discrimination guarantee. This gap is partially addressed by Protocol No 12 to the ECHR. The Protocol, which entered into force in 2005 but has not been widely ratified so far, contains a non-discrimination guarantee that is not limited to the enjoyment of Convention rights.[19] However, this guarantee is still narrower than the general right to equality before the law and equal protection ↵ of the law under Article 26 ICCPR in that it only applies to the enjoyment of rights set forth by (national) law.

p. 157

3.3 Prohibited Grounds of Distinction

Which grounds of distinction are unacceptable and should, therefore, be prohibited? There is no straightforward answer to this question. Depending on one's moral and political views, any criterion may be regarded as either relevant or irrelevant. There is certainly broad consensus today that normally a person's inherent characteristics such as race, colour, or sex are not acceptable criteria for differential treatment. In addition, grounds such as membership of a particular group, holding certain beliefs, and national or social origin are outlawed by most human rights treaties. But as is evident from a comparison between the ICCPR, adopted in 1966, and the ICRMW, adopted in 1990, what is seen as unacceptable can change over time: the ICRMW has considerably expanded the list of prohibited grounds by adding the criteria of conviction, ethnic origin, nationality, age, economic position, and marital status. Today, further criteria, including disability[20] and sexual orientation, gender identity, and sex characteristics,[21] would have to be added. In addition, discrimination may be intersectional, that is, based on a combination of characteristics that form an individual's identity rather than a single ground.[22] Intersectional discrimination often occurs based on sex in combination with one or more other grounds.[23]

Equality and non-discrimination norms vary widely in their approaches to defining the prohibited grounds of distinction. A first type of norm provides for a *general guarantee of equality*, without specifying any particular prohibited grounds. Article 24 ACHR, for instance, simply states: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.' Such norms leave it to the relevant body to decide which distinctions are acceptable and which ones are not.

A second category of norms uses a diametrically opposed approach: these norms contain an *exhaustive list* of prohibited grounds. The CEDAW, for instance, prohibits only distinctions based on 'sex' (Article 1), the ICERD those based on 'race, colour, descent, or national or ethnic origin' (Article 1(1)), and the CRPD those based on 'disability' (Articles 1 and 5). Article 2(2) ICESCR, Article 2(1) CRC, and Article 1 ACHR contain lists that are

much longer but still fixed (in the case of the ICESCR, 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'). However, since the latter three lists also include the rather vague criteria of 'other status' (ICESCR and CRC) and, respectively, 'any other social condition' (ACHR), they lend themselves to an extensive interpretation.[24]

Steering a middle course between these two extremes, there is a third category of norms which contain a list of prohibited grounds but one that is *open-ended*. For instance, Article 14 ECHR (as well as its Protocol No 12) prohibits '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'.[25] Similarly, Article 2(1) UDHR, Articles 1(1) and 7 ICRMW, and Article 2 ACHPR provide for non-discrimination 'without distinction of *any* kind, *such as* ...'.[26] As a consequence, even distinctions made on ↵ grounds that are not listed may engage these provisions. The European Court of Human Rights sometimes does not even find it necessary to state the particular ground of distinction involved when considering a case under Article 14 ECHR.[27]

p. 158

The text of Article 26 ICCPR ('discrimination on *any* ground *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status')[28] suggests that this provision is also open-ended. Nevertheless, the Human Rights Committee has often been at pains to fit a particular distinction within one of the listed grounds, be it the specific ones or the broad rubric of 'other status'. Thus, it has found that the reference to 'sex' also includes 'sexual orientation'[29] and that 'other status' covers grounds such as nationality[30] and age.[31] But it has never clarified how it decides whether a difference in treatment comes within the reference to 'other status'. Its efforts to apply one of the listed grounds suggest that the Committee regards the list of Article 26 as exhaustive and it has accordingly stated that an applicant is required to show that the difference in treatment was based on one of the enumerated grounds.[32]

4 Direct and Indirect Discrimination

At the heart of all non-discrimination norms is the formal equality requirement that likes should be treated alike. It is, therefore, clear that international human rights law prohibits direct discrimination (Section 4.1). But human rights bodies and courts have acknowledged that the requirement of consistent treatment is not sufficient to achieve true equality: not only discriminatory treatment but also a discriminatory outcome (indirect discrimination) is prohibited (Section 4.2). Finally, it is important to note that international human rights law prohibits both intended and unintended discrimination (Section 4.3).

Whether there has been a difference in treatment or result is the first question that a court needs to assess when considering a discrimination claim under international human rights law. Once a prima facie case of direct or indirect discrimination has been made out, the court must decide whether there is a justification for the difference in treatment or outcome. This second element of the test is discussed in Section 5.

4.1 Direct Discrimination

Direct discrimination occurs when a person, *on account of one or more of the prohibited grounds*, is treated less favourably than someone else in comparable circumstances. Thus, the complainant must show, first, that others have been treated better because they do not share the relevant characteristic or status and, second, that these others are in a comparable, or, in the terminology of the European Court of Human Rights, 'analogous'[33] or 'relevantly similar',[34] situation. In practice, international human rights bodies often tend to merge the comparability test with the test for whether there is an objective justification for the difference in treatment, explained in Section 5.

A classic example of direct discrimination is when members of a certain ethnic group are denied access to a public facility, such as a swimming pool, which is open to everyone else. But most cases of direct discrimination are not as straightforward as this. More often, direct discrimination occurs covertly: the 'discriminator' will not admit that the difference in treatment was based on a prohibited ground, making it difficult for the complainant to provide sufficient evidence. Furthermore, as explained already, it may not always be easy to identify a person who is in a comparable situation. How can a woman establish pay discrimination when there are hardly any men doing the same job?

p. 159

4.2 Indirect Discrimination

Indirect discrimination occurs when a practice, rule, or requirement that is outwardly '*neutral*', that is, not based on one of the prohibited grounds of distinction, has a disproportionate impact on particular groups defined by reference to one of these grounds. Thus, although there is no difference in treatment, due to structural biases, treating unequals equally leads to unequal results.

The concept of indirect discrimination has its origins in US and European Community (EC) law but has now also found its way into the jurisprudence of international and regional human rights bodies. The Human Rights Committee recognized the possibility of indirect discrimination, albeit without explicitly referring to the concept, for the first time in *Singh Bhinder v Canada*.[35] The case concerned a Sikh who was dismissed from his employment with the Canadian Railway because he refused to comply with a legal requirement that safety headgear be worn at work, as his religion required him to wear only a turban. The Committee found that the legislation may amount to de facto discrimination: although it was neutral in that it applied to all persons without distinction, it disproportionately affected persons of the Sikh religion. (There was nevertheless no violation of Article 26 ICCPR as the safety headgear requirement was based on reasonable and objective grounds.) But only much later, in *Althammer v Austria*, a case concerning the abolition of household benefits that affected retired persons to a greater extent than active employees, did the Committee expressly refer to the concept of 'indirect discrimination':

> The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[36]

Similarly, it was only in 2007 that the European Court of Human Rights, in its ground-breaking ruling in *DH and others v the Czech Republic*, came up with an explicit definition of 'indirect discrimination'. Several Roma children had complained that the manner in which statutory rules governing assignment to schools were applied in practice resulted in the placement of a disproportionate number of Roma pupils in 'special schools' for children with 'mental deficiencies'. Referring to the definition of 'indirect discrimination' in EC law, the Grand Chamber of the European Court of Human Rights stated:

> The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group … In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC and the definition provided by ↵ ECRI [the European Commission against Racism and Intolerance], such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent.[37]

p. 160

The African Commission on Human and Peoples' Rights seems also to have recognized the concept of indirect discrimination when it found a violation of Articles 2 and 3 ACHPR in a case where legal remedies, even though guaranteed to everyone by law, were in practice 'only … available to the wealthy and those that can afford the services of private counsel'.[38] The Inter-American Convention against All Forms of Discrimination and Intolerance 2013 contains, in Article 1(2), an explicit definition of 'indirect discrimination'.[39]

4.3 Discriminatory Intention

In some legal systems, such as in the USA, complainants need to show a discriminatory intention or purpose to establish discrimination.[40] There is no such requirement under international human rights law; the reason why someone has been treated less favourably is irrelevant.

That both intended and unintended discrimination are prohibited under international law is apparent from the explicit definitions of discrimination contained in some of the human rights treaties. The ICERD defines discrimination as any distinction based on one of the listed grounds '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'.[41] The CEDAW definition is almost identical.[42] The Human Rights Committee, in its General Comment on non-discrimination, has adopted the same definition for the purposes of the ICCPR[43] and has made it clear in its jurisprudence that discriminatory intention is not a necessary element of discrimination.[44] Equally, the European Court of Human Rights has indicated that discrimination under Article 14 ECHR may also relate to the *effects* of state measures.[45]

As is illustrated by the rulings in *Althammer* and *DH* described in Section 4.2, indirect discrimination is often equated with unintended discrimination. Conversely, it is normally assumed that where there is direct discrimination, there is a discriminatory intention. Although it is true that these concepts will often correlate, this is not always the case. There may be cases of direct discrimination—for example, the exclusion of pregnant women and mothers from certain types of work—where the intention is to protect the respective

groups rather than to discriminate against them. On the other hand, a 'neutral' criterion such as a literacy test for job applicants may well be used as a pretext for excluding certain ethnic groups, amounting to intended indirect discrimination.

p. 161

5 Justified and Unjustified Distinctions

Once it is established that there has been a difference in treatment or outcome, the next question that needs to be answered is whether there is a justification for it. As explained already, it is to some extent inevitable that states classify people into different groups. The crucial question is whether there are objective and reasonable grounds for these distinctions. This section first explains the relevant test under international human rights law. Next, it explores what standard of review human rights bodies or courts apply to carry out this test. Finally, it considers matters concerning evidence and proof.

5.1 The Justification Test

The Human Rights Committee, in its General Comment on non-discrimination, has stressed that, for the purposes of the ICCPR, 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'[46] But it is in the jurisprudence of the European Court of Human Rights that the criteria for distinguishing between justified and unjustified distinction have been most clearly articulated. The Court interpreted Article 14 ECHR for the first time in the *Belgian Linguistics Case* and has since repeatedly confirmed those conclusions:

> [T]he Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[47]

This two-limb test, requiring that any difference in treatment must (1) pursue a legitimate aim and (2) be proportionate, is very similar to the test used in the context of other rights to assess the permissibility of limitations, described in Chapter 7. The test formulated by the European Court has been adopted, explicitly or implicitly, by most other human rights bodies. While the Human Rights Committee had originally failed to provide a clear and consistent explanation of what it means by 'reasonable and objective criteria', it later increasingly started to interpret these terms as requiring a legitimate aim and proportionality.[48] The Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights have embraced the same approach,[49] as has the Inter-American Court of Human Rights.[50]

p. 162 ↵ In terms of what exactly this test involves, its first limb will not usually be very difficult for states to meet: most distinctions can be argued to pursue some aim that qualifies as legitimate, for example the protection of public order or tailoring the education system to children's differing learning capabilities. More difficult to satisfy is the second element of the test, the proportionality requirement. This requirement reflects the basic notion that a fair balance ought to be struck between the interests of the community and respect for individual rights. A wide range of factors may need to be considered to assess proportionality, including the suitability of a distinction to achieve the aim pursued, the availability of alternative means, and the question of whether the disadvantage suffered by the affected individuals or groups is excessive in relation to the aim. Whilst this assessment inevitably turns on the specific facts of a given case, international human rights bodies have been consistent in their characterization of certain reasons as not sufficient to justify differential treatment; these include, among others, mere administrative inconvenience,[51] existence of a long-standing tradition,[52] general assumptions,[53] stereotypes,[54] prevailing views in society,[55] or convictions of the local population.[56]

5.2 Standard of Review

The stringency with which human rights courts or bodies review the existence of a justification will vary according to a number of factors.

Most importantly, certain grounds of distinction are generally regarded as inherently suspect and therefore require particularly strict scrutiny. The grounds attracting the greatest degree of attention and most likely to be declared unjustified are race, ethnicity, sex, and religion. That *race* is among these 'suspect classifications' is indicated by the general acceptance of the prohibition of racial discrimination as forming part of customary international law, the widespread ratification of the ICERD, and the finding of the European Commission of Human Rights, later endorsed by the Court, that 'a special importance should be attached to discrimination based on race' and that it may amount to degrading treatment.[57] The Inter-American Commission on Human Rights also applies a strict standard of scrutiny to distinctions based on race.[58] With regard to the related notion of *ethnicity*, the European Court has stressed that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[59]

That distinctions based on *sex* are particularly suspect is underlined by the wealth of international treaties addressing the problem of sexual discrimination, including the CEDAW.[60] The Inter-American Commission
p. 163 has stated that distinctions based on sex ↵ 'necessarily give rise to heightened scrutiny'[61] and the European Court has observed that 'very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the [ECHR]'.[62] Finally, the suspect nature of distinctions based on *religion* can be concluded from the unanimous adoption by the General Assembly of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief[63] and the European Court's finding that '[n]otwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable'.[64]

As far as other grounds of distinction are concerned, it is difficult to discern a consistent approach in international case law. The Human Rights Committee, for instance, has indicated that any distinction based on one of the grounds explicitly listed in Article 26 ICCPR 'places a heavy burden on the State party to explain the reason for the differentiation',[65] but that does not seem to mean that differential treatment on grounds other than race, sex, and religion are subject to the same intense scrutiny. The European Court, on the other hand, has suggested that also distinctions based on nationality,[66] illegitimacy,[67] and, more generally, membership of any 'particularly vulnerable group in society that has suffered considerable discrimination in the past' (such as people with HIV or a disability and members of sexual minorities) should be treated as inherently suspect.[68] Lists of suspect classifications are, in any event, not fixed but can change as international consensus on these matters develops. Given the recent emergence of new international norms against discrimination on grounds such as disability,[69] sexual orientation, gender identity, sex characteristics,[70] and age,[71] it seems likely that these classifications will soon be more widely regarded as suspect.

Apart from the ground of distinction, the intensity of review may also depend on a number of other factors. For example, most courts and human rights bodies tend to apply a lenient standard as far as matters of social or economic policy are concerned,[72] whereas classifications affecting fundamental individual interests entail particularly strict scrutiny.[73] Furthermore, it will generally be more difficult for states to justify direct rather than indirect discrimination. The Declaration of Principles on Equality, an important but non-binding document signed by numerous human rights and equality experts, states that 'direct discrimination may be permitted only very exceptionally'.[74]

p. 164

5.3 Evidence and Proof

According to established human rights jurisprudence, it is up to the individual complaining of discrimination to establish a difference in treatment or outcome, the ground of distinction, and the existence of comparably situated groups. Having done so, the burden of proof shifts to the state to show that there is a justification for the distinction.[75]

In cases of alleged indirect discrimination, however, complainants may find it very difficult to prove that a neutral measure has a disproportionate impact on particular groups. Therefore, the European Court of Human Rights has held that less strict evidential rules should apply in these cases: 'statistics which appear on critical examination to be reliable and significant' may be sufficient prima facie evidence of indirect discrimination.[76] Thus, in *DH*, even though the statistical figures submitted by the applicants were contentious, the Court still thought that they revealed a dominant trend and thus accepted them as sufficient to establish a presumption of disproportionate numbers of Roma children being placed in 'special schools'. As a consequence, the burden of proof shifted to the government to show that there was a justification for the disparate impact of the legislation.[77]

DH demonstrates that statistical evidence may be of decisive importance to the outcome of cases of alleged indirect discrimination. Yet often the data required to establish a presumption that a measure has a discriminatory effect can, unlike in *DH*, only be collected by state authorities. The UN treaty bodies, therefore,

regularly stress that states have a duty to collect and analyse relevant statistical data, disaggregated by grounds of distinction.[78] Such a duty to gather information has also been included in the Declaration of Principles on Equality.[79]

6 Positive Action

As with any other human right, the right to equality and non-discrimination entails state obligations of different types.[80] The *obligation to respect* requires states to refrain from any discriminatory action and to ensure that all their laws and practices comply with the right to non-discrimination. The *obligation to protect* imposes a duty on states to prevent discrimination by non-state actors. According to the consistent jurisprudence of the UN treaty bodies, this means that states must introduce comprehensive legislation prohibiting discrimination in fields such as employment, education, healthcare, housing, and the provision of goods and services. This conclusion is supported by various provisions in the respective human rights treaties themselves. Article 2(d) ICERD, for example, explicitly states that '[e]ach 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 organization'; the CEDAW contains a parallel provision in Article 2(e); and most treaties are scattered with norms requiring states to prohibit particular actions of private parties that are discriminatory or may contribute to discrimination, such as racial hate speech (Article 20 ICCPR, Article 4 ICERD, Article 13(5) ACHR), trafficking in women and exploitation of prostitution of women (Article 6 CEDAW), or racial discrimination with regard to employment, housing, or education (Article 5(e) ICERD).

p. 165 ↵ However, an exclusively prohibitory approach is severely limited in that it focuses on discrimination understood as individual, isolated events that can be remedied through penalizing the perpetrators and compensating the victims. In fact, discrimination is often the consequence of deeply embedded patterns of disadvantage and exclusion that can only be addressed through changes to social and institutional structures. Accordingly, it is now well established in international human rights law that it is not sufficient for states to have anti-discrimination legislation in place. Instead, they also have an *obligation to promote, guarantee, and secure* equality by taking proactive steps to eliminate structural patterns of disadvantage and to further social inclusion.[81] This obligation, often referred to as the duty to take 'positive action', may cover a huge variety of legislative, administrative, and policy measures, ranging from the restructuring of institutions to the provision of 'reasonable accommodation'[82] for individuals in particular circumstances, from educational campaigns to the use of public procurement to promote equality, and from the 'mainstreaming'[83] of equality issues in public policy to encouraging participation of affected groups in relevant decision-making processes.

One important aspect of 'positive action' are 'affirmative action programmes' or, as they are generally called in international law, *special measures of protection*. These are 'measures … aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality'.[84] In their strongest form, such special measures involve the preferential treatment of members of a previously disadvantaged group over others in the allocation of jobs, university places, and other benefits (often referred to as 'positive' or 'reverse discrimination'). For example, when two equally qualified persons apply for a job, priority is given to the female applicant, or a certain number of university places are reserved for racial minorities.

Although such preferential treatment is clearly incompatible with a formal notion of equality, international human rights law permits it, thus recognizing that it may be legitimate to prioritize the achievement of substantive equality over the requirement of consistent treatment. Article 1(4) ICERD, for example, provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The CEDAW contains a similar provision in Article 4(1). For the purposes of the ICCPR, the Human Rights Committee has made it clear that special measures are permissible as long as they meet the general justification test described in Section 5.1, that is, as long as they ↵ pursue a legitimate aim in a proportionate manner.[85] Proportionality in this context means, among other things, that the preferential treatment must be introduced for the benefit of genuinely disadvantaged groups, be temporary and cease once the objectives have been achieved, and not result in the maintenance of separate rights for different groups.

p. 166

Not only does international human rights law permit but to some extent it even *requires* states to adopt special measures of protection. As the Human Rights Committee's General Comment on non-discrimination states:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.[86]

That states may need to adopt special measures has also been highlighted by the Committee on Economic, Social and Cultural Rights.[87] As far as racial groups and women are concerned, the duty follows from Article 2(2) ICERD and Article 3 CEDAW, respectively. At the regional level, the Inter-American Court of Human Rights has observed that 'States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons',[88] and this obligation is now codified in the Inter-American Convention against All Forms of Discrimination and Intolerance.[89] The European Court has stressed that 'a failure to attempt to correct inequality through different treatment' may amount to a violation of the right to non-discrimination.[90]

7 Conclusion

The concept of equality and non-discrimination in international human rights law has evolved significantly since the adoption of the UDHR. Detailed legal standards have been drawn up and human rights bodies and courts have developed a rich jurisprudence, giving concrete substance to the notion of equality. Nevertheless, considerable gaps, inconsistencies, and uncertainties remain: the concept of indirect discrimination was developed in other jurisdictions and has only recently been acknowledged by international human rights bodies; details of the justification test, such as the applicable standard of review and evidentiary rules, need further elaboration; and, as far as implementation at the national level is concerned, numerous states do not yet have comprehensive legislation to combat discrimination.

The most important challenge, however, is to ensure that every human being is in fact able to enjoy her or his right to equality. In a world in which the poorest 50 per cent collectively own less than 1 per cent of global wealth,[91] equal rights remain an unfulfilled ↵ promise for large sections of the population. Developments in international human rights law are evidence of a growing recognition that, while prohibitions of discrimination play a crucial role in achieving equality, states also have an obligation to proactively tackle structural patterns of disadvantage—in other words, formal and substantive approaches to equality need to be combined. One key component of such a proactive strategy must be to ensure that all people can participate on an equal basis in all areas of economic, social, and political life, including in the very decisions on how equality should be realized.

p. 167

Further Reading

ARNARDÓTTIR, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff, 2003).

ARNARDÓTTIR, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 *HRLR* 647.

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PETERSEN, 'The Implicit Taxonomy of the Equality Jurisprudence of the UN Human Rights Committee' (2021) 34 *LJIL* 421.

Useful Websites

UN Committee on the Elimination of Racial Discrimination (CERD): **<http://www.ohchr.org/EN/HRBodies/CERD** *<http://www.ohchr.org/EN/HRBodies/CERD>***>**

UN Committee on the Elimination of Discrimination against Women (CEDAW): **<http://www.ohchr.org/EN/HRBodies/CEDAW** *<http://www.ohchr.org/EN/HRBodies/CEDAW>***>**

UN Committee on the Rights of Persons with Disabilities (CRPD): **<http://www.ohchr.org/EN/HRBodies/CRPD** *<http://www.ohchr.org/EN/HRBodies/CRPD>***>**

European Commission Against Racism and Intolerance (ECRI): **<http://www.coe.int/ecri** *<http://www.coe.int/ecri>***>**

Equal Rights Trust: **<http://www.equalrightstrust.org** *<http://www.equalrightstrust.org>***>**

Questions for Reflection

1. Have you ever been treated in a way that you experienced as discriminatory? Did that treatment amount to a violation of the right to equality and non-discrimination as guaranteed by international law?
2. The police in city X focus their operations on a specific neighbourhood that is regarded as particularly dangerous. Since that neighbourhood is mainly inhabited by members of ethnic group A, they are disproportionately affected by police operations (such as stops and searches) as compared to members of other ethnic groups. Does this amount to a violation of the right to equality and non-discrimination?

p. 168

3. What risks does the use of algorithms (that is, computer instructions that, based on a series of input data, generate an output) pose with regard to the right to equality and non-discrimination? How can algorithmic discrimination be prevented and remedied?
4. The UN High Commissioner, in her report 'Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers', has called on states to '[m]ake amends for centuries of violence and discrimination through wide-ranging and meaningful initiatives, within and across States, including through formal acknowledgment and apologies, truth-telling processes, and reparations in various forms' (A/HRC/47/53, 1 June 2021, Annex, IV.4). Does the right to equality and non-discrimination oblige states to provide redress for harms suffered in the past due to colonialism, slavery, and other racially discriminatory policies and systems?

Notes

[1] See Chapter 1.

[2] A/CONF.157/23 (25 June 1993) para 15.

[3] Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard LR* 537.

[4] eg OC-4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR Series A No 4 (1984), Separate Opinion of Rodolfo E Piza, J, para 10 ('… it appears clear that the concepts of equality and non-discrimination are reciprocal, like the two faces of one same institution. Equality is the positive face of non-discrimination. Discrimination is the negative face of equality').

[5] See eg *Nachova v Bulgaria* (2006) 42 EHRR 43, para 145 (noting that 'the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment').

[6] Aristotle, *The Nicomachean Ethics of Aristotle* (JM Dent, 1911) Book V3, paras 1131a–b.

[7] See Fredman, *Discrimination Law* (OUP, 2011) 8–15.

[8] See *Palmer v Thompson* 403 US 217 (1971).

[9] France, *Le Lys Rouge* (Calmann-Lévy, 1894) ch 7.

[10] CRC, Arts 2 and 28; ICRMW, Arts 1(1), 7, 18, 25, 27, 28, 30, 43, 45, 54, 55, and 70.

[11] For race, see eg *South-West Africa Cases (Second Phase)* [1966] ICJ Rep 6, 293 and 299–300 (Dissenting Opinion of Judge Tanaka); *Barcelona Traction (Second Phase)* [1970] ICJ Rep 3, 32. For the other grounds, see Shaw, *International Law* (CUP, 2021) 256–7 and references cited there.

[12] OC/18, *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR Series A No 18 (2003) paras 100–1 and 173.4.

[13] ECHR, Art 14 reads: '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.'

[14] For a recent case, see *Budinova and Chaprazov v Bulgaria*, App no 12567/13, Judgment of 16 February 2021, para 69.

[15] *Konstantin Markin v Russia* (2013) 56 EHRR 8, para 130.

[16] CCPR/C/29/D/172/1984 (9 April 1987).

[17] *Broeks*, para 12.3.

[18] HRC, General Comment 18, HRI/GEN/1/Rev. 9 (Vol I) 195, para 12.

[19] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art 1 ('(1) The enjoyment of any right set forth by law 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. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1').

[20] See CRPD.

[21] See Chapter 15.

[22] See Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford LR* 1241.

[23] See eg *Yaker v France*, CCPR/C/123/D/2747/2016 (17 July 2018) para 8.17; *ON and DP v Russian Federation*, CEDAW/C/75/D/119/2017 (24 February 2020) paras 7.4–7.5. See also Chapter 16.

[24] See eg, for the ACHR, *Norín Catrimán et al (Leaders, members and activist of the Mapuche Indigenous People) v Chile*, IACtHR Series C No 279 (29 May 2014) para 202.

[25] Emphasis added.

[26] Emphasis added.

[27] eg *Rasmussen v Denmark* (1984) 7 EHRR 371, para 34.

[28] Emphasis added.

[29] *Toonen v Australia*, CCPR/C/50/D/488/1992 (31 March 1994) para 8.7.

[30] *Gueye v France*, CCPR/C/35/D/196/1985 (3 April 1989) para 9.4.

[31] *Love et al v Australia*, CCPR/C/77/D/983/2001 (28 April 2003) para 8.2.

[32] *Franz and Maria Deisl v Austria*, CCPR/C/81/D/1060/2002 (23 August 2004) para 10.5.

[33] *Lithgow v UK* (1986) 8 EHRR 329, para 177.

[34] *Fredin v Sweden* (1991) 13 EHRR 784, para 60.

[35] CCPR/C/37/D/208/1986 (9 November 1989).

[36] CCPR/C/78/D/998/2001 (8 August 2003) para 10.2.

[37] (2008) 47 EHRR 3, para 184.

[38] 241/2001, *Purohit and Moore v The Gambia*, 16th Activity Report (2002) paras 53–4.

[39] Art 1(2) reads: 'Indirect discrimination shall be taken to occur, in any realm of public and private life, when a seemingly neutral provision, criterion, or practice has the capacity to entail a particular disadvantage for persons belonging to a specific group, or puts them at a disadvantage, unless said provision, criterion, or practice has some reasonable and legitimate objective or justification under international human rights law.'

[40] The leading case is *Washington v Davis* 426 US 229 (1976).

[41] Art 1(1) (emphasis added).

[42] Art 1.

[43] HRC, General Comment 18, para 7.

[44] eg *Simunek et al v The Czech Republic*, CCPR/C/54/D/516/1992 (19 July 1995) para 11.7; *Adam v The Czech Republic*, CCPR/C/57/D/586/1994 (23 July 1996) para 12.7.

[45] *Oršuš v Croatia* (2011) 52 EHRR 7, para 150.

[46] HRC, General Comment 18, para 13.

[47] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case) (No 2)* (1968) 1 EHRR 252, para 10.

[48] eg *Gillot v France*, A/57/40 (15 July 2002) para 13.2.

[49] CERD, Concluding observations: Australia, CERD/C/AUS/CO/14 (14 April 2005) para 24; CESCR, General Comment 20, E/C.12/GC/20, para 13.

[50] Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, paras 56–7.

[51] *Gueye v France*, para 9.5.

[52] *Müller and Engelhard v Namibia*, CCPR/C/74/D/919/2000 (26 March 2002) para 6.8.

[53] *Di Trizio v Switzerland*, App no 7186/09, Judgment of 2 February 2016, para 82.

[54] *Konstantin Markin*, paras 141–3.

[55] *Broeks*; OC-24/17, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, IACtHR Series A No 24 (2017) paras 83 and 219.

[56] *Inze v Austria* (1988) 10 EHRR 394, para 44.

[57] *East African Asians v UK* (1973) 3 EHRR 76, paras 207–8; *Cyprus v Turkey* (2002) 35 EHRR 30, para 306.

[58] Case 11.625, *María Eugenia Morales de Sierra v Guatemala*, IACommHR Report No 4/01 (19 January 2001) para 36.

[59] *Timishev v Russia* (2007) 44 EHRR 37, para 58.

[60] See Chapter 16.

[61] *María Eugenia Morales de Sierra*, para 36.

[62] *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471, para 78.

[63] GA Res 36/55 (25 November 1981).

[64] *Hoffmann v Austria* (1993) 17 EHRR 293, para 36. See also *Vojnity v Hungary*, App no 29617/07, Judgment of 12 February 2013, para 36.

[65] *Müller and Engelhard*, para 6.7.

[66] *Gaygusuz v Austria* (1996) 23 EHRR 364, para 42; *British Gurkha Welfare Society v UK*, App no 44818/11, Judgment of 15 September 2016, para 81.

[67] *Inze*, para 41; *Fabris v France* (2013) 57 EHRR 19, para 59.

[68] *Kiyutin v Russia* (2011) 53 EHRR 26, paras 63–4 and references cited there.

[69] See the CRPD.

[70] See Chapter 15.

[71] See UN Principles for Older Persons, GA Res 46/91 (16 December 1991).

[72] eg *Oulajin and Kaiss v The Netherlands*, CCPR/C/46/D/406/1990 and 426/1990 (23 October 1992), individual opinion submitted by Committee members Herndl, Müllerson, N'Diaye, and Sadi; *Hämäläinen v Finland*, App no 37359/09, Judgment of 16 July 2014, para 109 (stating that 'a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy').

[73] eg *Dudgeon v UK* (1981) 4 EHRR 149, para 52.

[74] Equal Rights Trust, Declaration of Principles on Equality, <http://www.equalrightstrust.org/content/declaration-principles-equality <*http://www.equalrightstrust.org/content/declaration-principles-equality*>>, Principle 5.

[75] Declaration of Principles on Equality, Principle 21. For the ECHR, see *Timishev*, para 57.

[76] *DH*, para 188; see also *Di Trizio*, paras 84–90.

[77] *DH*, paras 191–5.

[78] eg CEDAW Committee, Report on twenty-ninth session, A/58/38 (part II) para 134 (Brazil); CERD Committee, General Recommendation 36, CERD/C/GC/36 (17 December 2020) para 50.

[79] Declaration of Principles on Equality, Principle 24.

[80] See Chapter 7.

[81] eg ICERD, Arts 2(1)(e), 2(2), and 7; CERD, General Recommendation XXIX, HRI/GEN/1/Rev. 9 (Vol II) 296, paras 5, 6, 8, 9, 17, 33–5; HRC, General Comment 4, HRI/GEN/1/Rev. 9 (Vol I) 175, para 2; HRC, General Comment 18, paras 5 and 10; CEDAW, Arts 3 and 5; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Arts 2(1)(d), 2(2), 3–24.

[82] For a definition of 'reasonable accommodation', see CRPD, Art 2.

[83] For 'gender mainstreaming', that is, the integration of a gender perspective in all legislation and public policies, see Report of the Fourth World Conference on Women, A/Conf.177/20 (1995), strategic objective H.2. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains, in Art 2(1)(c), an explicit obligation of gender mainstreaming. See further Chapter 16.

[84] Progress report on the concept and practice of affirmative action by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/15 (26 June 2001) para 7.

[85] eg *Stalla Costa v Uruguay*, CCPR/C/30/D/198/1985 (9 July 1987) para 10; *Jacobs v Belgium*, CCPR/C/81/D/943/2000 (7 July 2004) para 9.5.

[86] HRC, General Comment 18, para 10.

[87] eg CESCR, General Comment 16, HRI/GEN/1/Rev. 9 (Vol I) 113, paras 15 and 35.

[88] *Juridical Condition and Rights of the Undocumented Migrants*, para 104.

[89] Art 5.

[90] *Stec and Others v UK* (2006) 43 EHRR 47, para 51; see also *Sejdić and Finci v Bosnia and Herzegovina*, App nos 27996/06 and 34836/06, Judgment of 22 December 2009, para 44.

[91] Credit Suisse Research Institute, Global Wealth Databook 2021, 114, <https://www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html <*https://www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html*>>.

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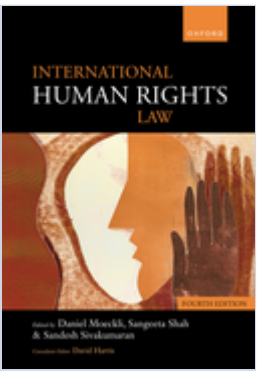

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 169

9. Integrity of the Person

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https://doi.org/10.1093/he/9780198860112.003.0009
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter examines the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment and the right to life. These are fundamental rights which stem from the concepts of human dignity and the integrity of the person, both foundational principles of human rights law. Following explanations of both these principles, the chapter sets out the meaning and content of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. It then explains the right to life, analysing similarly the content of the right and its limitations and how it has been interpreted in recent jurisprudence and treaty body commentaries.

Keywords: international human rights, human dignity, torture, degrading treatment, inhuman treatment, degrading punishment, right to life, death penalty, use of force, jus cogens

Summary

This chapter examines the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment and the right to life. These are fundamental rights which stem from the concepts of human dignity and the integrity of the person, both foundational principles of human rights law. Following explanations of both these principles, the chapter sets out the meaning and content of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. It then explains the right to life, analysing similarly the content of the right and its limitations and how it has been interpreted in recent jurisprudence and treaty body commentaries.*

1 Introduction

1.1 Respect for Human Dignity

Human dignity is central to the Universal Declaration of Human Rights (UDHR),[1] numerous human rights treaties,[2] international humanitarian law,[3] international criminal law,[4] and national constitutions worldwide.[5] It recognizes that each human being has intrinsic worth by virtue of their humanity, implies respect for the autonomy and the equality of each person, and requires that all persons have access to the basic conditions for life.

The link between indignity and torture was clear from the time of drafting the UDHR.[6] Human dignity continues to influence jurisprudence on torture and inhuman or degrading ↵ treatment. In *Pretty v UK*, the European Court of Human Rights noted that '[w]here treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of [torture or other prohibited ill-treatment].'[7] The Inter-American Court of Human Rights has likewise recognized certain acts as inhuman treatment because they fail to respect human dignity,[8] similar to the African Commission on Human and Peoples' Rights.[9]

p. 170

The right to life encompasses the right to enjoy a life with dignity.[10] The connections between human dignity and the right to life have influenced, though not always consistently, debates around reproductive rights,[11] bioethics,[12] end of life,[13] and what constitute acceptable punishments,[14] among other issues.

1.2 Integrity of the Person

Integrity of the person encompasses the right to be treated humanely and in a manner that preserves a person's physical and mental integrity,[15] which incorporates notions of well-being, autonomy, and privacy. It protects individuals from unjustifiable attacks or restrictions on physical or mental integrity and obligates states to positively protect against such attacks.

The Convention on the Rights of Persons with Disabilities (CRPD) makes clear that persons with disabilities have the right to have their physical and mental integrity respected on an equal basis with others.[16] Forced medication, seclusion, restraint, and non-consensual sterilization are all practices that have been applied to persons with disabilities, children, the elderly, and other marginalized or vulnerable persons. These practices can violate personal integrity, the prohibition of torture and ill-treatment, and, depending on the context, the right to life.

2 The Right to be Free From Torture and Ill-Treatment

In the face of medical experiments by the Nazis in concentration camps, the drafters of the UDHR were mindful of the need to outlaw specifically inhuman acts.[17] Thus, from the outset, torture was about unnecessary cruelty on the powerless.

Torture has been nearly universally outlawed, yet the practice continues. This incongruity persists in part because of some states' efforts to restrict the definition of torture to a narrow subset of prohibited behaviour, to characterize certain individuals or groups ↵ as unworthy of protection, and to justify acts which could amount to torture by their necessity to protect other interests such as national security. Some states have sought to introduce exceptions to certain aspects of the torture prohibition such as the prohibition on *refoulement* when there are national security considerations.[18] For the most part, courts have resisted such attempts.

p. 171

2.1 Sources

Several specialist conventions guarantee the right to be free from torture and ill-treatment, notably the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Inter-American Convention to Prevent and Punish Torture. Soft law standards which address torture specifically include the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNDAT) (1975), the Code of Conduct for Law Enforcement Officials (1979), the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol, 2000), the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines, 2002), and the revised Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules, 2015).

The prohibition of torture and other ill-treatment has also been incorporated into general human rights treaties and standard-setting texts, including the International Covenant on Civil and Political Rights (ICCPR),[19] the European Convention on Human Rights (ECHR),[20] the American Convention on Human Rights (ACHR),[21] the African Charter on Human and Peoples' Rights (ACHPR),[22] the Arab Charter on Human Rights (Arab Charter),[23] and the Association of Southeast Asian Nations Declaration on Human Rights (ASEAN Declaration),[24] as well as into standards protecting children,[25] women,[26] persons with disabilities,[27] and migrant workers.[28]

Torture and other forms of ill-treatment are also outlawed by international humanitarian law. Common Article 3 of the four Geneva Conventions of 1949, various other provisions in those conventions, and the two Additional Protocols of 1977 prohibit cruel treatment and torture as well as outrages upon personal dignity, in particular humiliating and degrading treatment, of civilians and persons taking no active part in the hostilities.[29] Finally, torture and inhuman treatment may amount to war crimes[30] and crimes ↵ against humanity, that is, international crimes that may be prosecuted by the International Criminal Court or other international criminal tribunals.[31]

p. 172

2.2 Legal Status

The prohibition of torture and other ill-treatment is non-derogable, meaning that there can be no circumstances when such practices are justifiable.[32] No person can be tortured, regardless of who they are: a non-citizen, a suspected terrorist, a convicted criminal, or a person suspected to have vital information about planned crimes.[33] Nor can the prohibition be balanced against other state interests such as national security or the need to locate evidence that may help protect others.[34] The prohibition of torture is also recognized as a principle of customary international law binding on all states, and as a *jus cogens* norm, a peremptory norm of international law which cannot be modified even by treaty.[35]

Whereas the status of the prohibition of torture is clear, certain aspects of the status of the prohibition of cruel, inhuman, or degrading treatment or punishment are subject to debate. Treaties such as the ICCPR and the ECHR, which prohibit torture and other ill-treatment as part of a single provision, recognize the non-derogable status as applicable equally to both prohibitions. In contrast, UNCAT, which treats the prohibitions separately, stipulates that the torture prohibition is non-derogable,[36] but is silent on the status of the prohibition of other ill-treatment. The UN Committee Against Torture has clarified in its General Comment 2 that 'the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable'.[37] Similarly, the UN Special Rapporteur on torture has asserted that *both* the prohibitions of torture and other ill-treatment enjoy 'the enhanced status of a *jus cogens* or peremptory norm of general international law.'[38]

There is also debate about whether the *jus cogens* status of the norm applies only to the prohibition of the *commission* of torture, or also to the range of associated positive and negative obligations set out in UNCAT.[39]

2.3 Definition

Torture is the calculated infliction of severe pain or suffering for a specific purpose such as coercion, punishment, intimidation, or discrimination. What makes it so horrible is the abuse of power—the intentional infliction of cruelty by those with the power and responsibility to protect. Torture can forever change its victims; it causes shame and stigma and affects belief systems. Beyond the physical impacts, it can result in long-term psychological consequences.[40]

p. 173 ↵ Building on the definition contained in the UNDAT of 1975, Article 1(1) UNCAT defines 'torture' as:

> 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

As compared to the Declaration definition, the UNCAT definition does not describe torture as an 'aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. It also broadens the purposes of torture to include 'any reason based on discrimination of any kind'. The definition does not include a finite list of acts amounting to torture. Instead, the definition is set out broadly, relying on the nature, purpose, and severity of the treatment applied. Whether conduct will amount to torture 'will depend on the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'[41]

Acts which do not satisfy the torture definition can amount to cruel, inhuman, or degrading treatment or punishment if inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity.[42] As in the case of torture, to constitute cruel, inhuman, or degrading treatment, the ill-treatment must reach a minimum level of severity or intensity. Unlike torture, however, there is no need for such acts to be committed for a prohibited purpose. Thus, acts committed for apparent lawful purposes (such as the use of force or detention) can amount to cruel, inhuman, or degrading treatment or punishment where the conduct exceeds what is permissible under law or where the pain or suffering is not proportionate or justifiable.

There are four main elements in the UNCAT torture definition. The interpretation of each of these elements and the extent to which they feature in other treaties and soft law standards is considered in turn.

2.3.1 Severe pain or suffering, whether physical or mental

'Severity' is the threshold of the intensity of pain or suffering required: (1) to determine whether a given treatment amounts to inhuman or degrading treatment or punishment; and (2) to distinguish between torture and other forms of ill-treatment. This threshold of intensity exists under human rights law, humanitarian law, and international criminal law frameworks though the meaning of 'severity' is ambiguous and value-laden, and subject to myriad interpretations. It is a relative consideration that will depend on both circumstances and context.

With respect to (1), there is no reference to 'severity' in Article 16 UNCAT, which requires states parties to prevent acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture. Nevertheless, courts and other adjudicative bodies considering the meaning of 'inhuman or degrading treatment' have recognized such a threshold. For instance, in the *Greek case*, the European Commission of Human Rights held that inhuman treatment covers 'at least such treatment as deliberately causes severe
p. 174 suffering, mental or physical, which, in the particular situation, is unjustifiable.'[43] Similarly, ↵ in *Ireland v UK*, the European Court of Human Rights held that ill-treatment must attain a certain minimum level of severity if it is to fall within the scope of Article 3 ECHR.[44] The meaning of 'severity' has been interpreted flexibly and 'depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim'.[45]

With respect to (2), 'severity' is one of several factors taken into account to distinguish between torture and others forms of ill-treatment. Evans emphasizes that it is 'only one element of an increasingly complex matrix.'[46] It has also been recognized that the classification of acts as ill-treatment or torture might change over time, owing to changing standards and values.[47]

In *Aksoy v Turkey*, the European Court of Human Rights determined that 'Palestinian hanging' (tying a person's hands behind their back and stringing them up by their arms) and other ill-treatment was 'of such a serious and cruel nature that it can only be described as torture'.[48] In *Aydin v Turkey*, it found that 'the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture.'[49] The African Commission on Human and Peoples' Rights has likewise required acts to meet a certain threshold of severity to be considered torture. *Abdel Hadi, Ali Radi and Others v Sudan* concerned 'severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their [the victims'] bodies, death threats, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after, as well as other forms of ill-treatment',[50] which resulted in serious physical injuries and psychological trauma. The Commission found this to amount to torture.[51]

Despite clear instances of torture, courts and commentators alike have long struggled to determine whether an act is sufficiently severe to constitute torture. There is debate whether the assessment is purely subjective or should also include objective elements which reflect what would ordinarily be understood as causing, or being capable of causing, severe pain or suffering.[52]

An objective approach to severity is problematic as the experience of pain and suffering will necessarily be different from each victim's point of view. However, a subjective approach can be problematic as it decides whether torture has occurred on the basis of the victim's relative resilience. Furthermore, assessments about 'severity' may come down to the consideration of a victim's credibility. These can be arbitrary, often dependent on judges' predispositions or backgrounds. Decision-makers tend to privilege physical forms of harm over psychological suffering. For instance, the use of beatings and hangings are routinely recognized as torture whereas total sensory deprivation or prolonged or indefinite solitary confinement are often characterized as other forms of ill-treatment. With respect to rape as the apex of gender-based violence, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) recognizes that *obviously* all acts of rape will satisfy the severity requirement for torture.[53] This approach avoids the need for potentially retraumatizing questioning of rape victims about their suffering. However, it ↵ has been argued that it 'essentializes' women's experiences of rape and reinforces 'the understanding that women are not capable of not being victimized by rapes'.[54] Regardless of the merits of that argument, this 'essentializing' is likely to produce the opposite effect for gender-based crimes other than rape by underplaying the suffering that such crimes can cause through extreme forms of mental anguish.[55]

p. 175

2.3.2 Specific purpose

The requirement that the act be carried out for a specific purpose is central to the UNCAT definition. The UN Special Rapporteur on torture has noted that 'the decisive criteria for distinguishing torture from [cruel, inhuman, or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.'[56]

Purpose has been interpreted broadly and non-exhaustively. International jurisprudence has recognized self-incrimination,[57] intimidation of the population,[58] humiliation,[59] and discrimination[60] as relevant qualifying purposes.

While the requirement of a specific purpose has been incorporated into international criminal law jurisprudence,[61] it does not feature in the definition of torture as a crime against humanity in the Statute of the International Criminal Court (ICC Statute),[62] though it is incorporated in the Statute as a war crime.[63] Sometimes a prohibited purpose has been implied. The suggestion that rape by a person wielding power or authority took place for simple private gratification purposes has not been accepted. The ICTY has held that rape by a person of authority inherently involves punishment, coercion, discrimination, or intimidation.[64]

2.3.3 Public official

Article 1(1) UNCAT specifies that for conduct to constitute torture it must have been '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'. Rodley and Pollard indicate that 'the prohibition is not concerned with private acts of cruelty: international concern arises only where cruelty has official sanction.'[65]

Nevertheless, the public official requirement has been critiqued by feminist scholars who argue that it maintains an artificially narrow lens on men subjected to ill-treatment in detention. The prohibition of torture should be capable of addressing a much wider spectrum of violence, including violence occurring in the private sphere, especially when ↵ there has been a failure of the state to exercise due diligence to protect persons from prohibited treatment.[66] This argument has only indirectly impacted the anti-torture framework. Efforts to better account for harms perpetrated by non-state actors have consisted of broadening what is understood as 'other person acting in an official capacity' to recognize regimes which take on state-like functions in what would otherwise be a power vacuum. For instance, in *Elmi v Australia*, the UN Committee Against Torture determined that, where state authority was wholly lacking (Somalia had no central government at the time), acts by groups exercising quasi-governmental authority could fall within the definition.[67] In *R v Reeves Taylor (Appellant)*, the UK Supreme Court has gone further, holding that the words 'person acting in an official capacity' included 'conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises de facto control', irrespective of whether a central state authority was present or lacking.[68]

p. 176

Due diligence requirements have also been used to prevent and respond to torture and other ill-treatment perpetrated by non-state actors.[69] For instance, disappearances which are not directly imputable to a state (because they are the acts of a private person or because the person responsible has not been identified),[70] gender-based violence including domestic violence,[71] and the failure to protect prisoners from violence by other prisoners[72] engage states' due diligence obligations. For the most part, this approach of recognizing state responsibility for the failure to exercise due diligence to prevent or respond to ill-treatment perpetrated by private actors has not led courts to recognize that private actors can or should be prosecuted for torture for the violence they perpetrate; human rights bodies have tended to refrain from labelling violence committed

by non-state actors as 'torture'.[73] Also, the due diligence 'expansion' has not led to state officials being prosecuted for torture as such, when they fail to protect individuals from the violence caused by private actors.[74]

In contrast, under international criminal law, there is a relatively clear statement from the International Criminal Tribunal for Rwanda (ICTR) about an official's responsibility for torture when instigating a crowd (of private actors) to rape women, also characterizing the rapes by the private actors as torture; the accused 'was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture.'[75] Different to the framings under human rights law, international criminal law does not limit acts of torture to conduct perpetrated by or connected with public officials. When torture operates as an underlying act for genocide, war crimes, or crimes against humanity, there is no public official requirement. In *Delalić*, the ICTY held that torture could be perpetrated by officials ↵ of non-state parties to a conflict.[76] This jurisprudence has evolved, with later cases holding that torture does not require any involvement of a person acting in an official capacity.[77] The ICC Statute does not require official capacity for the crime against humanity or the war crime of torture, although for a crime against humanity it specifies that the victim of torture must be in the custody or under the control of the perpetrator.[78]

p. 177

This international criminal law framing has led to prosecutions of members of armed opposition groups for violence committed in the context of armed conflict. The ICTY set out its rationale in *Kunarac*: 'the characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it'.[79] However, this rationale has not been applied outside armed conflicts where non-state actors take advantage of their positions of power and perpetrate violence on vulnerable persons in that power relationship, for instance violence against children in care homes or religious establishments, migrant workers, or victims of trafficking, people smuggling, and other forms of organized crime. This is despite the fact that, under human rights law, abuse of power is central to the rationale for the public official requirement or, as the UN Special Rapporteur on torture has put it, 'the powerlessness of the victim' of which the perpetrator takes advantage.[80]

2.3.4 Pain or suffering arising from lawful sanctions

Article 1(1) UNCAT stipulates that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' However, a sanction that is lawful under national law will only engage the exception if it also complies with international law. Forms of corporal punishment, 'including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure',[81] such as lashes, whipping, or flogging have been held to violate the prohibition.[82]

2.4 State Obligations

The prohibition of torture and other ill-treatment entails both negative and positive obligations. There are several negative obligations. States and their officials must refrain from committing torture and ill-treatment, and from acquiescing to, supporting, or assisting others to commit such acts. States are also prohibited from returning or extraditing a person to a country where they face a real risk of torture or ill-treatment.[83] In *Chahal*, despite arguments that national security interests should either override the risk, or

be taken into account in assessing the risk of ill-treatment in deportation cases, the European Court of Human Rights determined that the prohibition on *refoulement* is absolute.[84] Only in very limited circumstances will a state be in a position to override a risk of torture or ill-treatment in the receiving state by agreeing with it assurances that the person will be treated humanely.[85]

p. 178 ↵ As a further negative obligation, statements extracted by torture cannot be used in proceedings except against a person accused of torture as evidence that the statement was made.[86] The UN Human Rights Committee's General Comment 32 clarifies that this prohibition applies to both torture and other prohibited ill-treatment.[87] The introduction of evidence obtained by torture into legal proceedings, including derivative evidence, taints those proceedings and violates the right to a fair trial.[88] The rule on the inadmissibility of evidence obtained by torture has also been applied where the torture was allegedly committed by officials of a third state on third parties.[89]

Positive obligations in UNCAT require states to take effective legislative, administrative, judicial, and other measures to prevent acts of torture in any territory under their jurisdiction.[90] Also, as canvassed earlier in this chapter, states are obliged to exercise due diligence to prevent acts of significant violence from occurring in the private sphere. Furthermore, states are required to carry out effective investigations[91] and, where sufficient evidence exists, to prosecute (or extradite) perpetrators of torture,[92] and protect victims from reprisals.[93] The obligation to investigate is not displaced when the acts took place outside the state's territorial jurisdiction in a difficult security environment.[94]

Additionally, states are obligated to afford a remedy for torture, including compensation and rehabilitation. Article 14 UNCAT recognizes that survivors are entitled to an 'enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'.[95] The state is also required to take measures to prevent recurrence.

2.5 Specific Practices

While the determination of whether conduct amounts to torture will depend on the particular circumstances, specific practices that have been held to amount to torture include *falanga* and sustained beatings,[96] water suffocation,[97] and rape.[98]

Findings related to other forms of prohibited ill-treatment have included instances where the severity has not attained the threshold for torture or where the ill-treatment was not inflicted for a specific purpose. For example, courts and treaty bodies have tended to characterize as ill-treatment (as opposed to torture), or have failed to specify whether the conduct amounts to torture or other prohibited ill-treatment, the suffering
p. 179 imposed ↵ on families of the disappeared[99] and the extra-judicial transfer of persons from one state to another for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman, or degrading treatment.[100] Prohibited ill-treatment has also been found in respect of various detention practices, particularly when they do not align with standards and principles related to the treatment of prisoners,[101] such as solitary confinement and prolonged *incommunicado* detention,[102] poor prison conditions, and humiliation of prisoners,[103] including when the ill-treatment stems from detention in psychiatric hospitals and other care facilities[104] and refugee and migrant detention facilities.[105] Ill-treatment has also been found in respect of cruel, inhuman, or degrading punishment even

when imposed in accordance with domestic law, such as corporal punishment,[106] and certain practices concerning the imposition of the death penalty, including its imposition following an unfair trial[107] and an overly lengthy period on death row.[108] It is important to remember, however, that there is no clear formula to classify conduct as torture or other ill-treatment, particularly given the importance for courts to take into account the particular circumstances of the case, including any special characteristics that can impact on how particular conduct is experienced by the affected individuals.

UNCAT's demarcation between torture and cruel, inhuman, or degrading treatment or punishment has arguably undermined the progressive evolution of standards in this area. Several UNCAT obligations applicable to torture do not apply clearly to other forms of ill-treatment. This has helped create questionable areas of 'permissible' conduct. For instance, unlike in the case of treatment amounting to torture, UNCAT does not prohibit explicitly the *refoulement* of persons who face a real risk of cruel, inhuman, or degrading treatment or punishment nor does it require states to criminalize such treatment, afford reparation for such treatment, or disallow evidence procured by such treatment in any proceedings.[109] Nevertheless, for the most part, courts and the UN Committee Against Torture have interpreted progressively states' obligations and have recognized that both torture and other forms of prohibited ill-treatment form part of a continuum of ill-treatment that states are obligated to prevent, prohibit, and repair.[110]

p. 180

3 The Right to Life

The right to life applies to all persons without distinction or discrimination of any kind and concerns the right of individuals 'to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.'[111]

Unlike the prohibition of torture which is absolute, the deprivation of life can be lawful in certain circumstances. Consequently, the right to life consists of the right not to be *arbitrarily* deprived of life—any deprivation of life must have a legal basis and be reasonable, necessary, and proportionate.

3.1 Sources

The right to life is set out in a range of international human rights conventions and declarative texts, including Article 3 UDHR and Article 6(1) ICCPR and specialist conventions related to women,[112] children,[113] persons with disabilities,[114] older people,[115] and migrant workers.[116] In addition, a number of specialist texts deal with particular aspects related to the right to life, such as the death penalty,[117] the use of force and firearms by law enforcement officials,[118] and extra-legal, arbitrary, and summary executions.[119] The right to life is also contained in regional conventions and declarations, including Article 4 ACHR, Article 4 ACHPR, Article 2 ECHR, Article 5 Arab Charter, Article 11 ASEAN Declaration, and Article 1 American Declaration.

3.2 Legal Status

The prohibition on the arbitrary deprivation of life allows for no exceptions, not even in a state of war or a national emergency.[120] It also has peremptory status.[121] The African Commission on Human and Peoples' Rights, in its General Comment on the right to life, notes:

> The right not to be arbitrarily deprived of one's life is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus cogens* norm, universally binding at all times. The right to life is contained in the constitutions and other legal provisions of the vast majority of African and other States. All national legal systems criminalise murder, and arbitrary killings committed or tolerated by the State are a matter of the utmost gravity.[122]

p. 181 ↵ The right to life continues to apply during armed conflict in a complementary and not mutually exclusive way and should be interpreted in the light of applicable international humanitarian law.[123] International humanitarian law also prohibits the arbitrary deprivation of life, albeit not in those terms. It treats the wilful killing of protected persons as grave breaches,[124] prohibits disproportionate[125] and indiscriminate attacks,[126] and restricts the application of the death penalty.[127] Furthermore, killings that result from acts of aggression automatically constitute violations of the right to life.[128]

3.3 Territorial Scope

The obligation to respect and ensure the right to life operates within a state's territory but also extends to other locations outside a state's territory but subject to its jurisdiction.[129] The UN Human Rights Committee's General Comment 36 provides an expansive interpretation of states' extraterritorial obligations to protect, respect, and fulfil the right to life, holding that:

> States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy.[130]

3.4 Temporal Scope: Beginning and End of Life

Questions about when the right to life begins and ends remain controversial.

Article 4 ACHR provides that the right to life must be protected 'in general, from the moment of conception.' The Inter-American Court of Human Rights has found that, in the case of in vitro fertilization, 'conception' occurs only with the implantation of the embryo in the uterus and not at the moment of fertilization; hence, an embryo alone cannot be granted the status of a 'person'. Furthermore, the Court held that the protection of life under Article 4 ACHR is not absolute, but incremental according to the degree of development of the foetus.[131] In contrast, Article 2 ECHR leaves undefined from what point the right to life is protected. In *Vo v France*, the European Court of Human Rights indicated that in the absence of a European consensus on the status of the embryo, it was not necessary for it to rule on whether the unborn child was a person for the

purposes of Article 2.[132] Similarly, the Human Rights Committee has not articulated whether the right to life
p. 182 extends to human embryos, focusing instead on the rights of pregnant women; any regulation ↵ of the termination of pregnancies must not result in violation of the right to life or the right to be free from torture and other ill-treatment of such women.[133]

The right to life does not include a right to assisted suicide. In *Pretty v UK*, the European Court of Human Rights confirmed that 'no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.'[134] Conversely, there is no obligation on states stemming from the right to life to regulate assisted suicide. The Human Rights Committee, for instance, has simply required that where such regulation exists, states 'must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.'[135]

3.5 Material Scope: the Prohibition of Arbitrary Deprivation of Life

The prohibition on the arbitrary deprivation of life entails both negative and positive obligations.

Negative obligations include the need to refrain from arbitrarily taking life, and to avoid extraditing, deporting, or otherwise transferring persons to countries where they face a real risk of being exposed to arbitrary deprivation of life. For instance, the Human Rights Committee determined that the right to life was violated where no weight was given to a *fatwa* that was allegedly ordered against an individual who faced expulsion.[136]

States' positive obligations to protect life include preventing arbitrary killings by their security forces and other groups under their control, as well as preventing and punishing murder and manslaughter. Authorities must take reasonable steps to protect a person's life if they know or ought to know that the person faces a real and immediate risk of life-threatening violence.[137] Furthermore, they must ensure that persons in their custody, such as in prisons[138] and hospitals,[139] are adequately protected from life-threatening risks that are foreseeable. This includes taking adequate measures to address the spread of life-threatening, infectious diseases in places of confinement,[140] as well as preventing and responding to deaths in custody.[141] States cannot discriminate in their efforts to protect against arbitrary deaths. They must ensure that they protect vulnerable and marginalized groups from life-threatening acts of violence perpetrated by non-state actors.[142]

Equally, states must take appropriate steps to improve public health and increase life expectancy and address the causes and consequences of drought, diseases and epidemics, natural and nuclear disasters, malnutrition,
p. 183 and infant mortality.[143] In the words of the ↵ Human Rights Committee, they 'should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.'[144]

There must be proper investigations into all deaths caused by the state or where it appears that the state has failed to protect life. Such investigations must be impartial, effective, prompt, and open to public scrutiny. They must also allow for the next of kin to engage.[145] The duty to find out what happened is particularly

strong in relation to deaths in custody.[146] As with all human rights, states must provide access to appropriate remedies for violations of the right to life, which must entail adequate and effective reparation, including guarantees of non-repetition.[147]

3.6 Specific Practices

3.6.1 Lethal force by police and security forces

Police, security forces, and any other law enforcement authorities are only authorized to use force when conducting their operations in order to achieve a legitimate law enforcement objective. They can only use as much force as is necessary and proportionate in any particular situation. Force can only be resorted to when non-violent means such as persuasion, negotiation, and mediation remain ineffective or have no promise of achieving the intended legitimate law enforcement objective. When lethal force is used in such circumstances, it will not be arbitrary.

Law enforcement officials may only use firearms when less extreme means of force are insufficient:

- to defend themselves or others against imminent threat of death or serious injury;
- to prevent a particularly serious crime involving grave threat to life;
- to enable a person resisting arrest to be arrested if he or she is about to commit a particularly serious crime that involves grave threat to life; or
- to prevent a person resisting arrest from escaping where he or she is about to commit a particularly serious crime that involves grave threat to life.[148]

Use of force that results in a deprivation of life must be 'absolutely necessary'[149] and 'strictly proportionate' to achieve the permitted purpose.[150] As the African Commission has made clear, '[t]he starting point is that life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation.'[151] For example, using lethal force to disperse protesters violates the right to life.[152] There is also a duty to plan law enforcement operations in a manner that minimizes the risk that officials may kill or injure a member of the public. Using lethal force without affording to the victims an opportunity to explain their presence and/or surrender to the police and outside an action in self-defence violates the right to life.[153]

Human rights law requires there to be a system of accountability in which law enforcement agencies are held accountable for the fulfilment of their duties and their compliance ↵ with the legal and operational framework. Investigations must be adequate, effective, and capable of arriving at the truth and in leading to a prosecution, where appropriate.[154] Investigations must also address any underlying factors such as racial or other discrimination and other unlawful motives. As was held by the European Court, '[f]ailing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.'[155]

p. 184

3.6.2 The death penalty

Whilst many countries continue to abolish the death penalty and human rights law has progressively limited the instances in which the death penalty can be carried out, the practice has not been outlawed altogether. Human rights texts and jurisprudence have approached the death penalty in several ways.

First, human rights treaties have sought to encourage the trend to abolish the death penalty and to establish moratoria on its use. Both the Second Optional Protocol to the ICCPR (ICCPR-OP2) and the Protocol to the ACHR to Abolish the Death Penalty provide for the total abolition of the death penalty but allow states parties to retain the death penalty in time of war if they make a reservation to that effect. Similarly, Protocol 6 to the ECHR provides for the abolition of the death penalty in peacetime, although states parties may retain the death penalty for crimes 'in time of war or of imminent threat of war'. The later Protocol 13 to the ECHR abolishes the death penalty in all circumstances. The European Court of Human Rights has found that the evolution towards the complete abolition of the death penalty, in law and in practice throughout Council of Europe member states, demonstrates that Article 2 ECHR has been amended so as to prohibit the death penalty in all circumstances.[156] For states that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. It would be inconsistent and contrary to this obligation to extradite or transfer a person to a country in which that person might face the death penalty, without taking adequate precautions to ensure the penalty is not carried out.[157] The failure to do so would give rise to violations of the right to life and potentially also the prohibition of torture and inhuman or degrading treatment or punishment. Consequently, states must require firm diplomatic assurances from retentionist countries that persons to be extradited or expelled will not be sentenced to death.[158]

Second, those states that retain the death penalty may only resort to it for the most serious crimes,[159] after full respect for a fair trial.[160] What counts as serious crimes is to be narrowly construed, 'their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.'[161] Because of its arbitrariness, a mandatory death penalty for all cases of murder violates the right to life.[162] Furthermore, states must address ↵ disparities in the rates of executions amongst ethnic minorities[163] and remove discriminatory laws (such as the imposition of the death penalty for same-sex relationships).[164]

p. 185

Third, human rights treaties and bodies recognize that imposing the death penalty for crimes committed by children,[165] on pregnant women,[166] or on persons suffering from mental illness[167] violate the right to life.

Fourth, the application of the death penalty must cause the minimum possible suffering if it is not to violate the prohibition of ill-treatment. Thus, the Human Rights Committee held that execution by gas asphyxiation, stoning, injection of untested lethal drugs, burning, or burying alive, as well as public executions, are incompatible with the prohibition on torture and other ill-treatment and thus also violate the right to life.[168] Additionally, spending an extended period on death row with the uncertainty about when the penalty will be carried out may also violate the prohibition of torture and other ill-treatment.[169]

4 Conclusion

The right to be free from torture and ill-treatment and the right to life cover an ever-increasing array of factual scenarios and a variety of actors both within the state and outside. These wide contexts in which violations frequently occur require concerted and multi-pronged strategies to address both the causes and consequences, and increasingly necessitate a range of positive actions by states. The complexity of these rights and obligations attests to the growing awareness about the many interconnections between acts and omissions and the greater attention placed in all legal systems on locating realistic measures that can best meet obligations to respect, protect, and fulfil these most fundamental of human rights requirements.

Increasingly, jurisprudence and commentary are beginning to better address the relationship between access to the basic necessities of life and human dignity. In turn, there is a growing understanding that a failure to ensure access to such necessities can give rise to torture or ill-treatment and, in some cases, violations of the right to life. This is a more holistic vision of civil and political rights that has the potential to have a major practical benefit for many people.

Greater attention must be placed on identifying how racist and discriminatory attitudes foster torture and ill-treatment and violations of the right to life and on developing more robust responses that are capable of tackling root causes.

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Useful Websites

Committee for the Prevention of Torture in Africa: **<https://www.achpr.org/specialmechanisms/detail?id=7** *<https://www.achpr.org/specialmechanisms/detail?id=7>***>**

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: **<http://www.cpt.coe.int/en** *<http://www.cpt.coe.int/en>***>**

UN Committee Against Torture: **<https://www.ohchr.org/en/hrbodies/cat** *<https://www.ohchr.org/en/hrbodies/cat>***>**

UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: **<https://www.ohchr.org/EN/Issues/Executions** *<https://www.ohchr.org/EN/Issues/Executions>***>**

UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: **<https://www.ohchr.org/EN/Issues/Torture/SRTorture** *<https://www.ohchr.org/EN/Issues/Torture/SRTorture>***>**

UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: **<https://www.ohchr.org/EN/HRBodies/OPCAT** *<https://www.ohchr.org/EN/HRBodies/OPCAT>***>**

Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa: **<https://www.achpr.org/specialmechanisms/detail?id=9** *<https://www.achpr.org/specialmechanisms/detail?id=9>***>**

Questions for Reflection

1. What is the distinction between torture and other cruel, inhuman, or degrading treatment or punishment?
2. What, if any, is the impact of labelling conduct as torture as opposed to other cruel, inhuman, or degrading treatment or punishment?
3. How could the international law on torture better protect against violence occurring in the private sphere?
4. Does the right to life include the right to live in dignity? If so, what does this right entail?
5. Should human rights standards related to the right to life incorporate more fully cultural and religious values?

Notes

* This chapter takes inspiration from the text prepared by Sir Nigel S Rodley for prior editions of this book. Errors and omissions remain my own.

[1] Preamble and Arts 1, 22, and 23(3).

[2] ICCPR, preamble and Art 10; ICESCR, preamble and Art 13; CRC, preamble and Arts 23, 28, 37, 39, and 40; CRPD, preamble and Arts 1, 3, 8, 16, 24, and 25; Protocol No 13 to the ECHR, preamble; CFREU, preamble and Arts 1, 25, and 31; ACHPR, preamble and Art 5.

[3] Geneva Conventions, Common Art 3(1)(c); Additional Protocol I, Art 75(2)(b).

[4] ICC Statute, Arts 8(2)(b)(xxi) and 8(2)(c)(ii).

[5] Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 370–96.

[6] CHR, Drafting Committee, Draft Outline of International Bill of Rights, E/CN.4/AC.1/3 (4 June 1947) Art 4.

[7] (2002) 35 EHRR 1, para 52.

[8] *De la Cruz-Flores v Peru*, Merits, Reparations and Costs, IACtHR Series C No 115 (18 November 2004) para 128.

[9] 97/93, *Modise v Botswana* (2000) AHRLR 30, para 91.

[10] HRC, General Comment 36, CCPR/C/GC/36, para 3.

[11] See Dixon and Nussbaum, 'Abortion, Dignity, and a Capabilities Approach' in Baines, Barak-Erez, and Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (CUP, 2012) 64.

[12] Deryck, *Human Dignity in Bioethics and Biolaw* (OUP, 1993).

[13] CESCR, General Comment 14, HRI/GEN/1/Rev.9 (Vol I) 78, para 25.

[14] ICCPR-OP2, preamble; Protocol 13 to the ECHR, preamble.

[15] ACHR, Art 5.

[16] Art 17.

[17] Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1997) 42–3.

[18] *Chahal v UK* (1997) 23 EHRR 413; *Saadi v Italy* (2004) 49 EHRR 30.

[19] Arts 7 and 10.

[20] Art 3.

[21] Art 5.

[22] Art 5.

[23] Art 8.

[24] Art 14.

[25] CRC, Art 37(a).

[26] Declaration on the Elimination of Violence against Women, GA Res 48/104 (20 December 1993) Art 3(h).

[27] CRPD, Art 15.

[28] Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art 10.

[29] Geneva Convention I, Art 12(2); Geneva Convention II, Art 12(2); Geneva Convention III, Arts 13, 17(4), 87(3), and 89; Geneva Convention IV, Arts 27 and 32; Protocol I, Art 75(2); Protocol II, Art 4(2). See Chapter 25.

[30] Torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health constitute grave breaches of the Geneva Conventions. Geneva Convention I, Art 50; Geneva Convention II, Art 51; Geneva Convention III, Art 130; Geneva Convention IV, Art 147; Additional Protocol I, Art 11.

[31] See eg ICC Statute, Arts 7(1)(f) and (k), 8(2)(a)(ii) and (iii), 8(2)(c)(i) and (ii). See Chapter 26.

[32] ICCPR, Art 4; ECHR, Art 15; ACHR, Art 27. See Chapter 7.

[33] *Ireland v UK* (1979–80) 2 EHRR 25; *Chahal v UK*; *Tomasi v France* (1993) 15 EHRR 1; *Selmouni v France* (2000) 29 EHRR 403.

[34] *Gäfgen v Germany* (2011) 52 EHRR 1.

[35] eg ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 99; ICTY, *Prosecutor v Furundžija*, Trial Judgment, 10 December 1998, IT-95-17/1, paras 153–7; HRC, General Comment 29, HRI/GEN/1/Rev.9 (Vol I) 234, para 3; CAT, General Comment 2, HRI/GEN/1/Rev.9 (Vol I) 376, para 1.

[36] Art 2(2).

[37] Para 3.

[38] Report of the Special Rapporteur on torture, A/HRC/25/60 (10 April 2014) para 40.

[39] Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *EJIL* 815, 836–7.

[40] Reyes, 'The Worst Scars Are in the Mind: Psychological Torture' (2007) 89 (867) *IRRC* 591.

[41] *Selmouni v France*, para 100.

[42] UNCAT, Art 16(1).

[43] *The Greek case* (1969) 12 YB 1, 186.

[44] Para 162.

[45] *Brough v Australia*, CCPR/C/86/D/1184/2003 (17 March 2006) para 9.2. See similarly, *Huri-Laws v Nigeria*, Comm no 225/1998 (ACommHPR, 6 November 2000) para 41.

[46] Evans, 'Getting to Grips with Torture' (2002) 51 *ICLQ* 365, 372–3.

[47] *Selmouni v France*, para 101.

[48] (1997) 23 EHRR 553, para 64.

[49] (1998) 25 EHRR 251, para 86.

[50] 368/09 (5 November 2013) para 71.

[51] Para 73.

[52] Reyes, 595–8.

[53] *Prosecutor v Kunarac et al*, Appeals Judgment, IT-96-23 and IT-23/1-T, 20 June 2002, paras 150–1.

[54] Engle, 'Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *AJIL* 778, 813.

[55] See ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Warrant of Arrest, ICC-01/05-01/08, 10 June 2008, paras 39, 40.

[56] Report of the Special Rapporteur on torture, E/CN.4/2006/6 (23 December 2005) para 39.

[57] *Cantoral Benavides v Peru*, Merits, IACtHR Series C No 67 (18 August 2000) para 104; *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 114 (7 September 2004) para 148.

[58] *Gomez-Paquiyauri Brothers v Peru*, Merits, Reparations and Costs, IACtHR Series C No 110 (8 July 2004) para 116.

[59] ICTY, *Prosecutor v Kvočka et al*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para 152.

[60] ICTY, *Prosecutor v Kunarac et al*, Trial Judgment, IT-96-23 and IT-23/1-T, 22 February 2001, para 654.

[61] *Prosecutor v Kunarac et al* (Trial Judgment) para 497.

[62] ICC Statute, Art 7(2)(e).

[63] Elements of Crimes for the ICC Statute, Arts 8(2)(a)(ii)-1(2) and 8(2)(c)(i)-4(2).

[64] *Prosecutor v Delalić et al*, Trial Judgment, IT-96-21-T, 16 November 1998, para 495.

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[66] Charlesworth and Chinkin, 'The Gender of *Jus Cogens*' (1993) 15 *HRQ* 63, 72.

[67] *Elmi v Australia*, CAT/C/22/D/120/1998 (14 May 1999) para 6.5.

[68] *R v Reeves Taylor (Appellant)* [2019] UKSC 51, para 76.

[69] HRC, General Comment 28, CCPR/C/21/Rev.1/Add.10, para 11. See also, HRC, General Comment 20, HRI/GEN/1/Rev. 1, 30, paras 13–14; HRC, General Comment 17, HRI/GEN/1/Rev.1, 23, para 6.

[70] *Velásquez-Rodríguez v Honduras*, Merits, IACtHR Series C No 4 (29 July 1988) paras 172–6.

[71] *Opuz v Turkey* (2010) 50 EHRR 28, paras 169, 176.

[72] *Yuriy Illarionovich Shchokin v Ukraine*, App no 4299/03, Judgment of 3 October 2013, paras 50–1.

[73] CAT, General Comment 2, CAT/C/GC/2, para 18; *Opuz v Turkey* (2010) 50 EHRR 28, para 161. See, in contrast, *Caso López Soto y Otros v Venezuela*, Fondo, Reparaciones y Costas, IACtHR Series C No 3 (26 September 2018) para 192, where the Inter-American Court of Human Rights characterized the long-term abduction, rape, and mistreatment of a woman by a private individual in the face of state inaction as torture.

[74] *Hajrizi Dzemajl et al v Yugoslavia*, CAT/C/29/D/161/2000, para 9.2.

[75] *Prosecutor v Laurent Semanza*, Trial Judgment and Sentence, ICTR-97-20-T, 15 May 2003, para 485.

[76] *Prosecutor v Delalić et al*, para 473.

[77] *Prosecutor v Kunarac et al*, para 496.

[78] Art 7(2)(e).

[79] *Prosecutor v Kunarac et al*, para 495.

[80] Report of the Special Rapporteur on torture, E/CN.4/2006/6 (23 December 2005) para 39.

[81] HRC, General Comment 20, HRI/GEN/1/Rev.1, 30, para 5.

[82] *Osbourne v Jamaica*, CCPR/C/68/D/759/1997 (13 March 2000) para 9.1; *Curtis Francis Doebbler v Sudan*, Comm no 236/2000 (ACommHPR, 15–19 May 2003) para 42; *Tyrer v UK* (1978) 2 EHRR 1, paras 30–5; *Caesar v Trinidad and Tobago*, Merits, Reparations and Costs, IACtHR Series C No 123 (11 March 2005) paras 70–4, 88.

[83] *Soering v UK* (1989) 11 EHRR 439.

[84] *Chahal v UK*. See also *Saadi v Italy*.

[85] *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1; *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005 (10 November 2006) para 11.5.

[86] UNCAT, Art 15.

[87] CCPR/C/GC/32, para 41.

[88] *Jalloh v Germany* (2007) 44 EHRR 32, para 105; *Gäfgen v Germany*, paras 162–8. See also Chapter 13.

[89] *A v Secretary of State for the Home Department* [2005] UKHL 71. See also *Othman (Abu Qatada)*, paras 267, 276, and 282; *El Haski v Belgium*, App no 649/08, Judgment of 25 September 2012.

[90] Art 2.

[91] See Office of the UN High Commissioner for Human Rights, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', HR/P/PT/8/Rev.1.

[92] UNCAT, Arts 5(2), 7, and 12. See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, paras 118–19; *Case of Barrios Altos v Peru*, Merits, IACtHR Series C No 75 (14 March 2001) paras 41–4; HRC, General Comment 31, CCPR/C/21/Rev.1/Add.13, para 18.

[93] UNCAT, Art 13; Istanbul Protocol, para 111.

[94] *Al-Skeini and Ors v Secretary of State for Defence* [2004] EWHC 2911 (Admin) paras 318–36.

[95] See CAT, General Comment 3, CAT/C/GC/3.

[96] *Abdel Hadi, Ali Radi and Others v Sudan*, para 71.

[97] *José Vicente and Amado Villafañe Chaparro v Colombia*, CCPR/C/60/D/612/1995 (14 June 1994).

[98] *Aydin v Turkey* (1998) 25 EHRR 251, paras 83–6; *Rosendo Cantú et al v Mexico*, Merits, Reparations, Costs, IACtHR Series C No 216 (31 August 2010) para 118; *Malawi African Association and Others v Mauritania*, Comm nos 54/91, 61/91, 98/93, 164–96/97, 210/98 (ACommHPR, 11 May 2000) paras 117–18.

[99] *Bazorkina v Russia* (2008) 46 EHRR 261, para 139; *Kurt v Turkey* (1999) 27 EHRR 373, paras 133–4; *Blake v Guatemala*, Merits, IACtHR Series C No 36 (24 January 1998) paras 114–16.

[100] *El-Masri v FYR Macedonia* (2013) 57 EHRR 25; *Al Nashiri v Poland* (2015) 60 EHRR 16; and *Husayn (Abu Zubaydah) v Poland* (2015) 60 EHRR 16.

[101] Revised UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), A/RES/70/175 (8 January 2016).

[102] *El-Megreisi v Libya*, CCPR/C/46/D/440/1990 (23 March 1994) para 5.4; *Aber v Algeria*, CCPR/C/90/D/1439/2005 (16 August 2007) para 7.3; *Suárez-Rosero v Ecuador*, Merits, IACtHR Series C No 35 (12 November 1997) paras 90–1.

[103] *Womah Mukong v Cameroon*, CCPR/C/51/D/458/1991 (10 August 1994) para 9.4; *Hénaf v France* (2005) 40 EHRR 44, paras 55–60; *Loayza-Tamayo v Peru*, IACtHR Series C No 33 (17 September 1997) paras 46(d), 58.

[104] *Dhoest v Belgium* (1997) 12 EHRR 135.

[105] *MSS v Belgium and Greece* (2011) 53 EHRR 2, paras 233, 263.

[106] *Tyrer v UK*.

[107] *Öcalan v Turkey* (2005) 41 EHRR 45, paras 167–75.

[108] *Soering v UK*; *Hilaire v Trinidad and Tobago*, Merits, Reparations and Costs, IACtHR Series C No 123 (21 June 2002) paras 167–9.

[109] UNCAT, Art 16.

[110] CAT, General Comment 3, CAT/C/GC/3, para 1.

[111] HRC, General Comment 36, para 3.

[112] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art 4; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Art 4; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

[113] CRC, Art 6; African Charter on the Rights and Welfare of the Child, Art 5.

[114] CRPD, Art 10.

[115] Inter-American Convention on Protecting the Human Rights of Older Persons, Art 6.

[116] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art 9.

[117] ICCPR-OP2; Protocols 6 and 13 to the ECHR; Protocol to the ACHR to Abolish the Death Penalty; UN ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984).

[118] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

[119] UN ECOSOC, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

[120] ICCPR, Art 4.

[121] HRC, General Comment 36, para 68.

[122] General Comment 3 (18 November 2015) para 5.

[123] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; HRC, General Comment 36, para 64. See Chapter 25.

[124] Geneva Convention 1, Art 50; Geneva Convention 2, Art 51; Geneva Convention 3, Art 130; Geneva Convention 4, Art 147.

[125] Protocol I, Arts 51(5)(b) and 57(2)(a)(iii).

[126] Protocol I, Art 51(4).

[127] Geneva Convention 4, Art 68; Protocol I, Arts 76(3) and 77(5); Protocol II, Art 6(4).

[128] HRC, General Comment 36, para 70.

[129] HRC, General Comment 31, para 10.

[130] Para 22.

[131] *Artavia Murillo et al v Costa Rica*, IACtHR Series C No 257 (28 November 2012) paras 163–264.

[132] *Vo v France* (2005) 10 EHRR 12, paras 84–5. See also *Evans v UK* (2008) 46 EHRR 34, paras 54–6.

[133] General Comment 36, para 8; *Mellet v Ireland*, CCPR/C/116/D/2324/2013 (31 March 2016).

[134] *Pretty v UK* (2002) 35 EHRR 1, para 40. See similarly *Haas v Switzerland* (2011) 53 EHRR 33.

[135] General Comment 36, para 9.

[136] *Masih Shakeel v Canada*, CCPR/C/108/D/1881/2009 (24 July 2013) paras 8.5 and 8.6.

[137] *Osman v UK* (1998) 29 EHRR 245, paras 115–16; Case 12.626, *Jessica Lenahan (Gonzales) et al v USA*, IACommHR Report No 80/11 (21 July 2011) paras 128–36 and 164–70.

[138] *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19; *Dzieciak v Poland*, App no 77766/01, Judgment of 9 December 2008.

[139] *Mehmet Şentürk and Bekir Şentürk v Turkey* (2013) 60 EHRR 4.

[140] *Pandemic and Human Rights in the Americas*, Res 1/2020 (IACommHR, 10 April 2020) paras 45–9; *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic*, CPT/Inf(2020)13 (20 March 2020).

[141] *Zhumbaeva v Kyrgyzstan*, CCPR/C/102/D/1756/2008 (19 July 2011) para 8.6.

[142] HRC, Concluding observations: El Salvador, CCPR/CO/78/SLV (22 August 2003) para 16.

[143] ACommHPR, General Comment 3, paras 3, 41, and 42; 155/96, *SERAC v Nigeria*, 16th Activity Report of the ACommHPR (2002–2003) para 67.

[144] General Comment 36, para 26.

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[146] *Salman v Turkey* (2000) 34 EHRR 425, paras 104–9; HRC, General Comment 36, para 29.

[147] HRC, General Comment 31, para 16; General Comment 36, paras 19 and 28.

[148] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9.

[149] ECHR, Art 2(2).

[150] *McCann and others v UK* (1996) 21 EHRR 97, para 194.

[151] 295/04, *Noah Kazingachire et al v Zimbabwe* (2 May 2012) para 109.

[152] *Güleç v Turkey* (1999) 28 EHRR 121, paras 71–3.

[153] HRC, *Suarez de Guerrero v Colombia*, CCPR/C/15/D/45/1979 (31 March 1982) paras 13.2 and 13.3.

[154] OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016); HRC, General Comment 36, paras 27–8.

[155] *Nachova and others v Bulgaria* (2006) 42 EHRR 43, para 160.

[156] *Al-Saadoon and Mufdhi v UK* (2010) 51 EHRR 9, para 120.

[157] HRC, *Judge v Canada*, CCPR/C/78/D/829/1998 (5 August 2002) para 10.4.

[158] *Soering v UK*.

[159] ICCPR, Art 6(2); ACHR, Art 4(2); ACommHPR, General Comment 3, para 24.

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[161] ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 1. See also ACommHPR, General Comment 3, para 24.

[162] HRC, *Thompson v St Vincent and the Grenadines*, CCPR/C/70/D/806/1998 (18 October 2000) para 8.2; *Hilaire and others v Trinidad and Tobago*, Merits, Reparations and Costs, IACtHR Series C No 94 (21 June 2002) paras 106–8.

[163] HRC, General Comment 36, para 44.

[164] HRC, Concluding Observations: The Sudan, CCPR/C/SDN/CO/3 (29 August 2007) para 19.

[165] ICCPR, Art 6(5); ACHR, Art 4(5); CRC, Art 37; ACommHPR, General Comment 3, para 24.

[166] ICCPR, Art 6(5); ACHR, Art 4(5); ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 3.

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[168] General Comment 36, para 40.

[169] *Soering v UK*, paras 106–11.

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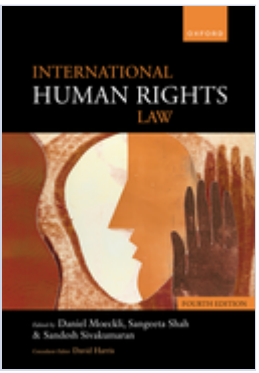

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 187

10. Adequate Standard of Living

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https://doi.org/10.1093/he/9780198860112.003.0010
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter examines the right to an adequate standard of living and its components, namely, the rights to food, housing, and health. The chapter analyses the meaning and key features of the right to an adequate standard of living and examines the normative content of that right and its components, namely, the rights to food, housing, and health. The chapter then explores the difficulties and special obligations in ensuring the right to an adequate standard of living for particular groups of people, addresses the relationship between the right to an adequate standard of living and other human rights, examines the question of progressive implementation of the right, and, finally, addresses the justiciability of the right to an adequate standard of living and the need for international action in its implementation.

Keywords: international human rights, food, housing, health, standard of living, water, women, children, indigenous peoples, Dalits, Roma, social security, social assistance, progressive implementation, obligation to protect, obligation to respect, obligation to fulfil

Summary

This chapter considers the human right to an adequate standard of living and its main components, namely, the rights to food, housing, and health. These rights are, in whole or in part, contained in principal international human rights instruments, which impose an obligation on states parties to take a range of measures to ensure everyone can enjoy them. A particular challenge is to ensure the right to an adequate standard of living to people who are in particularly vulnerable situations or have

special needs. The chapter explores the relationship between the right to an adequate standard of living and other human rights and describes some of the recent international developments regarding the progressive implementation of the right.

1 Introduction

The right to an adequate standard of living was first introduced into international human rights law through Article 25(1) of the Universal Declaration of Human Rights (UDHR):

> Everyone has the right to a standard of living adequate for the health and well-being of himself and 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.

Among the main inspirations for this provision was former US President Franklin D Roosevelt's 'Four Freedoms' address to Congress in 1941.[1] In that speech, Roosevelt referred to four fundamental human freedoms to be secured in the future world order: freedom of speech, freedom of religion, *freedom from want*, and freedom from fear. The inspirational legacy of that speech is expressly recognized in the preamble to the UDHR:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, *and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.*[2]

p. 188 ↵ Article 25 UDHR can also be seen as an elaboration of Article 1 UDHR, stating that '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.' A life in dignity requires an adequate standard of living. Human rights assume that individuals are not only rational but also have a social conscience, and are, therefore, concerned with the dignity of their fellow human beings. This requires a global social contract, which combines economic, social, and cultural rights with civil and political rights. This global social contract is spelled out in the UDHR and reinforced by subsequent legally binding conventions. The right to an adequate standard of living is also closely linked to Article 22 UDHR, which provides that everyone has the right to social security and is entitled to realization of the economic, social, and cultural rights indispensable for their dignity and the free development of their personality.

This chapter starts, in Section 2, with an analysis of the meaning and key features of the right to an adequate standard of living. Section 3 examines the normative content of this right and its components, namely, the rights to food, housing, and health. The right to water is a necessary component of each of these rights, and is briefly addressed under the right to food. Section 4 explores the difficulties and special obligations in

ensuring the right to an adequate standard of living for particular groups of people. Section 5 addresses the relationship between the right to an adequate standard of living and other human rights. Section 6 examines the question of progressive implementation of this right. Section 7 addresses the justiciability of this right and the need for international action in its implementation.

2 Meaning and Features

Article 25 UDHR has been strengthened in law through subsequent guarantees of an adequate standard of living, including Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 27 of the Convention on the Rights of the Child (CRC). None of these instruments precisely define the term 'adequate standard of living', but it can to some extent be understood from the context. According to Article 11 ICESCR, an adequate standard of living includes 'adequate food, clothing and housing'. Under Article 12 ICESCR, states parties have recognized the right of everyone to the highest attainable standard of health. The standard of living guaranteed to every child by Article 27 CRC is one that is 'adequate for the child's physical, mental, spiritual, moral and social development'.

While the basic necessities referred to in these instruments include food, clothing, housing, and healthcare, an adequate standard of living requires more. Precisely how much more is required cannot be stated in general terms, but depends on the conditions in the society concerned. The essential point is that everyone should be able, without shame and without unreasonable obstacles, to become a full participant in ordinary, everyday interaction with other people. Everyone should be able to enjoy their basic needs under conditions of dignity. No one should have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms, such as through begging, prostitution, or bonded labour. In purely economic terms, an adequate standard of living implies a living above the poverty line of the society concerned, which according to the World Bank comprises two elements:

> The expenditure necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society.[3]

p. 189

2.1 Duties of the Individual

The enjoyment of the right to an adequate standard of living requires efforts by all individuals to take care of their own needs and the needs of their children, supplemented by social security from the state or other resources. These obligations of the state are subsidiary to the efforts made by the individual through their own work or income. State obligations only come fully into play when individuals cannot or do not manage by themselves to secure their own or their dependants' standard of living, for example if they cannot find employment, work, or other economic activity in the formal or informal sector or do not have sufficient assets for production or services of their own.

For most children, their standard of living depends primarily on that of their parents. If children do not have parents or their parents fail to support them, the state has an obligation to assist and ensure that they have adequate care.

In post-industrial societies, women are increasingly regaining their economic autonomy through formal employment, making them less dependent on the efforts of their husbands or their families, although in most societies the standard of living of families still depends on the joint effort of spouses. In pre-industrial societies, the elderly were to a large extent taken care of by their offspring, just as the elderly had taken care of their children. In post-industrial societies, this is no longer practical, due to increased mobility. The standard of living of the elderly has, therefore, increasingly been secured through various forms of social security, such as old-age pensions.

2.2 State Obligations

The nature of state obligations varies greatly, depending on prevailing political factors and the nature and level of the state's economic and social development. In most societies, there is a considerable difference between the role performed by the state regarding the realization of the right to food or to housing, on the one hand, and the realization of the right to health, on the other hand. In practical terms, in post-industrial societies food and housing are mainly considered to be private goods which people are generally expected to obtain through their own efforts, whereas the right to health is widely associated with publicly organized healthcare as a public good and, therefore, an obligation of the state. Nevertheless, states have obligations under international human rights law in regard to all social rights, although the precise content of these obligations may vary from one state to another.[4]

Under the right to an adequate standard of living, states must, first, *respect* the individual's freedom to find their own ways of ensuring their standard of living, alone or in association with others.

Second, states are obliged to *protect* individuals' freedom of choice and their creative use of resources to satisfy their basic needs. For example, states are required to provide protection against fraud, unethical behaviour in trade and contractual relations (for instance, unethical marketing of unhealthy ultra-processed junk food, especially to children), marketing of dangerous products, and dumping of hazardous waste. States are further obliged to protect against discrimination that directly or indirectly prevents particular groups of people from having access to food or housing or other related rights.

Third, where necessary, states are obliged to *fulfil* everyone's right to an adequate standard of living. This may take two forms. First, states may have to *facilitate*, through ↵ information, education, or other means, people's access to public resources to ensure their livelihood if they lack the opportunity to do so themselves. Second, states may have to directly *provide* the means for the satisfaction of basic needs (be it in the form of direct aid or social security) to supplement the efforts of individuals themselves. Extensive direct provision of resources may become necessary during periods of widespread unemployment (such as during a recession), sudden crises or disasters (arising, for example, from wars or the climate crisis), or in regard to the disadvantaged, the elderly, or other marginalized groups.

p. 190

2.3 Equality and Non-Discrimination as an Overarching Principle

The duty of states to ensure equality and non-discrimination runs through all human rights instruments as a core principle and is essential to the enjoyment of economic, social, and cultural rights, including the right to an adequate standard of living. Article 2(2) ICESCR obliges states parties 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

More specifically, Article 3 ICESCR requires states to ensure the equal right of men and women to enjoy all Covenant rights. The obligations arising from the principle of equality and non-discrimination have been elaborated by the Committee on Economic, Social and Cultural Rights in its General Comment 20.[5] The Committee made it clear that states must eliminate formal and substantive, as well as direct and indirect, discrimination.[6] The Committee has also elaborated the meaning of equality and non-discrimination in the context of specific Covenant rights, including the rights to housing,[7] food,[8] health,[9] and water.[10]

3 Normative Content

This section explains the different elements of the right to an adequate standard of living, namely the rights to food, housing, and health. The main legal sources and different components of each of these rights are considered and challenges to their realization set out. However, these rights should not be seen in isolation, but need to be seen in conjunction with other rights such as the rights to work, education, and other rights that will be briefly touched upon in this chapter.

3.1 The Right to Food

At the core of the right to an adequate standard of living is the right to adequate food. Without food there is no life, and with inadequate food, life is shorter and more prone to ill-health. Access to adequate food and to food security has been a dominant concern in the evolution of civilizations and formation of states. Neglect or violation of the right to food is probably the most serious global human rights issue in terms of the number

p. 191 ↵ of people whose rights are not ensured. In their 2021 annual report on the state of food security and nutrition in the world, the UN Food and Agriculture Organization (FAO) and other UN agencies estimate that about 800 million people do not have enough to eat and that nearly three billion people cannot afford a healthy diet.[11] Access to clean water is of crucial importance for the enjoyment of all the elements of the right to an adequate standard of living, including the right to food, and is therefore also briefly dealt with in this section.

3.1.1 Sources

The right to food set out in Article 25 UDHR is further elaborated in Article 11 ICESCR. While Article 11(1) recognizes everyone's right to adequate food, Article 11(2) obliges states parties to take more immediate and urgent steps to ensure 'the fundamental right of everyone to be free from hunger'. The right to food is also contained in other international human rights instruments, such as the CRC (Articles 24 and 27), and in regional instruments such as in Article 12 of the Additional Protocol to the American Convention on Human

Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). While the African Charter on Human and Peoples' Rights (ACHPR) does not contain an express reference to the right to food, the African Commission on Human and Peoples' Rights, in its decision in *SERAC v Nigeria*, has suggested that the right is implicit in the ACHPR because it is inextricably linked to human dignity and is essential for the enjoyment of other rights.[12]

3.1.2 Components and obligations

In its General Comment 12, the Committee on Economic, Social and Cultural Rights defined the right to food as follows: 'The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement'.[13] According to the Committee, 'adequate food' implies, first, 'the *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture'.[14] *Availability* means that either people must be able to feed themselves directly from natural resources or well-functioning distribution and processing systems must exist; *dietary needs* implies that the diet as a whole contains all the necessary nutrients for physical and mental growth, development, and maintenance; *free from adverse substances* sets requirements for food safety; and *cultural or consumer acceptability* implies the importance of also taking into account perceived non-nutrient-based values attached to food.[15] Second, the right to food requires 'the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights',[16] encompassing both physical and economic accessibility.[17]

The legal obligations of states parties to the ICESCR under the right to food have been interpreted by the Committee in paragraph 15 of the same General Comment:

> p. 192 The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires ↵ measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.[18]

The Committee has pointed out that some of the measures required from states are of a more immediate nature, while others are more long term in character.[19] The right to food is violated when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. Resource constraints do not absolve the state from responsibility; it has to show that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.[20] Furthermore, any discrimination in access to food or to means and entitlements for its procurement constitutes a violation of Article 11 ICESCR.[21] The Committee has emphasized that violations can occur through the direct action of states or by other entities insufficiently regulated by states. Non-state

actors, like private corporations and civil society organizations, also have responsibilities in the realization of the right to food. States should enable an environment that facilitates implementation of these responsibilities.[22]

3.1.3 The right to water

An adequate standard of living requires access to adequate water for personal and domestic use. While the right to water is not expressly mentioned in either Article 11 or Article 12 CESCR, it is clearly implied. The availability and accessibility of safe and potable water throughout the day is essential for health. Water is required in producing, preparing, and consuming food. Water is necessary for personal hygiene and sanitation and is also, therefore, an integral part of the right to health.

The Committee on Economic, Social and Cultural Rights has spelled out the different components of the right to adequate water in its General Comment 15. According to the Committee, adequacy implies that the water supply for each person must be sufficient and continuous (*availability*), that water must be safe (*quality*), and that water and water facilities have to be within physical reach and affordable for all, without discrimination (*accessibility*).[23] The Committee has emphasized that the right to water includes freedoms, for example the right to be free from interferences such as disconnections or contamination of water supplies, as well as entitlements, such as the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.[24]

3.1.4 Realization

Extensive and accelerating international attention has been paid to the right to food since the World Food Summit, held at the invitation of the FAO in Rome in 1996. At that summit, governments from all parts of the world declared it unacceptable that more than 800 million people throughout the world, particularly in developing countries, did not have ↵ enough food to meet their basic nutritional needs. They recognized that this was not the result of a lack of food supplies, which in fact had increased substantially, but due to a lack of physical or economic *access* to food. Governments at the summit committed themselves to achieving food security for all and to an ongoing effort to eradicate hunger in all countries, with an immediate view to reducing the number of undernourished people to half the 1996 level no later than the year 2015. Regrettably, this target was not met. In relative terms, however, the situation is more encouraging. The world now feeds a much larger population than it did in 1996. The problem is not an overall lack of food produced, but the inequality of access to it, together with enormous food waste.

p. 193

Conditions differ widely between states, and the most appropriate ways in which to implement the right to adequate food also vary considerably. Nevertheless, all states parties to the ICESCR and the CRC are obliged to take the measures required to ensure that everyone is free from hunger, and thereupon move as quickly as possible to a situation where everyone can enjoy their right to adequate food. In so doing, the different levels of state obligations discussed here should be applied, using the particular combination of measures warranted by the national situation.

Therefore, ideally every state should have, or should develop, a national strategy to implement the right to food. This would include assessing the situation for different groups and regions within the country, taking into account variations on the basis of gender, ethnicity, or race, and between rural and urban areas. When resource constraints emerge, measures should be undertaken to ensure, as a minimum, that vulnerable population groups and individuals do not have to face hunger. In the elaboration and implementation of national strategies for the right to food, people's informed participation is essential. Thus, states must ensure that particular conditions in different regions of the country are taken into account.

In November 2004, the FAO Council adopted the 'Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security'.[25] The objective of these guidelines is to provide practical guidance to states in the realization of the right to food, based on the legal standards already mentioned. The guidelines deal with general enabling conditions, but more importantly, they include a set of practical measures to be carried out. These include measures relating to access to resources and assets (labour, land, water, genetic resources for food and agriculture, and so on), food safety and consumer protection, nutrition policies, education and awareness-raising, national monitoring, and the setting of benchmarks for progressive realization.[26] The guidelines also underline the importance of ensuring that national human rights institutions address the realization of the right to food as part of their work.[27] Finally, they contain a section on international measures, which deals with international cooperation and unilateral measures, the role of the international community, international trade, external debt, international food aid, partnerships with NGOs, civil society organizations, and the private sector (corporations, enterprises).

In following up on these guidelines, UN specialized agencies, funds, and programmes have attempted to translate relevant human rights norms into principles that can assist states in operationalizing development policies. The FAO developed and published a comprehensive set of practical methodologies for the many aspects of implementing the right to food at state and local levels, including with regard to relevant legislation and monitoring mechanisms. The UN Committee on World Food Security (UN CFS), originally a technical committee under the FAO, is, since its reform in 2009, a democratically run multi-stakeholder platform with a secretariat shared among the FAO, the World Food Programme (WFP), and the International Fund for Agricultural Development (IFAD). With other relevant UN bodies closely associated, and with special platforms for civil society organizations and business alliances, UN CFS is now considered the foremost inclusive international and intergovernmental platform for all stakeholders to work together to ensure food security and nutrition for all. Its global strategic framework has an explicit human rights value base. Over the last decade, it has published several documents that adopt a human rights perspective, including the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)[28] and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.[29]

p. 194

In contrast, the intergovernmentally negotiated 2021 UN Voluntary Guidelines on Food Systems and Nutrition recognized international human rights instruments, but did not attend to human rights-based approaches to guide policies and processes on the ground—reflecting a growing resistance from certain member states to development action driven by economic, social, and cultural rights.[30] The same was noted during the UN Food Systems Summit in New York in September 2021, which in the end nevertheless issued an extensive policy brief on the transformative potential of a human rights-based approach:

> A human rights-based approach to food system transformation reinforces that food is a human right owed to all in all circumstances, without exception. It also recognizes that this right is inextricably linked to all other human rights, and that human rights principles of participation and inclusion, accountability, non-discrimination, transparency, equality and empowerment, and rule of law are critical to developing meaningful, inclusive, and coherent policy. Recognizing the universe of rights to which all humans are entitled, and the obligations owed by States and non-State actors is the first step in constructing a unified and holistic policy framework. Human rights are not optional or voluntary; international human rights law is binding and must be implemented accordingly. Implementation further requires concrete actionable policy commitments, including those that rebalance agency in food systems to empower local producers and promote the rights of the most vulnerable, excluded and marginalized, particularly women, children, peasants, small-scale producers, migrants, workers, and Indigenous peoples.[31]

3.2 The Right to Housing

Second only to the enjoyment of the right to food, an adequate standard of living requires that everyone has a place to live—a physical space which provides personal and family security, basic infrastructure, satisfactory privacy, necessary warmth on cold days, and protection against heat on warm days.

3.2.1 Sources

The right to housing forms part of the guarantees set out in Article 25 UDHR and Article 11 ICESCR. Furthermore, it is either expressly referred to or implied in other international instruments such as the International Convention on the Elimination of All Forms of ↵ Racial Discrimination (ICERD) (Article 5(e)(iii)), the CRC (Article 27), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Article 14(2)), and the Convention Relating to the Status of Refugees (Article 21). At the regional level, the right to housing is contained in the European Social Charter (Article 31). As with the right to food, the African Commission on Human and Peoples' Rights held in its decision in *SERAC v Nigeria* that, although there is no express reference to the right to housing in the ACHPR, the Charter must be interpreted to include such a right.[32]

p. 195

3.2.2 Components and obligations

The Committee on Economic, Social and Cultural Rights has elaborated on the content of the right to housing in its General Comment 4.[33] In terms of the holders of the right, it has pointed out that the right applies to everyone. According to the Committee, the reference to 'himself and his family' in Article 11 ICESCR reflects traditional assumptions regarding gender roles and economic activity patterns, but cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or collective groups. The concept of 'family' must, therefore, be understood in a wide sense and enjoyment of this right must not be subject to any form of discrimination.[34]

Adequate housing requires more than mere shelter in the sense of having a roof over one's head—it must be seen as the right to live somewhere in security, peace, and dignity. According to the Committee, the requirements for adequate housing are the following:

- *Legal security of tenure*: whatever the type of tenure, all persons should possess a degree of security of tenure which provides legal protection against forced eviction, harassment, and other threats.
- *Availability of services, materials, facilities, and infrastructure*: this includes safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage, and emergency services.
- *Affordability*: personal or household financial costs associated with housing should not be such that the attainment and satisfaction of other basic needs is threatened or compromised.
- *Habitability*: the housing must provide the inhabitants with adequate space and protection from cold, damp, heat, rain, wind, or other threats to health, structural hazards, and disease vectors.
- *Accessibility*: housing laws and policies must take into account the special needs of disadvantaged groups to ensure that such groups have full access to adequate housing resources.
- *Location*: adequate housing must be in a location which allows access to employment options, healthcare services, schools, childcare centres, and other social facilities.
- *Cultural adequacy*: the way housing is constructed, the building materials used, and the relevant policies must appropriately enable the expression of cultural identity and diversity of housing.[35]

In market economies, housing is generally considered to be a private good. However, the right to housing implies that the state has a duty to protect against discrimination in access to housing and to facilitate access to housing for all. To that extent, human rights makes housing a public good. That does not necessarily mean that states have an obligation to ↵ provide housing. Most people find their own way to obtain and secure their preferred place to live. As with other human rights, state obligations under the right to housing are a combination of passive and active duties. States have, first, a duty to *respect* the housing found by people themselves by abstaining from forcible evictions and displacements. Second, they must *protect* the tenure of existing housing against interference or unjustified evictions by third parties and adopt and enforce the necessary regulations to ensure the necessary quality of housing. Third, they have an obligation through regulatory functions to *facilitate* the opportunity of everyone to find affordable housing. Fourth, in exceptional circumstances and in regard to particularly vulnerable groups, they have to *provide* necessary housing when individuals or groups cannot manage to do so themselves. State measures to implement the right to housing will, therefore, normally reflect a mixture of provisions regulating the private sector ('enabling strategies') and public or state-driven measures (public housing). In essence, the obligation on states is to demonstrate that they have done enough to realize the right for every individual in the shortest possible time, prioritizing for that purpose the use of available resources.[36]

p. 196

3.2.3 Realization

The Committee on Economic, Social and Cultural Rights has pointed out that there remains a disturbingly large gap between the standards set out in Article 11(1) ICESCR and the situation prevailing in many parts of the world. This refers principally to developing countries, which confront major resource and other constraints, but there is also a significant and growing problem of homelessness and inadequate housing in some of the most economically developed societies. According to UN-Habitat estimates from 2020, there are 150 million homeless persons worldwide and 1.6 billion who are inadequately housed, millions of which are located in Europe and North America.

Besides homelessness, forced evictions (that is, evictions that are coercive or not carried out in accordance with pre-existing law) are the most severe violation of the right to housing. According to UN-Habitat, about 15 million persons are forcefully evicted every year. Forced evictions have been carried out against squatters, low-income renters, indigenous peoples, and other vulnerable groups with no or inadequate legal security of tenure. In its General Comment 7, the Committee on Economic, Social and Cultural Rights called for strict legislation to prevent unjustified evictions. Similarly, the Commission on Human Rights adopted a resolution in 2004 calling for a wide range of measures, including legislation, to prohibit forced evictions unless justified under strict limitations. It requested governments to eliminate the practice of forced evictions by: (1) repealing existing plans involving, as well as any legislation allowing for, forced evictions; and (2) adopting and implementing legislation ensuring the right to security of tenure for all residents.[37]

No state party to the ICESCR is free of significant problems of one kind or another in relation to the right to housing. The Committee on Economic, Social and Cultural Rights has, therefore, expressed regret that many states do not acknowledge their difficulties in ensuring the right to adequate housing in their reports to the Committee.[38]

3.3 The Right to Health

The term ‘right to health’ can be misleading. There is no human right to be healthy. Due to genetics, risky behaviour, accidents, and other factors, it is not within the capacity of states to ensure that everyone lives a full and lengthy life. What is envisaged in international ↵ human rights law is that everyone shall have a right to the highest attainable standard of health—attainable both in terms of the individual’s potential, the social and environmental conditions affecting the health of the individual, and in terms of health services. For reasons of convenience, this chapter refers to the ‘right to health’.

p. 197

3.3.1 Sources

The right to health is provided for in Article 25 UDHR as part of an adequate standard of living. In the ICESCR, it is contained in a separate, comprehensive provision (Article 12). Further human rights standards on the right to health include Article 12 CEDAW, Article 5(e)(iv) ICERD, Article 24 CRC, Article 11 of the European Social Charter, Article 10 Protocol of San Salvador, and Article 16 ACHPR.

3.3.2 Components and obligations

Under Article 12(1) ICESCR, states parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to health extends to adequate healthcare, the underlying preconditions for health, and adequate fulfilment of the social determinants of health. Article 12(2) ICESCR sets out the main directions for state action in fulfilling this right. According to this provision, states must take steps for:

> (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of 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 its General Comment 14, the Committee on Economic, Social and Cultural Rights has specified that the right to health involves the following elements and state obligations:

- *Availability*: states must ensure that functioning public health and healthcare facilities, goods, and services are available in sufficient quantity. The precise nature of these facilities, goods, and services will vary depending on numerous factors, including the state party's level of development.
- *Accessibility*: health facilities, goods, and services have to be accessible to everyone. Accessibility has four overlapping dimensions: (1) non-discrimination; (2) physical accessibility; (3) economic accessibility (affordability); and (4) information accessibility (the right to seek, receive, and impart information and ideas concerning health issues).
- *Acceptability*: all health facilities, goods, and services must be respectful of medical ethics and culturally appropriate, sensitive to gender and lifecycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.
- *Quality*: health facilities, goods, and services must be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs, appropriate hospital equipment, safe and potable water, and adequate sanitation.[39]

The right to health requires states to adopt and implement measures ensuring the right of access to health facilities, goods, and services to all on a non-discriminatory basis, ↵ including to vulnerable or marginalized groups that otherwise might not have such access. This also requires the equitable distribution of health facilities, which are often concentrated in the main urban areas, leaving rural and less important urban areas unattended.

p. 198

As the Committee has pointed out, a state is in violation of its obligation to protect individuals' health if it fails to take all necessary measures to safeguard persons within its jurisdiction from infringements of the right to health by third parties. This may include omissions such as the failure to discourage production, marketing, and consumption of tobacco, narcotics, and other harmful substances; the failure to discourage the continued observance of harmful traditional medical or cultural practices; or the failure to enact or enforce laws to prevent the pollution of water, air, and soil by extractive and manufacturing industries.[40]

3.3.3 Realization

Realization of the right to health is closely linked to the realization of other economic and social rights. It is crucial that states ensure freedom from hunger and access for all to essential and sufficient food, which is nutritionally adequate and safe. The high level of child mortality, particularly in developing countries, is caused primarily by communicable diseases, insufficient or inadequate food, unsafe and polluted water, and the use of breast-milk substitutes under unhygienic conditions. Realization of the right to health depends on access to basic shelter, housing, food, and general sanitation, as well as an adequate supply of safe and potable water.

The Committee on Economic, Social and Cultural Rights has urged all states parties to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the entire population. It has pointed out that the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process. They should include methods such as right-to-health indicators and benchmarks by which progress can be monitored, and should give particular attention to all vulnerable or marginalized groups. In addition, everyone should be ensured access to essential drugs as defined under the World Health Organization (WHO) Action Programme on Essential Drugs.[41]

Of key importance is, finally, the task of ensuring reproductive rights, maternal (prenatal as well as postnatal) healthcare, and child healthcare. Maternal mortality is the leading cause of death among women and girls of reproductive age. It is estimated that half a million women and girls die annually from complications related to pregnancy and childbirth. If pregnancy-related injuries and disabilities are included, such as haemorrhage, infection, brain seizures, hypertension, anaemia, and obstetric fistulae, it is probable that tens of millions of women and girls are affected.

Drawing on the relevant provisions of the UDHR, the WHO has made universal health coverage a major goal for its work with member states. The role of the state is crucial in directing resources for healthcare on an equal basis and in acting as a serious regulator in a number of situations where corporate and other economic interests can threaten full realization of the right to health for all.[42]

p. 199

4 Categories and Groups of People with Special Concerns

Human rights, including the right to an adequate standard of living, should be equally applicable to everyone. In practice, however, it has proved necessary to pay special attention to the situation of some categories or groups of people, because they are vulnerable, have been neglected or marginalized, or have particular needs. It has been recognized that separate attention has to be given to the standard of living of different members of the family, including women and children. In addition, three particularly vulnerable groups of people will be discussed in this section: indigenous peoples, Dalits in South Asia, and the Roma in Europe.

4.1 Women

International human rights bodies have recognized that women may face greater difficulties than men in securing an adequate standard of living. The Committee on Economic, Social and Cultural Rights has, therefore, urged states to include in their national strategies to implement the right to food guarantees of women's full and equal access to economic resources, including the right to inheritance and ownership of land and other property, credit, natural resources, and appropriate technology. Such strategies should also contain measures to respect and protect self-employment and work which provides adequate remuneration to ensure a decent living for wage-earners and their families (as stipulated in Article 7(a)(ii) ICESCR).[43]

Healthcare is of particular importance for motherhood and childhood. Article 12 CEDAW requires states to 'take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality between men and women, access to health care services, including those related to family planning' and to ensure women have access to appropriate services in connection with pregnancy, confinement, and the postnatal period. The Committee on Economic, Social and Cultural Rights has underlined the need to develop and implement a comprehensive national strategy for promoting women's right to health to meet these requirements. It has pointed out that the realization of women's right to health requires the removal of all barriers interfering with access to health services, education, and information, including in the area of sexual and reproductive health. It has also emphasized the importance of preventive, promotional, and remedial action to shield women from the impact of harmful traditional, cultural practices and norms that deny them their full reproductive rights.[44]

Article 14 CEDAW requires states to pay special attention to the particular problems faced by rural women. In particular, states must ensure such women have the right to adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport, and communications. Furthermore, they must be given the right to participate in the elaboration and implementation of development planning at all levels and to have access to adequate healthcare facilities, including information, counselling, and services in family planning.

4.2 Children

Article 27 CRC provides 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. This involves adequate ↵ food, housing, nursing, and care. Article 27(2) provides that the parent(s) or others responsible for the child have the primary responsibility to secure the conditions of living necessary for the child's development.

p. 200

While ensuring the child's right to an adequate standard of living is the primary duty of parents, this may not always be sufficient. According to Article 27(3) CRC, states must take appropriate measures to assist parents to implement this right. If necessary, they have to provide material assistance and support programmes, particularly with regard to nutrition, clothing, and housing. In addition, many children grow up in single-parent households, are orphaned, or have parents who have absconded or neglect their duty. In such situations, where other relatives do not take it over, the state has a duty to directly ensure for the child an adequate standard of living through appropriate institutions or placement with foster parents.

Under the right to health, states have a duty to diminish infant and child mortality. Article 12(2)(a) ICESCR expressly requires states to make 'provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child'. Similar obligations are contained in Article 24(2)(a) CRC and flow from Article 6 CRC, which provides that every child has the inherent right to life and that states 'shall ensure to the maximum extent possible the survival and development of the child'. This obligation may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, pre- and postnatal care, access to information, as well as to resources necessary to act on that information.

More generally, Article 24 CRC guarantees the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Thus, states must ensure that no child is deprived of his or her right of access to healthcare services. Furthermore, they have an obligation to ensure the provision of necessary medical assistance and healthcare to all children, to combat disease and malnutrition, and to develop preventive healthcare. The obligation of states parties to combat disease and malnutrition reflects the dominant problems facing children in many developing countries. A large number of children, particularly in the poorer sector of the population, still die before the age of five, due to a combination of malnutrition, unsafe water and sanitation, and communicable diseases, although the figures are declining.[45] The risks can be substantially reduced through readily available technology such as oral rehydration therapy and immunization against the common childhood diseases. It is also essential to ensure provision of adequate nutritious food and clean drinking water.

4.3 Indigenous Peoples

The indigenous peoples of the world are generally among the most impoverished, because they have been marginalized to the frontiers of subsistence.[46] Many of them are struggling to maintain and preserve their own culture. Since much of their land and resources has been taken away from them, the little that is left cannot provide them with enough to satisfy an adequate standard of living. While efforts to strengthen their rights have had some positive results in recent years, such as the adoption in 1989 of the International Labour Organization (ILO) Convention on the Rights of Tribal and Indigenous Peoples (No 169) and in 2007 the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples, they still suffer from severe deprivation. When they are displaced and live on 'welfare', their culture is undermined and the alien lifestyle leads to high degrees of ↵ alcoholism, suicide, and sometimes criminal behaviour. In line with the UN Declaration on the Rights of Indigenous Peoples, conditions must be established, including through recognition of their rights to land and natural resources, which enable them to preserve their culture while sustaining a livelihood that ensures for them an adequate standard of living. This close link between rights to land and natural resources, on the one hand, and economic survival, on the other hand, has been highlighted by the Inter-American human rights bodies in a number of cases.[47] In the *Yakye Axa Indigenous Community* case, the Inter-American Court of Human Rights held that Paraguay had violated the rights of the members of that community to live a dignified existence, which follows from the right to life, by delaying the restitution of their ancestral lands and thus making it difficult for them to obtain food, clean water, adequate housing, and healthcare.[48]

p. 201

The Committee on Economic, Social and Cultural Rights has repeatedly addressed the problems faced by indigenous peoples in its General Comments. It has drawn attention to the particular vulnerability of indigenous peoples whose ancestral land may be threatened. In several places, corporations involved in oil or other mineral extraction have aggravated the situation of indigenous peoples, degraded their land, and caused their displacement.[49] The Committee has also emphasized that as part of their obligations to protect people's resource base for food, states parties should take appropriate steps to ensure that activities of the private business sector are in conformity with the right to food.[50] With regard to the right to housing, it has pointed out that indigenous peoples are among those vulnerable groups who suffer most from evictions.[51] Finally, the Committee has called on states to take particular care to ensure that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.[52]

Indigenous peoples often live in remote areas with the lowest level of access to modern healthcare, and when they can reach healthcare stations there is often a poor understanding of, and respect for, their cultural requirements. The Committee has argued that indigenous peoples have the right to specific measures to improve their access to health services and care. Health services should be culturally appropriate and thus take into account traditional preventive care, healing practices, and medicines. States should provide resources for indigenous peoples to design, deliver, and control such services. The Committee has noted that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. Therefore, development-related activities that lead to the displacement of indigenous peoples, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, have a deleterious effect on their health.[53]

4.4 Dalits in South Asia and Roma in Europe

Many other minorities are subject to persistent discrimination, undermining their standard of living. These include the low-castes or Dalits in South Asia—particularly in India—who, as a result of social practices, are often marginalized, deprived of access to ↵ the means of adequate food and housing, and given access only to the lowest, most menial work. While such practices are generally prohibited under the respective national laws, enforcement of the law is often weak and segments of the police and other law enforcement agencies are themselves socialized in the same discriminatory attitudes that keep such practices alive. In its General Comment 20 of 2009, the Committee on Economic, Social and Cultural Rights pointed out that the prohibited ground of discrimination of 'birth' listed in Article 2(2) ICESCR also includes *descent*, especially on the basis of caste and analogous systems of inherited status. Therefore, states parties should take steps to prevent, prohibit, and eliminate discriminatory practices directed against members of descent-based communities and act against dissemination of ideas of superiority and inferiority on the basis of descent.[54]

p. 202

A somewhat comparable situation exists in many parts of Europe, where the Roma and the Sinti are subject to widespread social discrimination, and where governments are unable fully to eradicate these practices. In 2012, the Commissioner for Human Rights of the Council of Europe presented a comprehensive report detailing extensive racially motivated violence against Roma and Travellers, police abuse of these groups, discrimination in access to adequate housing and to employment, denial of and discrimination by emergency

medical health services and by health providers, exclusion from healthcare as a result of physical distance from healthcare facilities, and serious impediments to their access to social security.[55] Multiple initiatives have been taken by the Council of Europe, the European Union, and by the Organization for Security and Co-operation in Europe (OSCE), but the persistent prejudices against, and exclusion of, the Roma and Sinti have made progress difficult.

5 Relationship With Other Human Rights

As pointed out in the conclusions of the 1993 Vienna World Conference on Human Rights, '[a]ll human rights are universal, indivisible, interdependent and interrelated.'[56] It is easy to show that the right to an adequate standard of living is closely linked to other human rights. Most obviously, it is heavily dependent on the realization of other economic and social rights, such as the rights to work, education, and property. Of particular importance is the right to social security, dealt with in Section 5.1.

The right to an adequate standard of living is also linked to cultural rights, which, according to Article 27 UDHR and Article 15 ICESCR, contain the following elements: the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, the right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the beneficiary is the author, and the freedom indispensable for scientific research and creative activity.[57] These rights intersect in several ways with the right to an adequate standard of living. To mention one example: the right to benefit from advances in scientific progress can be a basis for claiming a right of access to affordable new medicine, which may be crucial in treating diseases such as AIDS or COVID-19.[58]

p. 203 ↵ Finally, as explained in Section 5.2, the right to an adequate standard of living may also coincide or, on the other hand, clash with civil and political rights.

5.1 The Right to Social Security and Social Assistance

The right to social security is essential when people are not able to secure an adequate standard of living themselves, particularly when they do not have the necessary assets or are not able to work due to unemployment, old age, or disability. The drafters of the UDHR considered social security to be one of the core guarantees for the right of everyone to an adequate standard of living.

The general guarantee of an adequate standard of living set out in Article 25 UDHR includes 'the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. But the UDHR also contains a separate guarantee of the right to social security that uses stronger terms. Article 22 states that '[e]veryone, as a member of society, has the right to social security'. The ICESCR, in Article 9, guarantees 'the right of everyone to social security, including social insurance', while Article 10 of the same covenant refers to social security within the context of the protection of the family, mothers, and children. CEDAW contains a range of social security guarantees relevant to women, including the right of women to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age, and other incapacity to work, as well as the right to paid leave (Article 11(1)(e)), the right to family benefits (Article 13(a)), and the right of rural women to benefit directly from social

security programmes (Article 14(2)(c)). The CRC provides for the right of the child to benefit from social security, including social insurance (Article 26). The right to social security is also explicitly mentioned in regional human rights instruments, including the American Declaration of the Rights and Duties of Man (Article XVI), the Protocol of San Salvador (Article 9), and the European Social Charter (Articles 12, 13, and 14).

Social security must be distinguished from social assistance and charity. Charity is irrelevant in the present context, because it involves neither a right of the individual nor a duty imposed on the state. It is, therefore, not a human rights issue. Social assistance is often discretionary and, therefore, neither a right nor a duty.

Measures to implement the right to social security as set out in Article 9 ICESCR can include contributory or non-contributory schemes, or a combination of the two. The Committee on Economic, Social and Cultural Rights, in its General Comment 19, has defined these two types of provision of social security benefits as follows. *Contributory* (or insurance-based) schemes, such as social insurance, which is expressly mentioned in Article 9, generally involve compulsory contributions from beneficiaries, employers, and, sometimes, the state, in conjunction with the payment of benefits and administrative expenses from a common fund. *Non-contributory* schemes include universal schemes, which provide the relevant benefit to everyone who experiences a particular risk or contingency, and targeted social assistance schemes, where benefits are received by those in a situation of need.

In recent years, an embryonic form of social security under the name of 'cash transfer programmes' has emerged, particularly in the least developed countries where the social security system has limited reach. The cash transfers may take the form of non-contributory old-age pensions, disability grants, child support grants, widow's allowances, or household transfers to persons in poverty. These programmes are now subject to international monitoring under the heading of the need to safeguard a social protection floor.

p. 204 ↵ The Committee on Economic, Social and Cultural Rights has expressed its concern over the low levels of access to social security.[59] The ILO provides guidance to member states in building comprehensive social security systems and in extending social security coverage by prioritizing the establishment and advancement of the national floors of social protection, accessible to all in need. Social protection floors should 'ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.'[60]

In 2020, the European Union (EU) together with the ILO and UNICEF took the initiative to establish the Global Coalition for Social Protection Floors, an innovative partnership with several African and Asian states designed to promote better coverage of health, food, and social security.[61] According to the mandate behind this coalition, social protection is not only a human right but also an imperative investment. A social protection floor can gradually be given additional resources, often with high returns on the investments made, reducing the level of crime in society. It may also serve as a buffer against dependency and facilitate social integration.

In 2021, the Special Rapporteur on Extreme Poverty, Olivier De Schutter, therefore proposed the establishment of a Global Fund for Social Protection:

> A global fund for social protection should be set up to increase the level of support to low-income countries, thus helping them both to establish and maintain social protection floors in the form of legal entitlements, and to improve the resilience of social protection systems against shocks. Such a fund is affordable, whether funding comes from official development assistance or from other sources, including unused or new special drawing rights. Moreover, social protection should be seen as an investment with potentially high returns, since it leads to building human capital, has significant multiplier effects in the local economy, and contributes to inclusive growth and to resilience in times of crisis.[62]

According to that proposal, the Global Fund should gradually make international support redundant, and can be phased out once countries have enhanced their capacity to raise taxes progressively and to redistribute them equitably in the form of universal social protection. It can therefore be an important device against the effects of excessive globalization.

5.2 Civil and Political Rights

Civil and political rights are essential in order to achieve the realization of an adequate standard of living in practice. When rights to housing or food are unjustifiably denied, everyone, including the poor, must have effective access to remedies before independent courts or other institutions such as human rights commissions. In some parts of the world, civil and political rights have been extensively used to advance the realization of economic and social rights, including the right to an adequate standard of living.

p. 205

6 Progressive Implementation

It is obvious that the right of everyone to an adequate standard of living is still far from realized. Around 800 million people are chronically hungry, and at least one billion have substandard housing or no housing at all. The problem of homelessness is also growing in 'rich' countries. It is therefore encouraging that there is now a consensus to ensure the safeguarding of the social protection floor, as discussed earlier. This can help to reduce the enormous gaps between the standards set by international human rights law and the reality that many people face. This is also the case for many civil and political rights. Some may consider that human rights that are not applied in practice do not deserve the name 'rights'.

It has to be borne in mind that the UDHR was proclaimed as a 'common standard of achievement'.[63] All human rights set out in it, including the economic and social rights, must be realized through progressive measures. These measures must be taken at the national as well as the international level: the right to an adequate standard of living cannot be fully realized unless the world community and states cooperate towards global justice.

Article 2 ICESCR envisages a progressive realization of the Covenant rights and acknowledges the constraints due to the limited available resources. However, it also imposes obligations which are of immediate effect. In particular, states parties must guarantee that the rights will be exercised without discrimination of any kind and must take immediate and progressive steps towards full realization of the relevant rights by all

appropriate means, including particularly the adoption of legislative measures. The Committee on Economic, Social and Cultural Rights has pointed out that such steps should be deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[64]

Full realization would require that human rights are given priority in development processes. Regrettably, this has often not been the case. Both at the national and international level, there are serious maldevelopments.

As previously explained, violations imputable to the state can occur either by direct action by the state and its agencies or by its failure to ensure rights. The Committee on Economic, Social and Cultural Rights has pointed out that in determining which actions or omissions amount to a violation, it is important to distinguish the inability of a state party to comply from its unwillingness to do so. Should, for instance, a state party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, then it has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, its minimum obligations. A state claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

7 The Importance of International Monitoring and Recourse Procedures

Most states have some legislation relating to the rights to food, housing, and health. However, such legislation is often fragmented, does not guarantee them as proper entitlements, and is often weakly enforced or not enforced at all. International economic, ↵ social, and cultural rights constitute a comprehensive normative framework that should guide the content of national legislation in this area. In the absence of sufficient national legislation or its enforcement, the economic, social, and cultural rights contained in international instruments can play an important role for the individual. But are these rights justiciable? Behind this widely discussed question is a more fundamental one: what is the nature of international economic, social, and cultural rights?

p. 206

The answer is not as difficult as is often thought. International human rights law serves two functions. First, it provides directive principles. Second, under some conditions, it provides subjective rights or genuine entitlements, provided national courts treat them as such. National courts have, to an increasing extent, enforced international guarantees of economic, social, and cultural rights.[65] This issue is further discussed in Chapter 24, so the discussion here will focus on the first issue.

The notion of directive principles is well known from constitutional law in some states. In India, for example, directive principles of state policy are contained in the constitution as guidelines to the central and state governments, to be considered when framing laws and policies. These provisions are not directly enforceable by any court, but they are considered to be fundamental principles of governance that should be applied by state authorities.[66] Similar principles are also found in other constitutions, such as that of Ireland, which focus on social justice and economic welfare. Such directive principles play an important role in the political

process in these states, but there are normally no national monitoring authorities supervising their implementation. In addition, they are often general and vague in their wording and, therefore, leave a wide margin for political disagreement concerning their implementation.

This is where international human rights law, and in particular guarantees of economic, social, and cultural rights, have an important additional value. International monitoring bodies, such as the human rights treaty bodies and the special procedures of the Human Rights Council, can pursue a dialogue with each state on the optimal implementation of the directive principles, and can elaborate and clarify the content of state obligations under international human rights standards. This is what the Committee on Economic, Social and Cultural Rights has done by issuing its General Comments, several of which concern the right to an adequate standard of living, and by adopting concluding observations and recommendations upon examination of state reports.

The monitoring through examination of state reports has been supplemented by a procedure created by the Optional Protocol to the ICESCR, which was adopted in 2008 and came into force in 2013. Under the Optional Protocol, individuals who claim that their economic, social, and cultural rights have been violated can bring a complaint to the Committee after having exhausted available domestic remedies.

The UN Human Rights Council and its predecessor, the Commission on Human Rights, have developed important thematic mechanisms to report on and promote the implementation of the right to an adequate standard of living. The Special Rapporteurs or Independent Experts—on the right to food, the right to housing, the right to health, the right to water, and the elimination of extreme poverty—play a very important role in advancing the enjoyment of the right to an adequate standard of living. They highlight in their reports shortcomings and progress in the implementation of the right to an adequate standard of living in different parts of the world. Thereby, they make a significant contribution to the worldwide realization of this right.

p. 207 ↵ Finally, UN specialized agencies, programmes, and funds are occupied with strengthening and monitoring accountability of their proposed policies and actions, with human rights being the variable that depends on the backing of member states. One problem has been the lack of logical and robust indicators in food and nutrition systems that are linked with human rights principles. A promising step forward is a 2021 publication by the FAO that ‘highlights the main functions of the law supporting sustainable agri-food systems that promote healthy diets and improve nutrition’.[67]

8 Conclusion

Intended to promote and ensure freedom from want, the right to an adequate standard of living was given a central place in the proclamation of universal human rights from the very beginning in 1948. It has since been elaborated in international standards and clarified in detailed General Comments and practice. Several guidelines have been adopted for the implementation of the different components of an adequate standard of living, namely, the rights to food, water, housing, and health. The relevant international human rights

standards serve both as directive principles and as subjective rights. While their main function has been as directive principles pursued through international monitoring and reporting, there is an emerging trend also to use them as subjective rights by adjudicative bodies.

Gaps remain in the implementation of the right to an adequate standard of living. However, by adopting the 17 Sustainable Development Goals at the UN Summit on Sustainable Development in 2015, the international community has prioritized the need to ensure an adequate living standard for all. The three first-mentioned goals to be achieved by 2030 are: (1) to end poverty; (2) to achieve zero hunger; and (3) to ensure good health and well-being for all.[68] Obviously, realization of these goals must be combined with the achievement of the other 14 Sustainable Development Goals, but the fact that these three goals are listed first, highlights the importance given to the right of everyone to an adequate standard of living.

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Useful Websites

UN Committee on Economic, Social and Cultural Rights: **<http://ohchr.org/en/hrbodies/cescr** *<http://ohchr.org/en/hrbodies/cescr>***>**

UN Special Rapporteur on the right to food: **<http://www.ohchr.org/EN/Issues/Food** *<http://www.ohchr.org/EN/Issues/Food>***>**

UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: **<http://www.ohchr.org/EN/Issues/Housing** *<http://www.ohchr.org/EN/Issues/Housing>***>**

UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: **<http://www.ohchr.org/EN/Issues/Health** *<http://www.ohchr.org/EN/Issues/Health>***>**

UN Special Rapporteur on the human rights to safe drinking water and sanitation: **<www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater** *<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater>***>**

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Questions for Reflection

In relation to former US President Franklin D Roosevelt's 'Four Freedoms' speech of 1941, to what extent do you think that the 'freedom from want' has been realized today? Organize your thinking around the following questions:

1. What do you see as falling under the term 'want'?
2. What information do you think is needed to find out how different groups of people experience freedom from want?
3. Who has obligations or responsibilities for realizing this freedom?
4. To what extent can Roosevelt's other three freedoms influence freedom from want?

Notes

[1] On the origin of Roosevelt's concern with freedom from want, see McGovern, *The Third Freedom: Ending Hunger in Our Time* (Simon & Schuster, 2001).

[2] UDHR, second preambular para (emphasis added).

[3] World Bank, *World Development Report 1990* (OUP, 1990) 26. See also Chapter 30.

[4] On the origins of the analysis that follows, see Eide, 'State Obligations Revisited' in Eide and Kracht (eds), *Food and Human Rights in Development, Vol I* (Intersentia, 2005) 137. See also Chapter 7.

[5] CESCR, General Comment 20, E/*C.*12/GC/20 (2 July 2009).

[6] See Chapter 8 for an explanation of these concepts.

[7] CESCR, General Comment 4, HRI/GEN/1/Rev.9 (Vol I) 11; CESCR, General Comment 7, HRI/GEN/1/Rev.9 (Vol I) 38.

[8] CESCR, General Comment 12, HRI/GEN/1/Rev.9 (Vol I) 55.

[9] CESCR, General Comment 14, HRI/GEN/1/Rev.9 (Vol I) 78.

[10] CESCR, General Comment 15, HRI/GEN/1/Rev.9 (Vol I) 97.

[11] FAO, IFAD, UNICEF, WFP, and WHO, *The State of Food Security and Nutrition in the World: Transforming Food Systems for Food Security, Improved Nutrition and Affordable Healthy Diets for All* (2021).

[12] Communication No 155/96, 16th Activity Report of the ACommHPR (2002–2003).

[13] CESCR, General Comment 12, para 6.

[14] CESCR, General Comment 12, para 8 (emphasis added).

[15] CESCR, General Comment 12, paras 9–12.

[16] CESCR, General Comment 12, para 8 (emphasis added).

[17] CESCR, General Comment 12, para 13.

[18] Original emphases.

[19] CESCR, General Comment 12, para 16.

[20] CESCR, General Comment 12, para 17.

[21] CESCR, General Comment 12, para 18.

[22] CESCR, General Comment 12, paras 19–20. See also UN Guiding Principles on Business and Human Rights (2011) and Chapter 28.

[23] CESCR, General Comment 15, para 12.

[24] CESCR, General Comment 15, para 10.

[25] <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm *<http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>*>.

[26] FAO Council, Guidelines 8–17.

[27] FAO Council, Guideline 18.

[28] Adopted by the Human Rights Council on 28 September 2018, A/HRC/RES/39/12.

[29] <http://www.fao.org/3/i2801e/i2801e.pdf *<http://www.fao.org/3/i2801e/i2801e.pdf>*>.

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[34] CESCR, General Comment 4, para 6.

[35] CESCR, General Comment 4, para 8.

[36] CESCR, General Comment 4, para 14.

[37] CHR Res 2004/28, E/CN.4/RES/2004/28 (16 April 2004) para 2.

[38] CESCR, General Comment 4, para 4.

[39] CESCR, General Comment 14, para 12.

[40] CESCR, General Comment 14, para 51.

[41] CESCR, General Comment 14, para 43.

[42] See Meier and Gostin (eds), *Human Rights in Global Health*: *Rights-Based Governance for a Globalizing World* (OUP, 2018).

[43] CESCR, General Comment 12, para 26.

[44] CESCR, General Comment 14, para 21.

[45] The global under-five mortality rate declined by 59 per cent, from 93 deaths per 1,000 live births in 1990 to 38 in 2019. Despite this considerable progress, improving child survival remains a matter of urgent concern.

[46] For the definition of ‘indigenous peoples’, see Chapter 18.

[47] See Case 11.140, *Mary and Carrie Dann v United States*, IACommHR Report No 75/02 (27 December 2002); *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No 79 (31 August 2001); *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C No 125 (17 June 2005).

[48] *Yakye Axa Indigenous Community*, paras 164–8 and 176.

[49] CESCR, General Comment 12, para 13.

[50] CESCR, General Comment 12, para 27.

[51] CESCR, General Comment 7, para 10.

[52] CESCR, General Comment 19, HRI/GEN/1/Rev.9 (Vol I) 152, para 35.

[53] CESCR, General Comment 14, para 27.

[54] CESCR, General Comment 20, para 26.

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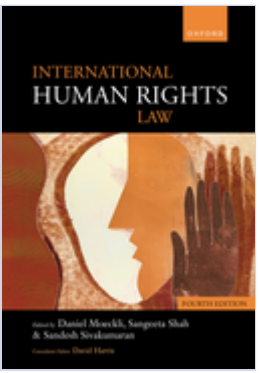

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 209

11. Thought, Expression, Association, and Assembly

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https://doi.org/10.1093/he/9780198860112.003.0011
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter discusses the sources, scope, and limitations of the four fundamental freedoms: thought, expression, association, and assembly. Freedom of thought includes freedom of conscience, religion, and belief. Freedom of expression includes freedom of opinion and freedom of information. Freedom of association concerns the right to establish autonomous organizations through which individuals pursue common interests together. The right of assembly protects non-violent, organized, temporary gatherings in public and private, both indoors and outdoors.

Keywords: freedom of thought, freedom of expression, freedom of association, freedom of assembly, international human rightslimitations

Summary

The four freedoms introduced in this chapter—thought, expression, association, and assembly—are interrelated and fundamental freedoms of the individual. They are essential for the exercise of many other rights. None are absolute in the sense that their exercise may never be restricted. International law provides the grounds on which each freedom may be required to be balanced against the rights of others or broader community interests. In the first instance, it is national authorities that have to carry out the careful balancing act. But international law also offers principles to safeguard against abuse of restrictions by the state. Freedom of thought includes freedom of conscience, religion, or belief. Freedom of expression includes freedom of opinion and freedom of information. Media freedom is also protected in international human rights law as essential for the enjoyment of freedom

of expression. Freedom of association concerns the right to establish autonomous organizations through which individuals pursue common interests together. The right of assembly protects non-violent, organized, temporary gatherings in public and private, both indoors and outdoors.

1 Introduction

1.1 Four Freedoms and their Relationships

The freedoms of thought, expression, association, and assembly, often described as fundamental freedoms, are closely related civil and political rights. The guarantee of each is necessary for the enjoyment of the other and, indeed, for the exercise of many human rights. Thus, freedom of expression is necessary if freedom of thought is to be exercised. In turn, freedom of expression has little meaning without the individual having freedom to think and have an opinion. The right to practise or to teach a religion includes the freedom to publish religious literature or broadcast religious programmes. If religious communities or denominations are to exist, their freedom of association is essential, as is their ↵ right to assemble for religious purposes. Freedom of expression is essential when people come together to pursue their interests through other associations, such as trade unions, political parties, or community groups. The European Court of Human Rights has defined one of the objectives of the freedom of association as the protection of opinions and the freedom to express them.[1] Freedom of expression is essential also to the freedom to assemble and the right to demonstrate over grievances. Thus, while each freedom is distinct in theory, in practice they are interrelated and interdependent.

p. 210

The consecutive location of the freedoms in all international human rights texts, beginning with the Universal Declaration of Human Rights (UDHR), reflects their complementary nature. Article 18 UDHR proclaims freedom of thought, conscience, religion, or belief, Article 19 freedom of opinion and expression, and Article 20 the freedoms of association and assembly. Each of the freedoms is pivotal for the individual's right to democratic participation, a right proclaimed in Article 21 UDHR. Each freedom needs also to be understood as integrating the right to equality and non-discrimination in Article 2 UDHR. Denials of the freedoms often occur in the context of discriminatory policies directed at particular groups or minorities, for example religious or ethnic minorities. Each freedom, as defined in international law, is expressed as a freedom of the individual but also has a collective dimension. Thus, Article 18 UDHR provides that freedom of thought, religion, or belief is to be enjoyed 'alone or in communion with others'. Freedom of expression includes not only the right of a speaker to communicate with others but the right of others to hear what the speaker has to say. By definition, the freedoms of association and assembly concern the collective activities of individuals.

Given the similar provisions of these four freedoms in international human rights law instruments, states and individuals could reasonably expect that the respective interpretations would be broadly consistent and coherent.

1.2 Limitations

A common feature of these freedoms is that none is unconditional in the sense that its exercise by individuals cannot be limited by the state. International human rights standards set out the grounds of permitted limitation. Two categories of limitation are envisaged. First, the freedoms may legitimately be regulated by law to protect the rights and freedoms of others. Second, limitation may be justified for different public interest reasons, namely, public order, health, morality, or national security. The constant challenge arising in practice is how to strike a balance, which is acceptable in a democratic society, between the right to exercise the freedom, on the one hand, and the need to protect the rights of others and the public interest, on the other hand. The factual and legal contexts are always critical.[2] The European Court of Human Rights explicitly affords states a margin of appreciation in applying restrictions, albeit ultimately subject to European supervision.[3] Other international human rights bodies have not expressly adopted that doctrine—indeed, the Human Rights Committee has explicitly rejected it, but in practice it may offer something similar.[4]

Most violations of these freedoms arise over patently unjustified limitations by governments. The killing of journalists, censorship of the internet, or the arbitrary banning of political movements or religious denominations occur with depressing frequency. But, even where these freedoms are broadly respected, difficult questions can arise over how to respond to direct conflict between the freedoms themselves or with other rights. In the ↵ case of the news media, for example, conflict arises on a daily basis between freedom of the press and the right to privacy. The tensions and misunderstandings which can arise between freedom of religion and freedom of expression were vividly demonstrated in the worldwide controversy over the publication of cartoons of the Prophet Mohammed in a Danish newspaper in 2005.[5] Another contemporary example concerns the display of religious symbols or wearing of religious dress (see Section 2.4). In summary, a society which enjoys the freedoms under discussion is not one in which there are no restrictions on their exercise. It is rather one in which the boundaries of freedom are openly debated and democratically resolved under the rule of law.

p. 211

Limitations will be discussed further as regards each freedom but some general principles applicable to all can be set out here:[6]

- *Legality*: any limitation on a freedom must be 'prescribed by' or be 'in accordance' with the 'law'. A restriction cannot be legitimate where it is the arbitrary whim of an official. The source of the national law may be a constitutional, legislative, or administrative measure, or a judicial ruling. The law must set out the ground of restriction in clear and precise terms so that it is both accessible and foreseeable.
- *Legitimate aim*: the limitation must follow a legitimate purpose, that is, be based on one of the exhaustive grounds of limitation listed in the international standards which define the particular freedom.
- *Necessary in a democratic society*: the limitation must correspond to a pressing social need, be justified by decisions that give relevant and sufficient reasoning, and be *proportionate* to the legitimate aim pursued. Any restrictive measure should be the minimum required to achieve its purpose in a democratic society. States must choose the means that cause the least possible prejudice to the rights in question.
-

Presumption of freedom: freedom is the rule, its limitation the exception. Restrictions are to be narrowly construed and convincingly justified.[7] Thus one should start with a strong presumption in favour of the freedom in question. The onus is on the authorities in the particular case to show that it is legitimate to restrict it. Blanket, indiscriminate restrictions will always be closely scrutinized. The situation is more complicated when two human rights have to be balanced. In such situations, the rights may be of presumptively equal weight and an intensive factual and contextual analysis will be required.

The following sections consider, in turn, the right to freedom of thought (Section 2), freedom of expression (Section 3), freedom of association (Section 4), and freedom of assembly (Section 5). Each section explains the sources of the respective right, its scope, and the limitations that can be imposed on it.

2 Freedom of Thought, Conscience, and Religion

2.1 Sources

This freedom is enshrined in Article 18 UDHR and in Article 18 of the International Covenant on Civil and Political Rights (ICCPR) as well as its Article 27 concerning the rights of minorities. It is also to be found in all regional human rights instruments.[8] The equality and non-discrimination provisions of the ICCPR (Articles 2, 3, and 26) and their equivalents in the regional instruments are vital for the enjoyment of the freedom as they prohibit unjustified differential treatment on the basis of religion. No international human rights treaty specifically devoted to freedom of thought, conscience, and religion has ever been adopted. However, an important Declaration was agreed by the UN General Assembly in 1981,[9] which provides the mandate of the Special Rapporteur on freedom of religion or belief, who is appointed by the UN Human Rights Council.[10]

p. 212

2.2 Scope

Article 18 UDHR proclaims:

> 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.

The UDHR by its nature could not specify fully the substance of this freedom in international law. That came with the drafting of Article 18 ICCPR. The predominant focus of both texts is on freedom of religion. However, the scope of the right is wider. It protects freedom of thought, that is, the right of the individual to have independent thoughts, ideas, and beliefs. This includes, for instance, an individual's right not to have to accept a political ideology or a religion with which he or she disagrees. Freedom of conscience, the individual's moral sense of right and wrong, is also explicitly recognized and protected. One common instance, considered in Section 2.4, in which this freedom is invoked arises where a citizen refuses on grounds of conscience to undertake compulsory military service. Finally, Article 18(4) ICCPR offers specific safeguards against the indoctrination of children by the state. It establishes a duty on the state to respect the

liberty of parents or guardians to determine the religious and moral education of their children in conformity with their own convictions. The child's right to freedom of thought, conscience, and religion is provided for in the Convention on the Rights of the Child (CRC) though it is accompanied by an obligation to respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.[11]

2.3 Freedom of Religion or Belief

While freedom of religion is the central concern of Article 18 ICCPR, that provision speaks of 'religion or belief', thus underlining the intention of the drafters that all beliefs, including non-theistic and atheistic beliefs, are protected.[12]

p. 213 ↵ There is no definition of religion offered in any international human rights instrument. It is probably impossible for states to agree a definition given the sheer diversity of religious ideas in the world. However, the significance of religion as one of the 'fundamental elements in [the] conception of life' for believers is recognized in international human rights law.[13] Freedom of religion is an individual right but has a collective aspect also. It means the right to hold spiritual beliefs and *to live by them*, whether in private or in public, alone or in community with others. The Human Rights Committee has stated that the term religion or belief is to be broadly construed, thus also including new religions.[14] But there are limits. For example, the Committee thought it inconceivable that the cultivation and worship of a narcotic drug could be a protected religion or belief under Article 18 ICCPR.[15]

2.3.1 Manifestation of religion

Article 18 ICCPR speaks of the right to manifest religion through 'worship, observance, practice and teaching'. The Human Rights Committee has offered guidance as to the wide range of activities encompassed by these words:

> The concept of *worship* extends to ritual and ceremonial acts giving 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 head coverings, 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 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.[16]

Practices that are merely *motivated* by religious belief are not protected. The existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case but it is not necessary to establish that the individual acted in fulfilment of a duty mandated by the religion in question.[17] The freedom to manifest one's religion includes the right not to be obliged to disclose one's religion.[18]

2.3.2 Freedom to change religion or belief

It follows from the freedom of thought and conscience that one may decide to change one's beliefs. The individual's right to change or choose religious belief is contested particularly by the Islamic faith. In some Muslim-majority countries, conversion from Islam to another religion (but not the reverse) constitutes the offence of apostasy, which in some cases is punishable by death. Similarly, in India several states have passed anti-conversion laws aimed primarily at inhibiting conversion from Hinduism to Christianity. Freedom to change a religion or belief is stated explicitly in Article 18 UDHR. However, reflecting ↵ Muslim sensitivities over the issue,[19] Article 18 ICCPR speaks of 'freedom to have or to adopt a religion or belief of his choice'. Despite this difference of language, the Human Rights Committee has confirmed that Article 18 guarantees that anyone may replace a current religion with another religion or become an atheist.[20] States must respect this right by abolishing state-sanctioned punishments for conversion and ensuring that there are no administrative obstacles to changing religion. There is also a positive obligation to protect individuals from harassment or violence from third parties that arises as a consequence of conversion.

p. 214

2.3.3 Proselytism

Article 18(2) ICCPR stipulates that there must be no coercion of the individual in the decision to either retain or change beliefs. Subject to this prohibition on forced conversion, the right to spread one's faith and to seek to persuade others to convert to it is protected as a manifestation of religion.[21]

2.3.4 Religion and the state

International human rights law does not require a separation between religion and the state. Such separation is to be found in the constitutional arrangements of many states, following the long-established examples of France and the US.[22] But in other states the relationships range from fusion of state and religion to formal recognition in law of the majority faith. The sole principles on religion and the state that international human rights law insists upon are those of pluralism and non-discrimination. Thus, the existence of a state church should not entail the suppression of, or discrimination against, minority faiths or new religions.[23] It is the duty of the state to defend religious diversity in a democratic society, and to insist on the values of pluralism and tolerance.[24] The European Court of Human Rights has held that for democracy to function properly, the state must remain neutral and impartial in its relations with various religions, denominations, and beliefs.[25] The right to freedom of religion normally excludes any assessment by the state of the legitimacy of religious beliefs or their means of expression.[26] In states that require the registration of religions to give legal status to a denomination, neither the law nor its application should discriminate

between religions by refusing, for example, to register some faiths while recognizing others.[27] All religions must have the freedom to establish communities or organizations and these should be autonomous in their activities. Autonomy includes determining their own leadership without interference from the state.[28]

While there may be exceptional cases,[29] the state has no general authority to decide whether or not a religion is legitimate. In *Moscow Branch of the Salvation Army v Russia*, the branch was refused registration by the city authorities, which claimed that it was a paramilitary organization.[30] The European Court of Human Rights found a violation of ↵ the branch's freedom of association in the context of the guarantee of freedom of religion. The Court emphasized that the guarantee of freedom of religion meant the state had no discretion to decide whether religious beliefs or the means used to manifest them were legitimate. It could not be credibly argued that the Salvation Army advocated the violent overthrow of the constitution or threatened the security of the state.

p. 215

2.4 Limitations

2.4.1 *Forum internum* and *forum externum*

An important distinction is to be drawn between those dimensions of the freedom of religion or belief which may be subject to limitation and those which may never be limited. Under Article 18(3) ICCPR, it is the manifestation of the freedom of religion or belief in 'worship, observance, practice and teaching' (the *forum externum*) which may be limited. The individual's freedom of thought, conscience, religion, or belief (*forum internum*), guaranteed in Article 18(1), must be respected by the state unconditionally, and that includes the freedom to have or adopt a religion or belief of one's choice. Thus, no one may be compelled to reveal his or her thoughts or beliefs, for example by a requirement to swear a religious oath or to carry a religious affiliation in an identity card.[31]

2.4.2 Grounds of limitation

Manifestation of religious belief may be limited on the grounds set out in Article 18(3) ICCPR: 'public safety, order, health, or morals or the fundamental rights and freedoms of others'. National security, however, is not included as a permissible ground in the case of freedom of religion, whereas it is a permissible ground with the other freedoms. Many cases ultimately turn on the proportionality of the particular restriction or its discriminatory application.[32]

Religious clothing and symbols

A contemporary and complex issue regarding religious manifestation concerns regulation of the wearing of religious dress or symbols in public spaces, which amounts to an interference with the believer's freedom to express their religious beliefs or identity. For example, the injunction to women in the Koran of *Hijab* or modesty is the religious source of the headscarf or the *burka* worn by some Muslim women. International human rights bodies have taken different positions as to whether restrictions of the wearing of the veil in public can be justified.

If there is evidence that individuals present a threat to public order or that they have been involved in proselytism by exerting inappropriate pressure on passers-by, then a restriction on religious dress could be legitimate.[33] Greater regulation of the wearing of religious symbols in some public spaces, for example classrooms or courtrooms, may be permissible on the basis that state secularism or religious neutrality can take precedence over the right to manifest one's religion. Such regulations can apply to public officials, on the basis that they are under a duty of discretion, neutrality, and impartiality, including a duty not to wear religious symbols and clothing while exercising official authority. By contrast, private citizens attending a courtroom as parties or witnesses should not be under such a duty of discretion.[34]

p. 216 ↵ A small number of states have banned any kind of face-covering in public. This represents an extremely extensive interpretation of the public spaces that must be regulated to accord with a particular state's ideology. Even if the ban is a general one, it particularly impacts Muslim women who wear the *burqa* or the *niqab*. In *SAS v France*, the European Court upheld such a ban on the basis that 'living together' was a legitimate dimension of 'the rights of others' that could justify limitations on freedom of religion.[35]

In *Yaker v France*, the Human Rights Committee had to consider essentially the same face-veiling issue. In stark contrast to the European Court, it held that the state had failed to demonstrate that the limitation of the author's freedom to manifest her religion or beliefs was necessary and proportionate. It specifically observed that the concept of 'living together' was very vague and abstract. Moreover, it considered that the criminal ban on full-face veiling disproportionately affected Ms Yaker as a Muslim woman who chose to wear the full-face veil, and introduced an unreasonable distinction between her and other persons who could legally cover their face in public. This constituted a form of 'intersectional discrimination' based on gender and religion, in violation of Article 26 ICCPR.[36]

Previously, the Human Rights Committee had found that the exclusion from a university in Uzbekistan of a practising Muslim student for wearing a headscarf interfered with her rights under Article 18 ICCPR.[37] The Committee held in line with its General Comment[38] that the freedom to manifest her religion encompasses the right to wear clothes or attire in public that is in conformity with her religion. In the light of little evidence suggesting that the restriction was justified, the Committee was also of the view that her exclusion from studies amounted to a violation of her right to be free from coercion in matters of religion under Article 18(2). In contrast, in *Leyla Sahin v Turkey*, the European Court of Human Rights upheld a similar Turkish regulation which prevented the applicant from continuing her medical studies at Istanbul University because she refused to remove her headscarf on religious grounds.[39] The Court considered that the interference with her religious freedom was justified in the interests of the rights and freedoms of others, which it linked to the Turkish constitutional principles of equality and secularism.[40]

Issues regarding regulation of religious dress are not limited to Islamic dress. In 2004, a French law banned the wearing of conspicuous religious symbols in state schools invoking the constitutional principle of secularism. The law prohibited not only the Islamic veil but also Jewish skullcaps, Sikh turbans, and Christian crosses. The European Court rejected complaints over this law brought by several Muslim girl pupils and Sikh boys over their expulsion from school. The children had worn substitute headwear, kerchiefs in the case of the girls and under-turbans in the case of the boys, which they refused to remove.[41] Noting that the pupils could still continue their schooling by correspondence courses, the Court found that the interference with their freedom to manifest their religion was justified and proportionate to the aims pursued, namely the

rights and freedoms of others and public order. However, the Human Rights Committee took a different view
p. 217 in a communication ↵ based on similar facts, holding that expulsion could neither be considered necessary nor proportionate.[42] The Human Rights Committee has also held that a requirement for a Sikh man to appear bareheaded in an identity card photograph constitutes a continuing interference with his right to freedom of religion. The Committee noted that:

> even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks.[43]

Where international human rights bodies take such different positions on religious clothing, states are put in a difficult position. France has not followed the views of the Human Rights Committee.[44]

In some Muslim majority countries, it is compulsory for all women to wear a veil, even if they are not Muslims. Such a requirement may also violate the freedom of religion. A human rights approach would argue that it should be for the individual to decide whether to wear religious dress or not. States should respect and seek to accommodate that choice.

Where restrictions upon religious dress in the workplace are imposed by a private company, the European Court of Human Rights has confirmed that the state still has a duty to ensure that a 'fair balance' is struck between the religious rights of the individual and the interests of the company.[45] Religious dress rules may also be open to challenge as discriminatory on the basis of religion and/or gender. As noted, such a challenge succeeded in *Yaker v France*. By contrast, in the context of equal treatment in employment and occupation under Directive 78/2000/EC, the Court of Justice of the European Union has taken the view that an internal rule of an undertaking which prohibits the visible wearing of any political, philosophical, or religious sign does not constitute direct discrimination. However, in the absence of such a rule, the willingness of an employer to take account of the wishes of a customer no longer to have the employer's services provided by a worker wearing religious clothing cannot be considered an occupational requirement that could rule out discrimination.[46]

The presence of religious symbols (crucifixes) in Italian schools was challenged in *Lautsi v Italy*. The European Court of Human Rights held that there had been no violation of Article 2 (right to education) of Protocol No 1, and that no separate issue arose under Article 9 ECHR.[47] It found in particular that the question of religious symbols in classrooms was, in principle, a matter falling within the margin of appreciation of the state—particularly as there was no European consensus as regards that question—provided that decisions in that area did not lead to a form of indoctrination. In *Perovy v Russian Federation*,[48] the European Court was
p. 218 divided on whether a Russian Orthodox Church ↵ religious blessing in a classroom, initiated by a parent group and performed in the presence of a seven-year old child who was a member of a different Christian denomination, constituted indoctrination. The blessing involved kissing a crucifix, which P refused to do, and to make the cross as per the Orthodox tradition, which P did not know how to do.

Conscientious objection to military service

In a number of states, conscription laws require that adult citizens have a legal duty to undertake a period of military training or service. For some individuals such a duty conflicts with their conscience due to their religious or philosophical beliefs, and they assert the right to refuse to undertake military service. International human rights standards are evolving in the direction of accepting that such refusal is a manifestation of the individual's conscience and should be protected under the guarantee of freedom of thought, conscience, and religion. Indeed, the Human Rights Committee's interpretation of the right to conscientious objection to military service has evolved from not being protected at all to it being an absolute element of freedom of conscience under Article 18(1) which is not capable of limitation under Article 18(3) ICCPR.[49] States may, instead, require individuals to undertake alternative service, which must not be punitive in nature but a real service to the community and compatible with respect for human rights.[50] Similarly, the European Union Charter of Fundamental Rights and Freedoms (CFREU) recognizes a right to conscientious objection to military service.[51] All member states of the Council of Europe, except Turkey, have recognized such a right. In *Bayatyan v Armenia*, the European Court of Human Rights relied upon this consensus when holding that opposition to military service, where it is motivated by a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of Article 9 European Convention on Human Rights (ECHR).[52] Thus, compulsory military service can only be justified where convincing and compelling reasons suggest that there is a pressing social need for conscription. By contrast, the Inter-American Commission on Human Rights has declined to accept that obligatory military service may conflict with freedom of conscience.[53]

3 Freedom of Opinion and Expression

3.1 Sources

This freedom is contained in Article 19 UDHR and in Articles 19 and 20 ICCPR. Detailed and authoritative guidance on states' obligations under these provisions can be found in the Human Rights Committee's General Comment 34.[54] Similar but not identical formulations of the freedom can be found in the regional human rights instruments.[55] There are also important provisions in the International Convention on the Elimination of Racial ↵ Discrimination (ICERD), in particular Article 4, which concerns the prohibition of racist speech and organizations. The CRC recognizes the child's right to freedom of expression.[56] Since 1993, there exists the position of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who is now appointed by the Human Rights Council.[57]

p. 219

3.2 Scope

Freedom of expression has been described as the touchstone or cornerstone of all rights.[58] Not only is freedom of expression inseparable from freedom of thought, association, and assembly, it is essential for the enjoyment of many rights, including economic, social, and cultural rights. It is a vital freedom for individual development, the functioning of democracy, and modern economies.

Article 19 UDHR provides the foundation for the fuller definition of the freedom in the ICCPR:

> 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.

Although this text was drafted over 70 years ago, it powerfully expresses the ideal of freedom of speech in today's era of the internet and other digital communication technologies. Freedom of expression is an individual right. It includes the freedom, without interference or penalty, to hold opinions. Freedom of expression also has its collective components. Human beings communicate with others, not with themselves. The freedom includes the right to hear other views and to exchange ideas and information with others. It also includes the right to inform oneself, to be informed, and increasingly the right to access information. Hence, the crucial importance of all media as means of communication.

3.2.1 Freedom of opinion

Article 19 ICCPR guarantees freedom of opinion as well as expression. Human beings have diverse and differing opinions on all kinds of subjects, including political and social affairs. Article 19(1) provides that everyone is entitled to hold such views without interference. No one can be forced to think in a particular way. Nor should anyone suffer prejudice, discrimination, or repression because of their views or opinions. The freedom to hold opinions is, in the words of the Human Rights Committee, 'a right to which the Covenant admits no exception or restriction'.[59] In other words, people may think what they like.

3.2.2 Freedom of expression

Article 19(2) ICCPR sets out the positive meaning of freedom of expression. Its scope is extensive. The right is defined as including freedom to seek, receive, and impart information and ideas of all kinds. Freedom *to seek* includes active and investigative journalism in the public interest. Freedom *to receive* has been interpreted by the European Court of Human Rights as including the right of the public to be informed and the duty of the mass media to impart information to the public.[60] The freedom to *impart* extends to every kind ↵ of information and idea expressed through any media of choice, 'either orally, in writing or in print, [or] in the form of art'.[61] As the European Court has noted, the freedom 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.'[62]

p. 220

All forms of expression are protected. These include spoken and written language, satire, as well as art and images, including caricature and cartoons. The manner in which these are transmitted, that is, through fictional and non-fictional books, newspapers, the internet, leaflets, film, paintings, sculpture, song, and so on, is also protected. Developing regulatory challenges relate to so-called 'disinformation'[63] and 'fake news'.[64]

The internet

The internet has become 'one of the principal means by which individuals exercise their right to freedom of expression and information; it provides essential tools for taking part in activities and discussions concerning political issues or matters of public interest.'[65] It also 'plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general'.[66] Moreover, '[u]ser-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression'.[67] A Joint Declaration on Freedom of Expression and the Internet, adopted by several Special Rapporteurs in 2011, sets out that freedom of expression must apply to the internet in the same way that it applies to any other media.[68] However, it has been recognized that the internet is different from the printed press and poses greater risks for the enjoyment of the rights of others, particularly young people.[69] Duties and responsibilities are placed on the owners and controllers of internet portals to exercise a degree of control over content. The duties and responsibilities will be heavier where economic interests of commercial organizations are involved and lighter if non-profit organizations are involved.[70]

There is a developing human right to access the internet. Given the increasing importance of the internet in daily lives, particularly in terms of participation, facilitating governmental transparency, and access to diverse sources of information, it is arguable that the positive obligations of states to promote and facilitate the right to freedom of expression must include facilitating access to the internet.[71]

p. 221 ↵ Freedom of expression is to be enjoyed 'without regards to frontiers', in other words it does not stop at the borders of the state. This clause was intended to outlaw forms of censorship such as the Cold War practice of radio jamming of foreign broadcast signals and extends in today's digital age, for example, to the blocking of access to the internet or mobile phones. So, completely blocking access to the internet during times of social unrest, as took place during the anti-government protests arising in various countries in the Arab world in 2011, known as the Arab Spring, or the blocking of content of particular websites, such as YouTube, Facebook, or Twitter, constitute interferences with the right. The interference will constitute a violation if it is excessive or arbitrary and available remedies are insufficient to prevent abuses.[72] However, access to websites can be blocked for legitimate reasons, for example to ensure respect for copyright legislation or other intellectual property rights.[73]

3.2.3 Media freedom

There is no explicit recognition or protection offered to the press and other media in international human rights standards, although such is often to be found in national laws and constitutions. At the international level, the freedoms and responsibilities of the press have been developed from the guarantee of freedom of expression of the individual. The protection afforded under human rights standards to all media—print and modern mass electronic media as well as the new information communication technologies—is justified because of their role in making people's freedom of expression meaningful and their contribution to democratic life. All such means of communication provide access to news and to opportunities to exchange information and ideas. International and national standards on freedom of expression have largely been shaped by the struggle for journalistic and artistic independence against government licensing and censorship of media. That struggle continues in different parts of the world. Media freedom is thus

inseparable in practice from the enjoyment of freedom of expression in society. The media has a watchdog role on the exercise of power in society, and free media facilitates political debate. As the European Court of Human Rights has put it:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. In particular it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the core of the concept of a democratic society.[74]

States must, therefore, protect journalists from threats, violence, or other acts of harassment that stop them from fulfilling this essential role.[75] Human rights bodies have adopted an expansive definition of the term 'journalists', which includes: 'professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere'.[76] The duties and responsibilities on journalists include that they must investigate in a rigorous, objective, and balanced manner, although the methods of doing this may vary depending on the media in question.[77] However, journalistic freedom also includes possible recourse to a degree of exaggeration or even provocation. Concerning internet discussion sites, the European Court has held that the limit of admissible criticism is broad where the comments are those of professional journalists who are well known to the public and are commenting on matters of general interest.[78]

p. 222

But media in all its forms is also a source of considerable power, including economic power. The international standards speak, therefore, of the media's duties and responsibilities.[79] Media regulation is necessary to ensure the effective protection of freedom of expression,[80] democratic accountability, and to guard against excessive concentration of ownership.

3.2.4 Freedom of information laws

The most striking advance in the norms on freedom of expression over recent years has been the growth of laws implementing the right to access official information held by governments. Democracies have come to understand that transparency affords governments and public administration legitimacy in the eyes of the public. In all regions of the world, governments have established 'the right to know' through legislation. An 'access to information law' works on the principle of maximum disclosure: all official information should be made public as a matter of principle, unless there are legitimate reasons justifying non-disclosure. In 2009, the Council of Europe adopted the first international treaty on the subject: the Council of Europe Convention on Access to Official Documents.

In *Claude Reyes and others v Chile*, the Inter-American Court of Human Rights became the first international tribunal to hold that there is a right to access information held by the government, derived from the guarantee of freedom of expression.[81] The case originated in a request for information made by three environmental activists about a controversial deforestation project, which was ignored by the government. The Human Rights Committee has confirmed that states must 'proactively put in the public domain Government information of public interest … [and] enact the necessary procedures, whereby one may gain access to information, such as by means for freedom of information legislation.'[82] However, the European

Court of Human Rights has suggested that there is no positive obligation on the state to collect and disseminate information of its own motion.[83] The Court also indicated that Article 10 ECHR only obliges the government to impart information to an individual where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression.

3.3 Limitations

If people may think what they like, they may not always say or write what they like. As opposed to freedom of opinion, freedom of expression is not an absolute right. Under Article 19(3) ICCPR, its exercise carries with it 'special duties and responsibilities'. Such ↵ language acknowledges the power of the media, but also the justification of restriction where it is necessary to respect the rights or reputations of others, and where it is necessary on grounds of national security, public order, public health, or morals. It is possible to examine only some of these grounds here. But as discussed already, it is crucial how restrictions are applied because if wrongly or excessively invoked, they can have a 'chilling effect' on the freedom or even eliminate it.[84] For example, a ground such as national security in the context of counter-terrorism is often misapplied or abused to the detriment of freedom of expression.[85]

p. 223

3.3.1 Privacy

One right which may clash with freedom of expression is privacy.[86] In *Von Hannover v Germany*, Princess Caroline of Monaco, who had campaigned for many years over paparazzi taking pictures of her and her children, complained to the European Court of Human Rights.[87] The Court found that her right to privacy was violated. There was no justification for the constant media intrusion into her private life. The public interest was not advanced since the photographs were published to satisfy public curiosity, not to contribute to public debate. The Court considered that the Princess, although a member of a royal family, exercised no official functions and was thus a private person. While public figures such as politicians and popular celebrities do have a right to private life, it is less extensive given that they are willingly in the public arena.[88] Therefore, when considering whether the correct balance has been struck between freedom of expression and privacy, regard should be had to the following issues: whether the expression contributes to a debate of general interest; how well known the person concerned is; the nature of the activities that are the subject of the report and how they link to the role of the person concerned; the prior conduct of the person concerned; how the information was obtained and its veracity; the content, form, and consequences of publication; and finally the severity of the sanction imposed.[89]

3.3.2 Defamation

To publish a false statement about another which damages his or her reputation is a civil and often a criminal wrong. But the implementation of laws which impose liability for defamation can, and often do, undermine the freedom of the media to fulfil their function of informing the public and to comment critically on public affairs. Given the vital importance of free media in a democracy, international human rights standards have been directed at ensuring that national laws on defamation are applied as narrowly as possible as regards 'political speech'. Robust criticism of the government or a politician should be tolerated in the interests of

open debate on political issues. In *Lingens v Austria*, a journalist was convicted of criminal libel because he had accused a former prime minister of Austria of political opportunism and of using his influence to prevent an investigation of a political ally for Nazi crimes. The European Court of Human Rights found that Austrian
p. 224 ↵ law, which required Lingens to prove the truth of what were his opinions, operated as an excessive interference with press freedom.[90] There is an increasing trend towards the abolition of criminal penalties for defamatory statements based on the argument that civil remedies, such as the payment of damages, are a sufficient sanction and the threat of criminal prosecution has a chilling effect on freedom of expression. This approach has garnered the support of the Human Rights Committee.[91]

3.3.3 Hate speech

Control of the advocacy of violence, hatred, and discrimination against individuals or groups on the basis of their race, colour, ethnicity, religious beliefs, sexual orientation, or other status presents a challenge to all states. The internet has added a global dimension to the availability of propaganda advocating violence or hatred of others.[92] Article 20 ICCPR and Article 4 ICERD *oblige* states to criminalize speech that amounts to war propaganda or that advocates racial hatred. However, these limitations on expression must be compliant with Article 19(3) ICCPR and thus be provided by law and be the least restrictive means of achieving the relevant aim.[93] The use of speech to incite violence is a criminal offence in virtually all states. But to strike an acceptable balance between the right to freedom of expression and restraint on other forms of objectionable speech is in practice often difficult.[94] If the speech is regarded, in its context, as abusive, inciting, or justifying violence or armed resistance, condones terrorism, or is classed as 'hate speech', it may not be protected at all because it negates fundamental human rights values.[95] Alternatively, it may be viewed as an expression which states have considerable scope to restrict and restrain as necessary in a democratic society for the protection of the reputation and rights of others.[96] Obviously the line between the two approaches can be difficult to navigate.[97] In terms of practicalities, internet news portals which, for commercial purposes, provide a platform for user-generated comments assume the 'duties and responsibilities' associated with freedom of expression in accordance with Article 10(2) ECHR where users disseminate hate speech or comments amounting to direct incitement to violence.[98]

Islamophobia, anti-Semitism, and Holocaust denial

The mere fact of defending *Sharia* (Islamic law), without calling for violence to introduce it, cannot be regarded as hate speech.[99] However, incitement to ethnic, racial, or religious hostility, hatred, and
p. 225 discrimination is not protected speech. A current concern ↵ is the widespread expression, particularly in Europe, of prejudice and hostility towards Muslims, sometimes termed Islamophobia. In 2001–2, a member of the British National Party displayed a large poster in his flat window with a photograph of the Twin Towers in flames with the caption 'Islam out of Britain—Protect the British People' and a symbol of a crescent and star in a prohibition sign. He was convicted of displaying hostility to a racial or religious group. His complaint to the European Court of Human Rights that his freedom of expression was infringed was dismissed.[100] The poster, the Court held, represented a vehement attack against Muslims linking the group as a whole with a grave act of terrorism.

Like Islamophobia, anti-Semitism is a widespread phenomenon, which frequently finds expression in Holocaust denial. Holocaust denial or negationism denies the Nazi genocide against Jews during the Second World War or seeks to minimize its true scale. Such speech is a criminal offence in several European states. A French historian, Robert Faurisson, in an interview with a magazine said it was his personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps. The Human Rights Committee upheld his criminal conviction because of these comments as a justifiable interference with his freedom of expression under Article 19 ICCPR.[101] It was persuaded by the French government's argument that holocaust denial is the main vehicle of anti-Semitism in France.[102]

Disputing the existence of clearly established historical events, such as the Holocaust, does not constitute scientific or historical research.[103] However, debates surrounding historical events of a particularly serious nature should be able to take place freely as they are an integral part of freedom of expression to seek historical truth.[104] In *Perinçek v Switzerland*,[105] a Turkish politician was the subject of a criminal conviction for publicly expressing the view, in Switzerland, that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire had not amounted to genocide. The European Court held that there had been a violation of Article 10. It had not been necessary, in a democratic society, to subject Perinçek to a criminal penalty in order to protect the rights of the Armenian community. Perinçek's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance.

By contrast, *M'Bala v France*[106] concerned the conviction of M'Bala, a comedian with political activities, for public insults directed at persons of Jewish origin or faith. The European Court declared the application inadmissible, finding that under Article 17 ECHR (prohibition of abuse of rights), M'Bala was not entitled to the protection of Article 10. During the offending scene, the performance in question could no longer be seen as entertainment but rather resembled a political meeting, which, under the pretext of comedy, promoted negationism and amounted to a degrading portrayal of Jewish deportation victims.

Blasphemy

Criticism of religion, as distinct from incitement to hatred of people because of their religious beliefs, is currently a highly contested freedom of expression issue at the international level. For example, the 1988 publication of *The Satanic Verses* by Salman Rushdie ↵ and the 2005 Danish cartoons that depicted the Prophet Mohammed were both considered to be 'insulting' to the Islamic faith.[107] Such incidences, amongst others, led to calls for a restriction of freedom of expression in order to suppress 'defamation of religions' and the Human Rights Council and the General Assembly, led by Muslim majority states, have passed resolutions supporting such an approach.[108] But others, mostly Western states, have rejected the need to protect religious institutions or doctrines from robust criticism, satire, or even ridicule. In 2011, the Human Rights Council moved away from the terminology of 'defamation of religion', returning to the idea of protecting believers from intolerance and violence.[109] This is a more convincing approach. Human rights law protects those individuals who have a religious belief rather than the religion itself. Therefore, blasphemy laws are, according to the Human Rights Committee, incompatible with the right to freedom of expression.[110] Nevertheless, a number of states still retain offences of blasphemy in their criminal codes[111] and the European Court of Human Rights has accepted the legitimacy of a prosecution for blasphemy where 'believers may legitimately [have felt] themselves to be the object of unwarranted and offensive attacks' and the punishment imposed was an 'insignificant fine'.[112]

4 Freedom of Association

4.1 Sources

Freedom of association is proclaimed as an individual right in Article 20 UDHR and is included in both international covenants and regional instruments.[113] Article 22 ICCPR provides a general guarantee of freedom of association. It also includes the right to form and join trade unions, a right independently recognized in Article 23(4) UDHR. Article 8 ICESCR provides for the association rights of trade unions. Trade union rights are more fully protected in the international agreements of the International Labour Organization (ILO).[114] The ILO Committee on Freedom of Association, comprising an equal number of representatives of governments, employers, and unions, oversees the protection of trade union freedoms.[115] In 2010, the Human Rights Council established the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.[116]

4.2 Scope

Freedom of association is the freedom to pursue collective action. It protects the right of individuals to form associations for common purposes, free from government interference. It includes the right of the association independently to determine its membership, ↵ appoint officers, employ staff, and generally conduct its own affairs subject only to the law. While linked historically with trade unions, the freedom includes the freedom to establish and belong to political parties, which are vital for the functioning of democracy. But the right of the individual to establish and participate in all manner of civil society associations is equally part of this freedom. Article 16 ACHR speaks of the right to establish associations for 'ideological, religious, political, economic, labor, social, and cultural, sports, or other purposes'. This freedom is also of central importance to the activities of human rights defenders. The Declaration on Human Rights Defenders, passed by the UN General Assembly in 1999, affirms the right of human rights activists to form, join, and participate in NGOs for the purpose of, inter alia, seeking and imparting information about human rights, discussing and developing new ideas on human rights, and advocating on issues of human rights.[117]

p. 227

4.2.1 The right not to associate

The right to associate includes the negative freedom to choose not to belong to an association and not to be compelled to join one. The negative formulation of the right is included in the UDHR (Article 20(2)) but not in the ICCPR. The explanation for its absence concerns the status of collective bargaining agreements between trade unions and employers over the employment of union members only (closed shop agreements). For the same reason, the right to freedom of association under Article 11 ECHR is also silent on the right not to associate. The jurisprudence of the European Court of Human Rights illustrates the tension which can arise between the individual and collective dimensions of the freedom of association. In *Young, James and Webster v UK*, the Court found that the dismissal of individuals employed prior to a closed shop agreement violated the right to freedom of association of the dismissed employees.[118] In *Sigurjonsson v Iceland*, the same Court

examined an Icelandic law that made taxi drivers' licences contingent upon membership of a union.[119] The Court found that the government interest in this rule—facilitating the regulation of public transport—was relevant but not sufficient to justify the extreme consequence of non-membership of the union.

In *Sorensen and Rasmussen v Denmark*, compulsion to join a particular trade union was regarded as striking at the very substance of the right to freedom of association.[120]

4.2.2 The right to strike

The Human Rights Committee has held that the right to association in the ICCPR does not include a right to strike. In *JB et al v Canada*, the Committee noted that ILO Convention No 87 had been interpreted to provide such a right and that the ICESCR includes the right to strike along with its recognition of trade union rights.[121] The Committee pointed out that 'each international treaty, including the [ICCPR] has a life of its own and must be interpreted in a fair and just manner'.[122] Having been drafted in parallel discussions, the inclusion of the right to strike in the ICESCR without similar language in the ICCPR suggested that the right of association in that Covenant was not intended to protect the right to strike.

The European Court of Human Rights regards industrial action as a core aspect of trade union freedom. The taking of secondary industrial action, including strike action, by a trade union against one employer in order to further a dispute in which the union's ↵ members are engaged with another employer is also regarded as being covered by Article 11 ECHR.[123] However, states have been awarded a wide margin of appreciation when it comes to restricting secondary action.

p. 228

4.3 Limitations

The Human Rights Committee addressed the type of activities that constitute an interference with the right of association in *Korneenko et al v Belarus*.[124] In that case, the authorities stripped a human rights organization of its recognition because it had violated domestic regulations governing associations. Its official documentation was said to suffer from 'deficiencies' and it was accused of using equipment purchased with foreign grants for propaganda purposes. A domestic court ordered the dissolution of the group. The Committee held that the ICCPR protected all activities of an association. Dissolution of a group amounts to a severe interference with the freedom and must be strictly justified by reference to the grounds of limitation in Article 22(2). The government had failed to do this. Even if the NGO's documentation had been defective, the extreme step taken of dissolving it was a disproportionate response. The Committee found a violation.

Where domestic law requires registration of civic associations in order to obtain legal personality, a refusal or delay by the authorities in registration may constitute an interference with the freedom of association.[125] The European Court of Human Rights regards a refusal to register a political party as a drastic measure that can only be applied in the most serious cases where a party has not sought to pursue its aims by lawful and democratic means or its aims are incompatible with fundamental democratic principles.[126] The Inter-American Court of Human Rights has held that national requirements imposed on political parties to take part in elections must ensure that the members of indigenous and ethnic communities may participate in the electoral processes effectively and according to their traditions, practices, and customs.[127]

4.3.1 Banning political parties

Political parties are an essential form of association if democracy is to exist. Without an effective democracy, human rights cannot be guaranteed. Political parties thus must be guaranteed the fullest freedom of association and compelling reasons must be given for any interference with the freedom. That principle applies most particularly where political parties are banned or dissolved.[128] Such measures will normally be considered disproportionate.

In *Refah Partisi (the Welfare Party) and Others v Turkey*, the European Court of Human Rights upheld the decision of the Turkish Constitutional Court to disband the largest political party in the state.[129] The judgment sparked considerable controversy as at the time the Refah party was serving in a coalition government. Certain of its leaders were accused of advocating the introduction of *Sharia* in Turkey, and violating the secular principles ↵ of the Turkish Constitution. The Court recognized that closure constituted an extreme interference in the right of association, but concluded unanimously that it was justifiable. It noted that 'protection of public safety and the rights and freedoms of others and the prevention of crime might depend on safeguarding the principle of secularism'.[130] The Refah party was likely poised to be able to implement policies that could undermine the democratic and secular nature of Turkey and threaten the rights of others.[131]

p. 229

The decision in *Refah* can be contrasted with an earlier Turkish case, *United Communist Party of Turkey and Others v Turkey*.[132] The Turkish Constitutional Court dissolved this political party on the basis that the party advocated class domination and threatened the territorial integrity of the state. The European Court found that the dissolution of the party was disproportionate. The party had not undertaken activities or adopted stances that would threaten the territorial integrity or national security of the state and the use of terminology that the state found offensive or threatening was not enough to justify the extreme step of its dissolution.

Thus, unless a party threatens the democratic nature of a state or its fundamental values and principles,[133] it cannot be suppressed, even if the party has challenged the way the state is currently organized[134] or has espoused offensive ideas.

4.3.2 Additional limitations applicable to military and police

Article 22(2) ICCPR provides that members of the armed forces and of the police may be restricted by law in their exercise of the right of association. The provision, however, does not deny the right of military and police to freedom of association. It recognizes only that the state may regulate the exercise of that freedom. There are similar restrictions in the ECHR and the ACHR. Other state employees and civil servants have the right to form and join trade unions.[135]

5 Freedom of Assembly

5.1 Sources

The freedoms of assembly and association are contained in one provision in the UDHR and the ECHR.[136] The ICCPR (Article 21) and other regional instruments separate the rights.[137] In 2020, the Human Rights Committee adopted General Comment 37 which provides detailed and authoritative guidance on states' obligations under Article 21 ICCPR.[138] While the rights of assembly and association are closely connected, they are distinct. They are both vital democratic freedoms that enable individuals to act collectively to promote their interests. Freedom of assembly is qualified as a right of 'peaceful assembly' or in the ACHR a right to 'peaceful assembly, without arms'. Specific types of assemblies, such as religious assemblies, are additionally protected by Article 18 ICCPR, as are private assemblies in one's home by Article 17 ICCPR.

p. 230

5.2 Scope

The right of peaceful assembly protects non-violent, organized gatherings in public and private, indoors, outdoors, and online.[139] By definition, the right to 'peaceful' assembly cannot be exercised using violence. But in practice the factual situations can present a mix of peaceful and violent elements.[140] The Human Rights Committee interprets violence as entailing 'the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property'. Thus, the mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to 'violence'.[141] A broad range of assemblies is encompassed, including political, economic, artistic, and social gatherings. The right entails the possibility of organizing and participating in a peaceful assembly. The assembly can be stationary (such as a picket) or mobile (such as a march or protest) in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience.[142] The right also extends to counter-protests, though states have an obligation to ensure counter-demonstrators do not interfere with the initial demonstration.[143] Thus, states must not only abstain from interfering with the right, but are also required to take positive measures to protect peaceful assemblies.[144] Although the right envisages temporary gatherings, it also protects mass political protests that may last for weeks or months.

The African Commission on Human and Peoples' Rights found that the convictions and executions of four indigenous Ogoni activists violated their right to life and also their right of assembly. The Nigerian government alleged that the activists were responsible for the deaths of four men following a rally for indigenous rights. The activists were not accused of perpetrating the deaths, but held responsible because their peaceful assembly 'incited' the killings. The Commission held that the executions were part of a widespread attempt to intimidate protestors and limit demonstrations.[145]

5.3 Limitations

Restrictions on peaceful assembly may be imposed under Article 21(2) ICCPR, provided these are prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Restrictions

should be non-discriminatory and, in principle, content-neutral.[146] Outright banning of a demonstration
p. 231 may prove necessary, but clearly requires the strongest justification. In *Öllinger v Austria*, the European Court of Human Rights held that the state's duty to protect the right of assembly as far as possible should have included considering alternatives to a total ban on a small counter-protest at a cemetery on All Saints Day where a commemoration was to take place for former SS soldiers.[147]

5.3.1 Prior notifications and permits

Regulation of demonstrations or gatherings through prior notification or issuing of a permit by the authorities before a march or public meeting can take place is compatible with the freedom to assemble.[148] In *Kivenmaa v Finland*, the Human Rights Committee accepted that a requirement to notify the police of an intended demonstration in a public place in Helsinki six hours before its commencement would be compatible with the permitted limitations laid down in Article 21 ICCPR.[149] Such administrative procedures enable other rights and interests to be balanced with the right to assemble, for example the freedom of movement of others, national security, public order, and the normal circulation of traffic. An essential part of the state authorities' positive obligation to ensure the peaceful conduct of an assembly, to prevent disorder, and to secure the safety of all the citizens involved, is a duty to communicate with the assembly leaders.[150] The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it.[151] Undue delays or arbitrariness in the issuance of permits, however, can constitute a violation of the right. In *Turchenyak et al v Belarus*, the Committee held that the de facto prohibition of an assembly in any public location in the entire city of Brest, with the exception of the Lokomotiv stadium, unduly limited the right to freedom of assembly.[152] In *Baczkowski v Poland*, the application concerned the mayor of Warsaw's refusal to authorize a march and different other public gatherings to protest over discrimination, including against homosexual people. The mayor had said publicly before considering the applications for permits that he would ban any public propaganda for homosexuality. The European Court found, inter alia, that the mayor's refusal to permit the demonstrations constituted a discriminatory interference with the right to freedom of assembly.[153]

The dispersal of a spontaneous peaceful demonstration, one that occurs, for example, in response to an unexpected political event, solely because of the absence of prior notice may amount to a disproportionate restriction on freedom of peaceful assembly.[154] Similarly, arrest and conviction for participation in such a spontaneous demonstration may also be disproportionate. A balance is required and public authorities need to show a certain degree of tolerance towards peaceful gatherings which cause some disruption but do not endanger public order.[155] However, the police can disperse a demonstration where there was ample time to
p. 232 file notice of a public demonstration in advance but this was not done.[156] Should dispersal of a peaceful assembly take place through violent means, including the use of tear gas, this will not be proportionate.[157]

5.3.2 Repressive restrictions

Any restriction on assembly must be shown to be necessary in a democratic society. In *Oscar Elías Biscet et al v Cuba*, the Inter-American Commission on Human Rights held that restrictions on the right of assembly are illegal if used solely to suppress the opposition.[158] The petitioners claimed they were arrested, detained, and

intimidated because they discussed dissident publications at their weekly meetings. The Commission concluded that the convictions were an arbitrary restraint on freedom of assembly since their primary purpose was to constrain political opposition. In *Navalnyy v Russia*, the European Court considered that the seven arrests and prosecutions of a well-known political activist for administrative offences related to the unlawfulness of public gatherings violated Article 11 ECHR.[159]

Even where an assembly is unauthorized, the penalties for participation must be justified and necessary. The Human Rights Committee has found a violation of Article 21 ICCPR where an individual had been refused a 'lawyer's licence' following the imposition of a fine for his participation in an unauthorized rally. Although the imposition of the fine was appropriate, it was not clear to the Committee how the non-issuance of the licence was necessary for the purposes of Article 21.[160]

6 Conclusion

In this chapter, four freedoms—freedom of thought, expression, association, and assembly—were introduced. The freedoms were discussed along with the body of international human rights norms and jurisprudence, which have helped to define their scope since each was proclaimed in the UDHR in 1948. Each freedom was examined as a discrete freedom of the individual. But it was also noted that each has a collective component. All are interrelated and mutually reinforcing. The freedoms share the common feature that they are not unconditional entitlements. In practice, their exercise needs balancing against the rights and freedoms of others and against certain public interest considerations, which are carefully and exhaustively set out in the international standards governing each freedom. A challenge common to all the freedoms is how to ensure that, where such restrictions are in principle necessary, they are implemented by the state in a proportionate manner. That requires a democratic society and one built on the rule of law. The freedoms are, in turn, part of the foundations of a democratic society. The right to dissent and to speak out, the freedom to come together with others in independent associations to promote common interests, and the freedom to demonstrate are all essential if a democratic society based on the participation of its members is to function successfully.

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International Labour Organization: **<http://www.ilo.org** *<http://www.ilo.org>***>**

On Freedom of Religion or Belief:

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Forum 18: **<http://www.forum18.org/** *<http://www.forum18.org/>***>**

On Freedom of Expression:

Article 19: Global Campaign for Freedom of Expression: **<http://www.article19.org/** *<http://www.article19.org/>***>**

Amnesty International, Free Speech: **<https://www.amnesty.org.uk/free-speech-freedom-expression-human-right** *<https://www.amnesty.org.uk/free-speech-freedom-expression-human-right>***>**

Media Freedom Coalition: **<https://mediafreedomcoalition.org/** *<https://mediafreedomcoalition.org/>***>**

On Freedom of Information:

Access Info Europe: **<http://www.access-info.org/** *<http://www.access-info.org/>***>**

Freedom Info.org: **<http://www.freedominfo.org** *<http://www.freedominfo.org>***>**

p. 234

Questions for Reflection

1. What test should be applied to determine if something constitutes 'expression'?
2. Should the same principles apply to freedom of expression online as offline?
3. What is a 'manifestation' of a religion or belief? Should a belief in hitting children to discipline them be accepted as a manifestation of a religious belief? Or a belief in gender discrimination?
4. Should religious believers have to agree to respect the human rights of others as a condition for respect of their religious beliefs?
5. How helpful is the presence or absence of the concept of a 'margin of appreciation' in explaining the results of the cases considered in this chapter?

Notes

[1] *Ouranio Toxo and Others v Greece* (2007) 45 EHRR 8, para 35.

[2] *Frumkin v Russia* (2016) 63 EHRR 18.

[3] See Chapter 7.

[4] McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 *ICLQ* 21.

[5] eg *Ahmad and Abdol-Hamid v Denmark*, CCPR/C/92/D/1487/2006 (18 April 2008).

[6] See Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/71/373 (6 September 2016). See also Chapter 7.

[7] *Sunday Times v UK* (1979) 2 EHRR 245, para 65.

[8] ECHR, Art 9; Protocol 1 to the ECHR, Art 2; CFREU, Art 10; ACHR, Art 12; ACHPR, Art 8; Arab Charter, Art 30; ASEAN Declaration, Art 22.

[9] Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, GA Res 36/55 (25 November 1981).

[10] See now HR Council Res 40/10 (21 March 2019). See Wiener, 'Interpretation of the 1981 Declaration through the Mandate Practice of the UN Special Rapporteur on Freedom of Religion or Belief' in Evans, Petkoff, and Rivers (eds), *The Changing Nature of Religious Rights Under International Law* (OUP, 2015) 51.

[11] CRC, Arts 14(1) and (2). See Interim Report of the Special Rapporteur on Freedom of Religion or Belief, A/70/286 (5 August 2015).

[12] See HRC, General Comment 22, HRI/GEN/1/Rev 9 (Vol I) 204, para 2.

[13] 1981 Declaration, preamble.

[14] HRC, General Comment 22, para 2.

[15] *MAB, WAT and JAYT v Canada*, CCPR/C/50/D570/1993 (25 April 1994). Compare *Prince v South Africa*, CCPR/C/91/D/1474/2006 (14 November 2007).

[16] HRC, General Comment 22, para 4 (emphases added). See also Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP, 2016).

[17] *Eweida and Others v UK* (2013) 57 EHRR 8, para 82.

[18] *Işik v Turkey* (2015) 61 EHRR 6.

[19] Khaliq, 'Freedom of Religion and Belief in International Law: a Comparative Analysis' in Emon, Ellis, and Glahn (eds), *Islamic Law and International Human Rights Law* (OUP, 2012) 183.

[20] HRC, General Comment 22, para 5.

[21] *Kokkinakis v Greece* (1994) 17 EHRR 397; *Sister Immaculate Joseph v Sri Lanka*, CCPR/C/85/D/1249/2004 (18 November 2005).

[22] Hunter-Henin, *Why Religious Freedom Matters for Democracy* (OUP, 2020).

[23] HRC, General Comment 22, para 9.

[24] *Serif v Greece* (1999) 31 EHRR 561; *Metropolitan Church of Bessarabia and others v Moldova* (2002) 35 EHRR 306.

[25] *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339; *Magyar Keresztény Mennonita Egyház and Others v Hungary* (2015) 61 EHRR 23.

[26] *Hasan and Chaush*, para 78.

[27] *Metropolitan Church of Bessarabia*.

[28] *Hasan and Chaush*.

[29] eg *MAB, WAT and JAYT*.

[30] (2006) 44 EHRR 912.

[31] HRC, General Comment 22, para 3; *Buscarini and Others v San Marino* (2000) 30 EHRR 208; *Alexandridis v Greece*, App no 19516/06, Judgment of 21 February 2008.

[32] eg *İzzettin Doğan and Others v Turkey*, App no 62649/10, Judgment of 26 April 2016.

[33] *Ahmet Arslan and Others v Turkey*, App no 41135/98, Judgment of 23 February 2010.

[34] *Lachiri v Belgium*, App no 3413/09, Judgment of 18 September 2018.

[35] (2015) 60 EHRR 11; followed in *Belcacemi and Oussar v Belgium*, App no 37798/13; *Dakir v Belgium*, App no 4619/12, Judgments of 11 July 2017.

[36] CCPR/C/123/D/2747/2016 (17 July 2018).

[37] *Hudoyberganova v Uzbekistan*, CCPR/C/82/D/931/2000 (5 November 2004).

[38] See HRC, General Comment 22.

[39] (2007) 44 EHRR 5.

[40] Turkey has subsequently relaxed the restrictions on wearing headscarves. Turkey's Constitutional Court has re-interpreted the constitutional provisions on secularism and on freedom of religion in a more balanced manner, *Tuğba Arslan*, App no 2014/256, 25 June 2014.

[41] *Aktas v France, Bayrak v France, Gamaleddyn v France, Ghazal v France, J Singh v France, R Singh v France*, App nos 43563/08, 14308/08, 18527/08, 29134/08, 25463/08, and 27561/08, Admissibility Decision of 17 July 2009.

[42] *Singh v France*, CCPR/C/106/D/1852/2008 (4 February 2013).

[43] *Ranjit Singh v France*, CCPR/C/102/D/1876/2009 (27 September 2011) para 8.4.

[44] See McGoldrick (2016); Berry, 'A "good faith" interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee <http://sro.sussex.ac.uk/id/eprint/63027>' (2017) 37 *Legal Studies* 672.

[45] *Eweida and Others*.

[46] Cases C-157/15 *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* and C-188/15 *Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers*, Judgment of 14 March 2017.

[47] (2012) 54 EHRR 3. See McGoldrick, 'Religion in the European Public Square and in European Public Life' (2011) 11 *HRLR* 451.

[48] App no 47429, Judgment of 20 October 2020.

[49] HRC, General Comment 22, para 11; *Yoon and Choi v Republic of Korea*, CCPR/C/88/D/1321–1322/2004 (23 January 2007); *Atasoy and Sartuk v Turkey*, CCPR/C/104/D/1853–1854/2008 (29 March 2012). The right to conscientious objection to military service has been recognized also by other UN bodies. See OHCHR, *Conscientious Objection to Military Service* (2012). Cf. For conflicting views on State obligations with respect to a conscientious belief in same sex marriage see the majority and minority opinions in *Attorney General for Bermuda v Roderick Ferguson and others (Bermuda)* [2022] UKPC 5 (14 March 2022).

[50] *Jeong et al v Republic of Korea*, CCPRC/C/101/D/1642–1741/2007 (24 March 2011).

[51] CFREU, Art 10.

[52] (2012) 54 EHRR 15.

[53] Case 12.219, *Cristián Daniel Sahli Vera et al v Chile*, IACommHR Report No 43/05 (10 March 2005).

[54] HRC, General Comment 34, CCPR/C/GC/34 (12 September 2011).

[55] ECHR, Art 10; CFREU, Art 11; ACHR, Arts 13 and 14; ACHPR, Art 9; Arab Charter, Art 32; ASEAN Declaration, Art 23.

[56] Arts 12 and 13.

[57] See now HR Council Res 43/4 (19 June 2020).

[58] *Handyside v UK* (1976) 1 EHRR 737; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, IACtHR Series A No 5 (13 November 1985).

[59] HRC, General Comment 34, para 9.

[60] *Thorgeir Torgeirson v Iceland* (1992) 14 EHRR 843, para 63.

[61] ICCPR, Art 19(2).

[62] *Handyside*, para 49. See also *Ivcher-Bronstein v Peru*, IACtHR Series C No 74 (6 June 2001).

[63] See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/47/25 (13 April 2021).

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[65] *Yildirim v Turkey*, App no 3111/10, Judgment of 18 December 2012, para 54.

[66] *Times Newspapers Ltd v UK (nos 1 and 2)*, App nos 3002/03 and 23676/03, Judgment of 10 March 2009, para 27.

[67] *Delfi AS v Estonia* (2016) 62 EHRR 6, para 110.

[68] <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=848&lID=1 <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=848&lID=1>>.

[69] See *Editorial Board of Pravoye and Shtekel v Ukraine* (2014) 58 EHRR 28; *KU v Finland* (2009) 48 EHRR 52 (protection of minors); *Perrin v UK*, App no 5446/03, Admissibility Decision of 18 October 2005 (morals and the rights of others).

[70] *Delfi AS v Estonia*; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, App no 22947/13, Judgment of 2 February 2016.

[71] See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/66/290 (10 August 2011), paras 61–63; Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *HRLR* 175.

[72] See *Yildirim v Turkey* (blocking of access to Google sites, which hosted a website owned by an individual who was facing criminal proceedings for insulting the memory of Atatürk); *Vladimir Kharitonov v Russia*, App no 10795/14, Judgment of 23 June 2020.

[73] *Akdeniz v Turkey*, App no 20877/10, Admissibility Decision of 11 March 2014.

[74] *Castells v Spain* (1992) 14 EHRR 445, para 43.

[75] HRC, General Comment 34, para 23; *Vélez Restrepo v Colombia*, IACtHR Series C No 248 (3 September 2012) para 209.

[76] HRC, General Comment 34, para 44; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/20/17 (4 June 2012); Cram, *Citizen Journalists* (Elgar, 2015).

[77] *Delfi*, para 134.

[78] *Niskasaari and Otavamedia Oy v Finland*, App no 32297/10, Judgment of 23 June 2015, paras 9 and 54–9.

[79] On standards of responsible journalism, see *De Carolis and France Televisions v France*, App no 29313/10, Judgment of 21 January 2016.

[80] See *Editorial Board of Pravoye Delo*; P Wragg, *A Free and Regulated Press* (Hart, 2020).

[81] IACtHR Series C No 151 (19 September 2006). See also *Társaság a Szabadságjogokért v Hungary* (2011) 53 EHRR 3.

[82] HRC, General Comment 34, para 19. See also *Toktakunov v Kyrgyzstan*, CCPR//C/101/D/1470/2006 (28 March 2011).

[83] *Magyar Helsinki Bizottság v Hungary*, App no 18030/11, Judgment of 8 November 2016.

[84] *Baczkowski v Poland* (2009) 48 EHRR 19; *Fedotova v Russian Federation*, CCPR/C/106/D/1932/2010 (19 November 2012).

[85] HRC, General Comment 34, para 46. See also *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* adopted by a group of NGO experts in 1996, <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>>.

[86] ICCPR, Art 17.

[87] (2005) 40 EHRR 1.

[88] HRC, General Comment 34, para 38; *Axel Springer AG v Germany (No 2)*, App no 48311/10, Judgment of 18 July 2014.

[89] *Axel Springer AG v Germany* (2012) 55 EHRR 6, paras 89–95; *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15.

[90] (1986) 8 EHRR 407. See also *Bodrozic v Serbia and Montenegro*, CCPR/C/85/D/1180/2003 (31 October 2005).

[91] HRC, General Comment 34, para 47; *Adonis v Philippines*, CCPR/C/103/D/1815/2008/Rev 1 (26 April 2012).

[92] See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486 <https://undocs.org/A/74/486> (9 October 2019).

[93] *Rabbae, ABS and NA v Netherlands*, CCPR/C/117/D/2124/2011 (14 July 2016).

[94] See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357 (7 September 2012).

[95] *Pavel Ivanov v Russia*, App no 35222/04, Admissibility Decision of 20 February 2007 (general, vehement attack on one ethnic group); *Roj TV A/S v Denmark*, App no 24683/14, Admissibility Decision of 17 April 2018 (incitement to violence and support for terrorist activity).

[96] *Sürek (No 1) v Turkey*, App no 23927/94, Judgment of 8 July 1999 (encouraging violence and inciting hostility); *Vejdeland and Others v Sweden* (2014) 58 EHRR 15 (distributing homophobic leaflets); *ES v Austria*, App no 38450/12, Judgment of 25 October 2018 (criminal conviction and fine for statements accusing the Prophet Muhammed of paedophilia).

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[98] *Delfi AS v Estonia* (2016) 62 EHRR 6, para 115.

[99] *Gunduz v Turkey* (2005) 41 EHRR 5.

[100] *Norwood v UK*, App no 23131/03, Admissibility Decision of 16 November 2004.

[101] *Faurisson v France*, CCPR/C/58/D/550/1993 (8 November 1996).

[102] See also *Ross v Canada*, CCPR/C/70/D/736/1997 (18 October 2000).

[103] *Garaudy v France*, App no 65831/01, Admissibility Decision of 24 June 2003.

[104] *Dink v Turkey*, App nos 2668/07 and others, Judgment of 14 September 2010; *Kimel v Argentina*, IACtHR Series C No 177 (2 May 2008).

[105] (2016) 63 EHRR 6.

[106] App no 25239/13, Admissibility Decision of 20 October 2015.

[107] Cox, 'Pourquoi Suis-Je Charlie? Blasphemy, Defamation of Religion, and the Nature of Offensive' Cartoons' (2015) 4 *Oxford J of L and Religion* 343.

[108] eg GA Res 62/154 (6 March 2008); HR Council Res 7/36 (28 March 2008). See Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (CUP, 2014).

[109] HR Council Res 16/18 (12 April 2011).

[110] HRC, General Comment 34, para 48.

[111] Crouch, 'The Indonesian Blasphemy Case: Affirming the Legality of the Blasphemy Law' (2012) 1 *Oxford J of L and Religion* 514. Cf Cox, 'Justifying Blasphemy Laws' (2020) 35 *Journal of Law and Religion* 33.

[112] *IA v Turkey* (2007) 45 EHRR 30, paras 29 and 32.

[113] ECHR, Art 11; CFREU, Art 12; ACHR, Art 16; ACHPR, Art 10; Arab Charter, Art 24.

[114] Freedom of Association and Protection of the Right to Organize Convention 1948 (No 87); Right to Organize and Collective Bargaining Convention 1949 (No 98).

[115] See also Chapter 12.

[116] See now HR Council Res 41/12 (10 July 2019).

[117] GA Res 53/144 (8 March 1999).

[118] (1981) 4 EHRR 38.

[119] (1993) 16 EHRR 462.

[120] (2008) 46 EHRR 29.

[121] CCPR/C/28/D/118/1982 (18 July 1986). Five members dissented.

[122] *JB et al v Canada*, CCPR/C/OP/1 (18 July 1986) para 6.2.

[123] *National Union of Rail, Maritime and Transport Workers v UK* (2015) 60 EHRR 10.

[124] CCPR/C/88/D/1274/2004 (10 November 2006).

[125] *Ismayilov v Azerbaijan*, App no 4439/04, Judgment of 17 January 2008.

[126] *Linkov v Czech Republic*, App no 10504/03, Judgment of 7 December 2006.

[127] *Yatama v Nicaragua*, IACtHR Series C No 127 (23 June 2005).

[128] Tyulkina, 'Fragmentation in International Human Rights Law: Political Parties and Freedom of Association in the Practice of the UN HRC, ECtHR and Int-AmCtHR' (2014) 32 *Nordic Journal of Human Rights* 157.

[129] (2003) 37 EHRR 1.

[130] (2003) 37 EHRR 1, para 66.

[131] See also *Vona v Hungary*, App no 35943/10, Judgment of 9 July 2013.

[132] (1998) 26 EHRR 121.

[133] *Herri Batasune and Batasuna v Spain*, App nos 25803/04 and 25817/04, Judgment of 30 June 2009.

[134] *Party for a Democratic Society (DTP) and Others v Turkey*, App nos 3840/10 and others, Judgment of 12 January 2016.

[135] *Demir and Baykara v Turkey* (2009) 48 EHRR 54.

[136] UDHR, Art 20; ECHR, Art 11. See Salát, *The Right to Freedom of Assembly* (Bloomsbury, 2015).

[137] ACHR, Art 15; ACHPR, Art 11; ASEAN Declaration, Art 24.

[138] HRC, General Comment 37, CCPR/C/GC/37 (23 July 2020).

[139] General Comment 37, paras 6, 10, 13, and 34; Hamilton, 'The Meaning and Scope of "Assembly" in International Human Rights Law' (2020) 69 *ICLQ* 521.

[140] *Women Victims of Sexual Torture in Atenco v Mexico*, IACtHR Series C No 371 (28 November 2018) para 175.

[141] General Comment 37, para 15.

[142] *Turchenyak et al v Belarus*, CCPR/C/112/D/1948/2009 (19 January 2015).

[143] *Alekseev v Russian Federation*, CCPR/C/D/109/1873/2009 (2 December 2013); *Plattform 'Ärzte Für Das Leben' v Austria* (1988) 13 EHRR 204.

[144] General Comment 37, paras 23–9.

[145] 137/94, 149/94, 154/96, and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria*, 12th Activity Report of the ACommHPR (1998–1999) paras 1–2, 106.

[146] General Comment 37, paras 22, 26, 36, 48, and 53.

[147] (2008) 46 EHRR 38.

[148] General Comment 37, paras 70–3; *Coleman v Australia*, CCPR/C/87/D/1157/2003 (10 August 2005).

[149] CCPR/C/50/D/412/1990 (9 June 1994).

[150] *Frumkin v Russia* (2016) 63 EHRR 18.

[151] General Comment 37, para 36.

[152] CCPR/C/112/D/1948/2009 (19 January 2015).

[153] (2009) 48 EHRR 19. See also *Alekseyev v Russia*, App nos 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010.

[154] *Bukta and Others v Hungary* (2010) 51 EHRR 25.

[155] *Oya Ataman v Turkey*, App no 74552/01, Judgment of 5 December 2006.

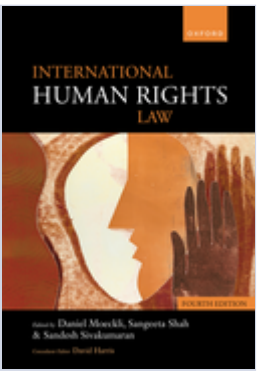
[156] *Éva Molnár v Hungary*, App no 10346/05, Judgment of 7 October 2008.

[157] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27 (21 May 2012) paras 33–8.

[158] Cases 771/03 and 841/03, IACommHR Report No 57/04 (14 October 2004).

[159] App nos 29580/12, 36847/12, 11252/13 and others, Judgment of 15 November 2018.

[160] *Gryb v Belarus*, CCPR/C/103/D/1316/2004 (26 October 2011).



International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 235

12. Education and Work

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https://doi.org/10.1093/he/9780198860112.003.0012
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter discusses two human rights that belong to the category of economic, social, and cultural rights: the right to education and the right to work. It explains how the modern view of the nature of economic, social, and cultural rights can be applied to these rights. The chapter discusses the sources of the rights under international human rights law, their main features, and components; the obligations resulting from each right; and the relationship of each right with other human rights. Both rights are crucial for the ability to live a life in dignity and develop one's personality.

Keywords: right to education, right to work, economic, social, and cultural rightsinternational human rights, International labour standards, International Labour Organization

Summary

This chapter focuses on the normative content of the right to education and the right to work. It discusses the sources of these rights under international human rights law and their main features and components. Both rights should be understood in terms of different entitlements and freedoms. The obligations resulting from each right are set out, demonstrating that states have both negative and positive obligations. Finally, the relationship of each right with other human rights is highlighted, thus illustrating that all human rights are interrelated and interdependent.

1 Introduction

This chapter discusses two human rights that belong to the category of economic, social, and cultural rights, namely the right to education and the right to work. It was long argued that this category of human rights is different from civil and political rights. The latter were said to be capable of immediate implementation, cost-free, and only entailing negative obligations (obligations not to interfere) for states. Economic, social, and cultural rights, on the other hand, were seen as subject to progressive realization, requiring financial resources, and entailing positive obligations (obligations to actively take measures). These differences were also said to imply that civil and political rights could be enforced by courts, whereas economic, social, and cultural rights were seen as non-justiciable, that is, not suitable for review by courts. This traditional view, which emphasized the inherent differences between the two categories of rights, dominated until the late 1980s. Gradually, however, this approach has given way to a view that stresses the unity, equality, and interdependence of all human rights.[1]

Section 2 deals with the right to education and Section 3 with the right to work and work-related rights. The chapter explains how the modern view of the nature of economic, social, and cultural rights can be applied to these rights. Each section first discusses the sources of the right under international human rights law, its main features, and components. Next, the obligations resulting from each right are discussed. Finally, the relationship of each right with other human rights is highlighted. Both rights are crucial for one's ability to live a life in dignity and develop one's personality.[2]

2 The Right to Education

The right to education has been included in many constitutions and international treaties. States have agreed that illiteracy must be eliminated and that all children must attend school. However, there is a big gap between theory and reality. Worldwide there are still 258 million children and youth out of school today.[3] The right to education is crucial for a person's self-fulfilment and the development of society as a whole. This section explains what the right to education is and what states should do to make this key right a reality for those who lack access to education.

2.1 Sources

2.1.1 Universal instruments

Article 26 of the Universal Declaration of Human Rights (UDHR) has been the basis for further guarantees of the right to education in later human rights instruments. It provides for the three basic characteristics of the right to education, namely, recognition of the right to receive an education, a guarantee for the exercise of parental rights in matters of education, and a reference to the aims of education.

Article 26 UDHR was transformed into legally binding form through two provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which in comparison to other Covenant rights are rather detailed: Articles 13 and 14. The right to education laid down in Article 13 ICESCR is a universal right, granted to every person, regardless of age, language, social or ethnic origin, or other status. Article 13(1) lists the aims that education should achieve in society. Article 13(2) enumerates the different steps that states must take to achieve the full realization of the right to education, in particular the specific obligation to make education available and accessible in a non-discriminatory way. In performing this duty, states have a degree of discretion within the limits of the standards of Article 13 and the key provision of Article 2(1), which states:

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

Article 14 deals with the implementation of primary education in states that have not yet realized this goal. It requires states to adopt a plan of action for the introduction of free and compulsory primary education. Article 13(3) and (4) guarantees the rights of parents in matters of education and the freedom to establish schools outside the public school system.

Other relevant universal instruments include the UN Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education, adopted in 1960, which aims to eliminate discrimination in education and promote equality of opportunity and treatment. The historical background of this Convention is the discrimination and segregation in education under the *apartheid* regime in South Africa. It remains relevant today as an important interpretation of the phenomenon of discrimination and exclusion in education. Article 10 of the Convention on the Elimination of All Forms of Discrimination
p. 237 Against Women (CEDAW) requires states to ensure that women ↵ have equal rights with men in the field of education. It lists a number of particular measures and goals, such as access to the same curricula and reduction in female student drop-out rates. Article 28 of the Convention on the Rights of the Child (CRC) lists the measures that states must take progressively to realize this right. It includes one new element that is lacking in previous instruments, namely the obligation to ensure that school discipline is administered in a manner consistent with the child's dignity. This may be understood as a ban on applying corporal punishment in schools.[4] Article 29(1) deals with the aims of education, while Article 29(2) guarantees the freedom of individuals and bodies to establish schools. Finally, Article 32(1) calls for protective measures against economic exploitation of children (child labour) which may interfere with the child's education.

2.1.2 Regional instruments

The right to education is also guaranteed by regional human rights instruments. In Europe, the relevant provision is Article 2 of the First Protocol to the European Convention on Human Rights (ECHR). This norm guarantees access to public educational institutions without discrimination and requires states to abstain from interference in the free exercise and free choice of education by pupils and parents. The European Court

of Human Rights has interpreted this provision as requiring states only to maintain the level of educational services existing at a given time, without imposing an obligation to expand educational facilities or to increase funding for education.[5] Access to education within the context of labour and other professional activities is covered by the right to vocational training laid down in Article 10 of the European Social Charter (1961). Educational rights of national minorities are guaranteed by Articles 12 to 14 of the Council of Europe Framework Convention for the Protection of National Minorities (1995). Finally, the EU Charter of Fundamental Rights guarantees the right to education in Article 14. This provision contains the key elements of the ECHR and the European Social Charter relating to education, but it adds that the right to education includes the possibility of receiving free compulsory education (Article 14(2)). The latter element is also a key part of Article 13 ICESCR.

Article 17(1) of the African Charter on Human and Peoples' Rights (ACHPR) provides that '[e]very individual shall have the right to education'. The Charter does not elaborate on this brief and generally worded provision. However, the African Charter on the Rights and Welfare of the Child contains a detailed provision on the right to education in Article 11. It is modelled on other human rights instruments, in particular the ICESCR and the CRC. It also contains some elements that are relevant from an African perspective. These include a clause that education shall be directed to the preservation and strengthening of positive African morals, traditional values, and cultures, and to the promotion and achievements of African unity and solidarity (Article 11(2)(c) and (f)). Furthermore, Article 11(6) stipulates that states parties shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability. This means that they should not be banned from attending school.

p. 238

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) deals with the right to ↵ education in Article 13. This provision is very similar to Article 13 ICESCR. It includes the rights to receive an education and to choose an education. What is special about this Protocol is that the complaints procedure of the American Convention on Human Rights (ACHR) applies to two of its provisions, namely certain trade union rights (Article 8a) and the right to education (Article 13). That means that there is a mechanism open to individuals to enforce these rights where it is alleged that they 'are violated by action directly attributable to a State Party to this Protocol'.[6]

Article 41 of the Arab Charter on Human Rights, adopted in 2004, provides for the right to education and requires states to eradicate illiteracy. It contains references to free primary and fundamental education and the aims of education. However, it lacks a provision guaranteeing parental rights and the freedom to establish schools.

Finally, the non-binding Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, adopted in November 2012, provides for the right to education in Article 31. Its structure and content are similar to other international provisions on the right to education.

From this overview, it becomes clear that Article 26 UDHR has been, and still is, a major source of inspiration for the drafting of universal and regional provisions on the right to education. However, subsequent developments, changing views, and regional particularities have been taken into account in more recent instruments.

2.2 Features

Two aspects of the right to education as laid down in international documents can be identified. On the one hand, realization of the right to education demands an effort on the part of the state to make education available and accessible. It implies a positive state obligation. This may be defined as the *right to receive an education* or the *social dimension* of the right to education. On the other hand, there is the personal freedom of individuals to choose between state-organized and non-public education, which can be translated, for example, in parents' freedom to ensure their children's moral and religious education according to their own beliefs. From this, stems the freedom of natural persons or legal entities to establish their own educational institutions. This is the *right to choose an education* or the *freedom dimension* of the right to education. It requires the state to follow a policy of non-interference in private matters. It implies a negative state obligation. Both aspects can be found in Articles 13 and 14 ICESCR. Articles 13(2) and 14 cover the social dimension, while Article 13(3) and (4) embodies the freedom dimension.

In addition, the right to education has been explained by the Committee on Economic, Social and Cultural Rights and the UN Special Rapporteur on the right to education to include four interrelated features:

- *Availability*: functioning educational institutions and programmes have to be available in sufficient numbers, through a public educational system and allowing private parties to establish non-public schools.
- *Accessibility*: educational institutions and programmes have to be accessible to everyone, without discrimination on any ground, also implying safe physical and economic accessibility.
- *Acceptability*: the form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate, of good quality, and in accordance with the best interests of the child; this includes a safe and healthy school environment.

p. 239

- *Adaptability*: education has to be flexible, so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their specific social and cultural context, including the evolving capacities of the child.[7]

This '4-A' scheme is a useful device to analyse the content of the right to receive an education and the obligations of states parties resulting from it as well as to measure the level of its realization.

It is clear that the consequences of the COVID-19 pandemic have put at serious risk the availability, equal accessibility, and adaptability of education.[8] Schools were closed, either fully or partially, for a significant period of time. This affected all school-going children worldwide, but in particular those belonging to vulnerable and marginalized groups, such as rural children and disabled children in countries in the South.[9] When boys and girls in poor countries can no longer go to school, there is the risk that they will be employed by their parents to work on the land or for domestic work. In addition, girls face the risk of arranged marriages and early pregnancies. When not accompanied by good quality home schooling, the closure of schools has led to educational arrears of many children worldwide. Furthermore, school closures and the consequent digital learning have led to a divide in education between rich and poor countries and between rich and poor families within countries. In addition, a social and economic divide has emerged between parents and caregivers who can, and those who cannot, provide support to their children in learning activities.

2.3 The Aims of Education

Education can be used or abused to prepare children well or badly for life.[10] Education in Germany during the Nazi regime was an example of brainwashing children. Indeed, the formulation of the aims of education as contained in international human rights instruments reflects the need to avoid the horrors of the Second World War from recurring. This is clear from Article 26 UDHR, which provides that education should contribute to avoiding conflicts between nations, groups, and people by promoting understanding, tolerance, and friendship and the maintenance of peace. In addition, education must be directed to the full development of the human personality and to strengthening respect for human rights. By emphasizing the individual's sense of dignity and ability to participate in a free society, Article 13(1) ICESCR makes it clear that the interests of the individual should be central to education.

It is noteworthy that some instruments emphasize specific aims, such as the elimination of stereotyped concepts of the role of men and women at all levels and in all forms of education (Article 10(c) CEDAW) or the development of a child's personality, talents, and mental and physical abilities through education (Article 29(1)(a) CRC). The CRC also adds further goals for education, such as the development of respect for the natural environment and for people of indigenous origin. These common aims, laid down in a number of
p. 240 international instruments, reflect a 'broad universal consensus on the major aims and ↵ objectives of the right to education'.[11] They also constitute the foundation for programmes about human rights education in schools worldwide.[12]

2.4 Components

On the basis of treaty law, General Comments of the Committee on Economic, Social and Cultural Rights, and case law, the following four key components of the right to education can be identified.

2.4.1 Access to education on a non-discriminatory basis

The essence of the right to education is the right to access available educational facilities. In more concrete terms, this means the right of access to existing public educational institutions on a non-discriminatory basis.[13] This right is violated, for example, if people belonging to a specific ethnic, linguistic, or religious group have restricted access to existing public educational institutions, as is the case for Roma children in some European countries.[14] In addition, education provided by the state should be of the same quality for all groups. Girls, for example, should not be given education of an inferior quality compared to boys.[15] Another extreme example was the situation in Afghanistan where the Taliban regime banned girls and women from all types of educational institutions.[16] The case of the young Pakistani girl, Malala, who advocated for the right to education for girls and was shot in the head by the Taliban in 2012, shows that this right is still far from being accepted by everyone as a human right.[17] In some African countries, female students are forced to disclose a pregnancy and leave school once the pregnancy has been discovered. This practice was found to be discriminatory by the Economic Community of West African States (ECOWAS) Court of Justice.[18] Discriminatory treatment of an HIV-positive person in the school system was qualified as a violation of the right to education under the Protocol of San Salvador.[19] Protecting the right to education of refugees deserves special attention from governments and the international community.[20]

2.4.2 The right to enjoy free and compulsory primary education

A second key component of the right to education is the right to enjoy primary education in one form or another, not necessarily in the form of traditional classroom teaching. Primary education is so fundamental for the development of a person's abilities that it ↵ can be rightfully defined as a minimum claim. p. 241 Accordingly, the Supreme Court of India has held the right to (primary) education to be implicit in the right to life.[21] Primary education relates to the first layer of a formal school system and usually begins between the ages of five and seven and lasts approximately six years, but in any case no fewer than four years.[22] Primary education includes the teaching of basic education or covering basic learning needs.

The term 'basic education' is frequently used, for example in outcome documents of international conferences such as the World Declaration on Education for All, but it is not part of international human rights law.[23] Basic education relates to the content of education rather than the form it takes (formal or non-formal schooling). Apart from a school and classroom system, basic education may be given in less traditional forms, such as village- or community-based, or in the open air. Usually, basic education is aimed at children within the framework of primary schooling. However, basic education is also relevant for other persons who lack basic knowledge and skills. This dimension is referred to as 'fundamental education' in Article 13(2)(d) ICESCR. The enjoyment of this right is not limited by age or gender; it extends to children, youth, and adults, including older persons; it is an integral component of adult education and life-long learning.[24]

The right to free and compulsory primary education also implies that no one, for example parents or employers, can withhold a child from attending primary education.[25] It is the only provision in the UDHR and the ICESCR in which the exercise of a right is linked to meeting an obligation, namely to attend primary education. States have an obligation to protect this right from encroachments by third persons. According to Article 13(2)(a) ICESCR, primary education shall be compulsory. There is a worldwide trend to extend compulsory schooling beyond primary schooling. The rationale for a minimum length of compulsory schooling beyond 11 years of age is that it should last at least to the minimum age of employment.[26] Obviously, it is not sufficient that primary education is compulsory by law. What is also necessary is a state inspection service to supervise and enforce this duty with respect to parents, schools, employers, and pupils themselves.

There are a number of factors that may influence actual attendance of children at school. These include inadequacy of school services, such as the distance between a student's home and the school, lack of transportation facilities, lack of running water and sanitation facilities at school, teaching in a language other than the child's mother tongue, and teaching materials and methods that do not fit in with the cultural background of children and their parents (adaptability of education). Other factors relate to the socio-economic status of parents, including their inability to pay for school attendance of their children, traditional attitudes regarding the education of girls, and loss of family income that a child attending classes would otherwise earn.

p. 242 ↵ Article 13(2)(a) ICESCR also stipulates that primary education shall be free. The rationale behind this entitlement is that:

> children would not have to pay for their schooling or remain deprived of it when they cannot afford the cost. Children cannot wait to grow, hence their prioritized right to education in international human rights law. The damage of denied education while they are growing up cannot be retroactively remedied.[27]

The degree to which primary education is really free is determined by a number of direct and indirect costs, such as school fees, expenses for textbooks and electronic devices, extra lessons, meals at school canteens, school transport, school uniforms, medical expenses, and boarding fees. Another form of indirect cost for parents is taxation. Its effects upon the accessibility of education will depend upon the progressiveness of the tax system: do low-income groups pay less, in absolute and relative terms, compared to high-income groups?[28]

Primary education must be a priority when allocating resources, because it deals with the fundamental basis for a person's development and the development of society as a whole.[29] It is the responsibility of states to provide for primary education and maintain educational services. They cannot waive that responsibility by giving more room to the private sector or by stimulating public–private partnerships for the financing of the educational infrastructure. With respect to the right to education in the ECHR, the European Court of Human Rights has held that a state cannot absolve itself of responsibility by delegating its obligations to private school bodies.[30] UNICEF has emphasized that 'only the State … can pull together all the components into a coherent but flexible education system'.[31] The Committee on Economic, Social and Cultural Rights has stressed that 'Article 13 [ICESCR] regards States as having principal responsibility for the direct provision of education in most circumstances'[32] and that states have an immediate duty to provide primary education for all.[33] Recently a number of governments of developing countries have begun to privatize educational services by allowing the private sector to set up fee-based commercial schools for primary and secondary education. This development has been criticized as contrary to the idea of education as a public good and the obligation of the state to make basic education available and equally accessible to all.[34] For those states that have not yet realized compulsory and free primary education, there is an 'unequivocal obligation' to adopt and implement a detailed plan of action as provided for in Article 14 ICESCR.[35] After a long delay, in 2009 India finally adopted an Act to implement the right to free and compulsory education for children of the age of six to fourteen years.[36]

p. 243

2.4.3 Free choice of education

Yet another key component of the right to education is free choice of education without interference by the state or a third person, in particular, but not exclusively, with regard to religious or philosophical convictions. This component is violated when a state fails to respect the free choice of parents with regard to the religious instruction of their children. Public education entails the danger of political goals, that is, the danger that the state will promote the most influential 'philosophy of life'.[37] Thus, a state must ensure an objective and pluralist curriculum and avoid indoctrination in this dominant philosophy.[38] However, in many states there is only limited, or no, opportunity to attend education of one's own choice: there may only be state-controlled education or, where available, private education is too expensive for parents. There is no obligation under international human rights law for states to provide financial support to private educational institutions. If they do, however, they must do so in a non-discriminatory way.[39]

2.4.4 The right to be educated in the language of one's own choice

A more controversial question is whether the right to be educated in the language of one's own choice is a key component of the right to education. In the *Belgian Linguistic Case No 2*, the European Court of Human Rights stated that 'the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be'.[40] This means that it is the state that determines whether a specific language is to be a national or official language as a medium of instruction in education. In addition, the Strasbourg Court stressed that individuals cannot claim a right to state-funded education in the language of their own choice, thus rejecting claims of a positive state obligation in that regard.

On the other hand, a state must respect the freedom of individuals to teach, for instance, a minority language in schools established and directed by members of that minority. This does not imply, however, that a state must allow the use of this language as the only medium of instruction; this would be dependent on the educational policy of the state. As a minimum, states must not frustrate the right of members of national, ethnic, or linguistic minorities to be taught in their mother tongue at institutions outside the official system of public education, albeit they are not obliged to fund those institutions. This right of minorities is solidly established in international law.[41] It was a cornerstone of the minority protection system established under the auspices of the League of Nations after the First World War. Moreover, the right of minorities to establish educational institutions in which they are entitled to use their own language was characterized by the Permanent Court of International Justice in 1935 as 'suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'.[42] It is in this sense that the right to be educated in the language of one's own choice belongs to the key components of the right to education.

2.5 Types of Obligations

p. 244

Obligations of states resulting from Articles 13 and 14 ICESCR may be derived from these treaty provisions themselves, Article 2(1) ICESCR, and General Comments 3, 11, and 13 of the Committee on Economic, Social and Cultural Rights. They may be divided into general obligations and specific obligations. *General obligations* include immediate obligations to prohibit discrimination in law and in fact, in the area of education, and to take steps to make primary education compulsory and free. Moreover, states are obliged not to take retrogressive measures, such as the introduction of school fees where previously education was free, and to protect the most vulnerable groups in society through special programmes, such as schooling for street children. *Specific obligations* include obligations to draft, adopt, and implement a comprehensive national education strategy, to establish minimum standards for private educational institutions, to develop curricula that conform to the aims of education, and to set up a school inspection system.

The typology of obligations introduced by the Committee on Economic, Social and Cultural Rights (obligations to respect, to protect, and to fulfil)[43] can be used to further define and refine the nature of states' obligations.

The obligation to *respect* the right to education requires states to abstain from interference. They must not prevent children from obtaining an education, for example by closing educational institutions in times of political tension without complying with the limitations clause of Article 4 ICESCR.[44] As a response to the

July 2016 *coup d'état*, the Turkish government derogated from a number of human rights obligations under the ECHR,[45] including the right to education. It has closed approximately 1,000 private schools and 15 private universities and fired tens of thousands of teachers. Although this derogation may be lawful, the effects it has on the enjoyment of the right to education are disproportionate.[46] The obligation to respect can be characterized as an obligation of conduct: it requires the state to follow the specific course of action specified in the treaty provision.

The obligation to *protect* requires states to guarantee the exercise of the right to education in horizontal relations (between private groups or individuals). For example, they must protect against discrimination of students in obtaining access to non-public schools. Other examples of the obligation to protect are the adoption and enforcement of legislation to combat child or bonded labour in private labour relations, or arrangements for monitoring and enforcing compulsory primary education.

The nature of the right to education is such that positive state action is needed to achieve the full realization of this right. The obligation to *fulfil* requires states to make the various types of education available and accessible for all and to maintain that level of realization, which may involve a variety of measures. While it may be necessary to adopt legislation to provide a legal framework, the primary means of realizing the right to education are policy measures as well as financial and material support. It is clear that the embezzlement of public education funds will have a negative impact on the enjoyment of the right to education, because fewer resources will be available for the provision of education.[47] The obligation to fulfil implies that states have a substantial degree of latitude, depending also on the specific level of education and the wording of the respective treaty obligation. Therefore, ↵ the obligation to fulfil should be characterized as an obligation of result, leaving the choice of means to the state, providing the result achieved conforms to international standards.

p. 245

Particular elements of the right to education give rise to *minimum core obligations* as defined by the Committee on Economic, Social and Cultural Rights in its General Comment on the nature of states parties' obligations.[48] Such obligations are not limited to cost-free (negative) obligations to respect but also include positive obligations to protect and to fulfil. Minimum core obligations emanating from the right to education apply irrespective of the availability of resources.[49] According to the Committee, the minimum core obligations with respect to the right to education include obligations:

> to ensure the right of access to public educational institutions and programs on a nondiscriminatory basis; to ensure that education conforms to the objectives set out in article 13(1) [ICESCR]; to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards' (article 13(3) and (4)).[50]

It is obvious that for many states meeting these core obligations is a challenge from legal, policy, practical, and financial points of view.

2.6 Relationship With Other Human Rights

Education is a social good in that it creates opportunities and provides choices to people. In this sense, education is an end in itself. However, it is also a means to an end, because it helps to achieve economic growth, health, poverty reduction, personal development, and democracy. Therefore, the right to education should be characterized as an 'empowerment right'. Such a right 'provides the individual with control over the course of his or her life, and in particular, control over ... the state'.[51] In other words, exercising an empowerment right enables a person to experience the benefit of other rights: 'the key to social action in defense of rights ... is an educated citizenry, able to spread its ideas and to organize in defense of rights'.[52] Education enables people to make a contribution to society as independent and emancipated citizens. Civil and political rights, such as freedom of expression, freedom of association, or the right to political participation only obtain substance and meaning when a person is educated. Galbraith has emphasized that 'education not only makes democracy possible; it also makes it essential. Education not only brings into existence a population with an understanding of the public tasks; it also creates their demand to be heard.'[53] In this sense, education is a threat to autocratic rule. Governments have used the education system for building nations, for instance through the introduction of a national language. Often this happened to the detriment of the languages and cultures of ethnic minorities and indigenous groups. For such groups, the right to education is an essential means to preserve and strengthen their cultural identity. For example, in China the ↵ authorities are making it more difficult for Tibetans to be taught in their mother tongue at public schools.[54]

p. 246

Education enhances social mobility: it helps people to escape from discrimination based on social status and to move up the social ladder. Moreover, education promotes the realization of other economic, social, and cultural rights, such as the right to work, the right to food, or the right to health: an educated person will have a greater chance of finding a job, will be better equipped to secure his or her own food supply, and is more aware of public health dangers. In general, education promotes the fulfilment of the right to an adequate standard of living; it provides people with access to the skills and knowledge for full membership of society. From the perspective of the rights of the child, education contributes to socializing children into understanding and accepting views different from their own. In other words, education unlocks the enjoyment of other human rights and contributes in an important way to the promotion of the essence of human rights, namely living in human dignity.

Finally, the right to education has a clear overlap with civil rights, such as freedom of religion and the right to privacy: the freedom of parents to determine the (religious) education of their children is not only part of the right to education but also of the freedom of religion[55] and is an issue belonging to people's private lives. Similarly, the right to education is linked to the freedom of association through the freedom to establish private educational institutions.

The interdependence of rights may also give rise to tensions and the need to weigh the different interests that are at stake. For example, a controversial issue is whether the state can prohibit the wearing of the headscarf in public educational institutions with a view to keeping the education system free from any religious expressions, or whether such a ban would violate the freedom of religion and expression of the student.[56]

In short, the right to education, through its links with other rights, accentuates the unity, indivisibility, and interdependence of all human rights.

3 The Right to Work and Work-Related Rights

In the age of economic globalization, millions of workers in many parts of the world experience the flexibility of the world labour market on a daily basis. They may benefit from new jobs created as a result of foreign direct investment, or they may lose their job because their employer fires them and moves the company to a country where labour is cheaper. Some countries rely on cheap labour and weak trade unions as a comparative advantage to attract foreign investments. As jobs move from one part of the world to another, so do workers. Many migrant workers from developing countries try to find a living in rich countries by taking on work that is badly paid and often of an inferior status and quality. It is particularly in this type of situation that workers' rights come to the fore. These rights are meant to counter the negative consequences of economic globalization for labour, such as extreme forms of income inequality, exploitation of workers (including women, children, and migrant workers), and high levels of unemployment. The reaction of the international community to these consequences has been the call for social justice and decent work.[57] Workers' rights are crucial in this respect. They aim at protecting and promoting working conditions by laying down international minimum standards. The International Labour Organization (ILO) has played, and continues to play, a key role in setting, implementing, and monitoring these standards. This section of the chapter discusses the right to work and so-called 'work-related' rights, including, among others, the right to the enjoyment of just and favourable working conditions, the right to strike, and trade union rights.

p. 247

3.1 Sources

3.1.1 Universal instruments

A discussion of the right to work and work-related rights should start with the origins of the ILO, which was established in 1919 after the First World War. From the preamble to its constitution it is clear that the achievement of social justice was considered to be crucial for the establishment of lasting peace between states. In addition, it was deemed important to improve labour conditions of workers in order to prevent social unrest, which could possibly result in social and political revolutions such as the one that took place in Russia in 1917.[58] Thus, governments at that time had a self-interest in improving labour conditions, although sentiments of justice and humanity were also mentioned as guiding concerns in the preamble. In this respect, it is interesting to note that in 1944 the ILO stated explicitly that 'labour is not a commodity'.[59] Hundreds of binding conventions and non-binding recommendations have been adopted within the framework of the ILO over the years. The tripartite structure of the organization provides a framework for representatives of governments, workers, and employers to discuss and agree on new rules. These are usually called international labour standards.

The early establishment of the ILO meant that it was far ahead in laying down work-related rights when the UN started its normative human rights activities after the Second World War. The ILO contributed actively to the drafting of both the UDHR and the ICESCR. Article 23 UDHR and Articles 6 to 8 ICESCR contain a number of elements that relate to the protection of the right to work, such as the free choice of work, equal pay for equal work, and trade union rights. Trade union rights are also part of the International Covenant on Civil and

Political Rights (ICCPR), Article 22 of which recognizes the right to form and join trade unions. The ICCPR also provides for the prohibition of forced labour in Article 8(3). There are a number of further universal human rights instruments that deal with work-related rights. For example, Article 11 CEDAW lays down detailed obligations for states aimed at eliminating discrimination in the field of employment. Article 32 CRC recognizes the right of children to be protected from economic exploitation and hazardous work. There is a clear link here with the elimination of child labour. Article 10(3) ICESCR serves a similar purpose, adding that states 'should set age limits below which the paid employment of child labour should be prohibited and punishable by law'. Note the use of the permissive 'should' instead of the more mandatory 'shall'.

The work-related rights of migrant workers are of particular importance. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families lays down a number of relevant rights. Its main feature is the principle of non-discrimination with respect to rights granted to migrant workers and ↵ members of their families (Article 7). This principle has been elaborated for matters of employment and labour conditions in Article 25. However, Article 52 allows for restrictions that states of employment may impose on migrant workers' free choice of remunerated activities. Furthermore, the Convention contains a number of provisions that are applicable to particular categories of migrant workers, such as frontier workers and seasonal workers.[60] Some aspects of the Convention do not apply to migrant workers and members of their families who are non-documented or in an irregular situation.[61]

p. 248

The Convention on the Rights of Persons with Disabilities is based on the principles of, among others, non-discrimination, full and effective participation and inclusion of disabled people in society, and equality of opportunity (Article 3). As is made clear by Article 27, these principles also apply to matters of work and employment. This means, for example, that states have to prohibit discrimination on the basis of disability with respect to conditions of recruitment for jobs and to promote employment opportunities and career advancement for persons with disabilities in the labour market. Among numerous other positive obligations, states must also ensure that reasonable accommodation is provided to persons with disabilities in the workplace (Article 27(1)(i)).

3.1.2 Regional instruments

The European Social Charter (1961), the Additional Protocol to the European Social Charter (1988), and the Revised European Social Charter (1996) all aim at protecting the rights of workers. They extensively regulate various aspects of the right to work, employment conditions, vocational training, participation of workers in the determination of labour issues, and access to social security, social assistance, and welfare services. The Charter also identifies specific groups that need special protection, such as women, children, elderly persons, and migrant workers. The Charter does not recognize individual rights that are directly enforceable against the state. Although rights language is used, its provisions are framed as state obligations rather than individual rights. For example, Article 1 Revised European Social Charter, dealing with the right to work, reads: 'With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake … to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment.' The Charter of Fundamental Rights of the European Union stipulates in Article 5 that no one shall be required to perform

forced or compulsory labour. In addition, it contains a number of workers' rights, including protection in the event of unjustified dismissal (Article 30) and the right of workers to information and consultation (Article 27).

Article 15 ACHPR provides that every individual shall have the right to work under equitable and satisfactory conditions and receive equal pay for equal work. Interestingly, the Charter also contains duties that are imposed on the individual, one of them being 'to work to the best of his abilities and competence' (Article 29(6)). Article 15 African Charter on the Rights and Welfare of the Child provides protection against child labour in similar terms to those of Article 32 CRC. Measures to protect children cover both the formal and informal sectors of employment.

In the Americas, the Protocol of San Salvador provides for the right to work in Article 6. Its wording is quite modern in that it refers to the notions of dignity and decency that have been essential features of recent debates about the right to work.[62] Article 7 lists a range of ↵ labour conditions that should be just, equitable, and satisfactory. Like Article 24 UDHR, it recognizes that workers have a right to rest, leisure, and paid holidays, and remuneration for national holidays (Article 7(h)).

p. 249

In the Arab Charter on Human Rights, one comprehensive article deals with a number of aspects of the right to work. Article 34 provides that the right to work is a natural right of every citizen. It also requires states to provide, to the extent possible, a job for the largest number of those willing to work. The reference to 'those willing to work' is unique in the texts of human rights instruments. Article 34 also prescribes non-discriminatory treatment of men and women in matters of training, employment, job protection, and remuneration.

3.1.3 ILO conventions

Conventions adopted within the framework of the ILO are special conventions, because they deal with one or more particular labour issue(s). As the ILO has always stated, labour standards included in its conventions and recommendations are universal in nature. They are deliberately set low in order to achieve a worldwide reach, although more favourable national working conditions remain applicable.[63] The ILO conventions recognize that there are economic disparities between states and that these differences may have an impact on the way states implement their obligations.[64] What is decisive in the end is whether a state has complied with its treaty obligations. The conventions address a variety of issues relating to the right to work and work-related rights, and many of them have a long history. The first ILO convention, adopted in 1919, dealt with the regulation of hours of work in industrial plants,[65] while another early convention was designed to counter unemployment.[66] More recent conventions deal with the elimination of the worst forms of child labour, the safety and health of workers in mines, the rights of domestic workers, and the prohibition and prevention of violence and harassment at work.[67]

3.2 Features

The right to work has a number of special features. First of all, it is an aggregate right, that is, it includes a number of components, such as claims to employment, free choice of work, improvement of working conditions, and trade union rights. Furthermore, the nature of the right to work, understood as a claim to employment, is such that it is not possible to enforce it directly against the state. It is not a subjective right enforceable by courts. Most people are employed by private employers rather than the state. This means that the state must regulate, monitor, and enforce labour rules by laying down mechanisms that workers can use to enforce their rights against employers. Many labour standards thus apply in horizontal relationships between employers and employees. To implement the ILO conventions, states have to bring their domestic law and practice into conformity with the international standards and employers have to comply with the domestic law. The advantage of ILO standards is that they are specific and detailed, thus giving clear guidance to states as to how to implement them. Consequently, compared to other economic, social, and cultural rights, the right to work and work-related rights are well developed in terms of their normative content.

p. 250 ↵ The detailed nature of ILO standards has helped to clarify the meaning of relevant provisions in human rights instruments. For example, Article 7(b) ICESCR mentions safe and healthy working conditions as a component of just and favourable conditions of work, without further explanation. ILO conventions and recommendations have been helpful in defining what this means for specific types of activity or categories of workers. For example, there is a convention on safety and health in the agricultural sector[68] and a convention on the labour conditions of seafarers.[69] These detailed rules may be used by human rights supervisory bodies to explain the nature and scope of human rights obligations.

Traditionally, there was little cooperation and coordination between international labour circles, on the one hand, and the human rights movement, on the other hand. The ILO and trade unions paid little attention to the use of human rights language to promote their cause and human rights activists largely ignored labour rights issues in their campaigns.[70] This situation has changed gradually over time. The ILO has been devoting special attention to the role of human rights in achieving social justice. For example, in 2010 it adopted a Recommendation on HIV/AIDS and the World of Work, which is meant to give impetus to anti-discrimination policies at the workplace level.[71] For its part, the human rights community is focused increasingly on violations of workers' rights, which often result as a negative consequence of the globalization of production and trade. For example, Amnesty International has drawn attention to the abuse of rights of workers by multinational companies in the palm oil industry in Indonesia as a side effect of uncontrolled business practices and economic growth.[72]

3.3 Components

The right to work is composed of several key components. One of the most fundamental rights is the *freedom from slavery*, guaranteed by Article 8(1) ICCPR. Slavery is 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[73] Thus, a slave is unable to exercise the right of individual self-determination. Although slavery has been eradicated in many countries, it still exists in parts of Asia and Africa. For example, caste and ethnic status underpin the use of slavery in Niger, Mauritania, and Mali, where tens of thousands of people are ascribed slave status at birth and are then

considered to be the property of their 'masters' who force them to work without pay.[74] In India, many children work long hours in the cotton industry to pay off the debts of their parents. This is not freely chosen work, but bonded labour.

Forced or compulsory labour has also been banned under international human rights law. 'Forced or compulsory labour' is 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[75] In 1957, ILO member states agreed on new standards concerning the abolition of forced labour, committing themselves not to use forced labour as a means of political coercion or education or as a punishment for holding or expressing certain views; as a method of mobilizing and using labour for the purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; or as a means of racial, social, national, or religious discrimination.[76] The convention was directed against communist states that imposed forced labour in so-called labour camps for political opponents and states such as Rhodesia and South Africa that applied forced labour of black workers as part of their discriminatory laws and practice. Not all forms of 'compulsory' labour qualify as prohibited labour under international labour law and human rights law. Both the 1930 Forced Labour Convention and the ICCPR provide for exceptions, including compulsory military service and work required of persons in detention.[77] In 2016, an ILO Protocol to the Forced Labour Convention 1930 entered into force which is aimed at tackling forms of modern slavery. It, inter alia, requires employers to exercise due diligence to avoid modern forms of slavery in their business practices and supply chains.[78]

p. 251

The counterpart of the prohibition of slavery and forced labour is the *freedom to work*, which means the right to free choice of work or occupation. People have a right, not a duty, to work. This right is codified in several human rights instruments, such as Article 6(1) ICESCR and Article 1(2) Revised European Social Charter. A current, controversial issue is the so-called *Kafala* (sponsorship) system applied in Qatar in the construction sector for employment of migrant workers. This system requires a 'No Objection Certificate' for workers from their employer if they want to change job or leave the country. In combination with mistreatment of migrant workers employed in the construction of stadiums and infrastructure for the 2022 FIFA World Cup tournament, this system of bonded labour has raised a great deal of international criticism because of the violation of the right to the free choice of work.[79] In 2020, Qatar adopted a number of labour reforms. It will now allow migrant workers, including domestic workers, to change jobs before the end of the contact without the prior consent of their employer. The question remains whether these changes will be put in practice, monitored, and enforced.[80]

Another key component of the right to work and work-related rights is the principle of *non-discrimination and equal treatment*, which is part of every human rights treaty. For example, Article 7(a)(i) ICESCR provides for 'equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work'. ILO standards lay down more specific rules and other grounds of discrimination that are prohibited.[81] Examples include trade union membership and action, marital status, pregnancy, and family responsibilities.

The right to work also includes the *right to seek work*, which implies that states must design, adopt, and implement active employment policies aimed at creating jobs and reducing unemployment. States are under a duty to act, not to succeed in providing everyone with a job. In some communist states, the right to work was constitutionally guaranteed and the authorities claimed that there was full employment, when in reality

p. 252 there was ↵ hidden unemployment. Today, the internationalization of economic processes has limited the role of governments to influence employment through national measures, but raising employment figures remain one of the major concerns.[82] The ILO has said that job creation for young people must be a priority in achieving inclusive and sustainable development.[83]

The right to work implies a right to, not just any kind of work but, *decent work*. Although there is no authoritative definition of 'decent work', this concept, which is at the heart of current ILO policies and programmes, implies that work has to be of an acceptable quality in terms of conditions of work, feelings of value and satisfaction, relations between employer and employee, and remuneration.[84] The right to fair remuneration is protected by several human rights instruments.[85] It includes, inter alia, the right to equal pay for work of equal value. Fair remuneration is meant to guarantee to workers and their families a decent standard of living. The wage level is subject to a number of factors, such as the standard of living in a country, the type of work, and the situation on the labour market. For the European region, the European Committee on Social Rights has determined that the net minimum wage should amount to at least 60 per cent of the net national average wage.[86] Decency also implies that a certain minimum level of protection has to be met. For example, there is agreement that certain forms of child labour do not meet that standard, as is evidenced by the ILO Convention on the Worst Forms of Child Labour.[87] According to this Convention, the worst forms of child labour include work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children (Article 3(d)).

Other components of the right to work include the right to have access to free employment services in order to find a job as guaranteed by Article 1(3) Revised European Social Charter, and protection of employment security, that is, protection against unjustified dismissal. ILO Convention No 158 (1982) sets out reasons that cannot be invoked to justify a dismissal, such as union membership or the exercise of a right by a worker, such as maternity leave.

Finally, there are some instrumental rights, such as the freedom of association, the right to bargain collectively, and the right to strike that serve the purpose of promoting and protecting the right to work and work-related rights.

The critical importance of some fundamental work-related rights has been proclaimed and confirmed in a key declaration adopted by all member states of the ILO in 1998. The Declaration on Fundamental Principles and Rights at Work establishes an obligation of member states, arising from the very fact of membership of the ILO, to respect, promote, and realize a number of *core principles and rights* laid down in ILO conventions. These include:

- freedom of association and effective recognition of the right to collective bargaining;
- elimination of all forms of forced or compulsory labour;
- effective abolition of child labour; and
- elimination of discrimination in respect of employment and occupation.

p. 253 ↵ The significance of this Declaration lies in the fact that states agreed that they have these obligations even if they have not ratified the relevant conventions.[88] Furthermore, the principles have universal reach and application, applying to all member states of the ILO with respect to both their domestic and international policies and practice. As a consequence, for example, importing and exporting states may not benefit from commodities produced through the use of forced labour or the worst forms of child labour.

3.4 Obligations

Obligations resulting from the right to work and work-related rights can be derived from the treaty provisions themselves as well as the explanations given by the Committee on Economic, Social and Cultural Rights, for example in its General Comment 18. However, these obligations have been formulated in general terms, often making it difficult to monitor implementation.

As explained already, pursuant to Article 2(1) ICESCR, states must progressively realize the rights included in the ICESCR by taking appropriate measures, such as the adoption of legislation. Article 6(2) ICESCR lists a number of steps that states parties must take to achieve the full realization of the right to work, such as setting up vocational guidance and training programmes. Some obligations are not subject to progressive realization, but have an immediate effect. One example is the obligation to guarantee that the right to work can be exercised 'without discrimination of any kind', as provided for in Article 2(2) ICESCR.

The Committee on Economic, Social and Cultural Rights has identified further obligations resulting from the right to work by using the typology of obligations 'to respect, to protect and to fulfil'.[89] These entail both negative obligations to abstain from interference and positive obligations to act. Under the obligation to *respect*, the state must not, for example, apply forced or compulsory labour and must allow the establishment and functioning of trade unions. The obligation to *protect* requires states to lay down in domestic law standards for labour relations between private employers and employees (for example, minimum wages, working hours, and occupational health and safety rules), to monitor compliance with the law, and to enforce it in case of infringement.[90] In a globalized economy, a key question is what role both home and host states can play through national legislation and policy in regulating and monitoring working conditions in subsidiaries of multinational companies, for example in the garment industry. Do companies give effect to their corporate social responsibility to respect and promote fair labour conditions through self-regulation and voluntary codes of conduct, or should soft law instruments persuade companies to adopt and implement a decent work approach?[91] Finally, the obligation to *fulfil* requires states, for instance, to develop an active employment policy to counter unemployment.

The Committee on Economic, Social and Cultural Rights has characterized some obligations as *minimum core obligations*, which must be realized under all circumstances. These include, for example, the obligation to ensure non-discrimination and equal opportunity in matters of employment, for instance with respect to the right of access to employment for women, migrants, and disabled people.[92] Another core obligation is the duty to abolish the worst forms of child labour pursuant to applicable ILO standards.

p. 254 ↵ As far as the obligations arising from ILO conventions are concerned, two broad categories can be distinguished. First, some of the conventions entail immediate obligations for states. An example is the Equal Remuneration Convention (No 90) (1951), which stipulates in Article 2 that states shall ensure the application

to all workers of the principle of equal remuneration for men and women workers for work of equal value. States may use different methods to implement this principle, including national laws or regulations, legally established or recognized machinery for wage determination, or collective agreements between employers and workers. Other conventions, in contrast, contain obligations that are programmatic in nature, that is, they provide for programmes of action that set general objectives for domestic policy. These conventions allow for policy freedom and discretion for authorities regarding how best to implement the standards. An example is the Human Resources Development Convention (No 142) (1975), which requires states to adopt and develop policies and programmes of vocational guidance and vocational training.

3.5 Relationship With Other Human Rights

The right to work and work-related rights are linked to the enjoyment of other human rights. They play a key role in facilitating the right to an adequate standard of living laid down in Article 25 UDHR and Article 11 ICESCR. When people make a living through work, they are in a much better position to have access to food, medical care, housing, and education. Income generated through work is instrumental in acquiring property, such as a house or land. In addition, decent work, not any kind of work, and just and favourable working conditions contribute to living in dignity. There are also links with the right to social security, that is, the right to access and maintain benefits in order to secure protection from a lack of work-related income, caused by illness, disability, maternity, employment injury, unemployment, old age, or death of a family member.[93] This right is thus complementary to the right to work and work-related rights. The right of children not to be subject to child labour is closely linked to the need to make the right to education a reality.[94]

There are also relationships with civil and political rights, such as the right to information concerning work-related issues, freedom of expression to speak out about abuses at the workplace, and freedom of association with regard to trade unions. Finally, the enjoyment of other rights has an impact on the enjoyment of the right to work. Workers who are well trained and in good health will probably find it easier to find a suitable job and will perform better. This relationship has been acknowledged in the Revised European Social Charter.[95]

Due to its different dimensions and its links to other work-related rights, the right to work is a composite and complex right. In practice, it is particularly relevant to the horizontal relationships between employers and employees. Similar to the right to education, it becomes clear with the right to work that all human rights are interrelated and interdependent. International human rights law is less developed with regard to the right to work than the international standards established within the framework of the ILO. The implementation of the right to work at the domestic level can benefit from the detailed rights and obligations laid down in ILO conventions. Similarly, it can be argued that ILO standards should be seen and applied as human rights norms, because they are aimed at the protection of human dignity.

p. 255

4 Conclusion

This chapter has demonstrated that both the right to education and the right to work are important for living a life in dignity. Both rights are critical for the development of society as a whole, but also for achieving self-fulfilment and 'moving up the social ladder'. Their content, but also their realization, reflects the idea that all human rights are indivisible, interdependent, and interrelated. The modern approach to economic, social, and cultural rights emphasizes the importance of clarifying the normative content of each right by identifying its different dimensions, framed as entitlements and freedoms. These give rise to positive and negative obligations for states. It is a challenge for states to phrase, implement, and monitor their domestic policies in accordance with international standards. This is particularly so when implementation requires allocation of scarce (financial) resources in a period of economic recession.[96] Human rights monitoring bodies, international organizations, and NGOs should be aware of these different dimensions when monitoring implementation of these rights by states.

Further Reading

ADAMSON, AUBRY, DE KONING, and DORSI (eds), *Realizing the Abidjan Principles on the Right to Education—Human Rights, Public Education and the Role of Private Actors in Education* (Edward Elgar, 2021).

BEITER, *The Protection of the Right to Education by International Law* (Martinus Nijhoff, 2006).

BELLACE and TER HAAR (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar, 2019).

BERLINER *et al*, *Labour Standards in International Supply Chains* (Edward Elgar, 2015).

CHAPMAN and RUSSELL (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002).

DE BECO, LORD, and QUINLIVAN (eds), *The Right to Inclusive Education in International Human Rights Law* (Cambridge University Press, 2019).

DUHAIME and Décoste, 'From Geneva to San José: The ILO Standards and the Inter-American System for the Protection of Human Rights' (2020) 159 *Intl Lab Rev* 525.

EIDE, KRAUSE, and ROSAS (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff, 2001).

HUMAN RIGHTS WATCH, *'Years Don't Wait For Them'—Increased Inequality in Children's Right to Education Due to the Covid-19 Pandemic* (2021).

KALANTRY, GETGEN, and KOH, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 *HRQ* 253.

TAPIOLA, *The Teeth of the ILO* (ILO, 2018).

VERHEYDE, *Article 28: A Commentary on the UN Convention on the Rights of the Child* (Brill/Nijhoff, 2006).

p. 256

Useful Websites

ILO: **<http://www.ilo.org** *<http://www.ilo.org>***>**

UNESCO: **<http://www.unesco.org** *<http://www.unesco.org>***>**

International Network for Economic, Social & Cultural Rights: **<http://www.escr-net.org** *<http://www.escr-net.org>***>**

Anti-Slavery International: **<http://www.antislavery.org** *<http://www.antislavery.org>***>**

Right to Education Initiative: **<http://www.right-to-education.org** *<http://www.right-to-education.org>***>**

Center for Economic and Social Rights: **<http://www.cesr.org** *<http://www.cesr.org>***>**

Global Initiative for Economic, Social and Cultural Rights: **<http://www.gi-escr.org** *<http://www.gi-escr.org>***>**

Questions for Reflection

1. Which elements of the right to education and the right to work would be justiciable and enforceable before the courts?
2. Should education be/remain a public good or a private good?
3. From the perspective of economic globalization, what challenges do you see for the protection of decent work as a human right?
4. How would you assess the use of corporal punishment as a disciplinary measure at school?
5. How would you assess the policy in some European countries that eligibility for receiving a social assistance grant from the state is linked to a duty to do unpaid work for the community?

Notes

[1] See Chapter 7.

[2] See UDHR, Art 22.

[3] Human Rights Council, Res 47/6 (12 July 2021).

[4] See CRC, General Comment 8, CRC/C/GC/8.

[5] The ECtHR has interpreted the meaning and scope of Art 2 in a number of leading judgments: *Case relating to certain aspects of the laws on the use of languages in education in Belgium* (*Belgian Linguistic Case No 2*) (1968) 1 EHRR 252; *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711; *Campbell and Cosans v UK* (1982) 4 EHRR 293; *Leyla Sahin v Turkey* (2005) 44 EHRR 5; *Ponomaryov v Bulgaria* (2011) 59 EHRR 20.

[6] Protocol of San Salvador, Art 19(6).

[7] CESCR, General Comment 13, HRI/GEN/1/Rev.9 (Vol I) 63; Preliminary Report of the Special Rapporteur on the Right to Education, E/CN.4/1999/49 (13 January 1999) part II.

[8] For a discussion, see the report by the UN Special Rapporteur on the Right to Education, A/HRC/44/39 (15 June 2020).

[9] See <http://www.unesco.org/covid19 *<http://www.unesco.org/covid19>*>. UNESCO figures show that, worldwide, on average, two-thirds of an academic year has been lost due to COVID-19-related school closures.

[10] Tomasevski, *Education Denied* (Zed Books, 2003) 60.

[11] Nowak, 'The Right to Education' in Eide, Krause, and Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff, 2001) 251.

[12] See <https://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx *<https://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx>*>.

[13] ICESCR, Arts 2(2) and 3; ICCPR, Art 26; CRC, Art 2.

[14] See *DH and Others v Czech Republic* (2007) 47 EHRR 3; Recommendation CM/Rec(2009)4 of the Committee of Ministers to member states on the education of Roma and Travellers in Europe.

[15] UNESCO Convention Against Discrimination in Education, Art 1(1) and CEDAW, Art 10. See for an interpretation, CEDAW, General Recommendation 36, CEDAW/C/GC/36.

[16] Human Rights Watch, *1999 World Report*. See also Report of the UN Secretary-General on the situation of women and girls in Afghanistan, E/CN.4/Sub.2/2000/18 (21 July 2000).

[17] 'Pakistani girl shot over activism in Swat valley, claims Taliban', *The Guardian* (9 October 2012), <http://www.guardian.co.uk/world/2012/oct/09/pakistan-girl-shot-activism-swat-taliban *<http://www.guardian.co.uk/world/2012/oct/09/pakistan-girl-shot-activism-swat-taliban>*>.

[18] *WAVES v The Republic of Sierra Leone*, ECW/CCJ/JUD/37/19 (12 December 2019), <https://www.escr-net.org/caselaw/2020/women-against-violence-and-exploitation-society-waves-v-republic-sierra-leone *<https://www.escr-net.org/caselaw/2020/women-against-violence-and-exploitation-society-waves-v-republic-sierra-leone>*>.

[19] *Gonzales Lluy v Ecuador*, IACtHR Series C No 298 (1 September 2015).

[20] Art 22 Refugee Convention. See UNESCO, Protecting the right to education for refugees (2017), <https://unesdoc.unesco.org/ark:/48223/pf0000251076 *<https://unesdoc.unesco.org/ark:/48223/pf0000251076>*>.

[21] *Unni Krishnan and Others v State of AP and Others*, 1 SCC 645 (4 February 1993).

[22] Preliminary Report of the Special Rapporteur on the Right to Education, paras 75–9; Melchiorre, 'At what age? …' (2004), <http://www.right-to-education.org *<http://www.right-to-education.org>*>.

[23] Sustainable Development Goal 4 aims to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'. GA Res 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015). See further <http://www.un.org/sustainabledevelopment/education/ *<http://www.un.org/sustainabledevelopment/education/>*>.

[24] CESCR, General Comment 13; UNESCO Recommendation on Adult Learning and Education (2015), section I.1.

[25] See CESCR, General Comment 11, E/C.12/1999/4.

[26] See Progress report of the Special Rapporteur on the Right to Education, E/CN.4/2000/6 (1 February 2000) para 46 and Table 3. See also Melchiorre (2004).

[27] Report of the UN Special Rapporteur on the Right to Education, E/CN.4/2004/45 (15 January 2004) para 8.

[28] See background paper prepared by the Special Rapporteur on the Right to Education, E/C.12/1998/18 (30 November 1998) para 12.

[29] See CESCR, General Comment 13, para 51: 'States parties are obliged to prioritise the introduction of compulsory, free education'.

[30] *Costello-Roberts v UK* (1993) 19 EHRR 112.

[31] UNICEF, *The State of the World's Children 1999*, 63.

[32] CESCR, General Comment 13, para 48.

[33] CESCR, General Comment 13, para 51.

[34] Report by the UN Special Rapporteur on the right to education, A/HRC/29/30 (10 June 2015); Report by the UN Special Rapporteur on the right to education, A/HRC/41/37 (10 April 2019); the Abidjan Principles—Guiding Principles on the human rights obligations of states to provide public education and to regulate private involvement in education (2019).

[35] CESCR, General Comment 11, para 9.

[36] Act No 35 of 2009, *The Gazette of India* No 39, 27 August 2009.

[37] Compare ACHPR, Art 17(3): 'The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.'

[38] *Kjeldsen, Busk Madsen and Pedersen case*.

[39] *Waldman v Canada*, CCPR/C/67/D/1996 (5 November 1999).

[40] Section I.B., para 3.

[41] eg ICCPR, Art 27; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) sections 32–4; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art 4; European Charter for Regional or Minority Languages, Art 8; Framework Convention for the Protection of National Minorities, Arts 12–14.

[42] *Minority Schools in Albania*, PCIJ, Advisory Opinion, Series A/B No 64 (1935) 17.

[43] See Chapter 7.

[44] CESCR, General Comment 13, para 59.

[45] See for the Turkish derogation statement: <https://wcd.coe.int/ViewDoc.jsp?p=&id=2436803&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true *<https://wcd.coe.int/ViewDoc.jsp?p=&id=2436803&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>*>.

[46] Human Rights Watch, Turkey: Rights Protections Missing from Emergency Decree (26 July 2016), <https://www.hrw.org/news/2016/07/26/turkey-rights-protections-missing-emergency-decree *<https://www.hrw.org/news/2016/07/26/turkey-rights-protections-missing-emergency-decree>*>.

[47] ECOWAS Court of Justice, *SERAP v Nigeria*, ECW/CCJ/JUD/07/10 (30 November 2010) para 19.

[48] CESCR, General Comment 3, E/1991/23, Annex III.

[49] 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *HRQ* 691.

[50] CESCR, General Comment 13, para 57.

[51] Donnelly and Howard, 'Assessing National Human Rights Performance: A Theoretical Framework' (1988) 10 *HRQ* 214, 215.

[52] Donnelly and Howard (1988) 234–5.

[53] Galbraith, *The Good Society: The Humane Agenda* (Houghton Mifflin, 1996).

[54] See the *New York Times* documentary, *A Tibetan's Journey for Justice*, <https://www.hrw.org/video-photos/video/2019/05/30/330638 *<https://www.hrw.org/video-photos/video/2019/05/30/330638>*>.

[55] See ICESCR, Art 13(3) and ICCPR, Art 18(4).

[56] See Chapter 11.

[57] See ILO Declaration on Social Justice for a Fair Globalization (2008).

[58] For the text of the Constitution, see: <http://www.ilo.org *<http://www.ilo.org>*>.

[59] Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia) (1944).

[60] Migrant Workers Convention, Arts 57–63.

[61] Migrant Workers Convention, Art 35.

[62] Art 6(1) reads: 'Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.'

[63] ILO Constitution, Art 19(8).

[64] See also ILO Constitution, Art 19(3).

[65] Hours of Work (Industry) Convention 1919 (No 1).

[66] Unemployment Convention 1919 (No 2).

[67] Convention No 182 (1999), Convention No 176 (1995), Convention No 189 (2011), and Convention No 190 (2019) respectively.

[68] Convention No 184 (2001).

[69] Maritime Labour Convention (2006).

[70] Leary, 'The Paradox of Workers' Rights as Human Rights' in Compa and Diamond (eds), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, 1996) 22.

[71] ILO Recommendation 200 (2010).

[72] Amnesty International, 'The Great Palm Oil Scandal: Labour Abuses Behind Big Brand Names', <https://www.amnesty.org/en/documents/asa21/5184/2016/en/ *<https://www.amnesty.org/en/documents/asa21/5184/2016/en/>*>.

[73] Slavery Convention (1926), Art 1(1).

[74] See <http://www.antislavery.org *<http://www.antislavery.org>*> for more information on current forms of slavery.

[75] See ILO Forced Labour Convention (No 29) (1930), Art 2(1).

[76] ILO Convention Concerning the Abolition of Forced Labour (No 105) (1957), Art 1.

[77] Forced Labour Convention (No 29), Art 2(2); ICCPR, Art 8(3).

[78] Protocol No 29 of 2014 to the Forced Labour Convention, 1930. See <http://50forfreedom.org *<http://50forfreedom.org>*>.

[79] See the Complaint concerning non-observance by Qatar of Forced Labour Convention No 29 (1930) under Art 26 ILO Constitution, GB.326/INS/8 (Rev) (17 March 2016); Human Rights Watch, 'Qatar: Failing on Crucial Labor Reforms' (27 January 2016), <https://www.hrw.org/news/2016/01/27/qatar-failing-crucial-labor-reforms *<https://www.hrw.org/news/2016/01/27/qatar-failing-crucial-labor-reforms>*>.

[80] Human Rights Watch, 'Qatar: Significant Labor and Kafala Reforms'(24 September 2020), <https://www.hrw.org/news/2020/09/24/qatar-significant-labor-and-kafala-reforms *<https://www.hrw.org/news/2020/09/24/qatar-significant-labor-and-kafala-reforms>*>.

[81] See ILO Discrimination (Employment and Occupation) Convention (No 111) (1958).

[82] See ILO Employment Policy Convention (No 122) (1964) and Revised European Social Charter, Art 1(1).

[83] ILO Global Initiative on Decent Jobs for Youth (2021), <https://www.ilo.org/global/topics/youth-employment/publications/WCMS_488464/lang--en/index.htm *<https://www.ilo.org/global/topics/youth-employment/publications/WCMS_488464/lang--en/index.htm>*>.

[84] For more information on ILO's decent work campaign, see: <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm *<http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>*>.

[85] eg ICESCR, Art 7(a)(i); Revised European Social Charter, Art 4; Protocol of San Salvador, Art 7(a); ACHPR, Art 15.

[86] Digest of the Case Law of the European Committee on Social Rights (2008) 43.

[87] ILO Convention No 182 (1999).

[88] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998).

[89] CESCR, General Comment 18, E/C.12/GC/18, paras 22–8.

[90] For an extensive interpretation of the normative contents of standards relating to conditions of work, see CESCR, General Comment 23, E/C.12/GC/23.

[91] eg see the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Foodwear Sector (2017), <https://www.oecd.org/industry/inv/mne/responsible-supply-chains-textile-garment-sector.htm *<https://www.oecd.org/industry/inv/mne/responsible-supply-chains-textile-garment-sector.htm>*>.

[92] CESCR, General Comment 18, E/C.12/GC/18, para 31.

[93] CESCR, General Comment 19, E/C.12/GC/19, para 2. See also Chapter 10.

[94] See Worst Forms of Child Labour Convention (No 182) (1999), Art 7(2).

[95] Revised European Social Charter, Arts 10–13.

[96] See the 2016 statement by the CESCR, 'Public debt, austerity measures and the ICESCR', E/C.12/2016/1.

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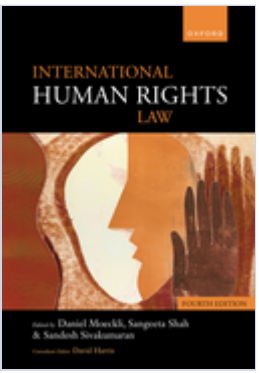

International Human Rights Law (4th edn)
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p. 257

13. Detention and Trial

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https://doi.org/10.1093/he/9780198860112.003.0013
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter discusses the protections afforded by international human rights law to the right to liberty and security of the person and the right to a fair trial. The right to liberty regulates powers of detention and provides safeguards against ill-treatment of detainees. An extreme form of arbitrary detention is enforced disappearance. The right to a fair trial sets out how court proceedings should be conducted and court systems organized. In addition, there are specific protections for those who are suspected of having committed a criminal offence.

Keywords: international human rights, right to liberty, fair trial, arbitrary detention, detainees, enforced disappearance, security of the person

Summary

This chapter introduces two rights: the right to liberty and the right to a fair trial. The right to liberty regulates powers of detention and provides safeguards against ill-treatment of detainees. The right to a fair trial sets out how court proceedings should be conducted and court systems organized. Both these rights establish extensive guarantees for individuals who are subjected to detention regimes or national justice systems, as well as specific guarantees for those suspected of having committed a criminal offence. These rights seek to prevent the arbitrary use of governmental power and create a climate conducive to the realization of all human rights.

1 Introduction

Individuals are at their most vulnerable when they are in detention. They are at the complete mercy of their captors. Therefore detention powers should only be exercised when actually necessary. Similarly, the determination of disputes by judicial bodies subjects individuals to the authority of the state. Judicial proceedings must be conducted so that this authority is not exercised in an arbitrary manner. The rule of law can only be secured if trials are conducted fairly. There is then a need to regulate how individuals are treated by national justice systems.

These concerns were recognized as early as 1215 in Magna Carta, which gave certain individuals what can now be considered to be the origins of the rights to liberty and fair trial.[1] The rights to liberty and fair trial set out safeguards to ensure that notions of 'due process' are adhered to in the operation of regimes of detention, the investigation and prosecution of criminal charges, and the conduct of court proceedings. This chapter considers the content and scope of obligations regarding the right to liberty, including freedom from arbitrary detention (Section 2), freedom from enforced disappearance (Section 3), and security of the person (Section 4), as well as the right to a fair trial (Section 5).

2 Freedom From Arbitrary Detention

The ideal is that no one should be deprived of their liberty. However, there may be valid reasons for a state to assume custody of an individual. For example, it may be necessary to detain convicted criminals who pose a threat to the community. As such, traditionally, the main concern of human rights activists has been the capricious use of detention powers by oppressive governments in order to subdue their opponents. Beyond this, it is recognized that restrictions on liberty are permitted and may even be required. However, even where detention may be justified, individuals in detention are susceptible to violations of their human rights. They are regularly 'forgotten'—left to languish in prisons or mental health facilities—or they may be subjected to torture or ill-treatment, either at the hands of their captors or by virtue of the conditions in which they are held.[2] Recognizing these concerns, human rights law provides an umbrella of protections that seek to prevent the arbitrary use of detention powers, provide timely remedies where arbitrary detention does take place, and provide safeguards to eradicate ill-treatment or 'disappearance' from instances of permitted detention. This section first surveys the sources of the right and then considers how these aims are realized.

2.1 Sources

Article 9 of the Universal Declaration of Human Rights (UDHR) provides that: 'No one shall be subjected to arbitrary arrest, detention or exile'. This pithy yet powerful provision was extended and its protections elaborated in Article 9 of the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee has adopted a detailed general comment on the right to liberty and security of the person[3] and the right has been guaranteed in other UN human rights treaties and declarations, including the Convention on the Protection of the Rights of Migrant Workers (Article 16), the Convention on the Rights of the Child (Article 37), the Convention on the Rights of Persons with Disabilities (Article 14), and the Declaration on the

Rights of Indigenous Peoples (Article 7). All regional human rights instruments also guarantee the right to liberty.[4] Freedom from arbitrary detention is a rule of customary international law[5] and the Human Rights Committee has claimed that this rule is a *jus cogens* norm.[6]

There are a number of non-binding instruments that elaborate on the implications of the right, including the Revised UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),[7] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[8] UN Basic Rules for the Treatment of Prisoners,[9] UN Rules for the Protection of Juveniles Deprived of their Liberty,[10] and UN
p. 259 ↵ Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders.[11] Similar instruments have been adopted by regional human rights bodies.[12]

In 1991, the UN Commission on Human Rights created a Working Group on Arbitrary Detention (WGAD),[13] whose mandate has been renewed by the UN Human Rights Council.[14] The Working Group receives and investigates communications alleging cases of arbitrary detention by member states of the UN. It also issues its own form of general comments—'deliberations'—on issues concerning arbitrary detention, which contain invaluable guidance on the right and its implementation.

2.2 Scope and Types of Obligations

Most issues concerning the right to liberty involve the arrest and detention of individuals in the context of criminal proceedings. However, the protections afforded by the right to liberty are not restricted to such situations.[15] For example, involuntary hospitalizations have been considered to fall within the scope of the right,[16] as have certain instances of confinement of migrants in airport transit zones.[17]

As a general proposition, right to liberty guarantees are concerned with narrow notions of detention involving the imposition of severe restrictions upon a person's physical being. Restrictions that do not reach this level of severity, where individuals are not permitted to travel or move freely within a state, are likely to be captured by protections relating to the right to freedom of movement, such as those set out in Article 12 ICCPR. The intensity of the restriction depends on its duration, effects, and manner of implementation. There is also a subjective element: namely, lack of consent. Where individuals 'know that they are free to leave at any time, [they] are not being deprived of their liberty'.[18]

House arrest has been considered to be a deprivation of liberty,[19] as have mandatory quarantine restrictions adopted in response to the COVID-19 pandemic.[20] However, restrictions upon movement which confine an individual to his or her home during non-working hours have been considered to be a restriction upon the right to freedom of movement rather than a deprivation of liberty.[21] Similarly, restrictions upon movement within a state, a city, or even parts of a city are freedom of movement concerns.[22] Crowd-control techniques may give rise to a deprivation of liberty, but it will depend on the context in which they are used. The
p. 260 European Court of Human Rights has held that the ↵ 'kettling'—or confinement—of persons inside a police cordon for up to seven hours did not constitute a deprivation of liberty when it took place in dangerous conditions that may have led to serious injury or damage.[23]

Whilst it may seem obvious when an individual is in detention, there are difficult cases. In a controversial opinion, the WGAD decided that Julian Assange's 'stay' in the Ecuadorian Embassy in London following a claim for asylum was a deprivation of liberty. Although Assange could leave the embassy whenever he wished, he would be arrested pursuant to a European Arrest Warrant issued by Swedish authorities if he left. Although the WGAD's reasons are unclear, it would appear that the UK and Swedish authorities' failure to recognize that Assange had been granted asylum by Ecuador, coupled with constant police surveillance of the Ecuadorian Embassy, led to the conclusion that this was a deprivation of liberty.[24]

States should *respect* the right to liberty and not arbitrarily detain an individual. They must also *protect* the right. Where private actors undertake detention functions on behalf of the state, there is an obligation to ensure that all such instances of detention are compliant with the right to liberty. Other forms of detention by private actors, such as abduction and kidnapping, must be criminalized. Similarly, systems of guardianship that prevent women from leaving their homes without permission should be abolished.[25] The European Court of Human Rights has held that states have an obligation not to return an individual to a country where there is a 'real risk' that there may be a 'flagrant breach' of the right to liberty, such as indefinite or incommunicado detention for many years without the prospect of being brought to trial.[26] The Human Rights Committee has suggested that returning an individual in such circumstances may constitute inhuman treatment.[27] State participation in extraordinary rendition processes, whereby the state detains an individual who is handed over to foreign officials outside the ordinary legal processes, is a clear violation of the right to liberty.[28] *Fulfilling* the right is essentially achieved through the establishment of procedural safeguards that are explicitly spelt out within the various international law provisions on liberty. These will be examined in Section 2.4.

2.3 Permissible Deprivations of Liberty

Article 9(1) ICCPR acknowledges that states may legitimately restrict the right to liberty. It provides that: 'No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' Therefore, only where a deprivation of liberty is unlawful and/or arbitrary will it constitute a violation of Article 9(1). Other international treaties have similar provisions on arbitrary detention.[29] However, some grounds for detention are prohibited explicitly by international human rights law. If detention is solely on the basis of a disability or failure to fulfil a contractual obligation, it will be unlawful.[30]

p. 261 ↵ The European Convention on Human Rights (ECHR) sets out a more restrictive approach. Rather than simply protecting individuals against illegal and/or arbitrary detention, Article 5(1) ECHR provides a list of grounds upon which detention is justified. These are:

1. execution of a sentence after conviction by a competent court;
2. non-compliance with a lawful court order or legal obligation;
3. reasonable suspicion of having committed an offence, to prevent flight having done so, or to prevent the commission of an offence where the ultimate aim is to bring the person before a competent court;
4. educational supervision in the case of minors;

5. prevention of the spread of infectious diseases;
6. where persons are of unsound mind, alcoholics, drug addicts, or vagrants; and
7. prevention of unauthorized entry into the state or where action is being taken with a view to deportation or extradition.

Detention on grounds other than those listed is not permissible under the ECHR in peacetime. However, the European Court of Human Rights has accepted that, in the context of an international armed conflict, international humanitarian law provides further bases for the detention of prisoners of war and civilians whose internment is necessary for imperative reasons of security.[31] None of the grounds set out in Article 5(1) ECHR (or international humanitarian law) by itself is enough to justify detention. As with the other treaties, the detention must also be lawful and not arbitrary.

2.3.1 Legality

Any deprivation of liberty must be pursuant to domestic law. It must be both sanctioned by and in conformity with any procedural requirements set out in national legislation or an equivalent norm of common law. Such a law must be formulated with sufficient precision to prevent arbitrary or overbroad application.[32] So, the involuntary detention of psychiatric patients in secure hospitals should only take place where there is a legal basis to do so, which clearly sets out when this may take place.[33] Similarly, where arrest warrants are mandatory and an arrest takes place without one, a violation of the right to liberty will be found.[34]

2.3.2 Arbitrariness

Whether detention is arbitrary will depend upon considerations of 'inappropriateness, injustice and lack of predictability and due process of law' as well as 'elements of reasonableness, necessity and proportionality'.[35] Therefore, detention is arbitrary when it takes place without a legal basis, as well as where 'it is not necessary in all the circumstances of the case'.[36]

In order to assess the *necessity* of detention measures, a proportionality assessment must take place. This
p. 262 assessment involves consideration of whether, *in the specific circumstances*, ↵ the detention regime is appropriate for the purported aim and whether there is a less invasive method of achieving that aim. So, the Human Rights Committee held that detention was a disproportionate punishment in *Fernando v Sri Lanka* where the author had been sentenced to one year of 'rigorous imprisonment' for contempt of court on the grounds of repeated applications to court, raising his voice, and refusing to apologize to the court. A fine would have sufficed.[37] An Australian policy of compulsory detention of asylum-seekers until their status has been determined has also been held to be disproportionate and thus arbitrary. The Human Rights Committee held that although it is permissible to detain individuals requesting asylum for an initial period to record claims, confirm identity, and so on, detention beyond this period without good reasons that are specific to the individual, such as a risk of criminal behaviour, would be considered arbitrary.[38]

Preventive detention[39]—that is, detention that is aimed at protection rather than punishment—is often criticized as being arbitrary. It is clear that such a power could easily be abused. Therefore, it should only be used as a last resort, where a 'present, direct and imperative threat is invoked to justify the detention of

persons considered to present such a threat', and for the shortest period of time.[40] In *SV and A v Denmark*, the European Court of Human Rights was satisfied that these conditions had been met. Three men who had previously committed acts of football hooliganism were detained during an international football match in order to prevent such crimes being committed. This was not arbitrary because less stringent measures would not have sufficed, and the men had been detained for less than eight hours and were released as soon as the imminent risk had passed.[41]

Where the detention of an individual would lead to a violation of another human right or is the result of a violation of another human right it may be considered arbitrary. As such, violations of Article 9(1) ICCPR have been found when individuals were arrested for their political views in contravention of Article 19 ICCPR[42] or activities as a human rights defender.[43] Detention on the basis of ethnic origin alone will be arbitrary.[44] Therefore, arrests on the basis of racial profiling, without further evidence, are prohibited.[45] Imprisonment after a grossly unfair trial will be considered arbitrary and the Human Rights Committee has held that a state will be in breach of its obligations if it gives effect, pursuant to an international prisoner transfer agreement, to a sentence imposed following a manifestly unfair trial.[46]

A detention that is legitimate at the outset may become arbitrary over time. This is because the rationale for detention may cease to be relevant. As a safeguard against this, there is a right to *periodic* review of detention in certain circumstances. If the circumstances surrounding the detention have not changed, or the detention has only been for a short period of time, then there is no review requirement. For example, where a person is serving a sentence of detention as a punishment which has been imposed by a court of law, it is assumed that the court that imposed the sentence has reviewed the necessity of ↵ the detention. However, in cases of life imprisonment, or where there is a discretionary preventive sentence of detention to be served after a mandatory 'tariff' or 'punitive' period, human rights bodies have clearly stated that there should be periodic reviews of the need for further preventive detention.[47] The key question is: does the detainee remain such a danger to society as to warrant continued detention? The European Court has held that the 'preventive' period of detention may become arbitrary if no reasonable effort is made to rehabilitate offenders and address the risks that they pose to society.[48] Similar principles apply to detention on grounds other than criminal conviction.[49]

p. 263

2.4 Guarantees to Those Deprived of Their Liberty

Even if deprivation of liberty is justified, a state's obligations regarding the detainee do not end. Detainees should be kept in an officially recognized place of detention and records should be kept. Although states may legitimately restrict the enjoyment of some rights, such as freedom of expression, when necessary, the general position is that individuals do not lose their human rights as a consequence of detention. In addition to this general protection, there are a number of specific guarantees of treatment that must be accorded to detainees. Most of these are entitlements for those individuals who have been arrested or detained pursuant to a criminal charge, although some are safeguards of general application to all detainees. States should take into account specific vulnerabilities of individuals when fulfilling these guarantees to ensure their effective protection. So, the European Court of Human Rights has held that where individuals have been declared

'partially incapacitated' and placed in a psychiatric institution, 'special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.'[50]

2.4.1 Rights of all detainees

Right to be informed of reasons for detention

Article 9(2) ICCPR provides that '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest'.[51] This elementary safeguard exists to ensure that individuals know why they are being detained. It serves both to reduce the distress of being incarcerated, as well as to allow detainees to challenge their detention. It applies to all persons in detention. The reasons for arrest must be communicated in a language that the detainee understands and must contain sufficiently detailed information to indicate why the individual is being incarcerated. The Human Rights Committee held that a violation of Article 9(2) ICCPR had occurred when individuals were told that they had breached state security, but no further details were given.[52] For this right to be effective for certain vulnerable detainees, such as those with certain mental disabilities or children, reasons for detention should be provided to an appropriate representative who can represent their interests.[53] Whilst the reasons for arrest must be communicated to the detainee 'immediately', exceptional delays will be permitted where they are kept to a minimum. ↵ For example, where overnight delays have occurred because of the need for an interpreter, this was considered acceptable,[54] whilst a delay of two days was not.[55]

p. 264

Right to humane treatment

Article 10(1) ICCPR provides that all detainees must be 'treated with humanity and with respect for [their] inherent dignity'.[56] This fundamental protection has implications for the treatment of the individual as well as the conditions of detention. While most cases of severe ill-treatment will be considered inhuman treatment or torture contrary to Article 7 ICCPR, Article 10(1) is triggered by attacks on dignity that do not reach the severity of suffering threshold required by Article 7 ICCPR.[57] States are obliged to protect all individuals from 'any hardship or constraint other than that resulting from the deprivation of liberty'.[58] Thus, whilst not proscribed, solitary confinement should only be used in exceptional circumstances and for limited periods of time.

Fulfilment of a detainee's right to humane treatment is inextricably linked to the conditions of detention in which they are held. States must ensure that these conditions are adequate. Detention facilities—whether prisons, medical facilities, or immigration detention centres—must not be overcrowded and must provide satisfactory light, ventilation, bedding, sanitary facilities, food, and clothing, as well as access to appropriate medical care where necessary.[59] Many of the recommendations and declarations adopted by the UN listed in Section 2.1 set out minimum standards of detention. Although ensuring such minimum conditions may be expensive, the Human Rights Committee has emphasized that the 'fundamental nature of the right means that the application of this rule … cannot be dependent on the material resources available in the State Party'.[60] The Committee found a violation of Article 10(1) ICCPR in *Wanza v Trinidad and Tobago* where the

author was detained in a windowless cell, ventilated by an 18 × 18 inch opening, for between 22 and 23 hours a day, whilst on weekends or holidays, when the number of prison staff was too low, he was not permitted to leave the cell at all.[61]

There must be strict state regulation of *all* detention facilities, even where they are run by private organizations, to ensure that conditions of detention are appropriate. The Inter-American Commission has stressed that states must exercise overall effective control of prisons and prevent systems of self-government whereby prison life is governed by 'gangs' of prisoners. In such situations, the state is simply unable to protect the dignity of prisoners.[62]

Rights to challenge the legality of detention and remedies

A further element of the guarantees against arbitrary detention is the right to bring habeas corpus or *amparo* proceedings; that is, all detainees should have the opportunity to challenge the *legality* of their detention, and be released should it be considered unlawful.[63] ↵ This right of challenge aims to provide redress where incarceration is inconsistent with domestic law and/or arbitrary contrary to international human rights law. Review of the legality of detention must be conducted by a court empowered to order release of detainees,[64] not by an administrative or executive body, and must take place without delay. In order for the right to be effective, detainees must have access to a lawyer and individuals cannot be kept incommunicado.

p. 265

Where detention is found to be unlawful, Articles 9(4) and 9(5) ICCPR provide two specific remedies: release and compensation for pecuniary and non-pecuniary harm suffered. Similar rights are provided for in Article 10 of the American Convention on Human Rights (ACHR) and Article 5(5) ECHR, and the African Commission has confirmed that the African Charter on Human and Peoples' Rights (ACHPR) also requires such remedies.[65] Therefore national courts must have the power to order release and award compensation.[66] In order for these rights to be effective, such orders must be complied with in a timely fashion.

2.4.2 Rights of those detained on a criminal charge

In addition to those rights discussed already, there are specific rights for individuals who are detained pursuant to a criminal charge, or who have been arrested on the basis of a suspicion that they have committed a criminal offence. Prevention and punishment of crimes is the broadest basis upon which states may ground detention. The considerable powers of the state in these circumstances must be kept in check with mechanisms for accountability of law enforcement officers and safeguards for arrested persons.

Article 9(2) ICCPR provides that in the context of detention on the basis of a criminal charge, individuals should be informed promptly, in a language that they understand, of the criminal charges they face. The requirement of 'prompt' notification does not require notification at the moment of arrest; some delay is permitted: seven hours has been considered satisfactory,[67] whilst seven days has been considered too long.[68]

All individuals who are arrested pursuant to a criminal charge must be brought 'promptly before a judge or other officer authorized to exercise judicial power'.[69] This should be an automatic process and not dependent upon a request by the arrested individual. The initial days of detention are often those when detainees are at their most vulnerable; the likelihood that torture or ill-treatment will occur is at its highest at this time. The

aim of bringing a detainee before a judge is to ensure independent judicial supervision of the actions of law enforcement officers and to confirm the legal basis for detention. The judge or judicial officer should be empowered to order the release of detainees where detention is not appropriate. If they cannot do so, the protections provided by this right will be illusory. Furthermore, the judge or other officer should be 'independent, objective and impartial in relation to the issues dealt with'.[70] With regard to the requirement of 'promptness', the Human Rights Committee has stated that '48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must ↵ remain absolutely exceptional and justified under the circumstances.'[71] Greater diligence is required for children: they should be brought before a judge within 24 hours of arrest.[72]

Protections afforded to those detained on a criminal charge continue beyond this first appearance before a judge. Article 9(3) ICCPR provides that such persons 'shall be entitled to trial within a reasonable time or to release' pending trial. Article 5(3) ECHR and Article 7 ACHR provide similar guarantees.[73] The general rule of liberty is applicable: individuals should not be kept in pre-trial detention unless it is necessary to do so. Essentially, these provisions provide a qualified right to release pending trial where exceptions are permitted 'to ensure the presence of the accused at the trial, to avert interference with witnesses and other evidence, or the commission of other offences'.[74] 'Public order', where the release of a suspected offender may give rise to a social disturbance,[75] and the 'personal safety of the suspect', where release of suspects may leave them vulnerable to attack, will also be relevant considerations.[76] The burden remains on the state to demonstrate that in the specific circumstances detention is necessary and proportionate. International human rights bodies have advocated the use of financial guarantees or the removal of travel papers and passports, rather than pre-trial detention, to secure the attendance of a suspect at trial.

As part of the right to humane treatment and in order to maintain the presumption of innocence, individuals held in pre-trial detention should be kept segregated from convicted criminals (Article 10(2)(a) ICCPR). They are to be treated as innocent individuals until proven guilty of an offence. Article 10(2)(b) ICCPR also provides that '[a]ccused juveniles shall be separated from adults and brought as speedily as possible for adjudication'.

Where release is not possible, the trial of the accused must take place within a reasonable period of time. What is considered *reasonable* is a matter to be determined on a case-by-case basis, but factors that will be taken into account include: the complexity of the case, the conduct of the accused (whether they have delayed the proceedings with challenges or by subverting investigations), and the efficiency of national authorities. Of primary concern is 'whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit whereby imprisonment without conviction imposes a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed innocent'.[77]

Finally, Article 10(3) ICCPR obliges states to ensure that detention following a conviction for a criminal offence is aimed at the reformation and social rehabilitation of offenders, not solely punishment. So, in *Kang v Republic of Korea*, the Human Rights Committee found a violation of this provision where the author had been held in solitary confinement for 13 years for failing to abandon his political views.[78]

2.4.3 Rights of foreign nationals

Foreign detainees are particularly vulnerable. They may have problems of participation in different and often
p. 267 disorientating legal systems, including a lack of knowledge of the official language of the host state. All foreign nationals who are 'arrested or committed to prison or to custody pending trial or … detained in any other manner' are entitled to access to a consular official from their home state.[79] Foreign detainees have the right to request that consular officials of their home state are notified of their arrest without delay and that all communications between the detainee and consular officials are forwarded without delay. All foreign detainees must be informed of these entitlements. These 'rights' have been confirmed by the International Court of Justice to apply in all cases of detention of foreign nationals and failure to respect these rights will impact the fairness of any subsequent judicial proceedings.[80]

2.5 Emergency Detention Powers

The right to liberty has been the subject of many derogations by states from their human rights obligations.[81] Detention, particularly indefinite detention without charge, is often used by states to deal with emergencies. On a purely textual basis, derogation from the right to liberty is permitted. However, any emergency deprivation of liberty measures must fulfil the requirements for a valid derogation: that is, the measures must be a necessary and proportionate response to the emergency faced. It would appear, then, that any such deprivations of liberty must not be 'arbitrary', and thus the right to freedom from arbitrary detention is not derogable. Rather, it is the determination of what is 'arbitrary' that changes when a state faces an emergency that threatens the life of the nation. So, in a time of armed conflict what constitutes an arbitrary detention will need to be determined by reference to the relevant rules of international humanitarian law.[82] Furthermore, the essential protections that the right to liberty affords serve to prevent violations of rights which are not derogable, such as freedom from torture and ill-treatment. Recognizing these positive externalities of the right to liberty, human rights bodies have stated that the procedural safeguards discussed already, including judicial oversight of arrests and the right to bring habeas corpus proceedings, must remain in place during times of emergency. For example, the Human Rights Committee has confirmed that '[i]t is inherent in the protection of rights explicitly recognized as non-derogable … that they must be secured by procedural guarantees, including, often, judicial guarantees' and so 'the right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the [ICCPR]'.[83] The Inter-American Court[84] and the European Court have made similar statements.[85]

p. 268 3 Enforced Disappearance

The most egregious violation of the right to liberty is an 'enforced disappearance', which comprises the secret deprivation of a person's liberty by state agents[86] who refuse to inform anyone of the arrest.[87] As such, at least insofar as the friends and family of the individual are concerned, the individual has effectively disappeared. The victim is removed from the protection of the law and cannot make use of the judicial safeguards described in Section 2. Such abductions often result in the death of the victim. A notorious example of enforced disappearance is the US Central Intelligence Agency's use of 'black sites' across the world

to secretly detain individuals for prolonged periods of time in the context of the 'global war on terror'.[88] Enforced disappearance was used systematically in Latin America in the 1960s and 1970s, and given its experience of the practice, the Organization of American States was the first international organization to adopt a treaty specifically directed at the eradication of the practice: the Inter-American Convention on Forced Disappearance of Persons 1994.

Enforced disappearance constitutes a violation of multiple human rights, including: the right to liberty, the right to humane conditions of detention, the right to recognition before the law, the right not to be tortured, and possibly the right to life.[89] The disappearance may also result in violations of the prohibition of torture and ill-treatment in respect of the family members who are left worrying about the fate of abducted individuals.[90] The International Convention for the Protection of All Persons from Enforced Disappearance has now confirmed that individuals have a 'free-standing' right not to be subjected to enforced disappearance.[91] Parties to the UN Convention or the Inter-American Convention are obliged to criminalize the practice of enforced disappearance and adopt further administrative and legal measures, in addition to those which exist to prevent arbitrary detention, to bring to an end the practice of 'secret detention'. The obligations to criminalize, investigate, and punish enforced disappearance have, according to the Inter-American Court of Human Rights, attained the status of *jus cogens*.[92]

4 Security of the Person

Treaty provisions on the right to liberty invariably contain a reference to protection of the 'security of the person', which is concerned with freedom from injury. States are obliged to refrain from inflicting bodily injury on individuals, to investigate threats to the person from both state and non-state actors, and to provide protection for individuals where such ↵ threats are credible. Whilst some human rights bodies have restricted the right to security of the person to those individuals who are threatened with arbitrary detention, the Human Rights Committee has stated that '[i]t cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained'.[93] Therefore, it has found violations of the right to security where there was a failure to investigate credible death threats.[94]

p. 269

5 The Right to a Fair Trial

The right to a fair trial is 'aimed at the proper administration of justice' and securing the rule of law.[95] Treaty provisions on fair trial establish a complex set of rules that cover two aspects of how the right is to be secured. First, there are rules specifying how court proceedings should be conducted. In general, fair trial guarantees are not concerned with the *outcome* of judicial proceedings, but rather the *process* by which that outcome is achieved. Fairness of outcome is not guaranteed. Second, there are structural rules regarding the organization of domestic court systems. Securing the right to a fair trial can require significant investment in the court system and many states fail to fulfil their obligations because of serious structural problems. Human rights law does not seek to impose a particular type of court system on states, but rather implements the principle that there should be a separation of powers between the executive and the judiciary.

5.1 Sources

Article 10 UDHR provides that '[e]veryone 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'. The UDHR also provides further, more specific, protections applicable when determining a criminal charge, in Article 11. Both the general and specific criminal protections are merged into one detailed provision of the ICCPR: Article 14. Due to their importance, aspects of fair trial guarantees can be found in most of the UN human rights treaties, including: Article 40 of the Convention on the Rights of the Child (CRC), Article 18 of the Migrant Workers Convention, Article 5(a) of the Convention on the Elimination of Racial Discrimination (ICERD), Article 15 of the Convention against Torture (UNCAT), and Article 13 of the Convention on the Rights of Persons with Disabilities. All regional treaties guarantee the right to a fair trial.[96] Despite the sophisticated treaty provisions on the right to a fair trial, the protections have evolved by means of considerable elaboration by international human rights bodies.

The 'fundamental principles of fair trial' form part of customary international law and the Human Rights Committee considers them to be peremptory norms of international law.[97] Although not listed in Article 4(2) ICCPR, the Committee has held that such ↵ principles are non-derogable in times of emergency because they ensure that 'the principles of legality and the rule of law' are respected. These fundamental principles create safeguards for those norms that are explicitly listed as non-derogable, such as the right to life and the prohibition against torture.[98]

p. 270

Particular aspects of the right to a fair trial are also elaborated upon in various declarations and guiding principles, including the Basic Principles on the Independence of the Judiciary,[99] the Basic Principles on the Role of Lawyers,[100] the UN Standard Minimum Rules for the Administration of Juvenile Justice,[101] and the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[102]

International criminal tribunals[103] must ensure a fair trial and guarantees to this effect are provided in the relevant statutes and rules of procedure. These rules are based upon the protections found in Article 14 ICCPR and customary international law.[104]

5.2 Scope and Types of Obligations

Though concerns regarding the conduct of judicial proceedings have traditionally focused on how *criminal* trials should be conducted, the right to a fair trial extends beyond such trials to civil and certain administrative proceedings. Article 14(1) ICCPR provides that guarantees should apply to the determination of both rights and obligations in a 'suit at law' as well as criminal charges, while Article 6(1) ECHR refers to the determination of both criminal charges and 'civil rights and obligations'. What is meant by the terms 'suit at law' and 'civil rights and obligations' has been a difficult question to answer.

The Human Rights Committee has interpreted the term 'suit at law' broadly:

> [T]he concept … is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.[105]

Article 8(1) ACHR specifies that fair trial guarantees are to be accorded in all proceedings which involve 'the determination of … rights and obligations of a civil, labour, fiscal, or any other nature'. The case law of the European Court of Human Rights suggests that the reference to '*civil* rights and obligations' is more restrictive, covering disputes between private parties as well as certain disputes between the individual and the state.[106] Most ↵ importantly, for all the international bodies, the application of fair trial rights to a 'suit at law' or the determination of 'civil rights and obligations' does not depend on whether national law has provided that the issue should be determined by a court or another body.

p. 271

Similarly, what constitutes a criminal charge is not restricted to what national law considers 'criminal' and thus punishable under that law. If this were the case, then states could avoid some of their human rights obligations by simply designating certain charges as something other than criminal. The idea of 'criminal charge' extends to those offences which are criminal in nature because they apply to the population at large and are accompanied by sanctions that 'must be regarded as penal because of their purpose, character or severity'.[107] Expulsion of aliens or disciplinary measures against soldiers are not considered 'criminal'. In the criminal context, the right to a fair trial is triggered at the moment official notification of a charge is given. Therefore, there may be some overlap with the protections granted by the right to liberty.

Fair trial norms oblige states to secure the right through a number of different guarantees. As stated already, these norms are very detailed in the treatment that individuals must experience in order to enjoy a fair trial. There are both negative obligations to *respect* these guarantees by not interfering in their enjoyment and positive obligations to *fulfil* them through investment, monetary and otherwise, in the court system. States must also *protect* the rights. Although one might assume that justice is only administered by the state, there are instances where the state must protect fair trial rights from interference by other actors. For example, where states recognize religious courts or those based on customary laws, they must ensure that these tribunals adhere to fair trial guarantees, and that there is recourse to a remedy if there is a failure to do so.[108] In addition, states must not transfer an individual to a jurisdiction where an individual may face a 'flagrant denial of justice', whereby there is a 'destruction of the very essence' of the right to a fair trial.[109]

5.3 Generally Applicable Fair Trial Guarantees

What does the right to a fair trial entail? Article 14 ICCPR provides fair trial guarantees of general application that apply to all types of judicial proceedings (considered in this section) as well as detailed guarantees specific to criminal trials (considered in Section 5.4). The generally applicable guarantees are set out in Article

14(1) ICCPR, which provides, inter alia, that '[a]ll persons shall be equal before the courts and tribunals. … everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[110] The procedural aspects of a number of human rights include recourse to judicial procedures and the general rights of due process will apply in these contexts. To take an example referred to already, Article 9(4) ICCPR provides that detainees have the right to have the legality of their detention determined by a court. Such review proceedings must be conducted according to the fundamental principles relating to a fair trial. Failure to do so will constitute violations of both Articles 9(4) and 14(1) ICCPR.

5.3.1 Equality before the courts

The right to equality before courts and tribunals is a specific application of the right to non-discrimination, contained in Article 26 ICCPR, to judicial proceedings.[111] It incorporates: (1) the right of equal access to courts; and (2) the rights of all parties to proceedings to equality of arms and to be treated without discrimination.

p. 272

Equal access

All human rights bodies have confirmed that there is a right to access courts of first instance to determine a criminal charge or rights and obligations in a suit at law. All individuals must have an equal chance to pursue their legal rights. '[A]ccess to administration of justice must be effectively guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.[112]

Ensuring equal access to courts and tribunals involves substantial activity on the part of states. They must ensure that judicial systems are organized so that 'all individuals … who may find themselves in the territory or subject to [their] jurisdiction' can access the courts.[113] So there is a requirement of physical accessibility, both in terms of geographic location as well as the actual buildings. But the right goes beyond this. There should be no legal or other impediments to accessing justice.[114] For example, statutory provisions that only allow for husbands (and not wives) to bring proceedings regarding matrimonial property in the courts have been found to violate Article 14(1) ICCPR.[115] Efforts should be made to overcome practices or norms that exclude certain vulnerable groups from accessing justice. So the Inter-American Court has held that states must take into account the 'special situation of vulnerability, … common values, uses and customs' of members of indigenous communities to ensure that they can access justice.[116]

Access to courts and tribunals can be severely hampered if court fees are unaffordable or where no legal assistance is available or only available at a prohibitively high cost. Article 14(3)(d) ICCPR obliges states to provide free legal aid in criminal cases where the interests of justice so demand and the individual concerned cannot afford to pay (see Section 5.4.4). Although there is no corresponding provision for civil proceedings, the Human Rights Committee has encouraged states 'to provide free legal aid … for individuals who do not have sufficient means to pay for it'.[117]

However, states may restrict access to courts where such restrictions are based on law, can be justified on objective and reasonable grounds, and are not discriminatory.[118] A contentious restriction on access to courts is where claims of state immunity—whereby a state is immune from proceedings in foreign courts regarding certain official acts—have barred judicial proceedings. The European Court of Human Rights has held that applying the rule of state immunity in cases raising civil claims regarding acts of torture, and thereby

restricting access to justice, is permissible because it pursues the legitimate aim of 'complying with international law to promote comity and good relations between states through the respect of another's state sovereignty'.[119]

p. 273

Equality of arms and treatment without discrimination

The right to equality before the courts also includes protections of equality of arms and treatment without discrimination. Equality of arms means that all parties should be provided with the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage to either party. The essence of the guarantee is that each side should be given the opportunity to challenge all the arguments put forward by the other side.[120]

There should be no differential treatment of persons during court proceedings. Like cases should be treated alike unless there are objective and justifiable reasons not to do so. On this basis, the Human Rights Committee held in *Kavanagh v Ireland* that a situation where the Director of Public Prosecutions decided, with unfettered discretion, whether or not individuals accused of certain crimes would face a jury trial raised issues of equality before the law.[121] The treaties aimed at eradicating specific forms of discrimination, such as the ICERD and the Convention on the Elimination of All Forms of Discrimination Against Women, explicitly stipulate that there should not be distinction as to race, colour, national origin, heritage, or sex during court proceedings.[122] Distinction on these grounds can never be justified.

5.3.2 Hearing by a competent, independent, and impartial tribunal

The courts and tribunals before which claims are heard and criminal charges are determined must be 'competent, independent and impartial' and established pursuant to national law. Courts and tribunals are those institutions empowered to make legally binding decisions on the basis of the rules of law applicable within a state. Therefore, a panel which can make recommendations as to a particular course of action but not binding decisions, such as a parole board, will not be considered a *competent* court or tribunal for the purposes of fair trial provisions. The requirement that tribunals be *established by law* means that the basic rules on jurisdiction, organization, and membership of the court should be contained in legislation. This acts as a safeguard against executive abuse of court procedures.

The requirement of independence refers to the institutional set-up of the courts. States are obliged to establish courts so that any form of interference with the activities of judges is thwarted. There are essentially two aspects to this. First, the courts should be fully independent of the executive and the parties to a dispute. Courts should not take direction from government ministers or departments on how to decide a case.[123] Second, states must ensure that there are safeguards in place to preserve the independence of the judiciary, including 'clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the judiciary and disciplinary sanctions taken against them'.[124] Providing such procedures and guarantees aims to remove the threat that justice may be subverted by appointing 'sympathetic' judges, corruption, or the removal of judges from their post. A clear violation of this principle was seen in *Lawyers for Human Rights v Swaziland* where the King assumed all judicial power, including the ↵ ability to remove judges as well as exercise judicial authority.[125] An ongoing attack on the

p. 274

independence of the judiciary has been seen in Poland since 2015. The ruling political party has attempted to control the activities of the Polish courts and remove judges by instigating negative media campaigns, initiating various law reforms relating to, inter alia, the appointment of judges and mandatory retirement ages, and the creation of a disciplinary chamber composed of judges appointed by the government. These reforms are a clear attack on the rule of law and breach the obligation to ensure an independent judiciary.[126]

Related to the consideration of independence is the idea of the *impartiality* of the courts. There are two aspects to this. First, judges of the court must be *subjectively* impartial. That is, they must act without any personal bias towards either party in a case. Judges must not harbour preconceptions about the action before them and should remain uninfluenced by the media and public perception. In general, there will be a presumption of subjective impartiality unless there is evidence to the contrary. Second, the court should be *objectively* impartial, so that the court and its judges must *appear* to the impartial observer to be free from bias. Justice must be seen to be done. For example, in *Piersack v Belgium* the presiding judge in the applicant's case had been the head of the public prosecutor's department during the investigation of the case. Although there was no evidence that the judge had knowledge of the investigation, the European Court of Human Rights held that he was not objectively impartial.[127] Where there is a perceived lack of independence and impartiality, the public will be wary of having recourse to justice systems and thus access to justice is affected.

Concerns have been expressed by international human rights bodies regarding the use of military courts to try civilians.[128] There are two grounds for such concerns. First, it is argued that military courts violate the principle of equality before the law because military trials deviate from the normal criminal trial procedures in a state, creating a distinction in the manner in which individuals are tried. The Human Rights Committee has stated that '[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials'.[129]

The second concern is that military courts are not sufficiently impartial to fulfil the requirements of fair trial provisions. In the words of the African Commission:

> Withdrawing criminal procedure from the competence of the courts established within the judicial order and conferring [it] onto an extension of the executive necessarily compromises the impartiality of the courts. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary.[130]

p. 275 ↵ Thus, some have argued that military trials of civilians are, of themselves, a violation of the right to be tried by an independent and impartial court. There may even be concerns regarding impartiality where only one member of the court is a serving military officer while the others are civilians.[131]

The Human Rights Committee has held that a state must demonstrate that both these concerns have been adequately addressed for the military trial of a civilian to be compatible with Article 14 ICCPR.[132] There will be no violation if it can be shown that the military trial is: necessary because regular civilian courts are inadequate for the particular determination, has maintained impartiality, and has afforded the civilian a fair trial in procedural terms. The procedural requirements of a fair trial are considered next.

5.3.3 Fair and public hearing

'Fair'

Fair trial guarantees explicitly provide for a right to a 'fair' hearing in both civil and criminal proceedings.[133] What is considered fair is ever-evolving as international human rights bodies consider new situations; however, there is a minimum set of guarantees for criminal trials (see Section 5.4). The principle of fairness includes 'the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive'.[134] All judicial proceedings must adhere to this principle. Other aspects of a fair hearing include, inter alia, the right to equality of arms discussed already, the right of the accused to attend hearings, and the expeditious disposal of proceedings. It is important to appreciate that whether a trial is fair will depend on an assessment of the proceedings as a whole; breaches of the individual elements may not lead to an unfair trial.

The right of the accused to attend hearings is based on the idea that individuals will wish to monitor proceedings concerning their interests. However, it is not an absolute guarantee. In criminal trials, a hearing in the absence of the defendant (*in absentia*) is generally not compatible with the idea of a fair hearing.[135] However, there are three exceptions to this general position. First, an individual may waive his or her right to be at the trial. Second, there will be no violation where the authorities have tried diligently but failed to inform the accused of the trial date because, for example, he or she has moved away from their stated address. Finally, there will be no violation if the accused aims to evade justice by not attending the trial. As regards civil proceedings, the right to be present at proceedings has been interpreted flexibly in accordance with different national legal systems. The presence of legal representatives may suffice. However, where 'the personal character and manner of life of the party concerned is directly relevant to the formation of the court's opinion', for example in child custody hearings, then there is a right to be present.[136]

A further aspect of the right to a fair trial is that there should be no excessive procedural delays in the resolution of a dispute. Delays call the effectiveness of the judicial system into question. Furthermore, a delay in determining a criminal charge will leave the defendant unsure of his or her fate and, although the guilt or innocence of the defendant is yet to be determined, public perceptions of guilt are often encouraged by long delays. Thus, there is a specific provision in the ICCPR (Article 14(3)(c)) that provides that everyone charged with a criminal offence should 'be tried without delay'. Although there is no comparable explicit protection in Article 14(1), the Human Rights Committee has interpreted ↵ the notion of 'fair hearing' to include the expeditious disposal of proceedings and so it is applicable to civil proceedings also.[137] The entire duration of proceedings, from the moment civil proceedings are initiated or an individual is informed of a criminal charge until a final appeal decision is made, is taken into account when deciding whether there has been undue delay. In addition, there may be a determination that the reasonable time guarantee has been violated

p. 276

for a particular stage of the judicial process. For example, a violation was found in *Pinkney v Canada* because appeals proceedings were delayed by nearly three years owing to the transcripts of the trial proceedings taking 29 months to prepare.[138] There is no absolute time limit within which judicial proceedings should take place. Instead, there are a number of considerations that need to be taken into account when assessing the reasonableness of a delay. These include: the length of each stage of the proceedings, the complexity of the legal issues at stake, the detrimental effects on the individual concerned caused by the delay, the availability of remedies to accelerate proceedings, and the outcome of any appeal proceedings.[139] Where delays to the administration of justice are caused by budgetary constraints, states must ensure that more resources are allocated to the judicial system: scarce financial resources have not been accepted as a valid excuse for a delay in the determination of criminal charges,[140] and temporary backlogs of cases must be addressed with appropriate measures.[141]

'Public'

Article 14(1) ICCPR also provides all individuals with a right to a public trial. Trials that are shrouded in secrecy are more likely to involve, or be perceived to involve, manipulation of the justice system in some states. Such trials have been used to suppress 'dissident' groups. There are two elements to this right. First, the trial itself should be conducted publicly and orally. Information regarding upcoming court proceedings should be made readily available in good time and sufficient facilities should be provided in courtrooms to allow the press and other members of the public to observe the proceedings.[142] However, this aspect of the right is qualified and Article 14(1) contains an exhaustive list of situations where hearings can be conducted without public scrutiny: 'for reasons of public morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. The language of these restrictions implies that a condition of holding a trial without public scrutiny is that the principles of a democratic society must be upheld, so that questions of proportionality will come into play. For example, in *YM v Russia* the Human Rights Committee was not convinced that an entire trial for murder, robbery, and illegal possession of weapons ought to be conducted behind closed doors because 'intimate details' would be disclosed. In the Committee's view, closing part of the trial where such details would be discussed was more appropriate.[143] There is no need for ↵ public access to pre-trial proceedings or appellate proceedings based on purely written submissions.[144]

p. 277

The second element to the right to a public trial provides that judgments should be made available to the public. Article 14(1) ICCPR provides that there may be exceptions to this rule where 'the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children'.[145] In all other circumstances, no restrictions to access to judgments are permitted. Even where the trial has been conducted without public scrutiny, the Human Rights Committee has stated that 'the judgment, including the essential findings, evidence and legal reasoning must be made public'.[146] Such information is a vital safeguard against arbitrariness and fosters public confidence in the justice system. Where findings of guilt or innocence in criminal cases are made by lay juries and therefore no reasons for the final verdict are given, the European Court of Human Rights has held that it is necessary to ensure that a

framework is established within which the verdict can stand. The use of procedural safeguards such as directions or guidance provided by the presiding judge to the jurors on the legal issues or evidence presented, and precise, unequivocal questions put to the jury by the judge, will provide such a framework.[147]

5.4 Fair Trial Guarantees in Criminal Proceedings

A detailed account of what constitutes a fair criminal trial is to be found in most human rights treaty provisions on the right to a fair trial. In addition to the generally applicable principles discussed already, Article 14 ICCPR contains a further six paragraphs regarding the rights of defendants in criminal trials. Similar detailed guidance can be found in Article 6 ECHR, Article 8 ACHR, and the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which expand on the protections set out in Article 7 ACHPR. The conduct of investigations often impacts upon criminal trials, and so to ensure that these rights are effective, they have been interpreted, where appropriate, to apply to the pre-trial investigatory phase as well.

5.4.1 Presumption of innocence

All treaty provisions on the right to a fair trial contain a guarantee of the right to be presumed innocent until proven guilty.[148] The Human Rights Committee has stated that this guarantee is one of the 'fundamental principles of fair trial' and constitutes a rule of *jus cogens*.[149] This right applies from the moment that an individual is accused, even before a formal criminal charge is issued, until determination of the charge by the final appeal court. State authorities, including judges, must refrain from any conduct that would influence the outcome of a trial to the defendant's disadvantage. Declarations of the guilt of an individual before trial by officials or the press[150] and excessively long periods of pre-trial detention that affect perceptions of innocence will constitute violations of this right,[151] ↵ as will placing a defendant in a cage during the trial because of their 'dangerousness'.[152] However, investigatory actions, such as fingerprinting, taking DNA samples, and searches of property, do not violate the presumption. As the presumption of innocence must be maintained at all times during the trial, the burden of proof rests upon the prosecution to prove guilt. If there is insufficient evidence, the court must decide in favour of the accused.

p. 278

5.4.2 Freedom from self-incrimination

Closely related to the presumption of innocence is the right not to be compelled to incriminate oneself. This right is provided for in Article 14(3)(g) ICCPR as well as Articles 8(2)(g) and 8(3) ACHR, and has been read into what constitutes a fair trial for the purposes of Article 6(1) ECHR.[153] This right is 'to be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt'.[154]

Self-incrimination is often a result of acts of torture or other ill-treatment. Article 15 UNCAT prohibits the use of evidence obtained by torture 'in any proceedings, except against a person accused of torture as evidence that the statement was made', while the Human Rights Committee has gone further to state that any evidence arising from treatment contrary to Article 7 ICCPR, that is torture *or* inhuman or degrading

treatment or punishment, must be excluded from evidence.[155] Use of evidence obtained by a third party—whether a private actor or an official of another state not involved in the proceedings—by means of torture or other ill-treatment will also render a trial unfair.[156] The African Commission has taken a strong position on this, assuming that any confession obtained during incommunicado detention has been obtained by coercion. It has held that 'where a confession is obtained in the absence of certain procedural guarantees against [torture or ill-treatment], it should not be admitted as evidence'.[157] However, disappointingly perhaps, the European Court of Human Rights has held that where evidence is secured as an *indirect* result of torture or ill-treatment—so-called 'fruit of the poisonous tree'—it may be admissible. In *Gäfgen v Germany*, the applicant was suspected of having kidnapped a young boy. He was threatened with torture in order to provide information regarding the boy's whereabouts. Although the confessions provided by the applicant following this threat were not used, real evidence that had been found as a result of the confessions was admissible during the applicant's trial. The European Court held that as this evidence was not the only evidence pointing to guilt, there was no violation of the right to a fair trial.[158]

Other instances of improper pressure will be decided on a case-by-case basis, examining whether the 'very essence of the right' not to incriminate oneself has been destroyed. So where adverse inferences are drawn in court from a suspect's silence during questioning, whether a violation has occurred will depend on whether there is other evidence pointing to guilt.[159]

p. 279

5.4.3 Right to be informed of the charge

Individuals accused of a criminal offence have the right to be informed of the charge that they are facing. This is in addition to the right of those detained to know the charge against them (see Section 2.4.1), and applies from the moment an individual is formally charged or publicly named as an accused person, whether in detention or not.[160] This right, provided for in Article 14(3)(a) ICCPR, Article 7(4) ACHR, Article 6(3)(a) ECHR, and read into Article 7(1)(c) ACHPR,[161] must be fulfilled promptly, without inexcusable delay. At the stage of being formally charged, suspects are entitled to be informed of the full details of the charge against them, including the type of offence and the elements upon which the accusation has been founded, in a language that they understand, so that they may begin to formulate a defence.

5.4.4 Right to an adequate defence

Beyond these protections are those that elaborate on the principle of equality of arms. Article 14(3)(b) ICCPR provides that everyone is entitled 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. Article 8(2)(c) ACHR, Article 7(1)(c) ACHPR, and Article 6(3)(b) ECHR contain similar provisions. What is considered adequate time will depend upon the nature and complexity of the case, as well as any other relevant factors, such as change of legal representative.

There are certain minimum levels of facilities, however, that must be accorded to all defendants for their defence to be effective. Explicitly provided for is the guarantee that defendants must be able to communicate with their counsel. In general, private and confidential meetings with a lawyer should be facilitated from the time individuals are taken into custody and during any pre-trial questioning. Access to a lawyer at this time serves to protect suspects from ill-treatment and coercion by the police, as well as to ensure that conditions

conducive to a fair trial are fostered during questioning. However, the European Court of Human Rights has held that access to a lawyer may be delayed in the 'interrogation' period in some circumstances and where any disadvantage is rectified at trial to ensure fairness overall.[162]

Defendants must also be provided in a timely manner with all the materials that the prosecution is to use in court, as well as any other material that may be exculpatory. Exculpatory evidence not only includes evidence that suggests innocence, but also material regarding the gathering of evidence which may show some impropriety. For example, where there is information that the evidence against the defendant has been obtained by torture, this should be transmitted to the defence. The materials must be presented so that the defendant *or* his or her counsel is able to understand them. Therefore, where the defendant requires translation of documents but their counsel does not, there is no obligation on the state to provide such translations.[163] The right to this information is not absolute, however. In exceptional circumstances, for example where national security is at risk, a court may allow the prosecution to withhold disclosure of some evidence. This is only permitted where strictly necessary and where any difficulties to the defence from non-disclosure are counterbalanced in order to ensure that a fair trial takes place.[164]

 ↵ There are other rights associated with aspects of an adequate defence guaranteed by international human rights law. Defendants have the right to be present at their trial and to defend themselves personally or to have counsel represent them.[165] The right to defend oneself without counsel is not unlimited. If the interests of justice require a lawyer to represent the accused, then a lawyer may be assigned against the wishes of the accused. Such interests apply when an individual is charged with a serious offence but unable to act in his or her own interests, when the defendant is obstructing justice, or in order to prevent intimidation of witnesses if they are examined by the accused during the trial. However, an effective defence requires trust between defendant and counsel and so any imposition of unwanted counsel must be strictly proportionate to the serious purpose articulated and efforts must be made to counter any potential disadvantage.[166]

Should the defendant require legal representation but does not have the means to pay, states are obliged to provide legal aid where the interests of justice so require.[167] The seriousness of the offence and the possible punishment will be relevant to this consideration. Where 'deprivation of liberty is at stake, the interests of justice … call for legal representation'.[168] Similarly, free legal assistance should be given if the proceedings may result in the death penalty.[169] Legal aid may also be required where the personal circumstances of the defendant require it. For example, in *Quaranta v Switzerland* the European Court of Human Rights held that a young adult with a drug addiction from an underprivileged background was not capable of presenting his case in an adequate manner and should have been provided with legal assistance.[170]

The legal assistance provided must be effective. If the counsel provided is negligent in their duties, then the state may have breached its obligation. In *Myrie v Jamaica*, the state-appointed counsel was absent from the courtroom for significant periods of the trial. The Inter-American Commission on Human Rights held that although the state cannot be held responsible for *all* deficiencies in state-provided legal assistance, it was required to 'intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention.'[171]

The defendant should be able to follow the proceedings in order to be able present his or her defence. Therefore, where court proceedings are conducted in a language which the defendant cannot understand, interpreter assistance must be offered free of charge.[172]

The defendant also has 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'.[173] Essentially, this secures the same powers for the defendant to compel witnesses to appear and cross-examine them as are granted to the prosecution. What is key is that the principle of fairness is upheld at all times. In *Peart v Jamaica*, the principal witness for the prosecution had made a written statement that indicated a person other than the defendant had committed the relevant crime.[174] However, the statement was not made available to the defence until after an appeal against the conviction had been rejected. The Human Rights Committee held that this was a serious obstruction of the defence's cross-examination of the lead witness and thus precluded a fair trial of the defendant. Where cross-examination may lead to serious concerns for the safety of the witness, then restrictions upon the right to examine may be implemented. The interests of the defence must be balanced against those of a witness called to testify and so only in extreme cases may witnesses remain anonymous. However, even where the witness remains anonymous to the public and the defendant, an effective examination of their testimony must still be facilitated. Where witnesses are completely absent from the trial, for example where they have died during the course of the investigation, and a conviction is based 'solely or decisively' on their evidence, a violation of this right will be found unless 'there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place'.[175]

p. 281

5.4.5 Right to review

Everyone convicted of a crime is entitled to have the conviction reviewed by a higher court in accordance with procedures set out in national law. This right is aimed at correcting miscarriages of justice; so higher courts are required to conduct an evaluation of the evidence presented and application of law at the trial, as well as the conduct of the trial. However, this does not mean that a full retrial is required; rather, the higher court can use transcripts and reports of evidence from the first trial to inform its review. In order to make use of this right, a convicted person is entitled to a written judgment that sets out the reasons for a finding of guilt, which can form the basis of any appeal.

The right is set out in Article 14(5) ICCPR and Article 8(2)(h) ACHR, while a more restrictive version of the right is to be found in Article 2 Protocol 7 ECHR. The African Commission on Human Rights confirmed in *Constitutional Rights Project v Nigeria* that this right is also protected by the ACHPR. The Commission criticized certain provisions of Nigerian law that precluded any judicial appeal of convictions for which the death penalty was imposed. It held that 'to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates Article 7(1)(a) of the African Charter, and increases the risk that severe violations may go unaddressed'.[176]

Where a newly discovered fact shows conclusively that there has been a miscarriage of justice and hence a conviction is overturned or a pardon given, all affected individuals are entitled to compensation for the punishment already endured.[177] In *WJH v Netherlands*, the author had been convicted of a number of offences but served no time in detention. Following a challenge to the conviction, the Dutch Supreme Court set aside the verdict and remitted the case back for consideration by a lower court, which acquitted him on procedural grounds. The Human Rights Committee rejected a claim that the Netherlands had violated its obligation to grant compensation for the initial conviction as 'the final decision in this case … acquitted the author, and

since he did not suffer any punishment as a result of his earlier conviction'.[178] Therefore, miscarriages of justice must be distinguished from acquittals on appeal. It is only for miscarriages of justice that compensation is due.

p. 282

5.4.6 Ne bis in idem

All major human rights treaties provide that the principle of *ne bis in idem* is applicable to all individuals who are charged with a criminal offence.[179] The principle essentially maintains that no person shall be tried twice for the *same* offence in the same jurisdiction. There are certain exceptions to this general rule. If there is evidence of newly discovered facts or there were serious defects in the earlier proceedings that affected the outcome of the case, the interests of justice may demand that cases should be reopened. For example, an exception should apply where the initial trial was conducted in such a way as to shield perpetrators of human rights violations.[180] Furthermore, individuals may be tried for the same offence in different jurisdictions. In the case of *AP v Italy*, the author of the communication was convicted by a Swiss court of being involved in a kidnapping conspiracy which had taken place in Italy. Four years later, after the author had served his sentence, an Italian court convicted him of the same offence. The Human Rights Committee held that Article 14(7) ICCPR was not engaged in this case because it 'does not guarantee *ne bis in idem* with regard to the national jurisdiction of two or more States'.[181]

5.4.7 'No punishment without law'

The fundamental right of 'no punishment without law' is guaranteed by all human rights treaties and serves to protect individuals from being held guilty of criminal behaviour without adequate legal basis.[182] States may not derogate from this obligation in times of emergency. To mete out punishment without a legal basis to do so is an obvious abuse of state power. Therefore, laws that are so vague that individuals cannot know how to regulate their actions in order to act in accordance with the law will constitute a violation of the right.

The right also includes the prohibition of retroactive legislation. This encompasses two guarantees. First, there should be no punishment for acts or omissions that 'did not constitute a criminal offence under national or international law' at the time of the offence (*nullum crimen sine lege*). Second, where harsher penalties are introduced after the commission of an offence, they may not be applied (*nulla poena sine lege*). There are two restrictions upon this aspect of the right. First, retroactive legislation will be permitted where the new law is more lenient than the old one. Second, legislation that is enacted to introduce criminal sanctions for international crimes, such as war crimes, can be applied retrospectively as long as the conduct was a crime under international law at the time of commission.[183]

5.4.8 Protection of juveniles

Juveniles, that is, those individuals who have not yet reached the age of majority, require special protection in criminal procedures and this may necessitate a stricter application of the fair trial rights discussed earlier. Recognition of this fact is set out in Article 40 CRC and Article 14(4) ICCPR[184] and detailed guidance has been provided by the Committee on the Rights of the Child in its General Comment 24 on Children's Rights in the

Child Justice System.[185] Underpinning these protections is the idea that children should be spared the stigma of being labelled criminals as far as possible and where offences are made out they should be met with educational rehabilitation rather than punitive measures. Thus, states should establish 'an appropriate criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age' where measures such as mediation between the perpetrator and the victim are contemplated as an alternative to criminal trials.[186] Where criminal trials are held, juveniles should:

p. 283

> be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation.[187]

6 Conclusion

Rights regarding the administration of justice are some of the oldest protections granted by law to individuals. Today, it is recognized that securing the rights to liberty and a fair trial is a necessary prerequisite for the enjoyment of all other human rights. A substantial body of norms, guidelines, and jurisprudence regarding these rights has been developed to give more specific protections to all individuals. As criminal justice systems are often manipulated to the detriment of the enjoyment of human rights, a significant proportion of the human rights framework for the administration of justice is devoted to this area. But it should not be forgotten that the rights discussed in this chapter are also concerned with issues beyond the criminal justice context, such as the use of detention powers in medical and immigration settings, and the resolution of civil disputes and judicial remedies for human rights violations. Any failure to respect these rights will raise questions regarding a state's commitment to the rule of law.

Further Reading

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MUJUZI, 'The African Court of Human and Peoples' Rights and its Protection of the Right to a Fair Trial' (2017) 16 *The Law and Practice of International Courts and Tribunals* 187.

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UDOMBANA, 'The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa' (2006) 6 *African HRLJ* 299.

VERMEULEN, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia, 2012).

WEISSBRODT, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 2001).

Useful Websites

UN Working Group on Arbitrary Detention: **<http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx** *<http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>***>**

UN Special Rapporteur on Independence of Judges and Lawyers: **<https://www.ohchr.org/EN/Issues/Judiciary/Pages/SRJudgeslawyersIndex.aspx** *<http://www2.ohchr.org/english/issues/judiciary/index.htm>***>**

Questions for Reflection

1. When is an individual considered to be in 'detention'? Should the fact that someone is technically free to leave be determinative of liberty, or should wider circumstances that impact an individual's subjective belief of freedom be taken into account?
2. Is 'preventive' detention consistent with the aims of the right to liberty?
3. What is meant by a 'fair' trial? Given the different legal systems that exist around the world, is it possible to objectively define what is 'fair'?
4. What special measures need be taken to ensure that: (a) women; (b) children; (c) persons with disabilities; and (d) members of indigenous groups enjoy the right to liberty and the right to a fair trial?

Notes

[1] The rights were only accorded to noblemen. See Chapter 1.

[2] See Chapter 9.

[3] HRC, General Comment 35, CCPR/C/GC/35 (16 December 2014), which replaces HRC, General Comment 8, HRI/GEN/1/Rev.9 (Vol I) 179.

[4] ECHR, Art 5; CFREU, Art 6; ADHR, Art I; ACHR, Art 7; ACHPR, Art 6; Arab Charter, Art 14.

[5] HRC, General Comment 24, HRI/GEN/1/Rev.9 (Vol I) 210, para 8. See also WGAD, Deliberation No 9, A/HRC/22/44 (24 December 2012).

[6] HRC, General Comment 29, HRI/GEN/1/Rev.9 (Vol I) 234, para 11. Compare the International Criminal Court's decision in ICC-01/04-01/07, *Prosecutor v Katanga* (application for the interim release of detained witnesses), DRC-D02-P-0236 etc (1 October 2013) para 33.

[7] GA Res 70/175 (17 December 2015), revising ECOSOC Res 663C(XXIV) (31 July 1957).

[8] GA Res 43/173 (9 December 1988).

[9] GA Res 45/111 (14 December 1990).

[10] GA Res 45/113 (14 December 1990).

[11] GA Res 65/229 (16 March 2011).

[12] eg IACommHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser/L/V/II.131 doc.26 (March 2008); Council of Europe Minimum Rules for the Treatment of Prisoners, Committee of Ministers Res (73)5 (19 January 1973); ACommHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (8 May 2014), <https://www.achpr.org/public/Document/file/Any/guidelines_on_arrest_police_custody_detention.pdf *<https://www.achpr.org/public/Document/file/Any/guidelines_on_arrest_police_custody_detention.pdf>*>.

[13] CHR Res 1991/42 (5 March 1991).

[14] HR Council Res 15/18 (30 September 2010).

[15] HRC, General Comment 8, para 1; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, para 77.

[16] *A v New Zealand*, CCPR/C/66/D/754/1997 (3 August 1999).

[17] *ZA v Russia* (2020) 70 EHRR 24.

[18] HRC, General Comment 35, para 6.

[19] *Madani v Algeria*, CCPR/C/89/D/1172/2003 (21 June 2007); WGAD, Deliberation No 1, E/CN.4/1993/24 (12 January 1993).

[20] WGAD, Deliberation No 11, A/HRC/45/16 (24 July 2020), Annex II, para 8.

[21] *Trijonis v Lithuania*, App no 2333/02, Judgment of 17 March 2005.

[22] *Celepli v Sweden*, CCPR/C/51/D/456/91 (18 July 1994); *Karker v France*, CCPR/C/70/D/833/98 (26 October 2000).

[23] *Austin v UK* (2012) 55 EHRR 14.

[24] A/HRC/WGAD/2015/54 (22 January 2016). For critique of the decision, see the dissenting opinion of Vladimir Tochilovsky; and Happold, 'Julian Assange and the UN Working Group on Arbitrary Detention', *EJIL: Talk* (5 February 2016).

[25] WGAD, Deliberation No 12, A/HRC/48/55 (6 August 2021) para 62.

[26] *Othman v UK* (2012) 55 EHRR 1; see also the Opinion of the WGAD, A/HRC/4/40 (9 January 2000), para 47.

[27] HRC, General Comment 35, para 57.

[28] *El-Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25.

[29] eg ACHR, Art 7; ACHPR, Art 6.

[30] CRPD, Art 14(1)(b); ICCPR, Art 11.

[31] *Hassan v UK*, App no 29750/09, Judgment of 16 September 2014. See also Case 12.865, *Ameziane v US*, IACommHR Report No 20/29 (22 April 2020) para 117. See Chapter 25.

[32] HRC, General Comment 35, paras 22–3.

[33] WGAD, Deliberation No 7, E/CN.4/2005/6 (1 December 2004).

[34] *Tibi v Ecuador*, IACtHR Series C No 114 (7 September 2004).

[35] HRC, General Comment 35, para 12; *Chaparro-Àlvarez and Lapo-Iniguez v Ecuador*, IACtHR Series C No 170 (21 November 2007) para 93. See, generally, WGAD Deliberation No 9.

[36] *A v Australia*, CCPR/C/59/D/560/93 (3 April 1997) para 9.2.

[37] CCPR/C/83/D/1189/2003 (31 March 2005).

[38] *A v Australia*; *Bakhtiyari v Australia*, CCPR/C/79/D/1069/2002 (29 October 2003). See also Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24 (2 April 2012) para 10.

[39] Also referred to as administrative detention or internment.

[40] HRC General Comment 35, para 15.

[41] (2019) 68 EHRR 17.

[42] *Mukong v Cameroon*, CCPR/C/51/D/458/1991 (21 July 1994); *Kanana v Zaire*, CCPR/C/49/D/366/1989 (2 November 1993). See also 266/03, *Gunme v Cameroon*, 26th Activity Report of the ACommHPR (2009).

[43] *Khadziyev v Turkmenistan*, CCPR/C/122/D/2252/2013 (6 April 2018).

[44] 27/89, 46/91, 49/91, and 99/93, *Organisation Mondiale Contre La Torture v Rwanda*, 10th Activity Report of the ACommHPR (1997).

[45] CERD Committee, General Recommendation XXXI, HRI/GEN/1/Rev.9 (Vol II) 306, para 20.

[46] *Hicks v Australia*, CCPR/C/115/D/2005/2010 (19 February 2016).

[47] HRC, General Comment 35, para 21. In the mental health context, see *Stanev v Bulgaria* (2012) 55 EHRR 22.

[48] *James, Wells and Lee v UK* (2013) 56 EHRR 12.

[49] eg in relation to involuntary psychiatric detention: *A v New Zealand*, CCPR/C/66/D/754/1997 (3 August 1999).

[50] *Stanev*, para 170.

[51] See also, ECHR, Art 5(2) ECHR; ACHR, Art 7(4).

[52] *Ilombe and Shandwe v Democratic Republic of Congo*, CCPR/C/86/D/1177/2003 (17 March 2006).

[53] *Krasnova v Kyrgyzstan*, CCPR/C/101/D/1402/2005 (27 April 2010); *ZH v Hungary*, App no 28973/11, Judgment of 8 November 2012.

[54] *Hill and Hill v Spain*, CCPR/C/59/D/526/1993 (2 April 1997) para 12.2.

[55] *Ismailov v Uzbekistan*, CCPR/C/101/D/1769/2008 (25 March 2011) para 7.2.

[56] See also ACHR, Art 5(2).

[57] See Chapter 9.

[58] HRC, General Comment 21, HRI/GEN/1/Rev.9 (Vol I) 202, para 3; *Vélez Loor v Panama*, IACtHR Series C No 218 (23 November 2010) para 198.

[59] See *Pacheco Teruel et al v Honduras*, IACtHR Series C No 241 (27 April 2012); *Suleimenov v Kazakhstan*, CCPR/C/119/D/2146/2012 (21 March 2017).

[60] HRC, General Comment 21, para 4.

[61] CCPR/C/74/D/683/1996 (26 March 2002).

[62] IACommHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (OAS, 2011) para 14.

[63] ICCPR, Art 9(4); ECHR, Art 5(4); ACHR, Art 7(6). The ACommHPR has confirmed that this right is implicit in ACHPR, Art 7(1): *Constitutional Rights Project v Nigeria* (153/96), 13th Annual Activity Report (1999). See also UN Basic Principles and Guidelines on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, A/HRC/30/37 (6 July 2015), Annex.

[64] On the meaning of 'independent court', see Section 5.3.2.

[65] *Constitutional Rights Project*.

[66] A reduction in sentence has been held to be 'compensation' for the purposes of ECHR, Art 5(5), where it is intended to remedy the harm suffered by unlawful detention: *Porchet v Switzerland*, App no 36391/16, Judgment of 8 October 2019.

[67] *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 42.

[68] *Grant v Jamaica*, CCPR/C/56/D/597/1994 (22 March 1996) para 8.1.

[69] ICCPR, Art 9(3); ECHR, Art 5(3). ACHR, Art 7(5) establishes that this is a right for *all* detainees and not just those detained on a criminal charge.

[70] HRC, General Comment 35, para 32.

[71] HRC, General Comment 35, para 33 (footnotes omitted); see *Medvedyev v France* (2010) 51 EHRR 39 for an example of when arrest on the high seas justified a delay.

[72] CRC, General Comment 24, CRC/C/GC/24 (18 September 2019), para 90.

[73] This is also protected by ACHPR, Art 7: see *Constitutional Rights.*

[74] *WBE v Netherlands*, CCPR/C/46/D/432/1990 (23 October 1992) para 6.3. See CRC General Comment 24, paras 85–8, in relation to pre-trial detention of children.

[75] *Letellier v France* (1992) 14 EHRR 83.

[76] *IA v France*, App no 28213/95, Judgment of 23 September 1998.

[77] *Wemhoff v Germany* (1979–80) 1 EHRR 55, para 5; *Case of the 'Juvenile Reeducation Institute' v Paraguay*, IACtHR Series C No 112 (2004).

[78] CCPR/C/78/D/878/1999 (15 July 2003).

[79] Vienna Convention on Consular Relations, Art 36(1); ICRMW, Art 16(7).

[80] *LaGrand (Germany v United States)* [2001] ICJ Rep 466; *Avena and other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 12; *Diallo*; *Jadhav (India v Pakistan)* (2019) ICJ Rep 418. Whilst the ICJ failed to confirm that the rights were human rights in these cases, the IACtHR has done so: see *Chaparro-Alvarez and Lapo-Iniguez v Ecuador*, IACtHR Series C No 170 (21 November 2007); it has also confirmed that they are minimum guarantees for ensuring foreign nationals have a fair trial: OC-16/99, *The Right to Information on Consular Assistance*, IACtHR Series A No 16 (1 October 1999).

[81] See Chapter 7.

[82] HRC, General Comment 35, paras 64–6; *Precautionary Measures in Guantanamo Bay, Cuba*, IACommHR (13 March 2002); *Hassan*.

[83] HRC, General Comment 29, paras 15–16; see also WGAD Deliberation No 9, para 47.

[84] OC-8/87, *Habeas Corpus in Emergency Situations*, IACtHR Series A No 8 (30 January 1987); OC-9/87, *Judicial Guarantees in States of Emergency*, IACtHR Series A No 9 (6 October 1987).

[85] *Brannigan and McBride v UK* (1994) 17 EHRR 539, para 62.

[86] The HRC has confirmed that an enforced disappearance can be at the hands of forces 'independent or hostile to a state party': *Hero v Bosnia*, CCPR//C/112/D/1966/2010 (27 November 2014).

[87] See CPED, Art 2; Inter-American Convention on Forced Disappearance of Persons, Art II; Rome Statute of the International Criminal Court, Art 7(2)(i); Working Group on Enforced or Involuntary Disappearances, General Comment on the definition of enforced disappearance, A/HRC/7/2 (10 January 2008).

[88] See Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, A/HRC/13/42 (19 February 2010); Opinion of the WGAD 29/2006, A/HRC/4/40/Add.1 (September 2006); *El-Masri*.

[89] *Sarma v Sri Lanka*, CCPR/C/78/D/950/2000 (16 July 2003); *Coronel v Columbia*, CCPR/C/76/D/778/1997 (24 October 2002); *Velásquez-Rodríguez v Honduras*, IACtHR Series C No 4 (29 July 1988); 24/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, 14th Activity Report of the ACommHPR (2001); *Kurt v Turkey* (1999) 27 EHRR 373; *Timurtas v Turkey* (2001) 33 EHRR 6.

[90] eg *Mojica v Dominican Republic*, CCPR/C/51/D/449/1991 (25 July 1994).

[91] CPED, Art 1.

[92] *Goiburu v Paraguay*, IACtHR Series C No 202 (22 September 2009).

[93] *Delgado Páez v Columbia*, CCPR/C/39/D/195/1985 (12 July 1990) para 5.5; see also General Comment 35, para 9.

[94] *Jayawardena v Sri Lanka*, CCPR/C/75/D/916/2000 (22 July 2002).

[95] HRC, General Comment 13, HRI/GEN/Rev.9 (Vol I) 184, para 1.

[96] ECHR, Arts 6 and 7; ACHR, Arts 8 and 9; ACHPR, Arts 7 and 26; Arab Charter, Arts 12, 13, 16, and 17; CFREU, Chapter VI. The protections in the ACHPR are augmented by the African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247 (2003).

[97] HRC, General Comment 29, para 11. Not all fair trial protections can be classified as such, see *Al-Dulimi v Switzerland*, App no 5809/09, Judgment of 21 June 2016, para 136. See Clooney and Webb, *The Right to a Fair Trial in International Law* (OUP, 2020) 13–26.

[98] HRC, General Comment 29, para 15; see also HRC, General Comment 32, HRI/GEN/1/Rev.9 (Vol I) 248, para 6; ACHR, Art 27(2); *African Commission on Human and Peoples' Rights v Libya*, App no 002/2013 Judgment of 3 June 2016.

[99] GA Res 40/32 (29 November 1985) Annex.

[100] A/CONF.144/28/Rev.1 (1990), 118.

[101] GA Res 45/100 (14 December 1990) Annex.

[102] GA Res 67/187 (20 December 2012) Annex.

[103] See Chapter 26.

[104] eg Rome Statute of the International Criminal Court, Arts 55, 66, and 67. See McDermott, *Fairness in International Criminal Tribunals* (OUP, 2016).

[105] HRC, General Comment 32, para 16 (footnotes omitted).

[106] Harris et al, *Harris, O'Boyle, and Warbrick: The Law of the European Convention on Human Rights* (OUP, 2018) 382–9.

[107] HRC, General Comment 32, para 15.

[108] HRC, General Comment 32, para 24; CRC, General Comment 24 CRC/C/GC/24, paras 102–4.

[109] *Othman*, paras 259–60.

[110] See also ECHR, Art 6(1); ACHR, Art 8(1).

[111] See Chapter 8.

[112] HRC, General Comment 32, para 9.

[113] HRC, General Comment 32, para 9.

[114] CRPD, Art 13 requires states to make 'accommodations' to facilitate access to justice: see *Makarov v Lithuania*, CRPD/C/18/D/30/2015 (18 August 2017).

[115] *Ato del Avellanal v Peru*, CCPR/C/34/202/1986 (28 October 1988). See, generally, also CEDAW Committee, General Recommendation 33, CEDAW/C/GC/33 (3 August 2015).

[116] *Tiu Tojin v Guatemala*, IACtHR Series C No 190 (26 November 2008) para 96.

[117] HRC, General Comment 32, para 10. See also *Airey v Ireland* (1979–80) 2 EHRR 305; OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, IACtHR Series A No 11 (10 August 1990) para 28.

[118] HRC, General Comment 32, para 9.

[119] *Al-Adsani v UK* (2002) 34 EHRR 11, para 54. See also *Jones v UK* (2014) 59 EHRR 1; *Sechremelis v Greece*, CCPR/C/100/D/1507/2006 (30 November 2010). In *Naït-Liman v Switzerland*, App no 51357/07, Judgment of 15 March 2018, the European Court held that access to a court did not require states to ensure universal jurisdiction for claims for compensation arising from acts of torture.

[120] HRC, General Comment 32, para 13.

[121] CCPR/C/71/D/819/1998 (4 April 2001). Although note that the majority found a violation of ICCPR, Art 26 and decided not to examine whether there had been a breach of Art 14(1).

[122] ICERD, Art 5(a); CEDAW, Art 15(2). See also CERD, General Recommendation XXXI and CEDAW Committee, General Recommendation 33.

[123] eg *Bahamonde v Equatorial Guinea*, CCPR/C/49/D/468/1991 (20 October 1993).

[124] HRC, General Comment 32, para 19. See also the UN Basic Principles on the Independence of the Judiciary; *Chocrón Chodron v Venezuela*, IACtHR Series C No 227 (1 July 2011).

[125] 251/02, 18th Activity Report of the ACommHPR (2005).

[126] eg Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/38/38/Add.1 (5 April 2018); C-619/18, *Commission v Poland,* Judgment of 24 June 2019; *Xero Flor w Polska v Poland*, App no 4907/18, Judgment of 7 August 2021.

[127] (1983) 5 EHRR 169.

[128] eg Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285 (7 August 2013).

[129] HRC, General Comment 32, para 22 (footnotes omitted).

[130] 54/91, *Malawi African Association v Mauritania*, 13th Activity Report of the ACommHPR (2000) para 98. See also Case 11.084, *Salinas v Peru*, IACommHR Report No 27/94 (30 November 1994); *Durand and Ugarte v Peru*, IACtHR Series C No 68 (3 December 2001) para 125.

[131] *Incal v Turkey* (2000) 29 EHRR 449, paras 71–2.

[132] See *Madani*, para 8.7.

[133] ICCPR, Art 14(1); ECHR, Art 6(1); ACHR, Art 8(1).

[134] HRC, General Comment 32, para 25.

[135] *Maleki v Italy*, CCPR/C/66/D/699/1996 (15 June 1999).

[136] *X v Sweden* (1959) 2 YB 354, 370.

[137] *Fei v Columbia*, CCPR/C/53/D/514/1992 (4 April 1995). ACHR, Art 8(1) and ECHR, Art 6(1) explicitly provide this protection for both the determination of civil claims and criminal charges.

[138] CCPR/C/14/D/27/1977 (29 October 1981).

[139] *Deisl v Austria*, CCPR/C/81/D/1060/2002 (23 August 2004). See HRC, General Comment 32, n 72 for examples.

[140] *Lubuto v Zambia*, CCPR/C/55/D/390/1990/Rev.1 (31 October 1995).

[141] *Zimmermann v Switzerland* (1994) 6 EHRR 17. In terms of responding to the challenges from the COVID-19 pandemic, see Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/47/35 (9 April 2021).

[142] *Marinich v Belarus*, CCPR/C/99/D/1502/2006 (19 August 2010).

[143] CCPR/C/116/D/2059/2011 (13 May 2016).

[144] *Axen v Germany* (1984) 6 EHRR 195; *Helmers v Sweden* (1993) 15 EHRR 285.

[145] ECHR, Art 6(1) does not allow for any exceptions to this right, while ACHR, Art 8(5) only provides this guarantee in the criminal context. No equivalent protections are set out in the ACHPR.

[146] HRC, General Comment 32, para 29.

[147] *Taxquet v Belgium* (2012) 54 EHRR 26.

[148] ICCPR, Art 14(2); ACHR, Art 8(2); ACHPR, Art 7(1)(b); ECHR, Art 6(2).

[149] HRC, General Comment 29, para 11.

[150] See *Marinich*; *Allenet de Ribemont v France* (1995) 20 EHRR 557.

[151] eg *Cagas v Philippines*, CCPR/C/63/D/788/1997 (23 October 2001); *Chaparro-Álvarez*.

[152] *Karimov and Nursatov v Tajikistan*, CCPR/C/89/D/1108 & 1121/2002 (27 March 2007).

[153] eg *Saunders v UK* (1996) 23 EHRR 313.

[154] HRC, General Comment 32, para 41.

[155] HRC, General Comment 32, para 41. See also *Othman*, paras 263–7; *Cabrera García and Montiel Flores v Mexico*, IACtHR Series C No 220 (26 November 2010), paras 165–7.

[156] *Ćwik v Poland* (2021) 72 EHRR 19.

[157] 334/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*, 29th Activity Report of the ACommHPR (2011) para 218.

[158] (2011) 52 EHRR 39.

[159] *John Murray v UK* (1996) 22 EHRR 29.

[160] HRC, General Comment 32, para 31.

[161] *Mohamed Abubakari v Tanzania*, App no 007/2013, Judgment of 3 June 2016, para 158.

[162] *Beuze v Belgium* (2019) 69 EHRR 1; *Ibrahim and others v UK*, App nos 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016.

[163] *Harward v Norway*, CCPR/C/51/D/451/1991 (16 August 1994).

[164] *Rowe v UK* (2000) 30 EHRR 1.

[165] ICCPR, Art 14(3)(d); ACHR, Art 8(2)(d); ACHPR, Art 7(1)(e); ECHR, Art 6(3)(c).

[166] HRC, General Comment 32, para 37. The HRC and ECtHR differ on whether a blanket rule requiring legal representation is consistent with the right to defend oneself: compare *Correia de Matos v Portugal*, CCPR/C/86/D/1123/2002 (28 March 2006), and *Correia de Matos v Portugal*, App no 56402/13, Judgment of 4 April 2018.

[167] ICCPR, Art 14(3)(d); ECHR, Art 6(3)(d); ACHR, Art 8(2)(e).

[168] *Benham v UK* (1996) 22 EHRR 293, para 61.

[169] HRC, General Comment 32, para 38.

[170] A 205 (1991).

[171] Case 12.417, IACommHR Report No 41/04 (12 October 2004) para 63.

[172] ICCPR, Art 14(3)(f); ACHR, Art 8(1)(a); ECHR, Art 6(3)(e).

[173] ICCPR, Art 14(3)(e). See also ACHR, Art 8(2)(f); ECHR, Art 6(3)(d).

[174] CCPR/C/54/D/464/1991 (24 July 1995).

[175] *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23, para 147; *Catrimán v Chile*, IACtHR Series C 279 (29 May 2014) paras 259–60.

[176] 60/91, 8th Activity Report of the ACommHPR (1994–1995) 13.

[177] ICCPR, Art 14(6); ACHR, Art 10; ECHR Protocol No 7, Art 3.

[178] CCPR/C/45/D/408/1990 (22 July 1992).

[179] ICCPR, Art 14(7); ECHR Protocol No 7, Art 4; ACHR, Art 8(4); ACHPR, Art 7(2).

[180] *Almonacid-Arenallo v Chile*, IACtHR Series C No 154 (26 September 2006) paras 154–5.

[181] CCPR/C/31/D/204/1986 (2 November 1987).

[182] ICCPR, Art 15; ACHR, Art 9; ACHPR, Art 7; ECHR, Art 7.

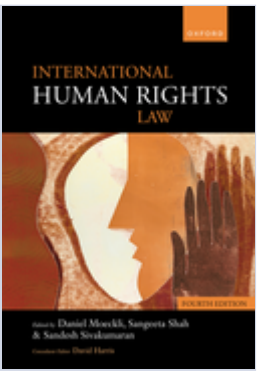
[183] ICCPR, Art 15(2); ECHR, Art 7(2). See *Kononov v Latvia* (2011) 52 EHRR 21.

[184] See also ACHR, Art 5(5); African Charter on the Rights and Welfare of the Child, Art 17.

[185] CRC General Comment 24, paras 38–71.

[186] HRC, General Comment 32, paras 43 and 44.

[187] HRC, General Comment 32, para 42.



International Human Rights Law (4th edn)
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14. Cultural Rights

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https://doi.org/10.1093/he/9780198860112.003.0014
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter examines the sources of cultural rights in international human rights law, describes their evolution, and highlights the major debates regarding their interpretation. Specifically, it discusses the content and meaning of the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the rights of authors and inventors to the protection of their moral and material interests.

Keywords: international human rights, cultural rights, culture, scientific progress, authors, inventors, intellectual property rights, indigenous peoples

Summary

While cultural rights have long been neglected in human rights theory and practice, they are attracting growing attention today. This chapter examines the sources of this category of rights in international human rights law, describes their evolution, and highlights the major debates their interpretation has given rise to. It discusses more specifically the content and meaning of the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the rights of authors and inventors to the protection of their moral and material interests.

p. 285

1 Introduction

A certain degree of fuzziness surrounds the notion of cultural rights. The source of the problem lies with the concept of culture itself. In the course of its history, the term 'culture' has been endowed with different meanings, each of which continues to coexist today.[1] First, at the time of the Enlightenment, that is, in the seventeenth and eighteenth centuries, the term culture began to be used in France in a metaphorical sense to mean the *cultivation of the mind* as well as the result of intellectual development, namely the knowledge of a person who is well versed in arts, letters, and science. During the nineteenth century, in an era of rising nationalism, the German term *Kultur* came to mean the intellectual and moral achievements of a whole nation. This new definition progressively permeated other languages. While in the earlier understanding, culture was seen as an individual characteristic of universal relevance—the culture one could acquire was supposed to be common to the whole of mankind—this newer conception of culture was a collective phenomenon associated with a particular group. Yet, in both cases, the notion referred to a distinct set of social activities: it only included intellectual, artistic, or moral expressions, in other words 'the life of the mind', to the exclusion of material or technical aspects of social life. A third usage of the term emerged in the late nineteenth century in the nascent field of anthropology. Culture, in this context, was redefined as
p. 286 encompassing *all* manifestations ↵ of the social life of a given population.[2] This last understanding of the term spread during the twentieth century in common language. Thus conceived, culture became synonymous with the specific *way of life* of a community.

This plurality of meanings of the concept of culture presents a persistent challenge for the conceptualization of cultural rights.[3] The difficulty involved in defining the subject matter of this category of rights partly explains the often-noted fact that cultural rights have long been neglected.[4] But other factors have also contributed to this neglect. Culture is often seen as a luxury compared to more 'classic' human rights issues, such as the right to life or freedom from torture. Besides, the idea of recognizing a *right to culture* in the anthropological sense has been viewed by many as entailing the risk of legitimizing cultural practices that conflict with particular human rights, such as female genital mutilation.[5] Attitudes, however, seem to be changing. Since 2000, cultural rights have attracted increasing attention from human rights experts and international bodies. The decision of the UN Human Rights Council in 2009 to appoint an independent expert in the field of cultural rights is a sign of this rising interest.[6]

Among the UN treaties dealing with human rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the only one to refer to *cultural rights* in its title. It is generally considered that cultural rights under the ICESCR include the right to education (Articles 13 and 14) and the rights spelled out in Article 15. The latter provision is inspired by Article 27 of the Universal Declaration of Human Rights (UDHR) which lays down that 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' as well as '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.' Building upon this provision, Article 15(1) ICESCR recognizes three different rights: the right (1) to take part in cultural life; (2) to enjoy the benefits of scientific progress and its

applications; and (3) to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author. Article 15(2) to (4) provides additional clarifications as to what these rights require from states parties:

> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

p. 287 ↵ Echoing this provision, the specialized UN human rights conventions—the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Article 5(e)(iv)); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Article 13(c)); the Convention on the Rights of the Child (CRC) (Article 31(2)); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) (Article 43(1)(g)); and the Convention on the Rights of Persons with Disabilities (CPRD) (Article 30(1))—prohibit discrimination against specific categories of people in the enjoyment of the right to cultural life. At the regional level, the right to take part in the cultural or artistic life of the community is recognized in the American Declaration of the Rights and Duties of Man (Article 13), which preceded the UDHR, as well as in Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. It is also proclaimed in the African Charter on Human and Peoples' Rights (Article 17(2)),[7] as well as in the ASEAN Human Rights Declaration (Article 32). By contrast, the European Convention on Human Rights (ECHR) contains no similar provision, while the Revised European Social Charter only mentions an obligation for states to take measures to enable persons with disabilities to access cultural activities (Article 15(3)) and elderly persons to play an active part in cultural life (Article 23). The Inter-American Convention on Protecting the Human Rights of Older Persons guarantees more generally 'the right to culture' (Article 21).

In addition, in the human rights literature, it has become increasingly common to speak of *cultural rights* when referring to the special rights recognized to minorities and indigenous peoples in order to enable them to preserve their distinct identity.[8] International instruments relating to these groups, like Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, or the Council of Europe Framework Convention on the Protection of National Minorities, do not explicitly label the rights they lay down as *cultural rights*. Yet, they contain numerous references to the notions of *culture*, *cultural identity*, or *cultural practices*. In particular, Article 27 ICCPR recognizes the right of persons belonging to minorities 'to enjoy their own culture'. The European Charter for Regional or Minority Languages includes an obligation for states to recognize the regional or minority languages 'as an expression of cultural wealth' (Article 7(1)(a)).[9] The evolution of the understanding of the right to take part in cultural life under Article 15 ICESCR has provided further support for this usage of the phrase *cultural rights*.

Since the right to education and the rights of minorities and indigenous peoples are dealt with in other chapters of this book,[10] this chapter focuses on the rights recognized in Article 27 UDHR and Article 15 ICESCR. One notion is central to these provisions, that of 'cultural life'. Section 2 traces the evolution of the interpretation of this concept. The three sections that follow analyse the content and scope of the three rights protected in these two articles: the right to take part in cultural life (Section 3), the right to science (Section 4), and the right of authors and inventors to the protection of their moral and material interests (Section 5).

p. 288

2 What is 'Cultural Life'?

The *travaux préparatoires* of the UDHR indicate that for its framers, the notion of 'cultural life' appearing in Article 27 meant intellectual and artistic activities.[11] More precisely, it was 'high culture' that they had in mind, that is, the traditional canons of literature, music, art, and so on.[12] The provision was primarily aimed at recognizing the right of the masses to access lofty cultural resources, which had so far been the privilege of an elite.[13]

With time, however, the interpretation of the term 'cultural life' used in Article 27 UDHR and Article 15 ICESCR has undergone a double evolution. First, the notion has been extended beyond *high culture* to include *popular* or *mass culture*. Second, it has been progressively acknowledged that the concept not only refers to the idea of culture as intellectual and artistic expressions (culture as the *life of the mind*) but also covers culture in an anthropological sense (culture as a *way of life*).

2.1 From High Culture to Popular Culture

The work of the United Nations Educational, Scientific and Cultural Organization (UNESCO) had an important influence on the evolution of the interpretation of 'culture' and 'cultural life' in the context of UN human rights instruments. Departing from the vision of the UDHR drafters, the UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, states that 'culture is not merely an accumulation of works and knowledge which an élite produces, collects and conserves in order to place it within the reach of all'.[14] Rather, it includes 'all forms of creativity and expression of groups or individuals'.[15] Thus:

> by participation in cultural life is meant the concrete opportunities guaranteed for all groups or individuals to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society.[16]

This text clearly asserts that cultural life is not restricted to high culture but also extends to non-elitist cultural expressions. This broader approach to cultural life was taken up by the Committee on Economic, Social and Cultural Rights. In the Revised Guidelines regarding the reports to be submitted by states under the ICESCR, adopted in 1991, the right to take part in cultural life is described as 'the right of everyone to take part in the cultural life *which he or she considers pertinent*', including popular forms of culture such as cinema

and traditional arts and crafts.[17] Under the current Guidelines, drafted in 2008, states are requested to provide information on the measures taken to promote popular participation in, and access to, concerts, theatre, cinema, and sport events, as well as information technologies such as the internet.[18]

p. 289

2.2 From Culture as the Life of the Mind to Culture as a Way of Life

The second transformation affecting the concept of cultural life was more profound. The inclusion of popular cultural expressions within the notion of cultural life did not modify its basic nature: cultural life was still conceived as a specific sphere of activities within society, relating to creativity, imagination, and artistic or intellectual endeavours. By contrast, the endorsement of an anthropological conception of culture entailed a considerable expansion of its scope: this latter notion of culture basically embraces the whole way of life of a social group. It can encompass *any* social activity or expression that is specific to a given population: from art, language, or religion to techniques, economic activities, customs, laws, conception of the family, and so on. At the same time, the anthropological approach to culture focuses on traits which are *specific* to a given community. The right to culture in this latter sense becomes the right to one's *own* culture. It overlaps with minority protection and indigenous peoples' rights.

UNESCO had a leading role in this evolution. As early as 1982, the Mexico City Declaration on Cultural Policies defined culture as 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group', including 'not only the arts and letters, but also modes of life, the fundamental rights of the human beings, value systems, traditions and beliefs'.[19] The UNESCO Universal Declaration on Cultural Diversity embraces the same conception of culture.[20] A similar approach was progressively endorsed by the Committee on Economic, Social and Cultural Rights. During a day of general discussion on the right to take part in cultural life, organized by the Committee in 1992, various members declared that 'culture meant a way of life' and that taking part in cultural life 'embraced all the activities of the individual'.[21] The Committee's General Comment 21 on the right of everyone to take part in cultural life, adopted in 2009, confirms this evolution. Culture is described in it as 'encompassing all manifestations of human existence.'[22] For the purpose of Article 15 ICESCR, it includes:

> inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.[23]

This expansion of the concept of cultural life, while encouraged by many authors,[24] has been criticized by some.[25] Critics argue that the definition proposed in the General Comment is so broad that it is very difficult to identify specific individual entitlements and state obligations. Some also fear that the emphasis now put in the context of Article 15 ICESCR on the protection of minorities and indigenous peoples, two subjects already

p. 290 ↵ covered by more specialized international instruments, risks reinforcing the traditional neglect affecting what initially was the main objective of this provision: promoting access to and the participation of everyone, including the most disadvantaged, to culture in its artistic and intellectual sense.[26] This expansive

approach, however, has been endorsed recently by the Inter-American Court of Human Rights (IACtHR). In *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina*, the Court found that practices that detrimentally impacted indigenous communities' traditional lifestyle, such as illegal logging, livestock raising, and overgrazing in their territory, resulted in a violation of their right to take part in cultural life.[27]

3 The Right to Take Part in Cultural Life

The Committee on Economic, Social and Cultural Rights has endeavoured to clarify the content, scope, and implications of the right to take part in cultural life protected by Article 15(1)(a) ICESCR in its General Comment 21. In line with the evolution described in Section 2, it attempts to do this on the basis of what can be termed a 'bi-dimensional' conception of culture, as meaning *both* the life of the mind and particular ways of life.

3.1 The Normative Content of the Right to Take Part in Cultural Life

General Comment 21 distinguishes between three main components of the right to take part in cultural life.[28] First, *participation* in cultural life means the right to freely choose one's identity and engage in one's own cultural practices, as well as to express oneself in the language of one's choice. Second, *access* to cultural life covers the right to know one's own culture and that of others through education and information, the right to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language, or specific institutions, and the right to benefit from the cultural heritage and creations of others. Finally, *contribution* to cultural life refers to the right to be involved in creating the spiritual, material, intellectual, and emotional expressions of the community. This is supported by the right to take part in the elaboration and implementation of policies that have an impact on cultural rights.

The Committee on Economic, Social and Cultural Rights has applied the tripartite distinction—*respect*, *protect*, and *fulfil*[29]—to specify the corresponding obligations of states parties to the right to take part in cultural life. The obligation to *respect* requires states to refrain from interfering with the enjoyment of the right.[30] This entails a duty to guarantee various rights and freedoms inherent in the right to participate in culture: the right to freely choose one's own cultural identity; the freedom to create, which implies the abolition of censorship of cultural and artistic activities; freedom of expression in the language of one's choice; the right to access one's own cultural heritage and that of others; and the right to take part freely in decision-making processes that may have an impact on cultural rights. Freedom to create is explicitly protected in Article 15(3) ICESCR, under which states must undertake 'to respect the freedom indispensable for scientific research and creative activity.' It can, moreover, be seen as a particular application of the right to freedom of expression.[31] The European Court of Human Rights has indeed acknowledged ↵ that freedom of expression under the ECHR covers freedom of artistic expression,[32] as well as academic freedom.[33]

p. 291

To meet their *obligation to protect*, states must take measures to prevent non-state actors from interfering in the exercise of the right. In addition, the Committee has linked four further sets of concerns to this obligation to protect.

First, states must protect cultural heritage in all its forms at all times, whether in time of war or peace and in the case of natural disasters.[34] This echoes the numerous international treaties dealing with the preservation of cultural heritage.[35] To be sure, these other treaties are not human rights instruments: their object is to secure the protection of cultural heritage, not to confer rights to individuals. Yet, given that cultural heritage —whether tangible, intangible, or natural—includes resources that are indispensable to allow individuals to enjoy their cultural rights, its preservation is of major importance to make these rights effective.[36] It was initially in the context of armed conflicts that an international regime of protection was established.[37] Later on, other instruments have been adopted to organize the international protection of cultural heritage in time of peace.[38] Relevant instruments have also been adopted at the European level in the Council of Europe, notably the Framework Convention on the Value of Cultural Heritage for Society. According to the UN Special Rapporteur in the field of cultural rights, the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity, whether in time of war or peace, has now reached the level of customary international law.[39]

A second aspect of the obligation to protect is the protection of cultural heritage of all groups and communities in economic development policies. The General Comment insists that 'particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services and deregulation on the right to participate in cultural life.'[40] It is often observed that economic globalization tends to favour cultural products and models of wealthier countries, resulting in the standardization of culture and marginalization of cultural expressions of poorer or smaller countries. The World Trade Organization (WTO) and international trade agreements concluded under its auspices have been criticized for undermining the ability of governments to maintain policies aimed at sustaining national cultural industries and creation.[41] This fear prompted the adoption ↵ of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which aims 'to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning' (Article 1(g)). Crucially, states parties 'reaffirm their sovereign rights to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions' (Article 5(1)). The Committee on Economic, Social and Cultural Rights' preoccupation, however, goes beyond the protection of states' national cultures in international trade: the General Comment stresses the need to protect, in particular, the cultural heritage of 'the most disadvantaged and marginalized individuals and groups' in economic development.[42] It thereby suggests that the protection of the right to take part in cultural life requires intervention by the state to regulate culture-related economic activities and support certain forms of cultural production with a view to ensuring that all groups and individuals, within their population, are able to maintain the cultural heritage they cherish.

p. 292

A third dimension of the obligation to protect the right to take part in cultural life lies with the duty to defend the cultural productions of indigenous peoples, notably their traditional knowledge, natural medicines, folklore, and rituals. This includes protecting their lands and resources from illegal or unjust exploitation by state entities and private companies.[43] The IACtHR has established that when dealing with major development or investment plans that may have a profound impact on the traditional territory of an indigenous people, states must not only carry out prior consultation with this people, but also obtain their free, prior, and informed consent, in accordance with their traditions and customs.[44] This principle has also been endorsed by the Human Rights Committee in the context of Article 27 ICCPR.[45] The IACtHR, moreover,

has established that failure of a state to prevent groups of individuals from engaging in activities that are harmful to the traditional way of life of indigenous communities, like illegal logging, livestock raising, and overgrazing in the territory of those communities, entails a violation not only of their right to a healthy environment, adequate food, and water, but also of their right to take part in cultural life.[46]

Finally, the Committee on Economic, Social and Cultural Rights also mentions, as part of the obligation to protect, the duty to prohibit discrimination based on cultural identity and incitement to discrimination, hostility, or violence on the basis of national, racial, or religious features.[47]

The *obligation to fulfil* entails a duty for states to take appropriate legislative, administrative, budgetary, judicial, and other measures necessary for the full realization of the right. This level of obligation includes an obligation to *facilitate* and *promote* the right as well as, in some circumstances, to *provide* conditions under which the right can be enjoyed:

- To *facilitate* the exercise of the right to participate in cultural life, states should establish and support public cultural institutions, develop adequate policies for the protection of cultural diversity, and grant assistance to individuals or organizations engaged in creative and scientific activities (artists, cultural associations, science academies, and so on). They should also support minorities and other communities in their efforts to preserve their culture.[48]

p. 293

- The obligation to *promote* requires states to ensure appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, as well as in relation to minorities and indigenous peoples.[49]

- Finally, states must *provide* individuals with the means necessary for the enjoyment of the right when, for reasons outside their control, they are unable to realize this right by themselves. The Committee ranks in this category the duty to preserve and restore cultural heritage; the duty to include cultural education, including history, literature, music, and teaching of other cultures, in school curricula; and the obligation to guarantee access for all, including disadvantaged groups, to cultural institutions (museums, libraries, cinemas, theatres, etc) and activities. Effective mechanisms should, moreover, be established to allow persons, individually, in association with others, or within a group, to participate effectively in decision-making processes.[50] The IACtHR has especially insisted on the duty of states to carry out prior consultation with indigenous communities on the exploitation of natural resources in their territory. It considers this obligation to be a general principle of international law.[51]

Among these elements, the Committee on Economic, Social and Cultural Rights identifies ‘core obligations’, that is, minimum essential levels of the right which all states must implement immediately, by contrast with other obligations that may be achieved progressively, depending on available resources. States must at least create and promote an environment within which people can participate in the culture of their choice. This entails the immediately applicable obligations to guarantee non-discrimination and gender equality in the enjoyment of the right to take part in cultural life; to respect the right of everyone to identify or not identify with one or more communities; to respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights; to eliminate barriers or obstacles to people’s access to their own culture or other cultures; and to allow and encourage the participation of members of minorities, indigenous peoples, or other communities in the design and implementation of laws and policies affecting them.[52]

3.2 Groups Requiring Special Attention

For different reasons, certain groups require particular attention in the implementation of the right to take part in cultural life.

First of all, for some categories of people, special measures are needed to enable them to effectively access the cultural resources, activities, and infrastructures necessary for the enjoyment of this right. In the case of *persons with disabilities*, Article 30 CRPD requires steps to be taken to ensure access to cultural materials; television programmes, films, theatre, and other activities; and cultural infrastructures, such as theatres, museums, cinemas, libraries, tourist services, and, as far as possible, monuments and sites of national cultural importance. Moreover, their specific cultural and linguistic identity, including sign language, should be recognized.[53] The Committee on Economic, Social and Cultural Rights ↵ also emphasizes the need to pay particular attention to the promotion of cultural rights of *older persons*. It refers to the 1982 Vienna International Plan of Action on Aging, which encourages governments to support programmes aimed at providing these persons with easier physical access to cultural institutions and calls for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture, and spiritual values.[54] Additionally, the Committee expresses concern at the situation of *persons living in poverty* and urges states parties to take concrete measures to bring culture within the reach of all and ensure the full exercise of the right to enjoy and take part in cultural life by persons living in poverty.[55]

p. 294

Minorities, *indigenous peoples*, and *migrants* are in a specific situation from the viewpoint of the right to take part in cultural life because they have a cultural heritage that differs from that of the majority. Accordingly, they are at risk of being subject to assimilation policies by the authorities. The Committee on Economic, Social and Cultural Rights insists that minorities should have the right to take part in the cultural life of the society at large as well as to conserve, promote, and develop their own culture.[56] In line with Article 31 ICRMW, it notes that the protection of cultural identities, language, religion, and folklore of migrants should receive particular attention.[57] In relation to indigenous peoples, the Committee considers that Article 15(1) ICESCR requires measures to be taken to protect their right to own, develop, control, and use their communal lands and resources as well as to act collectively to maintain and develop their cultural heritage, traditional knowledge, and cultural expressions.[58]

Finally, *women* and *children* must also be given special consideration. The Committee on Economic, Social and Cultural Rights highlights the duty of states to eliminate institutional and legal obstacles as well as those based on customs and traditions that prevent women from participating fully in cultural life, science, education, and research.[59] As for children, they 'play a fundamental role as the bearers and transmitters of cultural values from generation to generation.'[60] The right to take part in cultural life in their case is closely linked to the right to education. States should ensure that education is culturally appropriate, which means that it should enable children to develop their cultural identity and to learn about the culture of their own communities as well as of others.[61] Accordingly, school curricula for all children should respect the cultural specificities of minorities and indigenous peoples and incorporate their history, knowledge, cultural values, and aspirations.[62]

3.3 Limitations to the Right

As with the other rights set out in the ICESCR, the right to take part in cultural life is not absolute. It may be subject to limitations. Such restrictions must, however, respect certain conditions: they must be determined by law, compatible with the nature of the right, and strictly necessary for the promotion of the general welfare in a democratic society.[63]

p. 295 ↵ Of special concern here are cultural practices that conflict with certain human rights. The extension of the notion of 'cultural life' to culture in the anthropological sense has made this problem especially salient. Various practices anchored in cultural traditions are in tension with some human rights, in particular women's rights. The Committee on Economic, Social and Cultural Rights has emphasized in this regard that limitations to the right to take part in cultural life may be necessary to counter 'negative practices, including those attributed to customs and traditions, that infringe upon other human rights.'[64] In fact, the Committee has gone even further and asserted that taking steps to combat customary or traditional practices harmful to the well-being of persons, such as female genital mutilation, are in fact *required* by the right to take part in cultural life. Failing to do so constitutes a violation of this right insofar as such practices constitute barriers to the full exercise of the right by the affected persons.[65]

Interestingly, in some contexts, conflicts may arise between different aspects of the right to take part in cultural life. For instance, artistic freedom may in principle be limited by the prohibition of incitement to discrimination, hostility, and violence against an ethnic or religious group. Yet, evaluating whether a novel, song, or other work of art constitutes such form of incitement may raise arduous questions. As recognized by the European Court of Human Rights, it is important to take into account the particular nature of artistic expression, which can take metaphorical or satiric forms.[66] One must also be mindful of the risk that state authorities instrumentalize the accusation of incitement to hostility or violence to justify censorship of artistic creations that touch upon sensitive issues. In some states, in the name of combating incitement to religious hatred or protecting the religious feelings of believers, penal sanctions are imposed on artists who mock or criticize religious doctrines.[67] But it is in the nature of art to challenge conventions, moral codes, and traditions. Artistic freedom must include the right to create works that 'offend, shock or disturb the State or any sector of the population', to use a famous quotation of the European Court of Human Rights.[68] This discussion reveals a potential tension between the two approaches to culture now brought together in the interpretation of the right to take part in cultural life. Artistic freedom, which pertains to culture understood as artistic and intellectual activities, has a distinctly individualist character: it includes the freedom of individual artists to question, subvert, or contest dominant social norms and identities. By contrast, the right to enjoy one's own culture in the anthropological sense has a communitarian and somewhat conservative connotation: it is primarily the right to preserve a community's traditions and way of life inherited from the past. Finding the right balance between these two dimensions of the right to take part in cultural life may not always be easy.

p. 296 # 4 The Right to Science

The right of everyone 'to enjoy the benefits of scientific progress and its applications', protected in Article 15(1)(b) ICESCR, has long been overlooked by human rights advocates and institutions.[69] Yet it was rediscovered in the 1990s in the context of the controversies generated by the expansion of the international

intellectual property regime.[70] Many argued that this latter development restricted the ability of the general public, and especially the most disadvantaged, to benefit from scientific advancements, with a detrimental impact on the enjoyment of various rights (see Section 5). Against this background, the right provided for in Article 15(1)(b) started to attract more attention. Between 2007 and 2009, three expert meetings were convened by UNESCO, with the collaboration of academic institutions, resulting in the 2009 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, which attempts to clarify the normative content of this right. The UN Special Rapporteur in the field of cultural rights published a report on the subject in 2012.[71] Building on these efforts, the Committee on Economic, Social and Cultural Rights adopted a General Comment on this right in 2020.[72]

4.1 Essential Elements of the Right

The General Comment from the Committee on Economic, Social and Cultural Rights usefully clarifies the content of the 'right to science', which has long been viewed as vague and obscure. This right encompasses not only a right to *receive* the benefits of the applications of scientific progress, but also to *participate* in scientific progress.[73] These two dimensions translate into five essential elements.

First, states must ensure the *availability* of science, which entails taking steps for its conservation, its development, and its dissemination as required under Article 15(2) ICESCR. This implies securing adequate funding and policies to foster scientific research, disseminate scientific knowledge (including by promoting open science and open-source publication of research), and make its applications and benefits available, especially to vulnerable and marginalized groups. Particular emphasis is put on scientific education which should be adequately financed.[74]

Second, states are required to secure the *accessibility* of scientific progress and its applications to all persons, without discrimination. This means ensuring that everyone has equal access to the applications of science, particularly when they are instrumental for the enjoyment of other economic, social, and cultural rights, like vaccinations (see Section 5); that information relating to the risks and benefits of science and technology is accessible to all; and that everyone has the opportunity to participate in and benefit from scientific progress without discrimination.[75] To this latter end, states must adopt measures and ↵ policies to eliminate barriers that hinder the access of women, persons with disabilities, and persons living in poverty to quality scientific education and careers. In relation to women, the Committee adds that temporary special measures such as quotas might be necessary.[76]

p. 297

Third, states should protect the *quality* of scientific creation and applications, taking into account the most advanced, up-to-date, and verifiable science according to the standards generally accepted by the scientific community. This includes regulation and certification that may be necessary to ensure the ethical development of science and the protection of people participating in research or tests. Importantly, states should guarantee that these persons have given their free, prior, and informed consent.[77]

Fourth, states should ensure the *acceptability* of the right to science. This requires the incorporation of ethical standards into scientific research, such as the standards proposed in the UNESCO Universal Declaration on Bioethics and Human Rights. Furthermore, efforts need to be made to ensure that science is explained and its applications disseminated in such a way as to facilitate their acceptance in different cultural and social contexts, without jeopardizing their integrity and quality.[78]

Fifth, the right to science entails the protection of academic freedom. This includes the freedom to seek, receive, and impart scientific information as well as the freedom to develop international collaboration among scientists.[79] The Committee also identifies a duty for states to refrain from 'disinformation, disparagement or deliberate misinformation intended to erode citizen understanding of and respect for science and scientific research'.[80]

A theme that pervades the General Comment as a whole is that special efforts should be made to combat persistent inequalities in the enjoyment of this right and ensure that disadvantaged and vulnerable groups—in particular, people living in poverty, women, persons with disabilities, and indigenous peoples—are able to both contribute to and benefit from scientific progress. States should use the maximum of their available resources to overcome the hurdles that any person may face to benefit from new technologies or other forms of scientific advancements.[81]

4.2 Linkages With Other Rights

The right under Article 15(1)(b) is an essential tool for the realization of other economic, social, and cultural rights, especially the right to food and the right to health.[82]

In relation to the right to food, the Committee on Economic, Social and Cultural Rights has introduced in General Comment 25 a cautious critique of the impact of certain scientific developments. While recognizing that technological advancements have increased agricultural productivity, contributing to reduction of famine, the Committee acknowledges the environmental impacts of certain technologies associated with the Green Revolution and the risks entailed by an increased dependence on technology providers. Hence, the Committee stresses the need to interpret the right to science in accordance with the right of peasants and others working in rural areas to choose which technologies suit them best, as acknowledged ↵ in Article 15(4) of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.[83] States should also take measures to ensure that agricultural research integrates the needs of peasants and other people working in rural areas.[84]

p. 298

Regarding the right to health, states must 'promote scientific research, through financial support or other incentives, to create new medical applications and make them accessible and affordable to everyone', including the most vulnerable. The Committee, however, notes the difficulties stemming in this regard from intellectual property regimes and insists that the latter should not be applied to the detriment of the right to health.[85]

4.3 Right to Science and Intellectual Property

More generally, the Committee on Economic, Social and Cultural Rights has observed in its General Comment 25 that intellectual property has an ambivalent relationship with the right to science. While it can enhance the development of science and technology through economic incentives for innovations, it can negatively affect scientific advancement and access to its benefits in at least three ways: (1) it can create distortions in the funding of scientific research as private funders might support only research projects that are profitable; (2) it may hinder the sharing of information on scientific research and access to scientific publication; and (3) it may pose significant (financial) obstacles to access by low-income persons or developing countries to the benefits of scientific progress, notably in the field of health. Hence, states should take specific measures to foster the positive impact of intellectual property on the right to science, while at the same time avoiding its possible negative effects on the enjoyment of economic, social, and cultural rights.[86] This points towards a wider debate, which is at the core of current discussions on Article 15(1)(c) ICESCR, that of the relationship between intellectual property and human rights law.

5 The Rights of Authors and Inventors

While the right to take part in cultural life and the right to science concern the whole population, the third right recognized in Article 15 ICESCR concerns a specific category of persons, namely scientists, writers, and artists. Similar to Article 27(2) UDHR, Article 15(1)(c) ICESCR provides that 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.' The insertion of this clause in the UDHR generated vociferous debates during the drafting process. Introduced at the insistence of the French delegation, Article 27(2) was strongly opposed by several delegations, including those of the UK and the US, who contested that intellectual property was a basic human right. Chile pointed out the potential conflict between the protection of intellectual work and freedom of access to literary, artistic, or scientific output. Nevertheless, a majority of states voted in favour of this right.[87]

p. 299

5.1 Human Rights and Intellectual Property

A crucial question raised by the right under Article 15(1)(c) ICESCR is that of its relationship with intellectual property law, which has been developed largely outside the human rights framework, through domestic legislation, bilateral agreements, and multilateral treaties.[88] Broadly stated, this body of law aims to safeguard the producers of intellectual goods or services by granting them certain time-limited rights that allow them to prohibit or authorize the use of those productions by others and to draw financial reward from such use.[89] Whereas *copyright* relates to literary and artistic creations (such as books, music, paintings, or films) and technology-based works like computer programs and electronic databases, *industrial property* covers the protection of inventions through patents, as well as trademark and industrial design protection. Importantly, a patent holder may benefit from a right of exclusion: once a patent has been granted in a certain country, the patentee can exclude others from making, using, or selling the protected invention in that country.[90] In all national systems, however, there are some exceptions and limitations to intellectual property rights.

While human rights and intellectual property rights have long developed in relative isolation from each other, this changed radically with the adoption of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement by the WTO in 1994. TRIPS had the effect of imposing high minimum standards of intellectual property on all WTO member states, including on developing countries where copyright and patent laws were, at that time, absent or very limited. This generated intense criticism. It was observed that strict intellectual property models were likely to significantly disadvantage less developed countries by increasing the costs of development, in a context where industrialized countries hold the overwhelming majority of the patents registered worldwide. Furthermore, it was realized that intellectual property norms could hamper the achievement of various human rights, in particular the rights to health and to food.[91] A number of UN human rights institutions expressed serious concerns about this development. In 2000, the Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/7 on 'Intellectual Property Rights and Human Rights', stating that 'actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realisation of economic, social and cultural rights'.[92] The following year, the UN High Commissioner for Human Rights drafted a report on the impact of TRIPS on human rights, focusing on the right to health.[93] Also in 2001, the Committee on Economic, Social and Cultural Rights adopted a statement on 'Human rights and intellectual property'.[94] All these documents insisted on the primacy of human rights obligations over TRIPS and called upon states to ensure that intellectual property regulations correspond with international human rights law.

p. 300 ↵ The tensions between intellectual property rules and human rights are especially acute in the case of the right to health. The standard justification for the intellectual property system is that it creates an incentive for innovation, including in the pharmaceutical field. Yet, because it links innovation to commercial motivation, the system of intellectual property entails that research is directed first and foremost towards 'profitable' diseases, namely diseases that are prevalent in rich countries, where the return is likely to be the greatest.[95]

Additionally, whereas affordability of medicines is a central component of the right to health, medical patents result in higher prices for drugs, which restrict access for the poor. The problem became particularly salient in relation to the HIV/AIDS pandemic that predominantly affects the populations of developing countries. More recently, in the context of the COVID-19 pandemic, the grossly unequal global distribution of vaccines to the detriment of developing and low-income countries, due in large part to the effects of intellectual property regimes, has reignited this debate. The Committee on Economic, Social and Cultural Rights declared that access to a safe and effective vaccine against COVID-19 is an essential component of both the right to health and the right to enjoy the benefits of scientific progress and its applications. States are thus under an obligation to take all necessary measures to prevent intellectual property and patent legal regimes from impeding access to such vaccines.[96]

The impact of intellectual property on the right to food has also become a source of major concern. In order to encourage innovation in agriculture, intellectual property has been extended to new plant varieties in the form of patents and plant breeders' rights. As a result, a few agricultural corporations have acquired virtual monopolies on the genome of important crops, enabling them to set prices at levels far exceeding actual costs. In consequence, poor farmers experience difficulties in accessing seeds and production resources. This situation, moreover, can lead to higher prices for food, making it less affordable for the poorest.[97]

Another crucial debate concerns the protection of traditional knowledge (relating to medicine, agriculture, etc) and artistic creations of indigenous communities. These intellectual goods rarely qualify for intellectual property protection because they are usually considered by the community to belong to the whole group, whereas intellectual property rules presuppose a single owner. Accordingly, such knowledge and creations are considered to be part of the public domain, which makes them available for exploitation and appropriation by third parties. This leads to a situation called 'biopiracy', 'whereby traditional knowledge is expropriated and patented by outsiders without the indigenous sources receiving any benefit'.[98] In an effort to counter this phenomenon, Article 31(1) of the UN Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples 'to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional expressions'.

5.2 The Content and Limitations of the Right Under Article 15(1)(c) ICESCR

Against the backdrop of these controversies, in 2005 the Committee on Economic, Social and Cultural Rights issued a General Comment on the right protected in Article 15(1)(c). At the outset, the Committee asserts that this right 'does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international ↵ agreements.'[99] The right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author is a *human right*, which derives from the inherent dignity and worth of all persons, while intellectual property rights are first and foremost *means* by which states seek to advance societal interests, namely to 'provide incentive for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.'[100] The right under Article 15(1)(c) is essentially aimed at safeguarding the personal link between authors and their creations and allowing them to enjoy an adequate standard of living, whereas intellectual property regimes 'primarily protect business and corporate interests and investments.'[101] Ultimately, 'intellectual property is a social product with a social function.'[102]

p. 301

The Committee thus distinguishes the right under Article 15(1)(c) from intellectual property rights.[103] Yet the approach developed in the General Comment denotes a conceptual framework that 'is still largely influenced by existing intellectual property rights frameworks.'[104] According to the Committee, the 'moral interests' referred to in the provision include the right of authors to be recognized as the creators of their intellectual productions and to object to any distortion, mutilation, or modification which would be prejudicial to their honour and reputation.[105] The protection of 'material interests' is meant to allow authors to enjoy an adequate standard of living.[106] Among the obligations imposed on states lies the duty to 'prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies.' This may be achieved 'by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of any use made of their productions and to remunerate them adequately.'[107]

Furthermore, the Committee asserts that states should take action to effectively protect the interests of indigenous peoples in relation to their intellectual productions, which are often expressions of their cultural heritage and traditional knowledge.[108] As seen already, a similar obligation has also been derived by the

Committee from the right to take part in cultural life, which in its view entails a duty to defend the cultural productions of indigenous peoples, including their traditional knowledge and natural medicines, against unjust exploitation by state entities or private companies.[109]

The rights of authors, scientists, and inventors can be subject to limitations provided they are compatible with the essential aims of the right, namely protecting their personal link with their creation and allowing them to enjoy an adequate standard of living.[110] Significantly, the Committee calls for an adequate balance to be struck between state obligations under Article 15(1)(c) and under the other provisions of the Covenant:

p. 302

> In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.[111]

In particular, states parties 'have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education.'[112]

Importantly, the Committee insists that the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which one is the author is intrinsically linked to the other rights recognized in Article 15, the right of everyone to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, as well as the right to artistic and academic freedom. The relationship between these rights 'is at the same time mutually reinforcing and reciprocally limitative.'[113] The Committee thereby calls for a holistic interpretation of Article 15 ICESCR, implying the search for a fair equilibrium between the rights of authors and inventors to the protection of their private interests and the right of the public to access culture and science.

6 Conclusion

The cultural rights recognized in Article 27 UDHR and Article 15 ICESCR have traditionally been neglected in human rights theory and practice. Today, however, these rights are attracting growing attention. They prove to be particularly relevant to some crucial debates of our time, such as how to protect local cultures in the face of economic globalization; how to safeguard indigenous peoples', minorities', and migrants' rights to preserve their cultural heritage; how to ensure access for all to essential scientific advancements; or how to prevent intellectual property rules from hindering the enjoyment of human rights. Nonetheless, many interpretive questions remain. Two issues in particular are likely to continue to generate discussions in the years to come. One is how to develop an effective protection of cultural life given the very broad conception that has been endorsed by the Committee on Economic, Social and Cultural Rights, as including both culture as intellectual and artistic expressions and culture in the anthropological sense. A second critical question is

how to find the right balance between the different components of Article 15 ICESCR, in particular the right of authors and inventors to the protection of their interests, on the one hand, and, on the other hand, the right of everyone to access culture and science.

p. 303

Further Reading

BEIDER and PORSDAM (eds), *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (Edward Elgar, 2017).

BESSON, 'Science without Borders and the Boundaries of Human Rights: Who Owes the Human Right to Science?' (2015) 4 *European JHR* 462.

CULLET, 'Human Rights and Intellectual Property Protection in the TRIPS Era' (2007) 29 *HRQ* 404.

DONDERS, *Towards a Right to Cultural Identity?* (Intersentia, 2002).

EIDE, 'Cultural Rights as Individual Human Rights' in Eide, Krause, and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2001) 289.

FRANCIONI and SCHEININ (eds), *Cultural Human Rights* (Martinus Nijhoff, 2008).

HELFER and AUSTIN, *Human Rights and Intellectual Property: Mapping the Global Interference* (Cambridge University Press, 2011).

MCGOLDRICK, 'Culture, Cultures, and Cultural Rights' in Baderin and McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 447.

PLOMER, 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science' (2013) 35 *HRQ* 143.

PORSDAM, *The Transforming Power of Cultural Rights: A Promising Law and Humanities Approach* (Cambridge University Press, 2019).

SHAVER, 'The Right to Science: Ensuring that Everyone Benefits from Scientific and Technological Progress' (2015) 4 *European JHR* 411.

STAMATOPOULOU, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff, 2007).

THORNBERRY, 'Cultural Rights and Universality of Human Rights', Contribution to the Day of General Discussion on 'The right to take part in cultural life' organized by the UN Committee on Economic, Social and Cultural Rights (9 May 2008).

VRDOLJAK (ed), *The Cultural Dimension of Human Rights* (Oxford University Press, 2013).

Useful Websites

UN Committee on Economic, Social and Cultural Rights: **<http://www2.ohchr.org/english/bodies/cescr/** *<http://www2.ohchr.org/english/bodies/cescr/>***>**

Day of General Discussion on 'The right to take part in cultural life', UN Committee on Economic, Social and Cultural Rights, 9 May 2008 (including background papers from experts): **<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/DiscussionMay2008.aspx** *<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/DiscussionMay2008.aspx>***>**

Day of General Discussion on 'The right to enjoy the benefits of scientific progress', UN Committee on Economic, Social and Cultural Rights, 9 October 2018 (including background papers from experts): **<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2018.aspx** *<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2018.aspx>***>**

UN Special Rapporteur in the field of cultural rights: **<http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx** *<http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx>***>**

Questions for Reflection

p. 304

1. Is there a common thread that unites the different rights recognized in Article 15 ICESCR or should they be considered as different rights artificially grouped together?
2. The understanding of 'cultural life' within the meaning of Article 15(1) ICESCR has evolved from initially referring to intellectual and artistic expression to also include the protection of a specific way of life. Do you think this evolution strengthens or undermines the right to take part in cultural life?
3. How should cultural practices that contradict certain human rights, in particular women's rights, be analysed from the viewpoint of cultural rights?
4. Compared to the other rights recognized in the ICESCR, what is the added value of the right of everyone to enjoy the benefits of scientific progress and its applications?
5. To what extent can the right of authors and inventors to the protection of their moral and material interests under Article 15(1)(c) ICESCR be distinguished from intellectual property regimes?

Notes

[1] See Beneton, *Histoire de mots: Culture et civilisation* (Presses de la fondation nationale des sciences politiques, 1975).

[2] The British anthropologist Edward B Tylor is widely considered as the first author to propose this new definition of culture in *Primitive Culture* (John Murray, 1871).

[3] McGoldrick, 'Culture, Cultures, and Cultural Rights' in Baderin and McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP, 2007) 447.

[4] Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (1998) 158 *International Social Science J* 559; McGoldrick (2007), 447.

[5] Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff, 2007) 4–6.

[6] HR Council Res 10/23 (26 March 2009). In 2012, the Council conferred to the mandate holder the status of Special Rapporteur in the field of cultural rights: HR Council Res 19/6 (16 March 2012). For an overview of the work carried out during the first ten years of this mandate, see Cultural Rights: Tenth Anniversary Report, A/HRC/40/53 (17 January 2019). See also Beider and Porsdam (eds), *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (Edward Elgar, 2017).

[7] See also African Charter on the Rights and Welfare of the Child, Art 12; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Art 17.

[8] eg Stamatopoulou (2007); Francioni and Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff, 2008); Eide, 'Cultural Rights as Individual Human Rights' in Eide, Krause, and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2001) 289.

[9] See Mancini and de Witte, 'Language Rights as Cultural Rights: A European Perspective' in Francioni and Scheinin (2008) 247.

[10] See Chapters 12 and 18.

[11] Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 217–19.

[12] O'Keefe, 'The Right to Take Part in Cultural Life under Article 15 of the ICESCR' (1998) 47 *ICLQ* 904, 905.

[13] O'Keefe (1998) 906; Donders, *Towards a Right to Cultural Identity?* (Intersentia, 2002) 141.

[14] (1976), Preamble, 5th recital, subpara (c).

[15] Para 3(a).

[16] Art 2(b). See also UNESCO Universal Declaration on Cultural Diversity (2001).

[17] Revised Guidelines regarding the form and contents of reports to be submitted by states parties under Arts 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, E/1991/23, 88 at 108 (emphasis added); O'Keefe (1998) 913–14.

[18] Revised Guidelines on treaty-specific documents to be submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/2008/2, para 67.

[19] (2001), para 6. See also *Our Creative Diversity: Report of the World Commission on Culture and Development* (UNESCO, 1995).

[20] Preamble, para 5.

[21] E/1993/22, para 213.

[22] E/C.12/GC/21 (21 December 2009), para 11.

[23] CESCR, General Comment 21, para 13.

[24] eg Stamatopoulou (2007); Eide (2001); Stavenhagen, 'Cultural Rights: A Social Science Perspective' in Eide, Krause, and Rosas (2001) 85.

[25] McGoldrick (2007) 450–51; Romainville, *Le droit à la culture, une réalité juridique: Le droit de participer à la vie culturelle en droit constitutionnel et international* (Bruylant, 2014) 355–70.

[26] Romainville (2014).

[27] IACtHR Series C No 400 (6 February 2020) para 289.

[28] CESCR, General Comment 21, para 15.

[29] See Chapter 7.

[30] CESCR, General Comment 21, para 49.

[31] See Chapter 11.

[32] *Müller and others v Switzerland* (1991) 13 EHRR 212, para 27. See also *Dickinson v Turkey*, App no 25200/11, Judgment of 2 February 2021, paras 43, 54, and 55.

[33] *Sorguç v Turkey*, App no 17089/03, Judgment of 23 June 2009, para 35. See more generally ECtHR, *Cultural Rights in the Case-law of the European Court of Human Rights* (Council of Europe, 2011). See also CFREU, Art 13, which recognizes artistic and academic freedom.

[34] CESCR, General Comment 21, para 50(a).

[35] It can also be related to the duty incumbent upon states under ICESCR, Art 15(2) to take the necessary steps to ensure, inter alia, the conservation of culture.

[36] See Report of the independent expert in the field of cultural rights, A/HRC/17/38 (21 March 2011); Francioni, 'Culture, Heritage and Human Rights: An Introduction' in Francioni and Scheinin (2008), 1.

[37] Hague Conventions of 1899, Art 56, and 1907, Art 56; Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art 53; Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art 16; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art 4; Rome Statute of the International Criminal Court, Art 8(2).

[38] See eg Convention concerning the Protection of the World Cultural and Natural Heritage, Convention on the Protection of the Underwater Cultural Heritage, and Convention for the Safeguarding of Intangible Cultural Heritage, all concluded under the framework of UNESCO.

[39] Report of the Special Rapporteur in the field of cultural rights, A/71/317 (9 August 2016) para 24. See also the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage.

[40] CESCR, General Comment 21, para 50(b).

[41] Morijn, 'The Place of Cultural Rights in the WTO System' in Francioni and Scheinin (2008) 285; Voon, *Cultural Products and the World Trade Organization* (CUP, 2007).

[42] CESCR, General Comment 21, para 50(b).

[43] CESCR, General Comment 21, para 50(c).

[44] *Case of the Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007) para 137. In *Kichwa Indigenous People of Sarayuku v Ecuador*, IACtHR Series C No 245 (27 June 2012), the Court asserted that states' obligation to carry out prior consultation with indigenous communities on the exploitation of natural resources in their territory is a general principle of international law (para 164).

[45] HRC, General Comment 23, HRI/GEN/1/Rev.9 (Vol I) 207, para 7; *Angela Poma Poma v Peru*, CCPR/C/95/D/1457/2006 (27 March 2009) para 7.6.

[46] *Indigenous Communities of the Lhaka Honhat Association*, para 289.

[47] CESCR, General Comment 21, para 50(d).

[48] CESCR, General Comment 21, para 52.

[49] CESCR, General Comment 21, para 53.

[50] CESCR, General Comment 21, para 54.

[51] *Kichwa Indigenous People of Sarayaku*, para 164. The HRC has inferred from ICCPR, Art 27 a duty for states to take measures to ensure effective participation of indigenous peoples in decisions affecting their right to maintain a particular way of life associated with the use of land resources. See General Comment 23, para 7; *Angela Poma Poma*.

[52] CESCR, General Comment 21, para 55.

[53] CESCR, General Comment 21, paras 30–1.

[54] CESCR, General Comment 21, para 28. See also Inter-American Convention on Protecting the Human Rights of Older Persons, Art 21; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Art 17; European Social Charter, Art 23.

[55] CESCR, General Comment 21, paras 38–9.

[56] CESCR, General Comment 21, para 32.

[57] CESCR, General Comment 21, para 34.

[58] CESCR, General Comment 21, paras 36–7.

[59] CESCR, General Comment 21, para 25. See also CEDAW, Art 2(f).

[60] CESCR, General Comment 21, para 26. See also CRC, Art 31(2); African Charter on the Rights and Welfare of the Child, Art 12.

[61] CESCR, General Comment 21, para 26.

[62] CESCR, General Comment 21, para 27.

[63] ICESCR, Art 4. See CESCR, General Comment 21, para 19. See also Chapter 7.

[64] CESCR, General Comment 21, para 19.

[65] CESCR, General Comment 21, para 64.

[66] See *Dickinson v Turkey*, para 54.

[67] The European Court has admitted that the protection of 'the right of citizens not to be insulted in their religious feelings' can constitute a legitimate aim for the purposes of ECHR, Art 10(2) (limitations to free speech): *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34, para 48. In its later case law, it has, however, also recognized that a religious group must tolerate the denial by others of their religious beliefs and even the propagation of doctrines hostile to their faith, as long as it does not amount to incitement to religious hatred: *Tagiyev and Huseynov v Azerbaijan*, App no 13274/08, Judgment of 5 December 2019, para 44; *Klein v Slovakia* (2010) 50 EHRR 15; *Tatlav v Turkey*, App no 50692/99, Judgment of 2 May 1996.

[68] *Handyside v UK* (1979–80) 1 EHRR 737, para 49.

[69] Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009) 8 *Journal of HR* 1; Besson, 'Introduction' (2015) 4 *European JHR* 403.

[70] Plomer, 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science' (2013) 35 *HRQ* 143, 144.

[71] The right to enjoy the benefits of scientific progress and its applications, A/HRC/20/26 (14 May 2012). In 2013, the High Commissioner for Human Rights organized a seminar aimed at improving the conceptual clarity of this right (A/HRC/26/19).

[72] CESCR, General Comment 25, E/C.12.GC.25 (30 April 2020).

[73] CESCR, General Comment 25, para 11.

[74] CESCR, General Comment 25, paras 16, 27, 37, 46–7, and 49.

[75] CESCR, General Comment 25, paras 17 and 25–7. States are under an immediate obligation to eliminate all forms of discrimination in the enjoyment of this right (para 25).

[76] CESCR, General Comment 25, paras 31, 35, and 37.

[77] CESCR, General Comment 25, paras 18 and 43. See also paras 33, 35, and 40 (regarding the special protection of specific groups).

[78] CESCR, General Comment paras 25, 19, and 47.

[79] CESCR, General Comment 25, paras 13, 20, 24, 42, and 46. See also ICESCR, Art 15(3) and (4).

[80] CESCR, General Comment 25, paras 24 and 42.

[81] CESCR, General Comment 25, paras 24 and 47.

[82] The Venice Statement highlights other rights for the realization of which access to scientific innovations may be important, namely the right to an adequate standard of living, education, and water (para 12(d)).

[83] GA Res 73/165 (17 December 2018), Annex. See CESCR, General Comment 25, para 64. On the relation between the right to food and development of scientific and technological knowledge, see ICESCR, Art 11(2)(a).

[84] CESCR, General Comment 25, para 65.

[85] CESCR, General Comment 25, paras 67, 69, and 70; see also ICESCR, Art 12(2)(d).

[86] CESCR, General Comment 25, paras 60–2.

[87] Morsink (1999) 219–22; Plomer (2013) 171–5.

[88] eg Paris Convention for the Protection of Industrial Property (1883, last revised 1967); Berne Convention for the Protection of Literary and Artistic Works (1886, last revised 1971); and International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).

[89] World Intellectual Property Organization (WIPO), *Introduction to Intellectual Property: Theory and Practice* (Kluwer, 1997) 3.

[90] WIPO, *Understanding Industrial Property*, WIPO Publication No 895(E), 7–8.

[91] Chapman, 'The Human Rights Implications of Intellectual Property Protection' (2002) 5 *Journal of International Economic Law* 861; Cullet, 'Human Rights and Intellectual Property Protection in the TRIPS Era' (2007) 29 *HRQ* 404; Plomer (2013); Helfer and Austin, *Human Rights and Intellectual Property: Mapping the Global Interference* (CUP, 2011).

[92] E/CN.4/Sub.2/2000/7 (17 August 2000).

[93] The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner, E/CN.4/Sub.2/2001/13 (27 June 2001).

[94] E/C.12/2001/15 (14 December 2001).

[95] Report of the High Commissioner (2001), para 38.

[96] E/C.12/2021/1 (23 April 2021), paras 3 and 7–13. See Chapter 32.

[97] De Schutter (2011).

[98] Chapman (2002) 872–3.

[99] CESCR, General Comment 17, HRI/GEN/1/Rev.9 (Vol I) 123, para 2. By contrast with ICESCR, Art 15(1)(c), CFREU, Art 17(2) explicitly protects intellectual property.

[100] CESCR, General Comment 17, para 1.

[101] CESCR, General Comment 17, para 2.

[102] CESCR, General Comment 17, para 35.

[103] The UN Special Rapporteur in the field of cultural rights has taken a similar approach: see Copyright policy and the right to science and culture, A/HRC/28/57 (24 December 2014), paras 26–9 and Patent policy and the right to science and culture, A/70/279 (4 August 2015). For a critical discussion of these reports, see Macmillan, 'Copyright Policy and the Right to Science and Culture' in Beider and Porsdam (2017) 181; and Käll, 'Patent Policy and the Right to Science and Culture' in Beider and Porsdam (2017) 199.

[104] Cullet (2007) 422.

[105] CESCR, General Comment 17, para 13.

[106] CESCR, General Comment 17, para 15.

[107] CESCR, General Comment 17, para 31.

[108] CESCR, General Comment 17, para 32.

[109] CESCR, General Comment 21, para 50(c). The Committee has also inferred from the right to science an obligation for states to protect indigenous peoples' traditional knowledge, including through a special intellectual property regime (General Comment 25, para 39).

[110] CESCR, General Comment 17, para 23.

[111] CESCR, General Comment 17, para 35.

[112] CESCR, General Comment 17, para 35.

[113] CESCR, General Comment 17, para 4.

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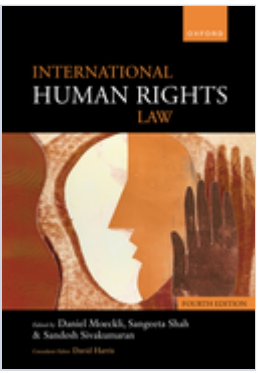

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 305

15. Sexual Orientation and Gender Identity

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https://doi.org/10.1093/he/9780198860112.003.0015
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter examines the human rights protections afforded to sexual and gender minorities. It shows that the jurisprudence focuses on issues of non-discrimination and privacy, and that important human rights protections can also be derived from the range of other civil, political, economic, social, and cultural human rights of general application. The chapter examines a recent exercise in the clarification of the application of human rights law concerning issues of sexual orientation, gender identity, and sex characteristics: the Yogyakarta Principles.

Keywords: sexual minorities, international human rights, non-discrimination, privacy, Yogyakarta Principles

Summary

Worldwide, people are subject to persistent human rights violations because of their actual or perceived sexual orientation and gender identity. The range of violations demonstrates that the members of sexual and gender minorities are highly vulnerable to human rights abuse. This chapter assesses the forms of their vulnerability and identifies the applicable international human rights law. It will be seen that the jurisprudence focuses on issues of non-discrimination and privacy and that important human rights protections can also be derived from the range of other civil, political, economic, social, and cultural human rights of general application. The chapter concludes with an examination of an exercise in the clarification of the application of human rights law concerning issues of sexual orientation, gender identity, and sex characteristics: the Yogyakarta Principles.*

1 Introduction

Typically, to be different to the majority in any society is to be vulnerable to prejudice, discrimination, and even attack. The greater the difference, the greater the risk. The story of the human rights movement is replete with moments defined by the identification of such vulnerable minorities and efforts to protect them. Thus, today, treaties address the situation of ethnic, racial, indigenous, religious, and other communities. However, the protection afforded by international law is by no means confined to groups whose protection has been the explicit focus of treaties. International human rights treaty law has proved itself to be flexible in addressing the plight of groups whose vulnerability may not have been in the minds of the treaty drafters. One of the most vibrant contemporary human rights debates concerns the extent to which international law offers protection to members of what are sometimes termed 'sexual or gender minorities'.

A wide range of terms are used to describe the diverse members of sexual and gender minorities, such as homosexuals, bisexuals, gays, lesbians, transgender, and intersex. ↲ Other terms, such as 'queer', can be considered pejorative in some contexts and acceptable in others. The variety of designations and usages, as well as the manner in which some of them have changed over time, can give rise to confusion when seeking to identify applicable provisions of human rights law. With this in mind, recent discourse on the application of human rights law has tended to cluster issues around three categorizations: 'sexual orientation', 'gender identity', and 'sex characteristics'. An authoritative document that we will consider in this chapter, the Yogyakarta Principles,[1] describes 'sexual orientation' as 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender'.[2] 'Gender identity' is described as:

p. 306

> each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[3]

The Yogyakarta Principles plus 10 (YP+10),[4] a 2017 supplement, adds a definition of 'sex characteristics': 'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'.[5]

Of course, these definitions are no more than intellectual constructs and, as such, can be subject to criticism. However, they have some force in that they tend to reflect the contexts in which affected people experience discrimination, exclusion, and attack in many societies. They also—and this is especially the case with regard to 'sexual orientation'—are grounded in the jurisprudence of human rights courts and treaty-monitoring bodies. To the extent possible, this chapter will employ these terms.[6]

2 Forms of Vulnerability

Before we examine the extent of applicable human rights law, it is important to take account of the situation in which people of diverse sexual orientations, gender identities, and sex characteristics find themselves. Even the briefest of global surveys demonstrates a remarkable degree of vulnerability and abuse.[7] As of 2019, at least six states maintained the death penalty for consensual same-sex practices,[8] and reports are commonplace of persons ↵ who are killed because of their sexual orientation or gender identity. Perpetrators often go unpunished. Persons with diverse gender identities are particularly likely to be targeted for violence. They are 'often subjected to violence in order to "punish" them for transgressing gender barriers or for challenging predominant conceptions of gender roles',[9] and transgender youth have been described as 'among the most vulnerable and marginalized young people in society'.[10] Violations directed against lesbians because of their sex are often inseparable from violations directed against them because of their sexual orientation. For example, there are accounts of multiple rape of a lesbian arranged by her family in an attempt to 'cure' her of her homosexuality.[11] Same-sex sexual relations between consenting adults constitute a criminal offence in 69 states.[12] Some states apply laws against 'public scandals', 'immorality', or 'indecent behaviour' to punish people for looking, dressing, or behaving differently from what are considered to be the social norms.

p. 307

Serious problems have also been identified regarding the enjoyment of economic, social, and cultural rights. For example, people have been denied employment or employment-related benefits or have faced dismissal because of their sexual orientation or gender identity. In the context of the right to adequate housing, lesbian and transgender women are reported to be at a high risk of homelessness; discrimination based on sexual orientation or gender identity when renting accommodation has been experienced both by individuals and same-sex couples; and children have been thrown out of the family home by their families upon learning of their sexual orientation or gender identity. Transgender persons often face obstacles in seeking access to gender-appropriate services at homeless shelters. Materials referencing issues of sexual orientation and gender identity have been banned from school curricula; student groups addressing sexual orientation and gender identity issues have been prohibited; students have faced high levels of bullying and harassment because of their actual or perceived sexual orientation or gender identity; and, in some cases, young persons who express same-sex affection have been expelled from school. In some countries, laws have prohibited the 'promotion of homosexuality' in schools. Numerous health-related human rights violations based on sexual orientation and gender identity have been documented. People have been forcibly confined in medical institutions, subjected to 'aversion therapy', including electroshock treatment, and intersex people have been subjected to involuntary surgeries in an attempt to 'correct' their genitals.

The plight in which people of diverse sexual orientations and gender identities find themselves is well summarized in a comment by an Indonesian human rights expert, Siti Musdah Mulia:

> I realise that compared to other minority groups, LGBT [lesbian, gay, bisexual, and transgender] people suffer more stigmas, stereotypes and discriminatory treatment, and even ruthless exploitation. The majority community (in Indonesia) still considers homosexuality as illicit, often as unmentionable.[13]

p. 308

3 Review of Law and Jurisprudence

There are no specific references to issues related to sexual orientation or gender identity in the global human rights treaties. At the regional level, explicit references are confined to the prohibition of discrimination in recently adopted, thematically focused treaties.[14] However, the UN human rights treaty-monitoring bodies, the European Court of Human Rights, and the Inter-American Court of Human Rights[15] have developed a significant body of jurisprudence on the topics. The African Commission on Human and Peoples' Rights has also considered issues related to sexual orientation and gender identity, albeit to a more limited extent.[16] The findings tend to be clustered in three groups: protection of privacy rights, combating of discrimination, and ensuring other general human rights protection to all, regardless of sexual orientation or gender identity. We will look at each of these in turn. As will become apparent, while the importance of the issue of intersex rights is increasingly recognized,[17] it has so far not been at the centre of attention in international jurisprudence.[18]

3.1 Protection of Privacy Rights

The European Convention on Human Rights (ECHR), in Article 8, the American Convention on Human Rights (ACHR), in Article 11, and the International Covenant on Civil and Political Rights (ICCPR), in Article 17, contain provisions for the protection of an individual's privacy. These reflect a perception of the drafters that there is an autonomous zone within which a person may live a personal life and make choices without interference. While the scope and the limits of that private space are impossible to chart outside the context of specific cases, it is acknowledged that 'respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'.[19]

The first successful international human rights cases on issues of sexual orientation were brought under the ECHR and invoked the privacy argument with regard to same-sex sexual activity. In *Dudgeon v UK*[20] and *Norris v Ireland*,[21] the criminalization of such practices was deemed a violation of Article 8 ECHR. In *Modinos v Cyprus*, the European Court, ↵ taking account that many of the prohibitions were not actually enforced in practice, held that even a 'consistent policy' of not bringing prosecutions under the law was no substitute for full repeal.[22] Privacy arguments were also successful regarding a ban on recruitment to the military of homosexuals: *Smith and Grady v UK*[23] and *Lustig-Prean and Beckett v UK*.[24] The European Court has also invoked privacy rights to identify a right of same-sex civil partnership in the cases of *Vallianatos and Others v Greece*[25] and *Oliari and Others v Italy*.[26] In *Orlandi and Others v Italy*, it found that the refusal to recognize in any form same-sex marriages that took place abroad violates Article 8 ECHR.[27] Citing these cases as well as privacy considerations, the Court of Justice of the European Union ruled in 2018 that 'spouse' in EU law includes persons of the same sex, which means they are entitled to enjoy derived residency rights in member states that have not legalized same-sex marriage.[28] The Inter-American Court of Human Rights, in its first finding of sexual orientation-related violations of the ACHR, identified a violation of the right to privacy in the case of the loss of parenting rights on the part of a woman, divorced from the father of her children, who was living with a same-sex partner.[29]

p. 309

The European Court of Human Rights has recognized privacy protection with regard to issues of gender identity. The approach of the Court reflects a perception that privacy protection may extend to the choices one makes regarding one's own choice of gender identity or expression. Interestingly, the cases are not about any effort of states to prohibit forms of gender identity choices. Instead, they address the positive obligation on the state to take the administrative actions, such as amending identity documents, which are necessary for the affected individuals to live in their changed gender identity. In *Goodwin v UK*[30] and *I v UK*,[31] the European Court reversed a long line of previous case law and held that the UK's refusal to change the legal identities of two transgender women constituted a violation of Article 8 ECHR. In *Van Kück v Germany*, the Court considered the case of a transgender woman whose health insurance company had denied her reimbursement for costs associated with gender affirmation surgery. It found a violation of Article 8, holding that the German courts had failed to respect 'the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination'.[32] In *L v Lithuania*, the Court considered that the state was required to legislate for the provision of full gender affirmation surgery whereby a person in the 'limbo' of partial reassignment could complete the process and be registered with the new gender identity.[33] According to the Court, Article 8 ECHR requires that there be a clear and predictable procedure for the legal recognition of gender identity in a fast, transparent, and accessible manner. Gender affirmation surgery, in particular, must not be a prerequisite for such procedures.[34] The Inter-American Court of Human Rights, relying extensively on the concept of privacy, came to similar conclusions in 2017.[35]

The Human Rights Committee, in the communication *Toonen v Australia*, adopted the approach of the European Court of Human Rights and considered that a criminal ↵ prohibition on same-sex sexual activity, even if unenforced, constituted an unreasonable interference with Mr Toonen's privacy under Article 17 ICCPR.[36] It is sometimes suggested that *Toonen* turns on its facts in the particular context of a state that cherishes diversity and that the findings might have been very different in the case of, for example, an Islamic state with a dominant moral code that rejected homosexual acts.[37] This view ascribes to the Human Rights Committee a doctrine of margin of appreciation such as that to be found in the practice of the European Court of Human Rights.[38] In 2011, in its General Comment 34 on Article 19 ICCPR, the Committee repudiated such a doctrine in its practice. It also stated that morals may only be invoked to restrict rights where such morals are, inter alia, non-discriminatory in effect and compatible with the universality of human rights.[39] In *G v Australia*, the Committee found a violation of, inter alia, Article 17 ICCPR because a married transgender person had been denied a birth certificate that correctly identified the person's sex.[40]

p. 310

3.2 Discrimination

As we have seen, people of diverse sexual orientations and gender identities are subject to multiple forms of discrimination. It is not surprising, then, that a considerable body of practice has developed in the work of the international human rights treaty bodies. The Committee on Economic, Social and Cultural Rights has addressed sexual orientation-related discrimination in its General Comments. In General Comments 18, on the right to work,[41] 15, on the right to water,[42] and 14, on the right to the highest attainable standard of health,[43] it has indicated that the International Covenant on Economic, Social and Cultural Rights (ICESCR) proscribes any discrimination on the basis of, inter alia, sex and sexual orientation, 'that has the intention or effect of nullifying or impairing the equal enjoyment or exercise of [the right at issue]'. The Committee has

consistently based this prohibition on the terms of the anti-discrimination provision—Article 2(2) ICESCR—which prohibits discrimination on a variety of specified grounds as well as one termed 'other status'. In 2009, the Committee adopted a General Comment on non-discrimination specifying that '"other status" as recognised in article 2(2) includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights.'[44] More recently, General Comments 22 and 25 condemned discrimination on the grounds of sexual orientation, gender identity, and sex characteristics in the context of the right to sexual and reproductive health and the right to enjoy the benefits of scientific progress and its applications.[45] The Committee, in its General Comments, also invokes the provision addressing the equal rights of men and women, Article 3 ICESCR, as a basis for its prohibition of sexual orientation-related discrimination.[46] General Comment 23 ↵ emphasizes that Article 7(c) ICESCR, which protects equal employment opportunity, bears particular relevance for lesbian, gay, bisexual, transgender, and intersex workers.[47]

p. 311

Other treaty bodies have adopted similar positions in their General Comments. The Committee on the Rights of the Child, in its General Comment 4, stated that:

> [s]tate parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention [on the Rights of the Child] without discrimination (art. 2), including with regard to 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' These grounds also cover [inter alia] sexual orientation.[48]

The Committee, on various other occasions, has drawn attention to the vulnerabilities of lesbian, gay, bisexual, transgender, and intersex children and adolescents, including in street situations,[49] in the justice system,[50] and in the digital environment.[51]

In 2010, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) issued two General Recommendations—one on the rights of older women and the other on the core obligations of states—in which it recognized that sexual orientation and gender identity are prohibited grounds of discrimination against women.[52] In 2020, the Committee considered a communication concerning the failure of law enforcement authorities to properly respond to a homophobic hate crime. The Committee noted that 'discrimination against women is inextricably linked to other factors that affect their lives, including being lesbian women' and that 'women experience varying and intersecting forms of discrimination, which have an aggravating negative impact'.[53]

The treaty bodies frequently raise issues of discrimination related to sexual orientation, gender identity, and sex characteristics when considering periodic reports of states parties. The Committee on Economic, Social and Cultural Rights did so regarding 9 of the 11 states considered in 2019, and the Committee on the Rights of the Child regarding 8 of the 17 states considered in the same period. In each case, the Committees expressed concern in their 'concluding observations'. Given the non-binding and flexible nature of these treaty body outputs, they are not always a useful indicator of formal obligations under the treaty. However, where the treaty body expresses concern about a specific practice, we can surmise that serious issues arise under the treaty.

Issues of sexual orientation-related discrimination have received extensive attention in the work of the Human Rights Committee. In *Toonen*, the Committee said that 'the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'. The Committee accordingly considered that sexual orientation-related discrimination is a suspect category in terms of the enjoyment of ICCPR rights (Article 2) and, more generally, for equality before and equal protection of the law (Article 26).[54] A small number of individual cases illustrate the Human Rights Committee's approach. In *Young v Australia*[55] and *X v Colombia*,[56] the Committee was of the view that distinctions made in law between same-sex partners who were excluded from pension benefits, and unmarried heterosexual partners who were granted such benefits, constituted violations of the ICCPR. In *C v Australia*, the Committee found a violation of Article 26 in the fact that a person in a same-sex marriage which took place abroad was denied access to divorce proceedings, whereas an opposite-sex marriage which took place overseas would have been recognized for divorce purposes.[57] However, not every case has been successful. In the 2002 case of *Joslin v New Zealand*, the differential treatment under taxation regulations of same-sex unmarried couples (for whom marriage was not available in law) and heterosexual married couples was considered not to constitute a violation of Article 26 ICCPR. And yet, an individual concurring opinion of two members observed that 'the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination'.[58]

p. 312

The Human Rights Committee frequently raises the issue of discrimination on the basis of sexual orientation, gender identity, or intersex status in its consideration of periodic reports. During 2019, it did so regarding 16 of the 17 states under review and, for example, criticized many states for the criminalization of homosexual sexual relations and the failure to incorporate sexual orientation, gender identity, and sex characteristics into anti-discrimination legal frameworks. It also expressed concern regarding irreversible medical treatment of intersex children and the lack of appropriate measures to combat homophobic and transphobic attitudes.

The European Court of Human Rights has generated a substantial body of jurisprudence concerning discrimination both on the grounds of sexual orientation and gender identity. In *Salgueiro da Silva Mouta v Portugal*, it held that a judge's denial of child custody to a homosexual father on the ground of his sexual orientation was discriminatory.[59] The Inter-American Court adopted a similar line of reasoning in *Atala Riffo and daughters v Chile.*[60] In *Karner v Austria*, the European Court considered that the failure of Austria to permit a homosexual man to continue occupying his deceased partner's flat was discriminatory, since this entitlement, available to family members under Austrian law, did not apply to same-sex partners. Austria claimed that excluding homosexuals aimed to protect 'the family in the traditional sense', but the Court considered that it had not demonstrated how the exclusion was necessary to that aim.[61] In *L and V v Austria*[62] and *SL v Austria*,[63] the Court considered that Austria's differing age of consent for heterosexual and homosexual relations was discriminatory. As the Court put it, the differing age 'embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority', which could not 'amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour'.

One area of discrimination in which the European Court was slow to find a violation of the Convention concerned the adoption of children. In the case of *Fretté v France*, a homosexual man complained regarding a refusal to allow him to adopt a child for reasons of his sexual orientation.[64] The Court found against him,

referring to the fast-evolving and very diverse practice across Europe, as well as the conflicting views of experts as to what would be in the best interests of the child. The decision in *Fretté* is unsatisfactory. It posits false ↵ dilemmas such as a supposed tension between the rights of the man and the child. There is no such tension. The tension is between the rights of homosexual and heterosexual prospective adoptive parents, with the best interests of the child as the overarching consideration. Issues such as these were handled in a better manner in *EB v France*. In that case, the Court, while maintaining the paramount principle of the best interests of the child, held that, 'in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention'.[65] In the later case of *X v Austria*, the Court held that a prohibition of the adoption of the child of a same-sex partner was in violation of the Convention since Austria extended such an entitlement to partners in different-sex relationships.[66] Also at the European level, the European Committee of Social Rights, the monitoring body for the European Social Charter, has interpreted the terms 'sex' and 'other' among the prohibited forms of discrimination to include discrimination on the grounds of sexual orientation.[67]

p. 313

Overall, the regional courts and the treaty bodies have mapped out an extensive range of areas and contexts in which sexual orientation and gender identity-related discrimination is prohibited. Furthermore, as we will see in Section 3.3, it can also be assumed that the protections apply for the non-discriminatory enjoyment of *all* human rights.

3.3 General Human Rights Protection

The international monitoring bodies are increasingly addressing issues of the entitlement of people of diverse sexual orientations and gender identities to benefit from the protection of other human rights of general application. The European Court of Human Rights, in *Alekseyev v Russia*, ruled that a municipal ban on LGBT Pride marches violated various provisions of the ECHR, including Article 11 regarding freedom of assembly.[68] The Human Rights Committee, in *Fedotova v Russian Federation*, held that the prevention of a display of posters that declared 'Homosexuality is normal' and 'I am proud of my homosexuality' near a secondary school building constituted a violation of the protester's right to freedom of expression. The Committee observed that the protester had 'not made any public actions aimed at involving minors in any particular sexual activity or at advocating any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it'.[69]

The Human Rights Committee, in 2014, adopted a General Comment on the right of liberty and security of the person (Article 9 ICCPR). It stated that the right benefited 'everyone' with that term embracing lesbian, gay, bisexual, and transgender persons.[70] The same is true, of course, of the right to life and the right of peaceful assembly, the rights addressed in the Committee's subsequent General Comments.[71] The Committee and the other treaty bodies, as we have seen earlier, have also generated significant practice in the context of the review of periodic reports of states parties. The Human Rights Committee has expressed concern to specific states regarding violent crimes perpetrated against persons of minority sexual orientation, including by law enforcement officials; the failure to ↵ address such crime in legislation on hate crime; the frequent failure of states to investigate such acts; and the need for training of law enforcement and judicial officials in order to sensitize them to the rights of sexual minorities.[72] The Committee on the Rights of the Child has expressed

p. 314

concern that homosexual and transgender young people often do not have access to the appropriate information, support, and necessary protection to enable them to live their sexual orientation and gender identity.[73] On a number of occasions, the Committee Against Torture has expressed concern about the torture of homosexuals and regarding complaints of threats and attacks against sexual minorities and transgender activists.[74]

The reports of the 'special procedures' of the Human Rights Council constitute a particularly valuable repository of examples of the application for people of diverse sexual orientations and gender identities of general human rights protections, as well as of the principle of non-discrimination. The Council's Working Group on Arbitrary Detention has frequently invoked *Toonen* as a basis for its finding of arbitrary detention of homosexuals.[75] A former Independent Expert on the situation of human rights defenders was assiduous in condemning attacks on members of sexual and gender minorities.[76] She drew attention to such human rights violations as summary execution; torture; arbitrary detention; unreasonable impediments to freedom of expression, movement, and association; and participation in public life.

A number of the 'special procedures' have drawn attention to the intersectional nature of many human rights violations, where already vulnerable people face heightened risk when promoting the rights of people of diverse sexual orientations and gender identities. For example, the Independent Expert on minority issues has referred to the multiple forms of exclusion of members of minority communities, based on aspects of their identities and personal realities such as sexual orientation or gender expression that challenge social or cultural norms.[77]

Some of the 'special procedures' that address economic, social, and cultural rights have indicated the extent to which violations of these rights are at issue for people of diverse sexual orientations and gender identities. The work of a former Special Rapporteur on the right to health is particularly notable. In 2004, he observed that:

> fundamental human rights principles, as well as existing human rights norms, lead ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.[78]

A former Special Rapporteur on education has identified a right to comprehensive sexual education.[79]

p. 315 ↵ Most pertinently, a new 'special procedure' was established in 2016: the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. The mandate holders, in their reports to the Human Rights Council and the UN General Assembly, have drawn particular attention to thematic issues such as 'socio-cultural and economic inclusion', 'so-called "conversion therapy" practices', and the 'impact of the COVID-19 pandemic on LGBT persons'.[80]

A broad range of human rights are also increasingly engaged at the regional level. The Council of Europe Commissioner for Human Rights often refers to violations.[81] Country reports and follow-up reports of the Inter-American Commission on Human Rights comment on such violations as 'social-cleansing' (killing) of

homosexuals and the treatment of lesbian prisoners.[82] The UN and regional level examples clearly reinforce the assertion that human rights of general application may not be constrained on the basis of sexual orientation or gender identity.

But how does one distinguish rights of general application from those that are intended only to benefit a certain category of people? The answer to this question will usually be straightforward. For instance, the ICCPR limits the right to participate in political life to citizens. The question arises, though, of when a generally stated human right is limited in terms of who may benefit. For our purposes, the issue concerns when a right exclusively addresses the situation and choices of what we might term sexual majorities. This is the context for one of the most topical contemporary debates concerning the rights of sexual minorities: whether international human rights law recognizes a right of same-sex marriage or of same-sex family life.

The Human Rights Committee, in *Joslin*, was unequivocal on the matter of same-sex marriage. It contended that the right to marriage (Article 24(2) ICCPR) refers to a right of a man and a woman and that same-sex marriage is thereby excluded from the protection of the Covenant. The position of the European Court of Human Rights is more nuanced. In its 2010 judgment in *Schalk and Kopf v Austria*, it observed that, '[it] would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'. However, in the case before it, it concluded that the diversity of practice across states parties to the European Convention was such that the matter of same-sex marriage 'is left to regulation by the national law'.[83] In a judgment delivered in 2012, the European Court also felt it necessary to state, obiter, that the Convention does not require states to grant access to marriage to same-sex couples.[84] The Court confirmed these views in the 2017 case of *Orlandi and Others v Italy.*[85] The Inter-American Court of Human Rights, for its part, opined in favour of a right to same-sex marriage in a 2017 advisory opinion.[86]

It will be interesting to observe the extent to which a right of same-sex marriage may emerge over time from the jurisprudence and practice of the international courts and treaty bodies, taking account of considerations such as the observations of the European Court of Human Rights regarding changing circumstances within societies, an evolution in national law and jurisprudence (such as the US Supreme Court finding in the 2015 case of *Obergefell*),[87] and the academic criticism levelled at the Human Rights Committee's findings in *Joslin.*[88]

p. 316

When we turn to the related but distinct issue of the identification of the family in international human rights law, we may observe that the UN and regional human rights monitoring bodies are moving, albeit haltingly, towards recognition of the existence of and rights pertaining to same-sex unmarried families. Article 23(1) ICCPR states the fundamental importance of the family and its entitlement to protection by the state, without reference to the form of family under consideration. Only in Article 23(2) do we find reference to the right of men and women to marry and found families. It is not necessarily the case that Article 23(2) restricts the meaning of the word 'family' in Article 23(1). And the Human Rights Committee, in *Young* and in *X*,[89] has criticized state practices that impede same-sex couples from benefiting from family-related benefits, such as transfer of pension entitlements. These cases, however, only addressed issues of inequality before the law (Article 26 ICCPR) and, in *X*, in a dissenting opinion of two members, it was observed that 'a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes'.[90]

It is the regional courts that are providing the clearest guidance. Reference has already been made to the approach of the European Court of Human Rights to same-sex civil partnerships. The Court, also in *Schalk and Kopf v Austria*, reversed previous findings[91] whereby, 'a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life," just as the relationship of a different-sex couple in the same situation would'.[92] The Inter-American Court of Human Rights adopted similar reasoning in the *Atala Riffo and daughters* case.[93]

One final uncertainty may be observed concerning the reach of human rights law to address abuses related to sexual orientation or gender identity. It remains unclear how far a human rights approach can go in terms of the regulation of practices of non-state actors.[94] This issue is of obvious importance since so many of the forms of abusive behaviour are to be found outside the state sector, such as in the workplace, privately owned housing, religious communities, and so forth.

4 Legal Initiatives to Bridge the Gap Between Law and Practice

This chapter's review of the law has shown the long reach of international human rights standards as regards the particular situation of people of diverse sexual orientations, gender identities, and sex characteristics. Fundamental principles, such as those of non-discrimination and of the universal application of general human rights standards, have been strongly affirmed. However, as has also been demonstrated, the courts, the treaty bodies, and the independent experts, limited as they are by the facts before them or their various mandates, have only indicated the actual application of these principles to a limited number of circumstances.

p. 317

As a result, a certain degree of legal uncertainty persists. That uncertainty is compounded by the terminological confusion, referred to already, which is to be found throughout the case law, comments of treaty bodies, and reports of special procedures. In particular, issues of gender identity have been little understood, with, for instance, some special procedures and states referencing being trans as a 'sexual orientation' and others frankly acknowledging that they do not understand the term.

There has been a significant initiative to address the uncertainty regarding the reach of the law (and the terminological confusion). In 2007, a group of 29 international human rights experts produced a text known as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.[95] A 2017 supplement, the Yogyakarta Principles plus 10, broadens the focus to include sex characteristics.[96] The documents have a tripartite function.[97] In the first place, they constitute a 'mapping' of the experiences of human rights violations experienced by people of diverse sexual orientations, gender identities, and sex characteristics. Second, the application of international human rights law to such experiences is articulated. Finally, the Principles spell out the nature of the obligation on states for implementation of each of the human rights.

The Principles have no binding force. They are neither a treaty nor the finding of a judicial or quasi-judicial body. Nevertheless, they carry the authority of their expert authors and have been considered by many states and experts to constitute a careful articulation of the state of existing law.[98] They have also been cited by international courts.[99] Accordingly, they bear examination in some detail. Each principle comprises a

statement of the law, its application to a given situation, and an indication of the nature of the state's duty to implement the legal obligation. Principles 1 to 3 address the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law. The experts placed these elements at the beginning of the text in order to recall the fundamental significance of the universality of human rights and the scale and extent of discrimination against people because of their actual or perceived sexual orientation or gender identity, as well as the manner in which they are often rendered invisible within society and its legal structures. Principles 4 to 11 deal with the fundamental rights to life, freedom from violence and torture, privacy, access to justice, and freedom from arbitrary detention. Principles 12 to 18 address non-discriminatory enjoyment of economic, social, and cultural rights, including accommodation, employment, social security, health, and education. Principles 19 to 21 concern the importance of the freedom to express oneself, one's identity, and one's sexuality, without state interference, based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others. Principles 22 and 23 address the right to seek asylum from persecution based on sexual orientation or gender identity. Principles 24 to 26 deal with the rights to ↵ participate in family life, public affairs, and the cultural life of the community, without discrimination based on sexual orientation or gender identity. Principle 27 recognizes the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of states to ensure the protection of human rights defenders. Principles 28 and 29 affirm the importance of holding rights violators accountable, and of ensuring redress for those whose rights are violated. Principles 30 to 38, added in 2017, concern the rights to: state protection, legal recognition, bodily and mental integrity, freedom from criminalization and sanction, protection from poverty, sanitation, the enjoyment of human rights in relation to information and communication technologies, and truth, as well as the right to practise, protect, preserve, and revive cultural diversity.

p. 318

A notable feature of the principles is the manner in which they spell out in some detail the legal obligations of the state with regard to each of the rights that are affirmed. A general typology for the obligations can be observed. States must: (1) take all necessary legislative, administrative, and other measures to eradicate impugned practices; (2) take protection measures for those at risk; (3) ensure accountability of perpetrators and redress for victims; and (4) promote a human rights culture by means of education, training, and public awareness raising. Also, in the documents' preambles, as we have already observed, the experts proposed the definition of the terms 'sexual orientation', 'gender identity', 'gender expression', and 'sex characteristics'. These formulations, drawing on their wide usage within academic writing and advocacy communities, establish a personal scope of application for the Principles. The prefaces also include references that acknowledge the imperfections of the text and the need to keep its contents under review with a view to future reformulations that would take account of legal changes as well as developing understandings of the situation of people of diverse sexual orientations, gender identities, and sex characteristics.

5 Conclusion

This chapter has assessed the actual human rights situation of people of diverse sexual orientations, gender identities, and sex characteristics worldwide as well as the extent of the application to them of international human rights law. The gap between law and practice has been highlighted and a major initiative to address that gap, the Yogyakarta Principles, has been discussed. These Principles are presented as a form of *aide-mémoire* that indicates the contemporary state of the law and presents it in an integrated and coherent manner.

Also pertinent for this area of the law are the relevant national and international politics. It is of particular utility to study the practice in such international diplomatic fora as the UN Human Rights Council and the General Assembly. For instance, it will be of interest to examine and assess future debates surrounding the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. It is important to remember that this initiative emerged from a context of long-standing contestation.[100] And while the mandate was renewed in 2019 with a greater number of votes in favour than when it was created in 2016, support was still far from unanimous.[101] Such patterns of diplomatic practice recall the extent to which the subject area is highly controversial and in a state of political flux. We are thus precluded from drawing any firm conclusions as to the prospects for better enforcement of the law or its further development. We can no more than observe that, with regard to the plight of many members of sexual and gender minorities, the universal enjoyment of human rights remains an elusive and distant goal.

p. 319

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O'HALLORAN, *Sexual Orientation, Gender Identity and International Human Rights Law: Common Law Perspectives* (Routledge, 2020).

OHCHR, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2nd edn, 2019) HR/PUB/12/06/Rev.1.

Useful Websites

Independent Expert on sexual orientation and gender identity: **<https://www.ohchr.org/EN/Issues/SexualOrientationGender** *<https://www.ohchr.org/EN/Issues/SexualOrientationGender>***>**

International Commission of Jurists: **<http://www.icj.org** *<http://www.icj.org>***>**

Human Rights Watch: **<http://www.hrw.org/en/category/topic/lgbt-rights** *<http://www.hrw.org/en/category/topic/lgbt-rights>***>**

International Lesbian, Gay, Bisexual, Trans and Intersex Association: **<http://www.ilga.org** *<http://www.ilga.org>***>**

ARC International: **<http://www.arc-international.net** *<http://www.arc-international.net>***>**

Questions for Reflection

1. How convincing are the—markedly different—approaches of the Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights to the question of a right to same-sex marriage?

p. 320

2. ↵ To what extent can the Yogyakarta Principles serve as a reference in the jurisprudence of international judicial bodies? What are the consequences for the legal authority of the Principles if they are cited in international jurisprudence?
3. International human rights treaties often use only male gender pronouns and sometimes female ones, yet the rights of persons of other gender identities are protected under the treaties. Does this language raise problems?
4. What should the role of businesses and other non-state actors be when it comes to eliminating discrimination against persons of diverse sexual orientations, gender identities, and sex characteristics?

Notes

[*] The views in this chapter are solely those of the author and its content does not necessarily represent the views or positions of the European Union Fundamental Rights Agency. This chapter was updated by Nils Reimann and finalized by Michael O'Flaherty.

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[20] (1982) 4 EHRR 149.

[21] (1988) 13 EHRR 186.

[22] (1993) 16 EHRR 485.

[23] (1999) 29 EHRR 493.

[24] (1999) 29 EHRR 548.

[25] (2014) 59 EHRR 12.

[26] Application nos 18766/11 and 36030/11, Judgment of 21 July 2015.

[27] Application nos 26431/12, 26742/12, 44057/12, and 60088/12, Judgment of 14 December 2017.

[28] C-673/16, *Coman* (5 June 2018).

[29] *Atala Riffo and daughters*.

[30] (2002) 35 EHRR 447.

[31] (2002) 35 EHRR 18.

[32] (2003) 37 EHRR 51, para 73.

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[35] OC-24/17, IACtHR Series A No 24 (24 November 2017) paras 85–171.

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[37] Cowell and Millon, 'Decriminalization of Sexual Orientation Through the Universal Periodic Review' (2012) 12 *HRLR* 341.

[38] See Chapter 5.

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[40] CCPR/C/119/D/2172/2012 (17 March 2017) para 7.14.

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[42] CESCR, General Comment 15, HRI/GEN/1/Rev.9 (Vol I) 97.

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[44] CESCR, General Comment 20, E/C.12/GC/20 (10 June 2009) para 32.

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[46] eg CESCR, General Comment 18, para 12(b)(i).

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[62] (2003) 36 EHRR 55.

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[92] (2011) 53 EHRR 20, para 94. See also, *PB and JS v Austria* (2012) 55 EHRR 31.

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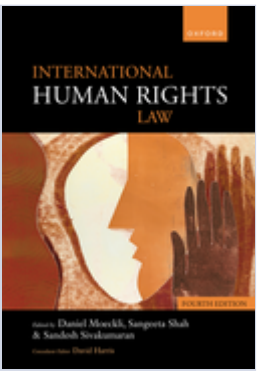

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 321

16. Women's Rights

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https://doi.org/10.1093/he/9780198860112.003.0016
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter examines women's rights and new developments related to gender identity. It describes the treatment of women in international law prior to the adoption of the UN Charter, in order to highlight the significance of the subsequent shift to the promotion of women's equality. It examines the non-discrimination approach favoured by the drafters of the founding human rights instruments, highlighting the importance of the approach as well as some of its limitations. The chapter goes on to examine the innovative approach taken in the Convention on the Elimination of All Forms of Discrimination Against Women, which promoted a strong version of women's substantive equality. The strategy of 'gender mainstreaming', adopted in the 1990s, sought to reinterpret mainstream human rights to be inclusive of women's experiences. The chapter concludes by highlighting some continuing obstacles presented by the law itself, which prevent women and other gender identities from successfully claiming and enjoying human rights.

Keywords: women's rights, equality, discrimination against women, Convention on the Elimination of All Forms of Discrimination Against Women, gender mainstreaming, gender identity, international human rights

Summary

International human rights law prohibits discrimination against women in their enjoyment of all human rights and fundamental freedoms. While non-discrimination is an essential component to the realization of women's rights, its comparative approach measures women's equality against men's enjoyment of rights, reinforcing gender dualism and the masculinity of the universal subject of human rights law whose rights are fully promoted and explicitly protected. To the extent that violations experienced exclusively or primarily by women are expressly recognized in the founding

human rights instruments, they are treated as a sub-category of the universal and often formulated as 'protective' measures rather than as human rights. There have been many efforts to address the resulting marginalization of women's rights, including the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women and the strategy of gender mainstreaming in the application of general human rights instruments. While these efforts have been successful in many respects, there are continuing conceptual and practical problems, including not only the limitations of anti-discrimination law and dualistic conceptions of gender, but the danger that specific recognition of women's rights violations may simply reproduce women's secondary status. Recent attention to discrimination based on 'gender identity' opens new, although contested, opportunities for further feminist change.

1 Introduction

In 1945, the UN Charter recognized the principle that human rights and fundamental freedoms should be enjoyed by everyone 'without distinction as to ... sex'.[1] Since then, international human rights instruments have repeatedly affirmed that women and men must equally enjoy the human rights they enumerate, without discrimination on the ground of sex.[2] The new era of universal human rights promised women, for the first time in international law, the full recognition of their humanity, marking a decisive break with the long-standing legal representation of women as lacking full legal and civil capacity. ↵ Significantly, the promise of equality also extended to the private realm of the family.[3] Women were no longer to be treated as the dependants of men, or as the property of their fathers or husbands.

p. 322

Yet there has been widespread resistance to taking these obligations seriously, as evidenced by the many sweeping reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This convention was adopted in 1979 to draw specific attention to the entrenched nature of women's inequality and the need for significant affirmative measures to address it. Unashamedly, some of the reservations to CEDAW challenge the very idea of women's equality with men.[4] Further, as UN women's human rights experts warned in 2017, in a Statement to the Human Rights Council on International Women's Day: 'Not only is the advancement of women taking a very long time and full equality far from a global reality, but today women's hard fought achievements face the risk of reversal ... by an alliance of conservative political ideologies and religious traditionalism'.[5] Efforts to counter terrorism and, more recently, the COVID-19 pandemic have also rolled back many advances in women's rights.[6]

The grim reality is that women fare considerably worse than men on almost every indicator of social well-being, despite the assumption by all states of at least some international legal obligations to promote their equal enjoyment of human rights, and despite many good intentions. Everywhere, notwithstanding women's increasing participation in the workforce, their average wage is considerably less than that of men and they are concentrated in precarious work in the formal and informal sectors. Furthermore, many women do not receive any remuneration for work in family enterprises and have unequal access to social security assistance. Violence against women and girls continues to be pervasive and is taking new forms facilitated by

information and communications technology, particularly social media platforms, endangering women's lives in both public and private spheres.[7] The World Health Organization estimates that about 295,000 women died of preventable complications related to pregnancy and childbirth during 2017.[8] Women's inequality is still widely regarded as 'natural' and as prescribed by religious teachings and cultural traditions.

Yet, although lack of political will presents a significant barrier to the realization of women's rights and equality, it is not the only problem. International human rights law itself presents some obstacles. As Douzinas has observed, human rights 'construct humans', rather than the reverse, and it follows that '[a] human being is someone who can successfully claim rights'.[9] This recognition presents a conundrum for women's human rights advocates because, in crafting laws that respond to the gendered realities of women's

p. 323 ↵ lives, there is the risk of reconstituting gender stereotypes through reproducing those realities, rather than challenging them. At the same time, 'special' measures designed to address women's specific injuries and disadvantage continue to affirm the maleness of the universal subject of human rights law, as men need no special enumeration of their gender-specific injuries.[10] Charlesworth has called this the 'paradox of feminism'; whether women's rights are best protected through general norms that treat women the same as men, or through specific norms applicable only to women.[11] Ultimately, the paradox forces us to ask hard questions about how women's inclusion as full subjects of the universal regime of human rights law might be achieved. One such question is whether the recognition of gendered harms suffered by everyone because of their gender identity, including men, women, trans, and other genders, would help to shift the harmful dualistic gender stereotypes that continue to reside in the idea of the universal human being.

This chapter critically examines the many efforts to achieve women's full inclusion in international human rights law. Section 2 describes the treatment of women in international law prior to the adoption of the UN Charter, in order to highlight the significance of the subsequent shift to the promotion of women's equality. The importance of the non-discrimination approach favoured by the drafters of the founding human rights instruments is recognized, while some of its limitations are highlighted. Section 3 examines the innovative approach taken in CEDAW, which promotes a strong version of women's substantive equality. Yet while CEDAW fostered a better understanding of the measures that may be necessary to achieve women's equal enjoyment of human rights, it also reinforced the marginalization of women's rights practically and conceptually, and institutionalized the idea that gender is a duality that always works to women's disadvantage. The other human rights treaty bodies tacitly used the existence of the CEDAW Committee as an excuse to continue their neglect of women's rights. To tackle this marginalization, a new strategy of 'gender mainstreaming' was adopted during the 1990s, which sought to reinterpret mainstream human rights to be inclusive of women's experiences. This strategy is examined in Section 4. The chapter concludes, in Section 5, by drawing attention to some continuing obstacles presented by the law itself, which prevent women from successfully claiming and enjoying human rights, and suggests that addressing the gendered harms experienced by men and other gender identities has the potential to complement and strengthen efforts to realize women's equal enjoyment of human rights.

2 A New Era of Non-Discrimination on the Ground of Sex and Equality with Men

While the UN Charter was the first international treaty to promote women's equality with men, it was not the first time that women were constituted as a category in international law. This section will briefly describe how women appeared in earlier international legal texts before examining how women's rights were recognized by the foundational human rights instruments. While the idea of women's equality with men was a radical and visionary development, of great importance to women (and men), this approach failed to acknowledge the specificity of many human rights violations suffered exclusively or predominantly by women and therefore failed to construct them as fully human.

2.1 The Position Prior to 1945

p. 324

Before 1945, international law had taken a paternalistic or 'protective' approach to women, treating them as the property, extension, or dependants of men, as primarily mothers and wives, and as incapable of full autonomy and agency.[12] Women were valued for their pre-marital chastity, their prioritization of motherhood and domesticity, and their acceptance of the heterosexual family hierarchy and the paternal protection of the state and its laws. The laws of war, for example, required an occupying power to respect 'family honour and rights', treating women as part of (male) family property and reputation, to be protected by the law.[13] Early international labour conventions prohibited women from certain types of work, such as night work and mining, on the basis that this interfered with their domestic and reproductive responsibilities.[14] Anti-trafficking conventions made women's consent to working in the sex industry irrelevant, thereby treating all sex workers as victims, needing rescue and rehabilitation.[15] None of these conventions constructed women as rights-bearers. Instead, women were granted 'protections', sometimes in the form of 'privileged' treatment, because of their socially ascribed secondary status.

2.2 The UDHR and the International Covenants

Following the Second World War, the shift from protectionism to universal human rights promised to recognize women as fully human, for the first time, by granting them the same human rights as men. The primary means for achieving women's equality, adopted by the drafters of the Universal Declaration of Human Rights (UDHR), was to prohibit discrimination based on sex in the enjoyment of universal rights and freedoms which, notably, does not single women out as the disadvantaged gender group.[16] The decision not to recognize rights that were specific to women's experiences was deliberately made on the basis that this would compromise the idea of the 'universality' of rights and wrongly emphasize women's difference from men rather than their common humanity.[17]

In transforming the UDHR into legally binding instruments, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) followed suit, relying largely on the prohibition of sex discrimination in the enjoyment of the rights they enumerated to achieve ↵ women's equality.[18] As the Covenants did not define 'discrimination' or 'equality', many states parties interpreted their obligations narrowly, to require formal, but not substantive, equality.[19]

p. 325

However, an additional provision was included as Article 3 common to both Covenants, which required states parties to ensure 'the equal right of men and women to the enjoyment of all … [rights] set forth in the present Covenant', indicating that particular attention must be paid to achieving gender equality and, by the use of the term 'enjoyment', signifying that substantive equality was the goal, although states parties were slow to embrace this interpretation.

The obligation to ensure that women equally enjoy the same rights as men was a very significant step forward for women. States parties are required to treat women and men alike when they are in a comparable situation. Think, for example, of the importance to women of the universal franchise, the freedom to move and to express their opinions to the same extent as men, of equal pay, and access to education on the same basis as men. In addition, the unprecedented acknowledgement that women and men 'are entitled to equal rights as to marriage, during marriage and at its dissolution',[20] broke through the tradition in liberal legal thinking that exempted the private sphere from legal scrutiny.[21] This provision opened the way for challenging the public–private dichotomy that has kept human rights violations experienced by women in the 'private' realm of the family hidden and delivered impunity to perpetrators. However, as would soon become apparent, this development was in tension with states' responsibilities to protect the institution of the family and the right to privacy as also set out in the UDHR and ICCPR.[22] For Third World women in particular, the issue of private actors violating their rights is not only a concern within their extended family networks, but also an issue of the unregulated activities of global private actors, such as transnational corporations and banks.[23] Many global economic actors exploit local resources and labour, with highly gendered effects, compounding the difficulties that poor states have in complying with their human rights obligations. Yet the 'private' conduct of the marketplace is not directly regulated by human rights law. Instead, states assume the obligation to 'protect' the enjoyment of human rights, which requires that they regulate private actors accordingly.

Despite these shortcomings, the prohibition of sex discrimination left little doubt that the differences between women and men, which had previously been treated as immutable and used to justify women's inequality, were to be understood as socially constructed and therefore amenable to change. Thus, international human rights law had the potential to challenge the 'naturalness' of discriminatory beliefs and gendered practices, and to assist in the task of changing harmful stereotypes of both 'women' and 'men', as well as other gender identities.

While groundbreaking in many respects, the preferred method of realizing women's full legal subjecthood by promoting their equal and non-discriminatory enjoyment of human rights soon proved to be problematic, both conceptually and in practice. Conceptually, non-discrimination was interpreted as a formal (*de jure*) rather than substantive (*de facto*) obligation. Treating women in the same way as men works well when women's and men's ↵ experiences of human rights violations are directly comparable, as in the first communication concerning sex discrimination considered by the Human Rights Committee. The communication was brought by a group of Mauritian women, complaining that legislation discriminated against women because it granted automatic residency to the foreign wives of Mauritian men but denied automatic residency to the foreign husbands of Mauritian women.[24] On these facts, the Human Rights

p. 326

Committee easily found that the legislation made an 'adverse distinction based on sex' because it negatively affected married women's enjoyment of ICCPR rights related to privacy and family life, as compared to married men.[25]

However, a comparison with the rights that men enjoy does not help in situations where women's experiences are substantially different from men's, as in the case of work. Rights recognized by the ICESCR that protect the right to work assume a male model of formal employment, which makes women's unremunerated work in the family and their poorly remunerated work in the informal sector invisible.[26] This approach also fails to take account of women's often interrupted patterns of paid work, the problem of gender segregation in the workforce which makes comparisons difficult, and the need for maternity leave, childcare provision, and a radical change in the distribution of domestic and caring responsibilities. A further problem with the comparative approach of equality and non-discrimination is that when the Covenants do explicitly refer to women's different experience, international law's discursive heritage of treating women protectively tends to re-emerge, as in the requirement that states parties ensure 'special protection' (rather than rights) for mothers for a period before and after childbirth.[27] The result is that when women are included in the Covenants by reference to the gendered specificities of their lives, they are treated as needing 'special' treatment. This approach constructs women's experience as non-universal and has the effect of buttressing the masculinity of the universal subject. The ICESCR also describes the right of everyone to an adequate standard of living 'for himself [sic] and his family',[28] breathing life into the erroneous stereotype that all women are dependent on male breadwinners, although the Committee on Economic, Social and Cultural Rights has strongly repudiated this interpretation.[29]

In practice, drawing formal comparisons between women and men proved to be a limited means of promoting women's substantive equality. The narrow focus of a comparison does not take account of the need to redress the institutionalized history of discrimination and disadvantage that often affects women's ability to exercise their rights in the same way as men, for example by ensuring that they have the information, autonomy, and freedom of movement to exercise their right to vote. A formal comparison also ignores the need to create enabling circumstances that will make women's equal enjoyment of rights possible, which may involve changing deeply embedded social and cultural attitudes that stigmatize or punish women for exercising their rights.

The limitations of relying on the prohibition of sex discrimination to do all the work of ensuring that women fully enjoy universal human rights and fundamental freedoms was soon apparent.[30] In addition to interpreting equality as a formal rather than substantive obligation, women's human rights violations were rarely addressed by human rights treaty bodies in the early years of their operation. This was because the comparative standard of ↵ non-discrimination did not force them to rethink their own gendered frameworks, and human rights NGOs were preoccupied with addressing Cold War violations experienced by men in the public sphere, such as the freedom of political expression and the release of political prisoners, which blinded them to what was happening to women, even where they, too, were political prisoners.

p. 327

3 The Substantive Equality Approach of CEDAW

Growing dissatisfaction with women's marginalization within the general framework and implementation of international human rights law led to the adoption of CEDAW by the UN General Assembly in 1979. Although CEDAW takes the same general approach as the Covenants by promoting non-discrimination, it is concerned specifically with discrimination against *women* and advances a strong form of women's substantive equality as the international norm. This section discusses the positive features of the approach taken by CEDAW and then examines some of its limitations. It begins with a discussion of three strategies adopted by CEDAW to promote a robust understanding of women's equality: the adoption of a comprehensive definition of discrimination against women; the promotion of the use of temporary and permanent 'special measures'; and the requirement that states parties tackle the causes of women's inequality by promoting social change relating to both women and men in all spheres of life, including in families.

3.1 Towards a Robust Understanding of Equality

The first step towards advancing women's substantive equality is the provision of a comprehensive definition of 'discrimination against women' in Article 1 CEDAW:

> [it] 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 covers a wide range of conduct and, importantly, prohibits discriminatory treatment (direct discrimination) as well as discriminatory outcome (indirect discrimination), and intended (purposive) discrimination as well as unintended discrimination (discrimination in effect). Both 'sex' and 'marital status' are specified as prohibited grounds of discrimination against women, and it should further be noted that other provisions in CEDAW (for example, Article 11(2) in the field of employment) also prohibit discrimination on the grounds of 'pregnancy' and 'maternity'.

The definition specifically promotes substantive equality by requiring that women must be able to 'enjoy' or 'exercise' their human rights and fundamental freedoms, and makes it clear that the prohibition of discrimination against women applies to all fields of life, not only the public sphere. Indeed, the application of CEDAW to private actors, including individuals and organizations, is made explicit in many instances in the text.[31] The CEDAW Committee, which monitors its implementation, has emphasized that states parties have an obligation to protect, mentioned earlier, which requires them to regulate private actors ↵ to ensure their 'due diligence' compliance with the Convention.[32] The Committee has also clarified many of the other obligations required by its substantive approach to women's equality in its interpretations of CEDAW, helping to constitute a more gender-inclusive subject of human rights law. For example, the Committee has urged states parties to adopt criteria in the determination of equal pay that facilitate the comparison of the *value* of

p. 328

the work usually done by women with the *value* of those more highly paid jobs usually done by men,[33] and to implement health measures that address 'the distinctive features and factors that differ for women in comparison with men'.[34]

The second way that CEDAW promotes women's substantive equality is by making it clear that non-identical treatment aimed at addressing women's specific experiences of disadvantage may be necessary to achieve women's equality. CEDAW distinguishes between temporary and permanent measures. Article 4(1) promotes the use of 'special temporary measures' (also known as 'affirmative action', 'positive action', or 'reverse discrimination'), which are directed towards 'accelerating de facto equality between women and men' by remedying the effects of past or present discrimination against women and promoting the structural, social, and cultural changes necessary to support the realization of women's substantive equality.[35] Such discriminatory measures are not prohibited, as long as they do not entail 'the maintenance of unequal or separate standards' for women and men and are discontinued when their objectives have been achieved. Thus, 'temporary' measures may be justified for a sustained period of time, until their objectives have been realized.[36] Some specific references to temporary special measures can be found in CEDAW's substantive provisions, such as measures in the field of education that increase women's functional literacy (Article 10(c)) and reduce the drop-out rates of female students (Article 10(f)). On many occasions, the CEDAW Committee has advocated special temporary measures, such as the adoption of quotas to promote gender balance in political bodies.[37]

CEDAW also supports permanent 'special measures' to ensure that non-identical treatment of women, due to their biological differences from men, is not considered discriminatory and does not work to their disadvantage. Article 4(2) makes it clear that measures 'aimed at protecting maternity' are not discriminatory, and this point is reinforced by other more specific provisions including measures safeguarding women's reproductive capacities in the field of employment (Article 11(1)(f)) and measures that provide women with 'appropriate' reproductive health services (Article 12(2)). Recognizing that these provisions have a 'protective' orientation, the CEDAW Committee has emphasized that the term 'special', when used in the context of CEDAW, breaks with the past paternalistic usage of the term to indicate that a group suffering discrimination is weak or vulnerable, and refers instead to measures designed to serve a specific human rights goal.[38] However, in practice, avoiding protective responses to women's specificities (both biological and cultural) is a continuing challenge.

The third way that CEDAW promotes women's substantive equality is by requiring that states parties address the underlying causes of women's inequality. As mentioned, religious teachings and cultural practices have often been (mis)used to reinforce dominant beliefs about women's secondary status, generating systemic discrimination against ↵ women, which may be perceived as 'natural'. To tackle systemic discrimination, Article 5(a) requires states parties to work towards 'the elimination of prejudices and customary and all other practices which 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 obligation is echoed in other provisions, such as the requirement that gender stereotypes be removed from school programmes and textbooks (Article 10(c)) and the deeming of legal instruments to be null and void if they restrict the legal capacity of women (Article 15(3)). Article 5(b) builds further on states parties' social change obligations by requiring that they promote change in sex-stereotyped attitudes and practices in families, including by 'recognition of the common responsibility [of women and men] in the upbringing and development of their children'. Some specific aspects of this

p. 329

obligation are also spelled out in other provisions, such as the requirement to establish a network of childcare services 'to enable parents to combine family obligations with work responsibilities and participation in public life' (Article 11(2)(c)), and access to 'information and advice on family planning' that will help to ensure the health and well-being of families (Article 10(h)). While CEDAW takes a consistently negative view of social, religious, and cultural traditions, it must be remembered that they can also lend valuable support to realizing women's equality.[39]

3.2 Limitations of the CEDAW Approach

The approach taken by CEDAW also has some limitations, four of which will be highlighted: its dualistic conception of gender and associated reliance on a comparison with men; the lack of reference to violence against women; its assumption of normative married (cis)heterosexuality;[40] and the very limited acknowledgement of multiple and intersectional forms of discrimination. The CEDAW Committee has ameliorated many of these problems by treating CEDAW as a dynamic instrument that must be read in the light of changing circumstances, and progressively interpreting its provisions in Concluding Observations to states parties' periodic reports and in General Recommendations. However, it is difficult for these efforts to completely overcome the limitations in the CEDAW text without supporting interpretations from other human rights bodies and good faith implementation by states parties. Also, the Committee has been cautious in addressing lesbian issues[41] and almost completely silent about transgendered discrimination,[42] despite the obligation to modify gender stereotypes and fixed parental roles which should enable it to support everyone's right to express their gender identity in the way they choose.[43]

The first limitation is that CEDAW relies fundamentally on a comparison between women and men. This is problematic for at least two reasons. First, it does not allow women to claim rights that men do not enjoy, except as 'special measures'. Consider the example of access to information, advice, and services related to family planning (Articles 10(h) and 12(1)) and the right to 'decide freely and responsibly [sic] on the number and spacing of their children' (Article 16(1)(e)), which are to be enjoyed 'on a basis of equality of men and women'. This leaves little room, if any, for the recognition of women's specific, stand-alone reproductive rights, including abortion rights, unless they qualify as 'measures protecting maternity' (Article 4(2)). By contrast, the 2003 Protocol on the Rights of Women in Africa (African Protocol) recognizes women's autonomous right to sexual and reproductive health, including the right to control their own fertility, to decide on the number and spacing of children, to choose any method of contraception, and to have family planning education.[44]

p. 330

CEDAW's primary reliance on comparing women with similarly situated men is also problematic because it does not recognize gender identities that do not conform to the duality of male/female and does not address discrimination between different groups of women.[45] For example, denying unmarried women access to reproductive technologies that are available to married women is prohibited by CEDAW only if unmarried men (the relevant comparator) are able to access the technology. The comparison does not adequately recognize women's interests because men have very different needs for reproductive assistance, and it renders lesbians and transwomen invisible. Only if the comparator is a married woman, can unmarried

women (including single women and women in de facto lesbian relationships) claim discrimination on the basis of marital status. The reproductive rights of transwomen, transmen (especially if they are able to become pregnant), and other gender identities remains unclear, whether married or not.

A second limitation of CEDAW is its lack of reference to violence against women. This is a silence that can be explained by the reliance on a comparative model, because gendered violence does not affect men in the same way as women (which is not to deny that men may also experience gendered violence). The failure in CEDAW to make specific reference to rights associated with security of the person suggests that, at the time of drafting, the prevalence of violence against women, especially in the private sphere, was unknown or simply accepted as the norm. Much has changed since then. The General Assembly adopted the Declaration on the Elimination of Violence Against Women in 1993, recognizing that gendered violence is 'one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'.[46] In 1994, the Commission on Human Rights (now the Human Rights Council) established the mandate of the Special Rapporteur on violence against women, its causes and consequences, which continues today.[47] In 1992, the CEDAW Committee pre-empted these developments by adopting General Recommendation 19, which interpreted gender-based violence as a form of 'discrimination against women' that is prohibited by CEDAW. Thus, violence 'directed against a woman because she is a woman or that affects women disproportionately' breaches CEDAW, even though it does not expressly make reference to violence.[48] This approach has been applied in the jurisprudence of the CEDAW Committee under its Optional Protocol procedure, which has found violations of states' obligations to eliminate discrimination against women in family relations (Article 16) where states parties have not acted with due diligence to protect complainants from domestic violence.[49] The Committee continues to ↵ grapple with the issue of violence against women, and General Recommendation 19 has been updated by General Recommendation 35.[50]

p. 331

Addressing violence against women as a human rights violation has been further expounded in three regional human rights instruments. The first, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Inter-American Convention) defines violence against women broadly as 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere'.[51] Importantly, this definition does not confine violence against women to a form of sex discrimination, but recognizes that it may constitute a human rights violation in itself, without the need for a male comparator. States parties must adopt a wide range of positive measures to eliminate such violence, including by applying 'due diligence' to 'prevent, investigate and impose penalties'.[52] The African Protocol develops the definition of violence against women further by including acts which 'cause *or could cause* [women] physical, sexual, psychological, and *economic harm*', threats, and all such acts during armed conflict.[53] Violence against women is specifically recognized as a violation of the right to dignity,[54] the rights to life, integrity, and security of the person,[55] and the right to be protected from harmful practices.[56] The particular vulnerability of asylum-seeking and internally displaced women, and elderly and disabled women, is also acknowledged.[57] The third regional instrument is the Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011 (Istanbul Convention), which identifies women's empowerment and economic independence among its aims, reflecting a conscious effort to counter protective responses.[58] These regional developments update CEDAW obligations, overcoming some of their textual limitations, although the

Istanbul Convention has been controversial. Several states have refused to ratify and one has withdrawn its ratification because of, inter alia, the Convention's definition of gender as a social construct and its requirement that non-stereotyped gender roles be included in teaching materials.[59]

A third limitation of CEDAW is that, like the Covenants, women's experience of 'family life' is assumed to be married and (cis)heterosexual (Article 16(1)) except when it comes to rights as a parent in matters relating to children, which are to be enjoyed regardless of marital status (Article 16(1)(d)). One result of the emphasis on 'marriage' and the equal rights of 'spouses' is that the diversity of family forms within which women live, including customary and de facto heterosexual and same-sex partnerships, is rendered invisible. Consequently, the text ignores human rights violations that take place within different family formations, like the unequal sharing of income and assets in a customary marriage or violence in a lesbian relationship, and fails to protect women's equal rights when a non-marital relationship breaks down. The CEDAW Committee has gone some way towards rectifying this problem by acknowledging that various forms of the family exist, by using the gender neutral terminology of 'spouse or partner',[60] and by insisting that women and men be treated equally in families, whatever form they take.[61] However, the Committee ↵ has never engaged proactively with issues of same-sex partnerships or families, and has only made reference to them on the rare occasions that states parties themselves have provided information about developments in their periodic reports.[62] Another repercussion of CEDAW's normative focus on heterosexual marriage is that women's sexual freedom is limited to issues of procreation, with reference to family planning and the spacing of children. This means that CEDAW also fails to address the discrimination that many women face for expressing their sexuality outside marriage, whether in committed relationships, in pursuit of sexual pleasure, as lovers of other women, or as sex workers.

p. 332

The fourth limitation is that CEDAW largely treats 'women' as a homogeneous group who share the same experience of discrimination. Yet sex discrimination can intersect with other forms of discrimination and create experiences of discrimination that are not fully comprehended by the concept of sex discrimination. This has been called 'compound' or 'intersectional' discrimination,[63] and its most extreme forms are experienced by the most disadvantaged groups of women. While the CEDAW text acknowledges some limited differences between women, on the basis of maternity for example, and age in respect of child marriage, there is only one significant exception to the general pattern of assumed homogeneity. Article 14 requires that states parties 'take into account the specific problems faced by rural women and the significant roles which rural women play in the economic survival of their families',[64] and many of the rights it goes on to enumerate do not rely on a comparison with men. The CEDAW Committee has interpreted 'rural' very broadly in many of its Concluding Observations in order to discuss intersectional forms of discrimination faced by women, on the basis of age, ethnicity, caste, and indigeneity.[65] The Committee has also drawn attention to 'multiple' or 'double' discrimination faced by specific groups of women in the context of Article 5(a), which requires modification of social and cultural attitudes and practices that are inconsistent with women's equality.[66] Further, a number of General Recommendations emphasize CEDAW's application to specific groups of women,[67] and others have stressed that special attention must be paid to the needs of women belonging to 'vulnerable' and 'disadvantaged' groups.[68]

The most promising development has been the CEDAW Committee's utilization of the concept of intersectional discrimination in its jurisprudence under the Optional Protocol[69] and in a number of General Recommendations. As the Committee has said, the concept enables it to consider other factors that affect women 'such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender ↵ identity'.[70] However, it is perplexing that 'gender identity' is included in this list because surely the category 'woman' is a gender identity already inclusive of transgender women. The Committee's approach contradicts the definition of gender identity adopted by the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, which makes it clear that *everyone* has a gender identity.[71]

p. 333

As with violence against women, the more recent regional women's rights instruments fill some of the gaps in CEDAW. The Inter-American Convention requires states parties to adopt measures that take 'special account' of women whose vulnerability to violence is compounded by such factors as their 'race or ethnic background', their 'status as migrants, refugees or displaced persons … while pregnant or … disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom'.[72] The African Protocol has provisions that address the rights of asylum-seeking and internally displaced women, elderly women, and women with disabilities, and also recognizes specific rights that must be enjoyed by widows[73] and 'women in distress', which includes poor women, women heads of families, pregnant or nursing women, and women in detention.[74] Both instruments recognize women's diversity more fully than CEDAW, and draw attention to the need to address the compound effects of multiple forms of discrimination.

There is little doubt that the almost universal ratification of CEDAW, the work of the CEDAW Committee, and the efforts of many women's rights and human rights NGOs[75] have advanced the project of making international human rights law more gender inclusive. However, the adoption of a specialist women's rights treaty also, in many respects, reinforced women's marginalization. The high number of reservations to CEDAW, particularly those that defeat its object and purpose, undermines the idea that women's rights are universal, like 'men's'. Rather than prompting the other human rights treaty committees to take women's rights more seriously, the existence of CEDAW tended to have the opposite effect of reinforcing their marginalization.[76] While a specific convention focusing on women's equality was necessary to address women's marginalization in international human rights law, it was plainly not sufficient.

4 Mainstreaming Women's Human Rights

Another major effort to advance the prospects of women successfully claiming their human rights sought to refocus attention on the general human rights instruments by promoting 'gender mainstreaming'.[77] The strategy was adopted by the 1993 Vienna World Conference on Human Rights and reaffirmed by the 1995 Beijing World Conference on Women. These ↵ developments prompted the chairpersons of the human rights treaty bodies to commit to fully integrating gender perspectives into their working methods.[78] This led eventually to the adoption of General Comments by four treaty bodies, which aim to comprehensively incorporate women's experience of human rights violations into the coverage of their respective treaties. This section examines each of these General Comments, noting the diversity of thinking about how to

p. 334

achieve gender mainstreaming that emerges. It also highlights the tenacity of protective representations of women, especially in the context of addressing gendered violence, and concludes that women are not yet constructed as fully human by international human rights law.

4.1 Re-Imagining the Universal Subject: the Approach of the Human Rights Committee

The Human Rights Committee led the way in 2000 with the adoption of General Comment 28 on equality between men and women.[79] The General Comment works through each of the ICCPR rights, bringing women-specific violations into the mainstream by re-imagining the subject of the ICCPR as a woman. For example, it is recognized that the right to life (Article 6) may be violated if women have no option but to resort to backyard abortions or if they are living in extreme poverty,[80] and the right to be free from torture and other cruel, inhuman, and degrading treatment (Article 7) may be violated if a state party fails to protect women from domestic violence.[81] The General Comment clearly promotes women's equality as a substantive concept and accepts that different treatment of women and men may be necessary to achieve equality. The result is an ambitious and creative 'feminization' of ICCPR rights.[82]

However, some of the problems associated with seeking to include women by reference to their 'difference' are also evident. The extensive cataloguing of women's specific injuries and disadvantages, particularly the emphasis on violence, invites protective responses. Indeed, the frequent use of the language of 'protection' is disquieting.[83] It revives the historically conditioned tendency to slide into protective measures when thinking about women as 'victims' of gendered and sexual violence, working against legal responses that empower women as full legal subjects. This tendency is compounded by the failure of the General Comment to identify any gendered human rights abuses that may be specific to men, such as military conscription.

4.2 Analysing the Relationship Between Gender and Racial Discrimination: the Approach of the Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination, which monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), was initially resistant to the idea of gender mainstreaming.[84] After intensive lobbying by women's groups, the Committee changed its mind and General Recommendation ↵ XXV on the 'gender-related dimensions of racial discrimination' was adopted in 2000.[85] In contrast to the Human Rights Committee's approach, which identified the gender issues associated with each of the substantive ICCPR rights, the ICERD Committee elaborates a methodology for analysing the relationship between gender and racial discrimination, with the aim of developing 'a more systematic and consistent approach' in conjunction with states parties.[86] The method requires particular consideration of gender in: (1) the form and manifestation of racial discrimination; (2) the circumstances in which it occurs; (3) its consequences; and (4) the availability and accessibility of remedies.[87]

p. 335

This approach opens the way to a deeper understanding of the structural dimensions of the intersection of race and gender discrimination and how they work together to intensify women's inequality. The methodology is very flexible, allowing for diverse and shifting conceptions of race which, like gender, is

understood as socially constructed. However, similar to General Comment 28, the few examples of intersectional discrimination given are concerned with addressing violence against women,[88] which also runs the risk of eliciting protective responses. While General Recommendation XXV is notable for its use of the language of 'gender' rather than 'women', it is not at all clear that it is intended to recognize that men and other gender identities, as well as women, may suffer from discrimination in which race and gender intersect.

4.3 Addressing the Inequality of Both Women and Men: the Approach of the Committee on Economic, Social and Cultural Rights

A fuller conception of 'gender' mainstreaming is evident in General Comment 16, adopted in 2005 by the Committee on Economic, Social and Cultural Rights.[89] The approach taken is similar to General Comment 28 of the Human Rights Committee in the attention given to identifying the gender dimensions of each of the rights enumerated in the ICESCR and the emphasis on addressing gendered violence. However, its distinctiveness lies in its identification of men, as well as women, as potentially suffering sex discrimination and inequality in the enjoyment of ICESCR rights. For example, with respect to the right to social security, states parties are expected to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[90] General Comment 16 also recognizes that victims of domestic violence are 'primarily women', thereby acknowledging that men, too, may be victims.[91] This position would be highly controversial if it were used as a means to deny the general reality of women's inequality vis-à-vis men. However, it has the potential to support a radical move towards recognizing men's gendered human rights abuses, as well as women's, which would help to eliminate protective approaches to women and underline the importance of changing the way 'men' are stereotyped in the process of realizing 'women's' equality.

4.4 Recognizing Gender as a Key Factor: the Approach of the Committee Against Torture

In 2008, the Committee against Torture adopted a General Comment on implementation obligations, which makes some important observations about the gender dimensions of the Convention Against Torture (UNCAT), conceiving gender mainstreaming even ↵ more inclusively.[92] General Comment 2 emphasizes
p. 336 that special attention must be given to protecting marginalized groups or individuals who are 'especially at risk of torture', including those who may be at risk because of '[race,] gender, sexual orientation, transgender identity … or any other status or adverse distinction'.[93] States parties are requested to provide additional information in their periodic reports about the implementation of UNCAT with respect to women, keeping in mind that 'gender is a key factor' that can intersect with other characteristics of a person to make them more vulnerable to torture or ill-treatment.[94] The Committee notes that women are particularly at risk in contexts that include 'deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes'.[95] The Committee observes that men, too, may be subject to gendered violations of UNCAT, 'such as rape or sexual violence and abuse', and, further, that men and boys, as well as women and girls, may be subject to violations 'on the basis of their actual or perceived non-conformity with socially determined gender roles'.[96] This approach opens the way for the Committee to

identify the specificity of human rights violations that are experienced solely or primarily by both women and men, as well as by the full range of gender non-conformists, although it falls short of explicitly challenging gender duality.

While all the General Comments aimed at gender mainstreaming promote women's equal enjoyment of human rights in a substantive sense, taking their lead from CEDAW, they also reinterpret mainstream human rights to be more inclusive of women's experience. These reinterpretations alleviate the need to compare women's experience with that of men's by reconstructing the universal standard to be more gender-inclusive. Yet only the Committee against Torture gets close to breaking with the tradition of gender duality. Such a break would create a foothold for more complex and dynamic understandings of the operation of gender hierarchies in human rights law and practice, which has the potential to strengthen the struggle for women's rights by more fully making them an issue of the mainstream.

5 Conclusion

The history of women's rights in international human rights law reveals a conundrum: how to insist on the recognition of women's specific human rights abuses without reproducing women's secondary status and encouraging protective responses. While every effort to more fully recognize women's rights in the development, interpretation, and implementation of international human rights law has met with some success, these efforts have also highlighted new challenges. While anti-discrimination law can be a very powerful means of promoting women's enjoyment of human rights, the comparative standard that it relies upon presents quandaries about how best to frame, measure, and realize women's substantive equality, which have yet to be resolved. While recognizing gendered violence as a violation of women's human rights has been a massive achievement, the historical pull towards embracing protective responses highlights the challenge of promoting, instead, ↵ a rights-based response that takes women's sexual injuries seriously while also respecting women's sexual agency. While the need to take account of intersectional forms of discrimination against women is increasingly acknowledged, there remain many conceptual and practical problems about how to make such discrimination legally cognizable. Finally, while gender mainstreaming has led to radical reinterpretations of mainstream human rights obligations, emphasizing the interdependence of ideas about 'men' and 'women' and the realization that women's equality depends on challenging accepted wisdom about dominant masculinities, it has also highlighted the dilemma of how fully to embrace 'gender' as a socially constructed category and include the whole range of gender identities in its coverage. We need new thinking about legal representations of gender that challenges the dualistic and naturalized gender stereotypes that underpin the panoply of gendered human rights abuses, before it will be possible for international human rights law to recognize women as fully human.

p. 337

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United Nations Entity for Gender Equality and the Empowerment of Women (UN Women): **<https://www.unwomen.org/en** *<https://www.unwomen.org/en>***>**

International Women's Rights Action Watch Asia-Pacific (IWRAW-AP): <**https://www.iwraw-ap.org/** *<https://www.iwraw-ap.org/>***>**

Women's Rights—Amnesty International: **<https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/** *<https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/>***>**

Women's Rights—Human Rights Watch: **<https://www.hrw.org/topic/womens-rights** *<https://www.hrw.org/topic/womens-rights>***>**

p. 338

Questions for Reflection

1. What steps might be necessary to ensure that temporary special measures, aimed at accelerating women's equal enjoyment of a particular human right, promote women's empowerment rather than reinforce their secondary status?
2. How should 'the family' be understood in international human rights law?

3. Is women's sexual freedom protected by international human rights law?
4. How has gender mainstreaming been taken up domestically, in your jurisdiction?
5. Do you think that CEDAW could or should be interpreted to cover all forms of gender (identity) discrimination rather than only discrimination against women?

Notes

[1] UN Charter, Art 1(4).

[2] See eg UDHR, Art 2; ICCPR, Arts 2(2) and 3; ICESCR, Arts 2(1) and 3.

[3] UDHR, Art 16(1). See further ICCPR, Art 23(4).

[4] Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *AJIL* 281; Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia JIL* 643. On reservations to human rights treaties generally, see Chapter 5.

[5] International Women's Day Statement by United Nations Women's Human Rights Experts, 34th Session of the Human Rights Council, 7 March 2017; Report of the Working Group on the issue of discrimination against women in law and in practise: Reasserting equality, countering rollbacks, A/HRC/38/46 (14 May 2018).

[6] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Part III, 'A gender perspective on countering terrorism', A/64/211 (3 August 2009) paras 18–53; Report of the Special Rapporteur on violence against women, its causes and consequences: COVID-19 and the increase of domestic violence against women, A/75/144 (24 July 2020).

[7] Report of the Special Rapporteur on violence against women, its causes and consequences: Online violence against women, A/HRC/38/47 (18 June 2018).

[8] World Health Organization, 'Maternal Mortality Fact Sheet' (updated November 2019).

[9] Douzinas, 'The End(s) of Human Rights' (2002) 26 *Melbourne ULR* 445, 457.

[10] Otto, 'Lost in Translation: Re-Scripting the Sexed Subject of International Human Rights Law' in Orford (ed), *International Law and Its Others* (CUP, 2006) 318.

[11] Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *HHRJ* 1.

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[14] eg International Labour Organization, Maternity Protection Convention 1919 (Convention 3); International Labour Organization, Convention Concerning Night Work of Women Employed in Industry 1919 (Convention 4); International Labour Organization, Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds 1935 (Convention 45).

[15] International Agreement for the Suppression of the White Slave Traffic 1904; International Convention for the Suppression of White Slave Traffic 1910; International Convention for the Suppression of the Traffic in Women and Children 1921; Convention for the Suppression of the Traffic in Women of Full Age 1933. See further, Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in the Contemporary Discourses of Trafficking in Women' (2000) 18 *Gender Issues* 23, 24.

[16] UDHR, Art 2. This type of non-discrimination provision is described as a 'subordinate norm' because it prohibits discrimination only with respect to the rights and freedoms set out in the instrument.

[17] Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 *HRQ* 229. For a critical analysis, see Bequaert Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights' in Gould (ed), *Beyond Dominance: New Perspectives on Women and Philosophy* (Rowman & Allanheld, 1983) 250.

[18] ICESCR, Art 2(2); ICCPR, Art 2(1).

[19] See Chapter 8.

[20] UDHR, Art 16(1); ICCPR, Art 23(4).

[21] Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 85.

[22] UDHR, Arts 12 and 16(3); ICCPR, Arts 17(1) and 23(1).

[23] Oloka-Onyango and Tamale, '"The Personal is Political" or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *HRQ* 691, 702.

[24] *Aumeeruddy-Cziffra et al v Mauritius*, CCPR/C/12/D/35/1978 (9 April 1981).

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[26] ICESCR, Arts 6, 7, and 8. See further, Promoting Women's Enjoyment of their Economic and Social Rights: Expert Group Meeting, EGM/WESR/1997/Report (1–4 December 1997) paras 46–8.

[27] ICESCR, Art 10(2).

[28] ICESCR, Art 11(1).

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[31] eg CEDAW, Arts 2(e), 2(f), 3, 5, and 6.

[32] CEDAW Committee, General Recommendation 19, HRI/GEN/1/Rev.9 (Vol II) 331, para 9.

[33] CEDAW Committee, General Recommendation 13, HRI/GEN/1/Rev.9 (Vol II) 325, para 2.

[34] CEDAW Committee, General Recommendation 24, HRI/GEN/1/Rev.9 (Vol II) 358, para 12.

[35] See further CEDAW Committee, General Recommendation 25, HRI/GEN/1/Rev.9 (Vol II) 365.

[36] CEDAW Committee, General Recommendation 25, para 20.

[37] CEDAW Committee, General Recommendation 23, HRI/GEN/1/Rev.9 (Vol II) 347, para 29.

[38] CEDAW Committee, General Recommendation 25, para 21.

[39] Nyamu-Musembi, 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights' in An-Na'im (ed), *Cultural Transformation and Human Rights in Africa* (Zed Books, 2002) 126; Obiora, 'Feminism, Globalization, and Culture: After Beijing' (1997) 4 *Glob Legal Stud J* 355.

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[42] Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *NJHR* 299, 307.

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[44] African Protocol, Art 14(1).

[45] An exception to this rule is CEDAW, Art 14 concerning 'rural women'.

[46] Declaration on the Elimination of Violence Against Women, GA Res 48/104 (20 December 1993).

[47] Commission on Human Rights Res 1994/45 (4 March 1994), ch XI, E/CN.4/1994/132. See further: <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx *<http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx>*>.

[48] CEDAW Committee, General Recommendation 19, paras 1 and 6.

[49] See eg *AT v Hungary*, A/60/38, Annex III (26 January 2005); *Goekce v Austria*, CEDAW/C/39/D/5/2005 (6 August 2007); *Yildrim v Austria*, CEDAW/C/39/D/6/2005 (1 October 2007); *VK v Bulgaria*, CEDAW/C/49/D/20/2008 (27 September 2011); *Jallow v Bulgaria*, CEDAW/C/52/D/32/2011 (28 August 2012).

[50] CEDAW/C/GC/35 (14 July 2017).

[51] Inter-American Convention, Art 1.

[52] Inter-American Convention, Art 7(b).

[53] African Protocol, Art 1(j) (emphases added).

[54] African Protocol, Art 3(4).

[55] African Protocol, Art 4.

[56] African Protocol, Art 5(d).

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[58] Istanbul Convention, Arts 6, 12(6), and 18(3).

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[61] CEDAW Committee, General Recommendation 21, paras 13, 18, 29, 33, and 39.

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[65] See eg India, A/54/38 (1 February 2000) paras 51–3; China, A/54/38 (3 February 1999) para 294.

[66] See eg Sweden, A/56/38 (31 July 2001) para 356.

[67] eg CEDAW Committee, General Recommendation 18, HRI/GEN/1/Rev.9 (Vol II) 330 (disabled women); General Recommendation 26, CEDAW/C/2009/WP.1/R (5 December 2008) (women migrant workers); General Recommendation 27, CEDAW/C/GC/27 (16 December 2010) (older women); and General Recommendation 34, CEDAW/C/GC/34 (7 March 2016) (rural women).

[68] CEDAW Committee, General Recommendation 24, HRI/GEN/1/Rev.9 (Vol II) 358, para 6 (health needs of refugee and internally displaced women, women with physical or mental disabilities, amongst others).

[69] See *Teixeira v Brazil*, CEDAW/C/49/D/17/2008 (27 September 2011) para 7.7 (African descent and socio-economic status); *Kell v Canada*, CEDAW/C/51/D/19/2008 (27 April 2012) para 10.2 (indigeneity); *ON and DP v Russian Federation*, CEDAW/C/75/D/119/2017 (24 February 2020) para 7.4 (lesbians).

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[77] Bunch, 'Women's Rights as Human Rights: Towards a Re-Vision of Human Rights' (1990) 12 *HRQ* 486; Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Iustus Forlag, 2004).

[78] Report of the Sixth Meeting of Persons Chairing the Human Rights Treaty Bodies, A/50/505 (4 October 1995) para 34(a)–(f).

[79] HRC, General Comment 28, HRI/GEN/1/Rev.9 (Vol I) 228.

[80] HRC, General Comment 28, para 10.

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[86] CERD, General Recommendation XXV, para 3.

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[89] HRI/GEN/1/Rev.9 (Vol I) 113.

[90] CESCR, General Comment 16, para 26.

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[94] CAT, General Comment 2, para 22.

[95] CAT, General Comment 2, para 22.

[96] CAT, General Comment 2, para 22.

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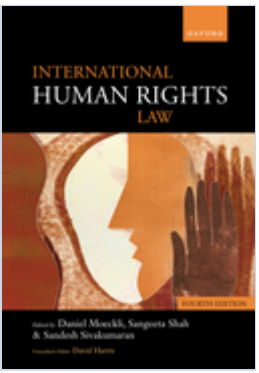

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 339

17. Children's Rights

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https://doi.org/10.1093/he/9780198860112.003.0017
Published in print: 01 June 2022
Published online: September 2022

Abstract

Centring on the Convention on the Rights of the Child (CRC) and the work of its treaty-monitoring body, the UN Committee on the Rights of the Child, this chapter addresses the key sources, developments, standards, and debates regarding international children's rights law. In tackling questions related to CRC rights, obligations, duty-bearers, jurisdiction, and limitations, the chapter makes clear the strengths and weaknesses of both the CRC and the enforcement mechanisms associated with that treaty. The chapter provides an in-depth discussion of the past record and future prospects of the CRC in terms of responding meaningfully to the diverse challenges faced by children.

Keywords: economic, social, and cultural rights, international human rightschildchildren's rightsConvention on the Rights of the ChildCRC Committeenon-discriminationbest interestsright to life, survival and developmentevolving capacity of the childparticipationright to be heard

Summary

The last 30 years have seen the emergence of children as a discrete—and increasing—focus of international human rights law attention. Centring on the Convention on the Rights of the Child (CRC) and the work of its treaty-monitoring body, the UN Committee on the Rights of the Child, this chapter addresses the key sources, developments, standards, and debates regarding international children's rights law. In tackling questions related to CRC rights, obligations, duty-bearers, jurisdiction, and limitations, the chapter makes clear the strengths and weaknesses of both the CRC

and the enforcement mechanisms associated with that treaty. The chapter provides an in-depth discussion of the past record and future prospects of the CRC in terms of responding meaningfully to the diverse challenges faced by children.

1 Introduction

The last 30 years have seen the emergence of children as a discrete—and increasing—focus of international human rights law attention. Much of this is attributable to the growing influence of the UN Convention on the Rights of the Child 1989, the most widely ratified of all human rights treaties.[1] However, it is also consistent with a broader trend within international human rights law to focus on the rights of particular groups of persons, both in terms of the development of group-specific treaties[2] as well as in the work of 'general' treaty bodies.

p. 340

The CRC was adopted on 20 November 1989 and came into force the following September. It emerged from a ten-year drafting process,[3] initiated as part of the ↵ 'International Year of the Child' in 1979.[4] The key UN child rights instrument prior to the Convention was the Declaration of the Rights of the Child 1959,[5] which had updated, and expanded upon, the Declaration of the Rights of the Child adopted by the League of Nations in 1924.[6] However, these earlier instruments were very different to the CRC in terms of their scope and the extent to which they delineated explicit rights-based protections and obligations. The CRC was subsequently added to by three optional protocols: the Optional Protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000, on the involvement of children in armed conflict 2000, and on a communications procedure 2011.

Beyond the CRC, it is important to note that children's rights have also been addressed by other UN human rights treaty bodies, with such references increasing as the profile of children's rights as an area of international human rights law has grown. All seven of the non-child-specific UN treaty body complaints mechanisms have addressed complaints brought by children.[7] Two of the treaty bodies have issued joint general comments or recommendations with the CRC's treaty-monitoring body, the UN Committee on the Rights of the Child (CRC Committee), on areas of overlap between their mandates.[8] Several others have produced sole-authored general comments with an extensive focus on children.[9]

Similarly, there is a growing body of child rights jurisprudence from regional human rights bodies.[10] The African regional human rights system is the only one to have a child-specific instrument and enforcement mechanism (the African Charter on the Rights and Welfare of the Child 1990 and the African Committee on the Rights and Welfare of the Child, respectively). However, the key instruments of both the Inter-American human rights and the European Social Charter systems contain child-specific provisions,[11] which their monitoring bodies have deployed to develop significant bodies of child rights jurisprudence. Despite the very limited reference to children in the European Convention on Human Rights and its protocols,[12] the European Court of Human Rights has also increasingly engaged with children's rights in the last two decades.[13]

p. 341 ↵ There are also a number of UN and regional special procedures with mandates that engage directly or indirectly with children's rights.[14] However, given the pre-eminence of the CRC, the key focus of this chapter will be that treaty and the work of the CRC Committee.

This chapter opens with a discussion of why it is important to look beyond law when considering children's rights (Section 2), before turning to the definition of the 'child' for the purposes of the CRC (Section 3). Section 4 assesses some of the objections that have been levelled against the CRC and the international child rights law project, focusing in particular on those rooted in cultural relativism. Section 5 centres on the monitoring and enforcement mechanisms associated with the CRC. Section 6 focuses on the rights set out in the CRC, and Section 7 on the obligations it imposes. Duty-bearers (Section 8), jurisdiction (Section 9), and limitations (Section 10) are then addressed. The chapter concludes with some thoughts on the future prospects of the CRC in terms of responding meaningfully to the diverse challenges faced by children.

2 The Importance of Looking Beyond Law

Before heading into our consideration of the CRC, we should note that the largely law-focused children's rights work inspired by it has been complemented—and underpinned—by research and practice from a wide range of disciplinary areas. These include the sociology of childhood, developmental psychology, moral philosophy, education, and political science. This is unsurprising given the questions raised for these disciplines by children, their characteristics as a social group, and their lived experiences.

In moral philosophy, for example, the difference between how children are perceived and traditional conceptions of right-holders (adult, rational, capable) has provided fertile ground for advancing debates around the basis and justification of rights.[15] Sociology has provided crucial insights into the socially constructed nature of childhood and led to a more nuanced understanding of the dissonance between, on the one hand, children's actual capacities and the reality of their lived experiences and, on the other, those misconceptions and stereotypes (for example, of children as being weak, passive, innocent, or incapable) that frequently underpin societal attitudes and policies relating to them.[16] Political scientists have begun to interrogate the assumptions underlying the very limited extent of children's democratic citizenship and their representation within society by parents and other adults.[17] Education scholars have played a key role in advancing the understanding of children as actively contributing social agents to the different contexts in which they find themselves.[18] Development psychologists have fleshed out different understandings of the nature and factors affecting children's 'development'—a key element ↵ of the CRC.[19] Disability studies, gender studies, and equality studies have deepened comprehension of the challenges faced by particular groups of children in rights terms—and made clear that failures to recognize, and respond to, differences between children will result in only the partial satisfaction of such rights.

p. 342

Insights from these extra-legal disciplines have influenced understandings of the CRC, including the content of the rights it guarantees, as well as the nature and scope of the obligations it imposes. Children's rights are very definitely not just the territory of lawyers. Indeed, compared to many other areas of human rights law, children's rights is a profoundly multidisciplinary field.

3 The 'Child' for the Purposes of the CRC

Article 1 CRC states that, '[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Thus, while the CRC favours the age of 18 as being the 'cut-off' for the purposes of childhood, it explicitly recognizes that there can be, and are, significant variations in the practice of states parties.

There is, however, one notable exception to the emphasis on 18 within the Convention. This arises in the context of children and armed conflict. Article 38 CRC makes clear that the duties of states to avoid recruiting children or to prevent children from taking a direct part in hostilities are only owed to 'persons who have not attained the age of fifteen years'. This inconsistency is addressed to some degree by the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which raises the age for direct participation in hostilities and compulsory recruitment to 18 and requires states to raise the minimum age for voluntary recruitment above 15.

Given sharp disagreement between states on the issue of when life—and, hence, childhood for the purposes of Convention rights enjoyment—begins, it is unsurprising that the CRC makes no mention of the start of childhood.[20] The sole brief reference to the position of the unborn child occurs in the Preamble, which quotes a section of the Declaration of the Rights of the Child 1959 recognizing that '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'. In practice, the CRC Committee has focused its work on the rights of the born child.

While the rights in the Convention potentially apply to all children under 18, this has not prevented the Committee from focusing on particular groups of children in its work. Its general comments on implementing child rights in early childhood[21] and on the implementation of the rights of the child in adolescence,[22] focus on the rights of children under the age of eight[23] and 'the period of childhood from 10 years until the 18th birthday',[24] respectively. Thus, the Committee has not been slow to recognize that different rights are of varying relevance to children of different ages and that the implementation of those rights will not be 'one size fits all' for children of all ages.[25]

p. 343

4 A Eurocentric Instrument?

While widely ratified, the CRC has been the subject of extensive criticism—and not just from states with concerns about its potentially constraining impact on their law and policy preferences. A range of scholars and activists have argued that the Convention—in the words of one celebrated critique—universalizes a Western conception of childhood,[26] thereby excluding the lived experiences of children outside the West. This has been developed into arguments rooted in cultural relativism[27] that children's rights have conceptual and moral validity only in certain cultural contexts,[28] challenging the legitimacy of the 'universal' approach outlined in the CRC. Proponents of this perspective have, amongst other things, cited the Convention's failure to engage in meaningful depth with the reality of child labour as a feature of many children's lives. Indeed, it is worth noting that there was particularly low African state representation in the CRC negotiations, resulting in a risk of the neglect or sidelining of issues of special importance to African children.

The 'universal' application of the CRC has also been challenged in the context of reservations, many of which seek to subordinate or subject its application to domestic laws, policies, and practice, religious beliefs, or customary traditions or practices. Serious questions arise as to whether such reservations are permissible under international law, including Article 51(2) CRC, which states that reservations incompatible with the object and purpose of the CRC shall not be permitted. Whether this is so or not, they are reflective of an effort on the part of numerous states to bring cultural relativism to bear to mitigate their obligations under the Convention.[29]

Claims about the delegitimizingly Western nature of the CRC have been strongly countered by commentators who have flagged how different provisions of the CRC, such as the child's right to an identity (Article 8), the obligation to take measures against 'traditional practices prejudicial to the health of children' (Article 24(3)), and the rights of minority children, including indigenous children (Article 30), reflect a concern with rights challenges faced by children in diverse global contexts.[30] Furthermore, it is notable that standards and jurisprudence of regional human rights systems—including the African and Inter-American ones—have clearly been strongly influenced by the CRC, albeit regional specificities have been accorded greater attention in regional instruments and case law. This has, however, been largely from the perspective that there are gaps in the CRC rather than from the perspective that there are fundamental errors in approach in terms of what it includes.[31]

Finally, the point has been made that the disconnect between the lived experience of rights-bearers and human rights law standards in different global regions is an enforcement issue rather than convincing evidence of the inability of the CRC to engage normatively with the diverse challenges faced by children globally. This is very definitely an issue that is not limited to the CRC and children's rights.[32]

p. 344

5 The Role of the CRC Committee

The CRC is monitored by the 18-member expert CRC Committee, which is mandated to examine the progress made by states parties in achieving the realization of obligations undertaken in the CRC. This is primarily achieved through the state reporting process.[33]

In 2014, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC-OP3) came into force, which adds to the tools available to the Committee. It sets out a complaints system that allows communications to be submitted by or on behalf of a child or group of children, 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 the CRC or one of its substantive Optional Protocols.[34] The CRC-OP3 also provides for inter-state communications[35] and an inquiry procedure for systematic violations.[36] The Committee's work under the CRC-OP3 is still nascent: as of November 2021, only 22 sets of views have been adopted, with many of these addressing the rights of migrant and asylum-seeking children. Twenty-eight complaints have been declared inadmissible on a range of grounds. One inquiry—focused on residential care in Chile—has been carried out at the time of writing.[37]

Despite being a child-specific instrument, the CRC-OP3 is very strongly based on the 'general' complaints mechanisms pertaining to other UN treaty bodies. It is particularly similar to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP), the adoption of which was a crucial step towards a complaints mechanism under the CRC, given that the ICESCR-OP made clear that economic, social, and cultural rights could be rendered justiciable under international law.[38] Despite the commitment of the CRC to child participation, there was no child involvement in the drafting process of the CRC-OP3.

The CRC-OP3 does have some features that are child-specific. For example, it provides that the rules of procedure for using the complaints mechanism must be child-sensitive and include safeguards to prevent manipulation of children and that the Committee may decline to examine communications that are not in the child's best interests.[39] However, there is no scope for collective complaints, which would arguably be particularly important given the challenges (including capacity, knowledge, and resources) faced by children in terms of engaging themselves with international legal processes.

It is in the Committee's working methods and rules of procedure that the child-specific nature of the monitoring and enforcement mechanisms has been honed. For instance, the Committee has adopted working methods for child participation in both its reporting process and its days of general discussion in 2014 and 2018, respectively. In setting out a range of measures to be taken to ensure that CRC-OP3 processes are both child-friendly and child rights-consistent, the Committee made clear that:

> [i]n fulfilling all functions conferred on it by the [CRC-OP3], the Committee shall be guided by the principle of the best interests of the child(ren). It shall also have regard for the rights and views of the child(ren), the views of the child(ren) being given due weight in accordance with her/his/their age and maturity.[40]

p. 345 ↵ Therefore, although the international enforcement and monitoring systems associated with the CRC were missing a strong child-centric perspective, the Committee has taken crucial steps to address this important oversight.

6 Rights and Principles Under the CRC

The CRC was the first multilateral UN treaty to include both civil and political rights, as well as economic, social, and cultural rights. Its Part I sets out the rights of children, as well as delineating specific state obligations.

6.1 Bringing Economic, Civil, Social, Political, and Cultural Rights Together

Historically, there has been a tendency on the part of different commentators to divide rights up into different categories. A particularly pervasive typology in children's rights has been that of protection, provision, and participation rights (sometimes reconfigured as protection, participation, provision, and prevention). Such typologies are useful in terms of identifying themes within the CRC as well as providing for

'an easy understanding of the Convention'.[41] However, there are strong arguments against the use of the '3 Ps' to frame analysis of CRC rights—not least the fact that any suggestion that all of the rights fit neatly into one or the other discrete category is incorrect. This typology will not therefore be used in this chapter.

Perhaps the key division for the purposes of the CRC is that between civil and political rights and economic, social, and cultural rights. While the CRC does not specify which rights are which, its Article 4—the umbrella obligations provision under the Convention—makes a distinction for the purposes of states duties:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. *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 co-operation.*[42]

If Article 4 CRC is to be applied properly, it is necessary to identify which rights qualify as civil and political and which as economic, social, and cultural. Any such categorization will, of course, be imperfect and there are some rights which could fall under either heading: for instance, the right to non-discrimination (Article 2), the right to protection from all forms of exploitation prejudicial to the child's welfare (Article 36), the right to education (Article 28), and the right to physical and psychological recovery and social reintegration of child victims (Article 39).

The categorization of rights for the purposes of this chapter is based, first, on the inclusion of corresponding rights protections in the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). Where equivalent provisions do not appear in those instruments, the chapter considers whether the relevant CRC rights are preponderantly civil and political or economic, social, and cultural in nature, in the light of how they have been interpreted and applied by the CRC Committee.

p. 346 ↵ The CRC sets out a series of civil and political rights of children, including the rights to life (Article 6(1)), to birth registration (Article 7), to respect for the views of the child (Article 12), to freedom of expression (Article 13), to freedom of thought, conscience, and religion (Article 14), to association and peaceful assembly (Article 15), to protection from interference with privacy, family, home, or correspondence (Article 16), to information (Article 17), to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and maltreatment or exploitation (Article 19), and to a fair trial (Article 40).

Children's economic, social, and cultural rights include the rights to the highest attainable standard of health (Article 24), to benefit from social security (Article 26), to a standard of living adequate for their development (Article 27), and to rest, leisure, and play (Article 31).

Finally, the CRC contains provisions focused on specific groups of children, which include both civil and political and economic, social, and cultural elements. Such groups include refugee children (Article 22), disabled children (Article 23), and minority or indigenous children (Article 30).

6.2 General Principles

In its work, the CRC Committee has identified four so-called 'general principles' (sometimes referred to by it as 'overarching principles'),[43] which it has treated as being of central importance to state efforts to implement the CRC as a whole. These are usefully thought of as lens(es) through which states should conceptualize their efforts to implement children's rights in all contexts, and which the Committee will use when interpreting and applying the CRC. The provisions identified by the Committee as general principles are Articles 2 (non-discrimination), 3(1) (best interests of the child), 6 (right to life, survival, and development), and 12 (right to respect for the views of the child).

The CRC Committee's singling out of Articles 2, 3, 6, and 12 CRC has not been without controversy. Some authors have argued, for instance, that Article 5 is more suited as a general principle than Article 6, given the former's cross-cutting nature and its formulation in direct relation to other rights in the Convention. The inconsistent and sometimes unsatisfactory way in which the Committee makes use of the general principles has also been rightly criticized.[44] That said, the Committee's emphasis on these provisions has meant that a good understanding of them is of particular importance.

6.2.1 Non-discrimination (Article 2)

Article 2(1) CRC prohibits discrimination 'of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. The use of 'or other status' makes clear that this list of grounds is not exhaustive. According to the CRC Committee, 'other status' includes grounds such as migration status,[45] health status,[46] and sexual orientation or gender identity.[47] The Committee has been explicit that

p. 347 ↵ Article 2 covers multiple and intersectional discrimination.[48] By referring to the status of parents and legal guardians, the CRC recognizes that children may be the subject of discrimination due to their association with, or membership of, a particular social group.[49] Notably, there is no explicit prohibition on age discrimination: that is, discrimination against children on the basis of their age vis-à-vis other children or adults. However, a growing number of commentators argue that Article 2 should be read as covering this, drawing on understandings of the particular political, social, and economic position of children within societies as well as growing research around the phenomenon of childism (frequently understood as prejudice and negative attitudes towards or stereotyping of children).[50]

Drawing on the work of the Human Rights Committee and other treaty bodies, the CRC Committee has been clear that Article 2 CRC is not focused on identical treatment: there may be a call for special measures to diminish or eliminate conditions that cause discrimination with regard to particular groups of children.[51] Differential treatment must 'be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards' to be in conformity with Article 2.[52]

6.2.2 Best interests of the child (Article 3(1))

While the CRC Committee sometimes cites Article 3 CRC as a whole as a general principle, its practice makes clear that it is the first paragraph of that provision that is of primary importance when it comes to its operationalization. Article 3(1) provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In contrast to more demanding domestic provisions,[53] the child's best interests are described as a *primary* rather than a *paramount* consideration. As such, the child's best interests are neither always determinative nor do they always trump other considerations. The term 'all actions concerning children' has been interpreted very broadly by the Committee to cover a wide range of actions and inactions that directly or indirectly affect children (including decisions, acts, conduct, proposals, services, procedures and other measures, inaction, and omissions).[54]

The Committee has described the child's best interests as a 'threefold concept'. First, it is a 'substantive right' of the child 'to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general'.[55]

p. 348 ↵ Second, best interests is a 'fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'. Crucially—given the potential indeterminacy inherent in the identification of what a child's best interests might be—the Committee has flagged that 'the rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation'.[56] In doing so, the Committee has made clear that CRC rights may be used as signposts by which the best interests of the child may be identified.[57]

Third, the child's best interests is a 'rule of procedure'. Whenever a decision is to be made that will affect a child or children, 'the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned'. Reverting back to the first element, the Committee has stated that 'the justification of a decision must show that the right has been explicitly taken into account'.[58]

While the Committee can legitimately be criticized for this somewhat confusing explanation of the best interests principle, its reluctance to narrow its understanding is perhaps unsurprising given the general language of Article 3(1) CRC, as well as the Committee's view of that provision as 'a dynamic concept that encompasses various issues which are continuously evolving'.[59] The Committee has repeatedly stressed the importance of a flexible, context-specific approach being adopted when applying Article 3(1). However, defining its scope is particularly important given that the Committee regards it as a directly applicable (self-executing) provision that can be invoked before domestic courts.[60]

6.2.3 Right to life, survival, and development (Article 6)

Article 6(1) CRC guarantees the child's right to life, while Article 6(2) calls on states to ensure to the maximum extent possible the survival and development of the child. The provision is frequently summarized—including by the CRC Committee—as 'the right to life, survival, and development'. All three elements of Article 6 impose both positive and negative obligations.

Key issues addressed by the Committee in relation to the right to life have included the death penalty, life imprisonment, torture, violence against children, armed conflict, harmful cultural practices, and traffic safety and other accidental causes of death.[61] The use of 'to the maximum extent possible' in Article 6(2), as well as the issues addressed by the Committee under the auspices of Article 6(2), make clear that, in contrast to the right to life, state obligations with regard to survival and development are qualified—and are best regarded as socio-economic rather than civil and political in nature. 'Survival'-related issues addressed by the Committee include violence[62] as well as malnutrition and poor sanitation.[63]

The Committee has been clear that it expects states to interpret 'development' as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological, and social development, with implementation measures to be aimed at achieving the optimal development for all children.[64] A more extensive focus on development—both in the context of Article 6 and other CRC provisions—has been a feature of the Committee's work in the last decade.[65]

p. 349

6.2.4 Right to respect for the views of the child (Article 12)

Article 12 has often been described as the most revolutionary of the CRC's provisions. There is no question that its conceptualization of children as active social agents whose views on matters affecting them merit being taken into account was deeply innovative in 1989.

Article 12(1) CRC provides:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

In particular, children shall, according to Article 12(2), be provided the opportunity to be heard in any judicial and administrative proceedings affecting them.

Article 12(1) is wide-ranging: it covers 'all matters affecting the child'. It also sets out a right to express views which is underpinned by a requirement that states ensure conditions for expressing views that account for the child's individual and social situation and 'an environment in which the child feels respected and secure when freely expressing her or his opinions'.[66] Furthermore, the child must be informed about the matters and possible decisions to be taken (and their consequences) by those who are responsible for hearing the child, and by the child's parents or guardian.[67] Article 12 is linked to and reinforced by other CRC rights, including the right to freedom of expression and the right to information.[68]

The Committee has made clear that views can also be expressed through non-verbal forms of communication, including play, body language, facial expressions, and drawing, through which very young children demonstrate understanding, choices, and preferences. Nor is it necessary for a child to have comprehensive knowledge of all aspects of the matter affecting them—rather, they need only have 'sufficient understanding to be capable of appropriately forming her or his own views on the matter'.[69]

That said, Article 12 is not a vehicle by which children's views are rendered automatically determinative. There are two immediate things to note from its wording. First, for a child to have the right to express their views, he or she must be deemed 'capable of forming his or her own views'. Second, even where a child is deemed to have that right, the weight to be given to their views varies depending on their 'age and maturity'. The Committee has asserted with regard to the first point that 'this phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible'.[70] With regard to the second point, age alone cannot establish the significance of a child's views. Instead, maturity—defined by the Committee as 'the capacity of a child to express her or his views on issues in a reasonable and independent manner'[71]—must be taken into account. As with 'best interests', the views of the child have to be assessed on a case-by-case examination. However, in all of these instances an adult mediator has the determinative role: both in determining capacity and in deciding on the ultimate weight to be accorded to the child's views.

p. 350 ↵ The emphasis on child autonomy and self-determination in Article 12 contrasts sharply with more paternalist or protectionist elements of the CRC, notably Article 3. Nevertheless, the Committee has asserted that:

> [t]here is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.[72]

Although the claim that there is 'no tension' is disputable, the Committee is clearly keen to present the articles as mutually reinforcing rather than in conflict.

There is a huge literature on Article 12, with a growing number of methodologies developed by academics and civil society designed to give it effect.[73] There is no question that Article 12 has played a key role in challenging traditional views of children as passive objects of societal or governmental interest and has been at the heart of research, policy, judicial, and other efforts to bring children's views to bear on decision-making related to them in contexts as varied as child protection, civil and criminal proceedings, strategic litigation, public budgeting, education, and national policy making.

There is increasing acceptance of children as social and even political agents, not least due to the impact of child and youth climate activism such as the Fridays for Future Movement. However, there remain very serious obstacles to children having a significant impact on adult-dominated law and policy processes that are key to the achievement of their rights. One important reason for this is the ongoing exclusion of children,

and younger children in particular, from democratic citizenship due to their inability to exert effective impact on democratic decision-making processes.[74] The Committee has yet to engage in any depth with the child's right to vote and Article 12—with its focus on adult-mediated child involvement—offers only a limited platform from which to do so.[75] In sum, while Article 12 marked definite progress in terms of understanding the agency and capacity of children, it has not resulted in a paradigm shift in terms of the child–adult power differential.

7 Obligations Imposed by the CRC

The first sentence of Article 4 CRC makes clear the wide range of implementation measures that states must take to give effect to Convention rights. These include legislative, administrative, and other measures. While implementation measures will vary depending on what is required by specific national contexts, they are 'intended to promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies … comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes'.[76] Since policies without adequate resourcing will not advance children's rights, the CRC Committee has stressed that states parties 'are obliged to mobilize, allocate and spend public resources in a manner that adheres to their obligations of implementation'.[77]

p. 351

The CRC imposes a range of positive and negative obligations. The Committee has repeatedly referred to the tripartite typology of state obligations in this context, namely that states parties must 'respect, protect and fulfil' CRC rights.[78] The obligation to 'fulfil' requires states 'to take action to ensure the full realization of the rights of the child', that is, to facilitate, promote, and provide for children's rights.[79] The Committee has located the tripartite typology of 'respect, protect and fulfil' in the first sentence of Article 4 and hence made it clear that it regards it as applying to all rights—not just economic, social, and cultural rights.[80] In doing so, it used an understanding of the different elements of that typology tightly based on that employed by the UN Committee on Economic, Social and Cultural Rights.[81]

Unsurprisingly given the second sentence of Article 4, in recent years the Committee has made great efforts to delineate the obligations imposed specifically by economic, social, and cultural rights.[82] The first—and, indeed, most significant—thing to note when looking at how the CRC Committee has addressed these rights is its heavy reliance on the work of the Committee on Economic, Social and Cultural Rights.

In its first expansive discussion of Article 4 CRC in a general comment, the CRC Committee highlighted that that provision was similar to Article 2(1) ICESCR and that the general comments of the Committee on Economic, Social and Cultural Rights should be seen as complementary to its own general comment.[83] The Committee went on to state that:

> [t]he second sentence of Article 4 reflects a realistic acceptance that lack of resources—financial and other resources—can hamper the full implementation of economic, social and cultural rights in some States; *this introduces the concept of 'progressive realization' of such rights*: States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation.[84]

It did so despite the fact that there is no reference to the language of progressivity in Article 4 CRC. Subsequently, in its General Comment 19, the Committee stated that the reference to the language of 'to the maximum extent of their available resources' in Article 4 'implies that the full realization of those rights will necessarily be achieved progressively'.[85] Progressivity has thus been deliberately read into Article 4 by the Committee.

'Resources' for the purpose of Article 4 are not simply financial in nature but include technological, economic, human, and organizational ones. Furthermore, 'available resources' are not just limited to those available in the national context but include those available from the international community through international assistance. Significantly from a child rights perspective, the Committee has recommended that states 'assess "available resources" beyond financial measures', emphasizing 'the importance of systematically supporting parents and families which are among the most important "available resources" for children'.[86]

p. 352 ↵ In its later work, the Committee has focused on financial resources in the context of budgets specifically, stating that Article 4 requires states parties 'to mobilize, allocate and spend sufficient financial resources' and that funds allocated to policies and programmes which further the realization of CRC rights 'should be spent optimally and in line with the general principles of the Convention'.[87] The Committee has also flagged that corruption and mismanagement of public resources 'represents a failure by the state to comply with its obligation to use the maximum of available resources'.[88]

Not all obligations imposed by Article 4 are progressive or limited by available resources. Indeed, when discussing 'progressive realization' and 'maximum available resources' the Committee has emphasized that its statements on these obligations were 'without prejudice to obligations that are immediately applicable according to international law'.[89] Furthermore, it has stated that 'progressive realization' in terms of Article 4 imposes an immediate obligation for states 'to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization of economic, social, and cultural rights of children'.[90] The Committee has also adopted the concept of the 'minimum core' of economic, social, and cultural rights, drawing on the relevant work of the Committee on Economic, Social and Cultural Rights.[91]

Non-retrogression is another immediate duty identified by the Committee. In its General Comment 19, it stated that:

> [t]he obligation imposed on States parties by article 4 to realize children's economic, social and cultural rights 'to the maximum extent' also means that they should not take deliberate retrogressive measures in relation to economic, social and cultural rights. States parties should not allow the existing level of enjoyment of children's rights to deteriorate. In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations. States parties shall demonstrate that such measures are necessary, reasonable, proportionate, non-discriminatory and temporary and that any rights thus affected will be restored as soon as possible. States parties should take appropriate measures so that the groups of children who are affected, and others with knowledge about those children's situation, participate in the decision-making process related to such measures. The immediate and minimum core obligations imposed by children's rights shall not be compromised by any retrogressive measures, even in times of economic crisis.[92]

As such, the Committee has developed a clear schema of obligations under the CRC.

8 Duty-Bearers Under the CRC

The key duty-bearer for the purposes of the monitoring and enforcement mechanisms set out in the CRC is the state. However, the Convention also makes a number of references to non-state actors.

The CRC repeatedly refers to the responsibilities, rights, and duties of 'parents' and others responsible for the day-to-day upbringing and support of the child. Article 3(2), for instance, provides that 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. ↵ Article 18 goes further by making clear the respective duties of the state, parents, and legal guardians. In requiring states to 'use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child', Article 18(1) provides that '[p]arents or, as the case may be, legal guardians, have the *primary responsibility* for the upbringing and development of the child. The best interests of the child will be their basic concern'.[93] This does not, however, absolve the state of its obligations under the CRC. Article 18(2) continues to say that: 'For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties *shall render appropriate assistance* to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children' (emphasis added). Article 18 thus depicts the state's role as a complementary and supportive one—not as a supplanter of parental responsibility.[94]

p. 353

A similar balance of roles is set out in Article 27 CRC guaranteeing the child's right to a standard of living adequate for their development. Article 27(2) makes clear that parents or others responsible for the child 'have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development'. However, states 'shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes' (Article 27(3)). As such, the Convention clearly envisions children as generally being under the care of parents or other adults who have primarily responsibility for the development and upbringing of their children, while casting the state in a collaborative assistive role.

The most celebrated CRC reference to parental responsibilities, rights, and duties is Article 5, which provides:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 5 does not create a right of children to exercise rights in accordance with their evolving capacities so much as it recognizes their right to receive appropriate guidance and direction from parents and guardians to secure the enjoyment of their rights in a manner consistent with their evolving capacities.[95] The CRC

Committee has defined 'evolving capacities' as 'an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights'. According to the Committee, 'the more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing'.[96] At the time of the adoption of the CRC, Article 5 was significant in its explicit recognition of the child as a right-holder rather than simply an object of parental rights and duties. Thirty years on, this is—in some societies at least—a less controversial conceptualization of child–parent relations.[97]

p. 354 ↵ Another key set of actors with an important role to play with regard to CRC rights—although not expressly referred to in the Convention—are business entities. While the Committee has carefully focused its general comment on the impact of the business sector on children's rights on the obligations of states, it has explicitly recognized that 'duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises'. It has stressed that all businesses must meet their responsibilities regarding children's rights, with states ensuring that they do so, and that business enterprises must not undermine states' abilities to meet their obligations towards children.[98] Thus, while it is clear that business entities have 'responsibilities', the Committee has been careful not to suggest that the Convention imposes directly enforceable obligations on them: '[h]ost States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction'.[99]

The Committee has also made reference to the responsibilities of a range of other non-state actors, including the media, researchers, and health service providers.[100] Nevertheless, it is important to bear in mind that the state remains the ultimate guarantor of children's rights—including where parents (or others responsible for the day-to-day care of the child) either cannot or will not give effect to their own duties or responsibilities with regard to children's rights. Furthermore, as noted earlier, the monitoring and enforcement system for children's rights is state-centric: the CRC Committee does not monitor parents' efforts and achievements in terms of the role set out for them under the treaty. Nor can a complaint under the CRC-OP3 be brought against anyone other than a state party.

9 Jurisdiction and Beyond Under the CRC

Article 2(1) CRC provides that states parties shall 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction'. This provision has been construed by the CRC Committee as the basis of the Convention's jurisdictional application, including the extraterritorial jurisdiction identified by the Committee.[101] Its work on jurisdiction remains relatively nascent, principally limited to statements in its general comments on migration as well as a small number of admissibility decisions. The Committee has been criticized for its failure to make clear the standard it uses when assessing if and when extraterritorial obligations are owed by states. While it has identified a number of factors or 'circumstances' relevant to the determination of jurisdiction in particular cases, serious questions remain with regard to how it will identify and apply extraterritorial obligations.[102] In a recent admissibility decision, the Committee addressed the issue

of transboundary harm related to climate change. The Committee stated that the appropriate test for jurisdiction in this context was that adopted by the Inter-American Court of Human Rights in its 2017 Advisory Opinion on the Environment and Human Rights.[103] According to the Committee, this implied that:

> when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) [jurisdiction] of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.[104]

p. 355

That said, states' obligations do not relate solely to rights-holders who are subject to their jurisdiction. Article 4 CRC makes explicit reference to 'international co-operation'—or, as the Committee views it, 'global implementation through international cooperation'.[105] Although no mention is made of jurisdiction in Article 4, this reference apparently results in the imposition of extraterritorial obligations.[106] While the full scope of Article 4 is not yet clear,[107] recent years have seen significant development of the understanding of this obligation with a growing awareness that 'international cooperation' as provided for in the CRC and other human rights treaties gives rise to legally binding obligations.[108]

The Committee has been clear that states 'have obligations to engage in international cooperation for the realization of children's rights beyond their territorial boundaries'.[109] It has noted that 'Article 4 emphasizes that implementation of the Convention is a cooperative exercise for the States of the world' and that the Convention should form the framework for international development assistance, with programmes of donor states being rights-based.[110] States that lack the resources needed to implement CRC rights are 'obliged to seek international cooperation', while states with resources for international cooperation have an obligation to provide such cooperation.[111] States should demonstrate that they have made every effort to seek and implement international cooperation to realize the rights of the child and are to collaborate with other states' efforts to mobilize the maximum available resources.[112]

Crucially, the Committee has also specified that states should comply with their Convention obligations when engaging in development cooperation as members of international organizations and when signing international agreements.[113] States should not accept loans from international organizations, or agree to conditions set forth by them, if those loans or policies are likely to result in violations of the rights of children.[114] Furthermore, the Committee has stressed that 'the World Bank Group, the International Monetary Fund and World Trade Organization should ensure that their activities related to international cooperation and economic development give primary consideration to the best interests of children and promote full implementation of the Convention'.[115]

10 Limitations

The CRC does not contain a general limitation clause. However, rights-specific limitations are included in some CRC civil and political rights protections,[116] along the lines of limitation clauses in the ICCPR. The Committee's work on limitations is sparse but the similarity in phrasing of the relevant provisions with

p. 356

corresponding rights protections under the ICCPR means the work of the Human Rights Committee provides useful insights into how these limitations might be applied by the CRC Committee in the future. The same is true regarding the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.[117]

April 2020 saw a significant advance in this context, with the Committee issuing a statement on the COVID-19 pandemic.[118] Here, it explicitly recognized that:

> in crisis situations, international human rights law exceptionally permits measures that may restrict the enjoyment of certain human rights in order to protect public health. However, such restrictions must be imposed only when necessary, be proportionate and kept to an absolute minimum.

This would appear to be the (admittedly broad) parameters the Committee will use to assess the permissibility of state-imposed limitations on children's rights in the COVID-19 context. Interestingly, it did not refer to the limitations expressly outlined in the CRC. As such, the Committee can be understood as viewing limitations as applying to rights beyond those containing express limitation clauses. Indeed, given the different challenges faced by children in terms of their rights enjoyment flagged by the Committee, it seems to regard limitations as being relevant in the context of economic, social, and cultural rights as well.

The Committee continued to specify that states should ensure that 'responses to the pandemic, including restrictions and decisions on allocation of resources, reflect the principle of the best interests of the child'. Yet, perhaps surprisingly, the other general principles—non-discrimination (Article 2), the right to life, survival, and development (Article 6), the right to respect for the child's views (Article 12)—were not cited here. That is not to say, however, that the CRC will not ultimately be interpreted in a joined up way so that the crucial emphasis on non-discrimination, the threats posed to children's survival and development, and the Committee's recommendation to states to '[p]rovide opportunities for children's views to be heard and taken into account in decision-making processes on the pandemic' elsewhere in the statement, are also taken into account in state decision-making in relation to restrictions of rights. Given the Committee's relative silence on limitations to date, assessing states parties' rights compliance in the context of the pandemic will provide it with an important opportunity to develop its work in this area.

11 Conclusion

What is the future of children's rights protection under the CRC? This chapter has flagged the criticisms that the Convention has received from a cultural relativist perspective. However, critique of the CRC is not just limited to those who would dismiss, sidestep, or undermine it. Even its strongest proponents recognize that it has gaps and blind spots. The Convention is now over 30 years old. As such, it might be forgiven for its failure to expressly address key challenges in terms of child rights enjoyment that have since emerged—for instance, the impacts of HIV/AIDS, climate change, and environmental degradation. Similarly, the last three decades have seen huge strides in understanding of ↵ the structural inequality and social, economic, and democratic vulnerability faced by children within different societies, as well as the prevailing adult–child power differential. Again, this is work that has been accelerated by the Convention and is not necessarily something that it would be expected to reflect at the time of its adoption.

p. 357

However, the lack of attention paid to girl children and gay children, amongst other groups, cannot be excused away on the basis of the Convention's age.[119] The CRC Committee has advanced understanding about the protection that the Convention accords in these and other areas, particularly through its general comments. However, the fact remains that the Convention's silence on globally contested issues, such as the minimum age of criminal responsibility, parent-administered physical punishment, and child marriage, has served to undermine efforts to advance children's rights in these contexts in the face of state resistance and indifference.

In sum, while the CRC is an authoritative and wide-ranging statement of children's rights, it is imperfect. As such, the CRC Committee's treatment of it as a 'living instrument, whose interpretation develops over time'[120] is crucial to ensuring its relevance and utility to child right-holders. The Committee's record so far suggests strongly that it—and the CRC—will rise to this challenge effectively.

Further Reading

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p. 358 ↵

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Useful Websites

UN Committee on the Rights of the Child: **<https://www.ohchr.org/en/treaty-bodies/crc** *<https://www.ohchr.org/EN/HRBodies/CRC>***>**

Child Rights Connect: **<https://www.childrightsconnect.org** *<https://www.childrightsconnect.org>***>**

Child Rights Information Network: **<http://www.crin.org** *<http://www.crin.org>***>**

Questions for Reflection

1. Why is it important that children should be accorded rights and recognized as 'rights-bearers' under international human rights law?
2. What are the key strengths and weaknesses of the standards set out in the CRC?
3. What are the key obligations imposed by the different rights under the CRC?
4. How is the balance between child autonomy and paternalism/protectionism struck in: (a) different parts of the CRC; and (b) the CRC Committee's work?

Notes

[1] At the time of writing, only the US had not ratified the CRC, having signed it in 1995.

[2] At the international level, see eg the UN Convention on the Rights of Persons with Disabilities (2006). At the regional level, see eg the Protocols to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) and of Older Persons in Africa (2016).

[3] See Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff, 1992); OHCHR, *Legislative History of the Convention on the Rights of the Child* (2007).

[4] GA Res 31/169 (1976).

[5] GA Res 1386 (XIV) (1959).

[6] See OHCHR (2007) 3–25.

[7] See Child Rights Connect, 'Child Rights Jurisprudence', <https://opic.childrightsconnect.org/jurisprudence-database *<https://opic.childrightsconnect.org/jurisprudence-database>*>.

[8] See Joint General Comment 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 22 of the CRC Committee, CRC/C/GC/22 (16 November 2017); Joint General Comment 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 23 of the CRC Committee, CRC/C/GC/23 (16 November 2017); Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the CRC Committee, CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014).

[9] See eg Committee on the Rights of Persons with Disabilities, General Comment 3, CRPD/C/GC/3 (25 November 2016); Committee on the Elimination of Discrimination against Women, General Recommendation 38, CEDAW/C/GC/38 (20 November 2020); Committee on Economic, Social and Cultural Rights, General Comment 11, E/C.12/1999/4 (10 May 1999).

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[11] ACHR, Art 19; European Social Charter, Art 17; Revised European Social Charter, Art 17.

[12] ECHR, Arts 5(1)(d) and 6(1); Protocol 1, Art 2; Protocol 7, Art 5.

[13] See Fenton-Glynn (2021).

[14] eg the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography, and other child sexual abuse material, the UN Special Rapporteur on trafficking in persons, especially women and children, and the Rapporteur on the Rights of the Child of the Inter-American Commission on Human Rights.

[15] eg Archard and Macleod (eds), *The Moral and Political Status of Children* (OUP, 2002).

[16] eg Qvortrup et al (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave, 2011).

[17] eg Cohen, 'Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies' (2005) 9 *Citizenship Studies* 221.

[18] eg Quennerstedt and Mood, 'Educational Children's Rights Research 1989–2019: Achievements, Gaps and Future Prospects' (2020) 28 *Int J of Children's Rights* 183.

[19] For a critical take on such work, see Buss, 'What the Law Should (And Should Not) Learn from Child Development Research' (2009) 38 *Hofstra LR* 13.

[20] See OHCHR (2007) 301–12.

[21] General Comment 7, CRC/C/GC/7/Rev.1 (20 September 2006).

[22] General Comment 20, CRC/C/GC/7/Rev.1 (6 December 2016).

[23] General Comment 7, para 4.

[24] General Comment 20, para 5.

[25] See further Section 8.

[26] Pupavac, 'The Infantilisation of the South and the Universalisation of Childhood' [1998] *HRLR* 3.

[27] See Chapter 3.

[28] See eg Bentley, 'Can There Be Any Universal Children's Rights?' (2005) 9 *Int J of Human Rights* 107.

[29] See Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 *HRQ* 472, as well as the responses of states parties to various reservations by other states parties, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4 *<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4>*>.

[30] eg Grover, 'A response to KA Bentley's "Can There Be Any Universal Children's Rights"' (2007) 11 *Int J of Human Rights* 429.

[31] See Nolan and Kilkelly (2016).

[32] Grover (2007).

[33] See Chapter 19.

[34] CRC-OP3, Art 5(1).

[35] CRC-OP3, Art 12.

[36] CRC-OP3, Arts 13–14.

[37] Espejo Yaksic, 'Report of the investigation in Chile under article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure', CRC/C/CHL/INQ/1, Leiden Children's Rights Observatory, <https://www.childrensrightsobservatory.nl/case-notes/casenote2018-2 *<https://www.childrensrightsobservatory.nl/case-notes/casenote2018-2>*>.

[38] See Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children' (2014) 22 *Int J of Children's Rights* 205.

[39] CRC-OP3, Art 3.

[40] Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, CRC/C/62/3 (8 April 2013) Rule 1.

[41] Hammarberg, 'The UN Convention on the Rights of the Child—and How to Make It Work' (1990) 12 *HRQ* 97, 99.

[42] Emphasis added.

[43] eg CRC Committee, General Comment 22, CRC/C/GC/22 (16 November 2017) para 19.

[44] Hanson and Lundy, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25 *Int J of Children's Rights* 285–306, 300–1.

[45] General Comment 22, para 9.

[46] CRC Committee, General Comment 3, CRC/GC/2003/3 (17 March 2003) paras 7–9.

[47] See Peleg, 'International Rights of the Child: General Principles' in Kilkelly and Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 135–57.

[48] General Comment 22, para 23.

[49] See further CRC, Art 2(2) which requires states to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[50] For more on childism, see Young-Bruehl, *Childism: Confronting Prejudice Against Children* (Yale UP, 2012).

[51] CRC Committee, General Comment 5, CRC/GC/2003/5 (27 November 2003) para 12.

[52] General Comment 22, para 22.

[53] eg Section 28(2) of the Constitution of the Republic of South Africa 1996. See also CRC, Art 21, which refers to best interests as a 'paramount consideration' in the context of adoption.

[54] CRC Committee, General Comment 14, CRC/C/GC/14 (29 May 2013) paras 17, 18.

[55] General Comment 14, para 6.

[56] General Comment 14, para 6.

[57] Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, 1998) 48.

[58] General Comment 14, para 6.

[59] General Comment 14, para 11.

[60] General Comment 14, para 6.

[61] See Peleg and Tobin, 'The Rights to Life, Survival and Development' in Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP, 2019) 186, 217–18.

[62] CRC Committee, General Comment 15, CRC/C/GC/15 (17 April 2013) para 17.

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[64] General Comment 5, para 12.

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[66] CRC Committee, General Comment 12, CRC/C/GC/12 (20 July 2009) para 23.

[67] General Comment 12, para 25.

[68] General Comment 12, para 80.

[69] General Comment 12, para 21.

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[74] See Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart, 2011) chs 2 and 3.

[75] See Nolan, 'The Child as "Democratic Citizen": Challenging the "Participation Gap"' [2010] *Public Law* 767.

[76] General Comment 5, para 9.

[77] CRC Committee, General Comment 19, CRC/C/GC/19 (20 July 2016) para 27.

[78] eg General Comment 4, para 3; General Comment 15, paras 1 and 71–4.

[79] General Comment 19, para 27(c).

[80] General Comment 19, para 27.

[81] See Chapter 7.

[82] For a more detailed discussion of what follows, see Nolan, 'Children's Economic and Social Rights' in Kilkelly and Liefaard (2019) 239.

[83] General Comment 5, para 5.

[84] General Comment 5, para 7 (emphasis added).

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[86] CRC Committee, Day of General Discussion on Resources (2007) paras 24 and 25.

[87] General Comment 19, para 28.

[88] General Comment 19, para 34.

[89] General Comment 19, para 29.

[90] Day of General Discussion on Resources (2007) para 47.

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[93] Emphasis added.

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[96] CRC Committee, General Comment 20, CRC/C/GC/20 (6 December 2016) para 18.

[97] For a similar standard to Art 5, see CRC, Art 14(2).

[98] CRC Committee, General Comment 16, CRC/C/GC/16 (17 April 2013) para 8.

[99] General Comment 16, para 42.

[100] eg General Comment 15, paras 79–85.

[101] See CRC Committee, *LH et al v France*, Nos 79/2019 and 109/2019, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (30 September 2020), paras 9.6–9.7.

[102] See Duffy, 'Casenote 2021/3: Communications No 79/2019 and 109/2019 LH et al v France and 77/2019 FB et al v France', Leiden Children's Rights Observatory, <https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3 <*https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3*>>.

[103] OC-23/17 (15 November 2017).

[104] *Sacchi et al v Argentina*, CRC/C/88/D/104/2019 (22 September 2021) para 10.7.

[105] General Comment 15, para 86.

[106] Langford, Coomans, and Gómez Isa, 'Extraterritorial Duties in International Law' in Langford et al (eds), *Global Justice and State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP, 2013) 51, 58.

[107] See Vandenhole, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?' (2009) 17 *Int J of Children's Rights* 23.

[108] See De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *HRQ* 1084.

[109] General Comment 16, para 41.

[110] General Comment 5, paras 60–1.

[111] General Comment 19, para 35.

[112] General Comment 19, paras 36–7.

[113] General Comment 19, para 39.

[114] General Comment 16, para 47.

[115] General Comment 5, para 64.

[116] CRC, Arts 10, 13, 14, and 15.

[117] E/CN/4/1985/4 (1985) Annex.

[118] CRC Committee, 'Statement on COVID-19' (8 April 2020).

[119] For an authoritative critique of groups that receive insufficient attention under the Convention, see Freeman, 'Introduction' in Freeman (ed), *The Future of Children's Rights* (Brill, 2014) 3, 8.

[120] CRC Committee, General Comment 8, CRC/C/GC/8 (2 March 2007) para 20.

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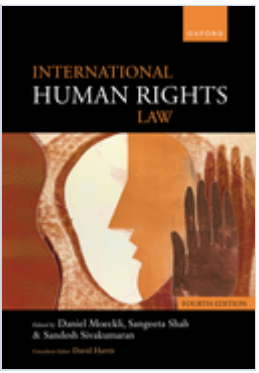

International Human Rights Law (4th edn)
Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris

p. 359

18. Group Rights

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https://doi.org/10.1093/he/9780198860112.003.0018
Published in print: 01 June 2022
Published online: September 2022

Abstract

This chapter discusses the definition, exercise, and limitations of certain group rights, including peoples with the right to self-determination, minorities, and indigenous peoples. The right to self-determination protects a group as a group entity with regard to their political participation, as well as their control over their economic, social, and cultural activity as a group. Rights of minorities can be seen as both an individual and a group right. Finally, the growing recognition of the rights of indigenous peoples is considered.

Keywords: international human rights, self-determination, minorities, indigenous peoples, group rights

Summary

This chapter concerns the human rights of three particular groups: peoples with the right to self-determination, minorities, and indigenous peoples. It explains that human rights apply to groups and not only to individuals, and how group rights and individual rights fit together. The right to self-determination is a right that protects a group as a group entity in regard to their political participation, as well as their control over their economic, social, and cultural activities as a group. Rights of minorities can be seen as both an individual and a group right, and have been the subject of international human rights protection over many years. There has been an increasing understanding and clarification of the application and content of the rights of indigenous peoples in recent years.

1 Introduction

1.1 Group Rights

Most of the discussion in this book, and the focus of many of its chapters, is about the human rights of individual human beings. This is not surprising, as the historical and conceptual bases of human rights generally developed from considerations concerning the dignity and oppression of individuals, and almost all national constitutional and legislative protections of human rights have been drafted to protect the rights of individuals. Similarly, the vast majority of human rights protected in international and regional treaties, such as the right to life, the right to an adequate standard of living, the right to education, and the right to freedom of thought, protect the rights of individual human beings.

However, human rights are not limited to those of individual human beings. As long as each individual is a part of one or many groups, an individual's identities, histories, and engagements are affected by belonging to groups and by the communities within which they live. Human rights can be understood in terms of the need to protect the dignity and physical integrity of a group (or a 'people'), as well as its civil, cultural, economic, political, and social engagement. As human rights should reflect lived realities, it is necessary to see them as more than about individuals. After all, most societies accord an importance to communities, collectives, and families, and humans possess a general communal quality. ↵ International human rights law is conceived and exercised within the context of communities, with rights being limited (in all except a few instances) by the rights of others and the general interests of the relevant community.[1]

p. 360

Yet in a number of situations it is a group of individuals who are discriminated against or oppressed because of the fact that they belong to a group or they have a group identity and sense of human dignity that is dependent on them belonging to a group. There does need to be a self-consciousness, or self-identity, of being part of a group. An objective definition is impossible to determine and cannot be imposed by external bodies, as was attempted in the colonial era. For example, the prohibition on genocide is a human right premised on the need to protect a group as a group from actions against its physical integrity and not only to protect the individual's right to life. Similarly, many indigenous communities have an identity that is dependent on them being a group rather than being a selection of individuals. Group rights protect a group from discrimination and oppression *as a group*, so it is the group alone which has the human right independently of its individual members, such as with the right to self-determination. Alternatively, group rights can be held by a collection of individuals who are connected in such a way that the right is held collectively, and might, in some circumstances, also be held as individuals, such as with the rights of minorities.

1.2 Group Rights v Rights of Individuals

Many individual human rights do have the effect of protecting a group. For example, the right of freedom of assembly, the right to join a trade union, and the right of freedom of religion all enable groups to gather, have protection, and express their thoughts. Yet each of these rights is an individual right under international human rights law. It is an individual right exercised in concert with other individual human rights but it can

only be held and claimed by an individual human being. While there is now some case law that enables legal entities, such as religious institutions and corporations, to bring claims on behalf of individuals (and perhaps even in their own right),[2] these remain individual rights that may lead indirectly to the protection of a group. They are not rights that directly protect a group as a group.

The UN Human Rights Committee considered the difference between group rights and individual rights when considering the right to self-determination (which is a group right), stating that:

> The right of self-determination is of particular importance because its realization is *an essential condition* for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants [the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.[3]

p. 361 ↵ In making this statement, the Human Rights Committee both recognized the difference between group rights and individual rights, and acknowledged that when groups are subject to oppression as a group and their rights are not able to be exercised, then the individuals within those groups are also not able to exercise their individual rights. The Committee made the difference even clearer when it took the view that a group who brought a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1) alleging a breach of the right to self-determination could not do so because the specific terms of the ICCPR-OP1 only enabled complaints by 'individuals'.[4] While there is some criticism of the Committee taking this stance, other international human rights treaties do not tend to contain the restriction that only individuals are able to bring a complaint. For example, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights allows for complaints by groups concerning the rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes the right to self-determination. The African Commission on Human and Peoples' Rights considered the link between individual and group rights (which are called "peoples' rights" in the African Charter) when it held:

> The Commission deduces … that peoples' rights are equally important as are individual rights. They deserve, and must be given protection. The minimum that can be said of peoples' rights is that, each member of the group carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity, i.e. common rights which benefit the community such as the right to development, peace, security, a healthy environment, self-determination, and the right to equitable share of their resources.[5]

1.3 Relevance of Group Rights

While there are a range of group rights, such as the prohibition on genocide, the right to development, and the right to a clean environment, a specific focus of this chapter is on the right to self-determination (sometimes called the right *of* self-determination). This is because the right to self-determination is

protected under the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, it has been considered in case law and other jurisprudence, and it has wide and significant impacts across the international community, as will be shown.

The rights of minorities have similar wide and significant impacts, as there are minorities in every state. While these rights have often been seen as within the compass of individual rights, it will be shown that they are also now considered as group rights. One type of collective that has been especially affected by the development of peoples and minorities rights is indigenous peoples, and so they are also considered in this chapter.

The acknowledgement that peoples, minorities, and indigenous groups have human rights, and that their rights should be protected in international law, has taken a long time. They are important human rights that affect the whole of the international community. With the reality that almost every state in the world has some current or potential issue connected with group rights, it is important that these rights are understood, respected, and applied appropriately.

p. 362

2 The Right to Self-Determination

2.1 Definition

Claims have been made for centuries about matters that could now be seen in terms of self-determination, with some writers tracing it as far back as the early stages of the institution of government. However, the use of self-determination in an international legal context primarily developed during the immediate post-First World War period, with both Marxist thought on national liberation in the USSR and the views of US President Wilson supporting it. In 1945, the UN Charter proclaimed that one of the purposes of the UN was 'respect for the principle of equal rights and self-determination of peoples'.[6]

Despite the general acceptance that self-determination is part of international law, it was not until the conclusion of the two international human rights Covenants that a legal definition was provided. Article 1 ICCPR and Article 1 ICESCR are identical, providing:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The definition in Article 1(1) is largely repeated in all the subsequent international and regional human rights treaties and documents that contain a right to self-determination, although the African Charter on Human and Peoples' Rights (ACHPR) elaborates on it slightly.[7]

Yet this definition does not clarify all aspects of the right. While it is evident that it is a right that is relevant in political contexts, it is also applicable in economic, social, and cultural contexts, with, for example, Article 1(2) of the Covenants dealing with a particular economic manifestation of the right and Article 55 UN Charter referring to economic and social aspects of the right.

There have been many attempts to establish a definition of 'peoples'. The definition often referred to is that of an influential group of UNESCO experts:

> A people for the [purposes of the] rights of people in international law, including the right to self-determination, has the following characteristics:
>
> (a) A group of individual human beings who enjoy some or all of the following common features:
>
> (i) A common historical tradition;
>
> (ii) Racial or ethnic identity;
>
> p. 363 (iii) ↵ Cultural homogeneity;
>
> (iv) Linguistic unity;
>
> (v) Religious or ideological affinity;
>
> (vi) Territorial connection;
>
> (vii) Common economic life.
>
> (b) The group must be of a certain number who need not be large (eg the people of micro States) but must be more than a mere association of individuals within a State.
>
> (c) The group as a whole must have the will to be identified as a people or the consciousness of being a people—allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.
>
> (d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.[8]

This definition appears to be an 'objective' one that can be applied to all relevant groups around the world, by providing some criteria that should be met for a 'people' to be established. However, an objective definition is impossible—and is likely to reinforce a developed-world, colonial, male construct of a 'people'[9]—and there would be few groups that have been universally accepted as peoples having the right to self-determination (including some of those who are in former colonies) who would meet all these criteria. This impossibility is acknowledged in paragraph (c) of the definition given here, where a 'subjective' criterion is included. This is because a key aspect of 'self' is self-identification, where the group identifies themselves consciously as a

'people'. This is an essential part of the definition of a 'people', not least because 'nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history',[10] often due to the oppression that they have received or to attain certain ends.[11]

In fact, in many situations, it is evident who are the 'peoples' with the right to self-determination. This can be because the relevant national constitution, legislation, or practice indicates this. Consistent oppressive action by those in power over another group may also indicate an acceptance of the group as a 'people', such as in colonial territories, not least because it may be a catalyst for the self-identification of the group as a people with the right to self-determination. External recognition by a state or group of states can be very useful for the group (such as the recognition by many states of the Palestinian people) but it is not conclusive of the group being a people for the purposes of the right to self-determination.

Indeed, if such external state recognition were conclusive it would allow the possibility of the existence of a human right (as distinct from the ability of a human right to be exercised) being dependent on the whims of governments. Dependence on the government for the existence of a group right would undermine the concept of a human right as being, for example, inherent in human dignity.[12]

p. 364 ↵ Therefore, it is necessary to adopt a very flexible definition as to who are a 'people'. A definition is required that is broad and inclusive, not decided by states alone or imposed on a group, and is adaptable to the many circumstances that exist worldwide. The definition must respect the self-identification of a group as a people. There would need to be some territorial nexus for a 'people' with a right to self-determination. Yet a 'people' can include just a part of a population in a state and it can include groups that live across state territorial boundaries (which reflect the fact that in reality there is no 'nation-state'). It would include all those who are subject to 'alien subjugation, domination and exploitation'.[13]

If a broad and adaptable definition is adopted, then the focus on the right to self-determination under international human rights law is in relation to how and when the right can be exercised. Further, a broad definition of the possessors of this human right is consistent with the need to protect as many people as possible from violations of human rights by a state (and others), considering both the inequality of power between a state and its inhabitants and the non-reciprocal nature of human rights treaties. Such a broad definition would then be consistent with the approach to other human rights in this book.

3 The Application of the Right to Self-Determination

3.1 Colonial Context

From the earliest time that the UN focused on self-determination as part of international law, it applied it to colonial territories. In 1960, in the UN Declaration of Independence for Colonial Countries and Peoples, the content and scope of the right to self-determination in relation to colonial territories was clarified. In 2019, in its *Chagos Advisory Opinion*, the International Court of Justice (ICJ) confirmed that this declaration was declaratory of customary international law when it was adopted.[14] Therefore, by 1960, a mere 15 years after the UN Charter, self-determination as a human right was a matter of customary international law binding on all states, at least in regard to colonial territories.

The ICJ has consistently held that the right to self-determination applies to all peoples in all colonial territories. In its *Namibia Opinion*, concerning the illegal presence of South Africa in Namibia, the Court's view was:

> [T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. ... The ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.[15]

This position was confirmed by the ICJ in the *Western Sahara Case*, with Judge Dillard stating that '[t]he pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations'.[16]

State practice confirms that the right to self-determination applies to all peoples in colonial territories. This is evident not only from the vast number of colonial territories that ↵ have exercised their right to self-determination to become new states, but also because of the acceptance by the colonial powers that they have a legal obligation to allow this exercise. Some writers have concluded from this consistent state practice, *opinio juris*, and lack of any denial by states that the right to self-determination of colonial peoples is now a matter of *jus cogens.*[17]

p. 365

3.2 Outside the Colonial Context

State practice shows that the right to self-determination has definitely been applied outside the colonial context. For example, when East and West Germany were united into one state in 1990, it was expressly stated in a treaty signed by four of the five permanent members of the UN Security Council that this was done as part of the exercise of the right to self-determination by the German people.[18] The right to self-determination was also referred to in the context of the dissolution of the USSR and Yugoslavia,[19] internally within states, and the ICJ confirmed that it applies to the Palestinian people in its *Advisory Opinion on the Wall.*[20]

The ICJ has gone further and has declared that the right to self-determination is 'one of the essential principles of contemporary international law' and has 'an *erga omnes* character'.[21] By having an *erga omnes* character, it means that there is an obligation on *all states* to protect and respect the right to self-determination. This makes clear that it is not only an obligation on colonial powers and that the right applies to peoples beyond the colonial context.

Indeed, since 1960 the right to self-determination has been expressed as a right of 'all peoples'. This is seen in the Declaration on Principles of International Law 1970 (which is often considered as being an internationally agreed clarification of the principles of the UN Charter), which provides:

> [All States should bear] in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.[22]

In fact, even the Declaration on Independence of Colonial Countries and Peoples 1960 dealt with colonialism 'in all its forms and manifestations'. This highlighted the oppressive *nature* of the administrative power over a people and not simply the physical distance of the administering colonial power from the colonial territory. Hence, where a group or groups in a state administer power in such a way that there is 'subjugation, domination and exploitation' (as stated in the Declaration on Principles of International Law) of another group that oppresses, demeans, and undermines the dignity of that group, then ↵ the right to self-determination may apply to the latter group. Therefore, the right to self-determination applies to any peoples in any territory (including non-colonial territories) who are subjected to 'alien subjugation, domination and exploitation'. Indeed, it would be contrary to the concept of a human right if the right to self-determination could only be exercised once (such as by a colonial territory) and then not again. All peoples in all states have the right to self-determination.

p. 366

4 The Exercise of the Right to Self-Determination

4.1 External and Internal Self-Determination

Under international human rights law, there is a concentrated focus on the *exercise* of a human right. This is usually because a particular issue has arisen due to an alleged restriction on the exercise of a right by a state. Similarly, the exercise of the right to self-determination is a crucial aspect in understanding the right.

The Declaration on Principles of International Law sets out the principal methods as to how the right to self-determination can be exercised. It provides that:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

While the vast majority of peoples in colonial territories exercised their right to self-determination by independence, this was not the only method of exercise that was either available or used. For example, the British and the Italian Somaliland colonies joined into one state of Somalia, part of the British colony of Cameroon merged with the French colony of Cameroun to form the new state of Cameroon and the remaining part joined with the existing state of Nigeria, and Palau and a number of other Pacific Ocean islands formed a free association with the US (that is, they had general self-government but their foreign affairs and defence were controlled by the US).

In non-colonial situations, a range of exercises of the right to self-determination have occurred. While many have been by independence, such as Bangladesh from Pakistan and Montenegro from its union with Serbia, others have been by merger (for example, the two Yemens), or by free association (for example, Bougainville with Papua New Guinea). Some have occurred after prolonged armed conflict, such as Eritrea's independence from Ethiopia in 1993, or a period of international territorial administration, such as in Kosovo. In the latter instance, the Kosovo Assembly issued, on 17 February 2008, a unilateral declaration of independence from Serbia. A large number of states, including the UK and US, recognized Kosovo as an independent state, while other states, including Serbia and Russia, rejected this independence on the grounds that it was contrary to international law. The ICJ was asked by the UN General Assembly to give its opinion. In the *Advisory Opinion on Kosovo*, the majority of the ICJ held:

> Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed … Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances … The Court considers that it is not necessary to resolve ↵ these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law … [T]he Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.[23]

p. 367

This avoidance by the Court in deciding these issues concerning the right to self-determination has been, rightly, strongly criticized.[24]

In these types of situation, there has been a change in the international relationships between the peoples exercising their right to self-determination and the original state/colonial power, as well as with other states and international actors. So these are considered exercises of *external* self-determination.

Yet, self-determination can also be exercised by *internal* means, where there is a change in the internal relationships and administrations within a state but no change in the external relationships. The Declaration on Principles of International Law expresses internal self-determination as being where 'a government [is] representing the whole people belonging to the territory without distinction as to race, creed or colour'. The Canadian Supreme Court considered that internal self-determination in relation to the peoples of the province of Québec enabled the 'residents of the province freely [to] make political choices and pursue economic, social and cultural development within Québec, across Canada, and throughout the world. The population of Québec is [and should be] equitably represented in legislative, executive and judicial institutions.'[25]

Accordingly, there are a range of internal exercises of the right to self-determination. For example, outside the colonial context there has been devolution of some legislative powers to Scotland and Wales in the UK, control over cultural, linguistic, and other matters within the Swiss cantons, and a form of federalism in

Bosnia-Herzegovina and in Iraq. These methods are often called forms of autonomy or governance. In many instances, the method of exercise has been by agreement with the central government to enable significant autonomy within a state, such as Mindanao in the Philippines, and the northern regions of Mali.[26]

What is shown by all these examples is that there are many possible exercises by peoples of their right to self-determination. While independence—called 'secession' when it is from an existing independent state—is often seen as the only option in non-colonial contexts, it is but *one option* of very many forms of exercise, and not normally the first option lawfully able to be exercised under international law. The Supreme Court of Canada made this clear when it stated that:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[27]

p. 368 ↵ What the Court is indicating is that, in most instances outside the colonial context, independence will not be considered to be a legitimate first step in the exercise of the right to self-determination. However, should other methods of exercise, such as internal self-determination, be made impossible due to the actions of the state, and if there is increased oppression of the group as a group, then it may be argued that, in those limited circumstances, the people could exercise their right to self-determination by seeking independence as a last resort.[28]

In any event, there must be flexibility in the forms of exercise of the right to self-determination (and there are also limitations on the exercise—see Section 5). In many instances, the exercise will be dependent on the particular context and the resolution of a dispute. For example, the Badinter Commission which was established by the European Community (now European Union) to clarify the legal position during the dissolution of Yugoslavia, held that:

> In the Committee's view one possible consequence of [the right to self-determination] might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned.[29]

This suggestion of different nationalities and sovereign powers within one state is a possibility that should be explored. It could also operate across states, as has happened to some extent with the peace agreements concerning Northern Ireland, where both the British and Irish governments were involved in the key negotiations and both signed the various agreements, even though Northern Ireland is entirely within the UK. While such solutions challenge traditional notions of sovereignty, they acknowledge the breadth of impact of the right to self-determination and seek to provide effective means to exercise the right as fully as possible.

4.2 Procedures for Exercising the Right to Self-Determination

The exercise of the right to self-determination must be by the people themselves. The ICJ confirmed this when it emphasized 'that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[30] In most instances, the will of the people can be determined by a popular consultation, such as by referendum or elections. For example, the Badinter Commission decided that the will of the peoples in Bosnia-Herzegovina had to be ascertained, such as by a referendum carried out under international supervision.[31]

However, there may be exceptional circumstances where there is no consultation, such as where the position is clear in all the circumstances. For example, during the dissolution of the USSR few referenda were held. Yet consultations can be manipulated, as was determined in the *Chagos Advisory Opinion* concerning the UK, Mauritius, and the Chagossian people. There are other examples, such as when Indonesia sought to integrate West Papua which had been under a separate Dutch colonial administration from the rest of Indonesia, when just a few indigenous leaders were asked their views as to whether they would accept Indonesian control and, probably under military threats, agreed to accept this control. Similarly, the people of Hong Kong were not fully consulted about the transfer of sovereignty of that separate, distinctive region to China. Even if the geopolitical situation is one where the choices of the people may be limited, they must be able to make a free and genuine decision on a clear question, which is their own decision and is not imposed by governments or others. In ensuring that the genuine will of the people is clear, it is important that the views of all within the group, including those of women, people with disabilities, and minorities, are heard and listened to equally.

p. 369

The decision on the necessary majority and form of public consultation is important, especially as the numbers voting can be affected by a boycott (for example, by smaller groups who may seek a different exercise of their right to self-determination) or other circumstances. The practice during the dissolution of Yugoslavia varied considerably. In Bosnia-Herzegovina, it was assumed that 50 per cent plus one was sufficient and a boycott by the Serbian population (which comprised over 30 per cent of the overall population) did not affect the result, with over 60 per cent of all those eligible to vote casting their votes in favour of independence. In Montenegro, the EU stated that there had to be a majority of 55 per cent of votes cast and there had to be a participation of at least 50 per cent plus 1 of those eligible to vote.[32] When there was a referendum in 2011 as to whether South Sudan should secede, the relevant national law required three steps: at least 60 per cent of registered voters casting their votes; if this 60 per cent was not achieved, then the referendum was to be repeated; and the result had to be one that secured 50 per cent plus 1 of the total number of votes cast. In the end, there were significantly more than 60 per cent of voters casting their vote, with over 95 per cent in favour of independence.

The actual voters in the referendum may not always be easy to decide. This is seen in the debate over which people to include in a referendum on Western Sahara, being primarily whether those who could vote were limited to those who were living in Western Sahara at the time of the ICJ's Opinion or if the referendum could include those (mainly Moroccans) who have moved there since.[33] Further, even if a majority of the people choose to exercise their right to self-determination by seeking secession from a state, this will not automatically lead to that result (though it may give a strong mandate to a people in their consultations with the relevant government), as there can be limitations on the exercise of the right to self-determination.

5 Limitations on the Exercise of the Right to Self-Determination

5.1 Rights of Others

Almost all human rights (with the exception of absolute rights such as the prohibition on torture) have limitations on their exercise. These limitations are to protect the rights of others or the general interests of the society (such as public order and public health). The right to self-determination is a human right and, because it is not an absolute right, it has limitations on its exercise. These are limitations on the ability of the peoples with the right to exercise that right fully and legitimately under international law.

p. 370 ↵ Therefore, where there is another people with the right to self-determination within the state or region or a people who are few in number with the right to self-determination within a larger population (as with most colonial territories), then the right is limited in its exercise in order to take into account the right of the other people. As shown in other chapters, this right is limited only to the extent to which it enables all human rights to be exercised as fully as possible in the circumstances.[34]

An example of the operation of this limitation is found in the decision of the Canadian Supreme Court concerning the potential secession (through the exercise of the right to self-determination) of the people of the province of Québec. The Court noted that the rights of the indigenous ('aboriginal') peoples in the province were also affected:

> We … acknowledg[e] the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Québec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Québec to unilateral secession. In light of our finding that there is no such right applicable to the population of Québec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.[35]

The Court not only acknowledged the rights of the indigenous peoples in this passage but also the human rights and constitutional rights of people in all parts of Canada. It determined that, even if there had been a clear majority of the people of Québec who wished to secede, they could not do so without negotiations with the other parts of Canada. However, this does not necessarily give a permanent veto power to the other parts of Canada, as the internal right to self-determination of the people of Québec must not be so restricted.

5.2 Territorial Integrity

The limitation on the exercise of the external right to self-determination that is most often asserted by governments is 'territorial integrity'. This is a claim that asserts that the state itself should not be divided up and is broadly based on the general interests of international peace and security. This limitation on the right to self-determination was expressed in the Declaration on Principles of International Law:

> Nothing in the foregoing paragraph [recognizing the right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

This is an important potential limitation on the exercise of the right. However, it is only a justifiable limitation in certain situations, namely when an exercise of external self-determination (such as independence) is being sought and when a state is 'possessed of a ↵ government representing the whole people belonging to the territory without distinction as to race, creed or colour'. In other words, it can only be a legally justifiable limitation on the exercise of external self-determination when a state is *already* enabling full internal self-determination for those people.

p. 371

A particular aspect of this limitation on the exercise of the right to self-determination is the international legal principle of *uti possidetis juris*. This principle provides that states emerging from colonial administrative control must accept the pre-existing colonial boundaries. Its purpose is to achieve stability of territorial boundaries and to maintain international peace and security. This was made clear by a Chamber of the ICJ:

> The maintenance of the territorial *status quo* in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, induced African states judiciously to consent to the respecting of colonial frontiers.[36]

This is generally accepted as a principle applicable solely to colonial territories. There is, though, some scope for considering that historically established boundaries (as was the case in much of the former Yugoslavia and the USSR) may be accepted as prima facie the appropriate territorial boundaries on independence even in non-colonial contexts, unless there are agreements to the contrary.

The principle of *uti possidetis juris* may appear to be a sound one in terms of preserving international peace and security at the time of independence. However, it has not prevented many boundary disputes.[37] This is mainly because many of these boundaries were created to preserve the interests of the colonial states and were not related to natural or cultural boundaries understood by the peoples on the ground. As one of the architects of these boundary determinations said at the time:

> We have been engaged ... in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.[38]

The ICJ recognized these problems when it stated that '*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes'.[39] It could be argued that adoption of the principle today gives legitimacy to political or diplomatic actions purely on the basis that those actions occurred during the colonial era and were made without taking the views of the people on the territory into account.[40]

p. 372 ↵ Therefore, the principle of *uti possidetis juris* is of questionable legitimacy as a limitation on the right to self-determination. It should only apply, if at all, in (the now very few) situations of decolonization or, perhaps, where the states involved in a dispute expressly choose to use a colonial boundary as relevant evidence for a boundary delimitation.[41]

5.3 Other Limitations

There are two other potential limitations on the exercise of the right to self-determination that are often raised: competing claims over the relevant territory by states; and the use of force. It is not uncommon for there to be a situation where more than one state asserts sovereignty over a territory where there are people with a right to self-determination. The ICJ recognized this situation in the *East Timor Case*, where it accepted that Portugal, as the colonial power, and Indonesia, as the occupying power, had forms of jurisdiction over the same territory, as did the people of East Timor, who had the right to self-determination.[42] In many instances, a state will assert that an early treaty enables it to gain sovereignty (as did China in relation to Hong Kong and as Spain does in relation to Gibraltar), notwithstanding the wishes of the people of that territory. This situation was considered in the *Western Sahara Case*:

> [T]he consultation of the people of a territory awaiting decolonization is an inescapable imperative. … Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization.[43]

Therefore, even where there may be a lawful competing claim by another state over a particular territory, the peoples on that territory still have a right to self-determination that they must be able to exercise.

In relation to the use of force, the peoples seeking to exercise their right to self-determination often use force and have force used against them. The general position appears to be that set out in the Declaration on Principles of International Law:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.

This makes clear that a state cannot use force (arguably at least not disproportionate force) to prevent the exercise of the right to self-determination. The people themselves are entitled to support from other states when forcible action occurs against them as a people. That support must be in accordance with the purpose and principles of the UN Charter, so occupation by one state to 'support' a people's right to self-determination in another state would not be lawful. This was one of the criticisms of the Russian actions to support Abkhazia and South Ossetia in Georgia, as well as of Russia's role in the Crimea and parts of Ukraine in 2014.[44] Significantly, when Additional Protocol I to the Geneva Conventions ↵ 1949 was agreed in 1977, its protection extended to wars of national liberation, being 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[45] The restrictions on the use of force against peoples seeking to exercise the right to self-determination do not seem to restrict the peoples themselves using force to assert their right to self-determination, such as the people of Eritrea, though other human rights issues may then arise as their force cannot infringe the human rights of others, such as minorities.

p. 373

6 Minorities

6.1 Defining 'Minorities'

Article 27 ICCPR and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 (Declaration on Minority Rights) provide protections for those who are 'ethnic, religious or linguistic' minorities. The Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities determined that:

> [Minorities are groups who are] numerically inferior to the rest of the population of a State, in a nondominant position, whose members—being nationals of the State—possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[46]

However, there are other minorities who may be excluded from this definition, and it is not clear how minorities are determined.[47] Indeed:

> [T]he difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population. Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage.[48]

Therefore, any determination as to the existence of a minority must take into account objective elements, such as shared ethnicity, language, or religion, as well as subjective considerations, such as the self-identification by individuals as members of a minority. Despite the lack of a clear definition, human rights supervisory bodies continue to try to protect effectively the rights of minorities.[49]

While the Declaration on Minority Rights is devoted to national, ethnic, religious, and linguistic minorities, it is also important to combat multiple discrimination and to address situations where a person belonging to a national, ethnic, religious, or linguistic minority is also discriminated against on other grounds such as gender, disability, or sexual ↵ orientation. Similarly, it is important to keep in mind that, in many states, minorities are often found to be among the most marginalized groups in society and severely affected by, for example, pandemic diseases, and in general have limited access to health services. Undoubtedly, the state-focused nature of the international human rights legal system means that it is largely minorities within a state as a whole who are protected by this right.

p. 374

6.2 Rights of Minorities

At the Paris Peace Conference in 1919 after the First World War, a number of treaties were drafted to protect minorities in the new states being created, as a condition for settlement of territorial boundaries.[50] The obligations to protect minorities under these treaties largely related to giving minorities some autonomy.

However, significant development of minority rights did not occur until the adoption of Article 27 ICCPR, which provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The subsequent Declaration on Minority Rights provides guidance about the development of law in this area —as do some regional treaties in this field.[51] There is now probably a customary international law obligation on all states to protect the rights of minorities.[52] Indeed, the Human Rights Committee has asserted that 'provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to … deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language'.[53]

6.3 Exercise of Minority Rights

The types of rights for which minorities have protection are, as Article 27 ICCPR provides, 'to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The Declaration on Minority Rights adds to these with the following: the rights to participate in cultural, religious, social, economic, and public life; to participate in decisions on the national and, where appropriate, regional level; and to associate with other members of their group and with persons belonging to other minorities.

p. 375

↵ In some instances, the exercise of minority rights does raise issues of conflict between the individual and the group. In the case of *Lovelace*,[54] the claim by a divorced indigenous Canadian to return to the indigenous land was upheld by the Human Rights Committee despite Canadian law (intending to protect the indigenous minority) precluding her from so doing. However, a Swedish law that protected the identity of the Sami minority as a whole by revoking the reindeer husbandry rights of those who pursued more lucrative

work was held to be valid despite the consequent restriction imposed on the individual Sami.[55] The Human Rights Committee's view was that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.[56] Therefore, there are times when the minority rights protection of an individual will be limited by the broader interest of the group as a whole. These examples also show that indigenous peoples may be able to assert their human rights through the use of minority rights protections.[57] Note that the Organization for Security and Co-operation in Europe (OSCE) has a High Commissioner on National Minorities, whose aim is to identify and address causes of tension relating to minorities.

6.4 Individual v Group Rights of Minorities

The concept of human rights of minorities embodies both the protection of the rights of individuals who are part of a minority group and of the minority group as a group, according minorities a collective right to enjoy the common traits of their group. There are two views as to how these rights should be approached. The individual rights approach to minority rights argues that such rights must be vested in, and be exercised by, the individual members claiming affiliation with the minority group rather than the minority group itself. In contrast, the group rights approach recognizes that the collective qualities that the minority possess, such as their group culture and their group language (being an inherent part of their human dignity), distinguish them from the majority and so require them to be protected as a group. However, it should be noted that, under both approaches, who is a minority may change over time and location, and this makes the right somewhat contingent on historical circumstances, which is unusual for a human right.[58]

It is clear that Article 27 ICCPR is solely an individual right for those who are part of a minority. For example, the Human Rights Committee has rejected group claims based on Article 1 (right to self-determination), as discussed already, but accepted the same claim under Article 27 as long as it was argued as an individual right.[59]

However, there is a good argument that where 'national' minorities are concerned then treating the right as a group right is the appropriate approach. Indeed, it is strongly argued that minorities can form a 'people' for the purposes of the right to self-determination, especially as the definitions for each group are very similar, internal self-determination can apply to minorities within a state, and many minorities use the

p. 376 ↵ language of self-determination.[60] For example, the Badinter Commission considered that the shared ethnic, religious, and linguistic background of Serbians from Bosnia-Herzegovina and Croatia with Serbians in Serbia did not prevent them from being a 'people' for the purposes of the right to self-determination even though they had specific minority rights protection as well.[61] While the exercise by a minority of their right to self-determination may be limited to internal self-determination, in that minority groups would usually seek to exercise their right by enabling some degree of autonomy over matters of relevance to their culture, language, religion, or ethnic identity, it does not mean that they do not possess a right to self-determination.

7 Indigenous Peoples

7.1 Defining ‘Indigenous Peoples’

There are significant similarities between minorities and indigenous peoples. Indigenous peoples have also been in a non-dominant position, and their cultures, languages, and religious traditions are normally different from the majority in the societies in which they live. International law has tended to recognize and protect indigenous rights separately. For example, the International Labour Organization (ILO) adopted in 1957 and 1989 two treaties, ILO Convention No 107 concerning Indigenous and Tribal Populations and ILO Convention No 169 concerning Indigenous and Tribal Peoples, which apply to members of ‘semi-tribal or tribal populations’, ‘tribal peoples’, and ‘groups regarded as indigenous’, with specific characteristics.

However, no definition of ‘indigenous peoples’ has unanimously been adopted by the international community. Since the importance of maintaining their distinct identities and characteristics under the self-identification principle was accepted, the idea of a formal definition has deliberately been rejected.[62] Nevertheless, the recognition and protection of the rights of indigenous peoples under international law has not depended on a formal definition, and their main characteristics have been outlined widely in different instruments. The UN Working Group on Indigenous Populations listed the relevant factors to the understanding of the concept of ‘indigenous’, which have also been taken into account by international organizations and legal experts:

> (a) Priority in time, with respect to the occupation and use of a specific territory;
>
> (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
>
> (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
>
> (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[63]

These still remain the main elements of definitions of indigenous peoples.

7.2 The Rights of Indigenous Peoples

p. 377

The main concern in relation to indigenous peoples has been the preservation of their views and traditions as a group:

> Under the basic principles of universality, equality and non-discrimination, indigenous peoples are entitled to the full range of rights established under international law. However, indigenous peoples, as collectivities, have distinct and unique cultures and world views, and their current needs may differ from those of the mainstream population. Their equal worth and dignity can only be assured through the recognition and protection of not only their individual rights, but also their collective rights as distinct groups. It is when these rights are asserted collectively that they can be realized in a meaningful way. This has led to the development of a separate body of international instruments for the recognition and protection of the rights of indigenous peoples.[64]

Thus, indigenous peoples are entitled to the full range of individual human rights, including protection from discrimination, rights in relation to children, and cultural rights, as well as the rights of the indigenous peoples as a group.

The ILO Conventions remain the only international binding instruments that specifically provide a detailed list of rights and obligations of states in respect of indigenous peoples. ILO Convention No 107 covered a wide range of issues, such as traditionally occupied lands; social, economic, and cultural development; recruitment and conditions of employment; and social security and health. However, it had an integrationist approach (that is, to bring (often forcibly) indigenous people into the majority society) that was gradually seen as outdated. It was modified by ILO Convention No 169, on the basis of the recognition of, and respect for, ethnic and cultural diversity of indigenous peoples as permanent societies. ILO Convention No 169 acknowledges the rights of indigenous peoples to identity (in relation to the recognition of their legal capacity or juridical status), territory, autonomy, participation in the political and social national life, physical welfare, and cultural integrity.

The UN Declaration on the Rights of Indigenous Peoples 2007 represents the most comprehensive response to the issue of indigenous peoples at the universal level. The Declaration proclaims:

> *Article 1*
>
> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
>
> *Article 3*
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> *Article 4*
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

p. 378 ↵ Its provisions are compatible with ILO Convention No 169, although it does not provide a mechanism to monitor its implementation and does not have a legally binding character. Nonetheless, the Declaration has been influential and its provisions have been reflected in some national laws[65] and in the decisions of the Inter-American Court of Human Rights.[66] It is, therefore, clear that there is a general consensus, based on acceptance of the UN Declaration and other state practice, that indigenous peoples have a range of human rights, including the right to self-determination.[67]

In relation to other group rights of indigenous peoples, the Inter-American Court of Human Rights has accepted a right to collective property, noting the existence of a special relationship between the indigenous peoples and their traditional lands and resources:

> Among indigenous peoples there exists a communitarian tradition related to a form of collective land tenure, inasmuch as land is not owned by individuals but by the group and the community … [T]he protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle … This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the Convention so that they can continue living their traditional lifestyle, and so that their cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.[68]

The Court has also developed a system of reparations that are applicable in cases of violations of indigenous peoples' rights.[69]

7.3 Exercise of Indigenous Peoples' Rights

The exercise of indigenous peoples' rights follows similar patterns to those seen with regard to the right to self-determination and minority rights, with the same diversity of means of exercise. In addition, there is a specific right of consultation that is considered to be essential for protecting indigenous peoples, which finds its origins in the right to self-determination and has been recognized as a general international law obligation. This right of consultation of indigenous peoples about decisions affecting their land arises because of their particular economic and social characteristics, such as their practices, culture, traditions, and capacity to sustain themselves in their vulnerable situation, in relation to development of land. This understanding has consolidated into a right of indigenous peoples of free, prior, and informed consent (FPIC) in matters related to land and their activities. 'Free' means that there is no coercion, intimidation, or
p. 379 manipulation; 'prior' ↵ means that consent is sought sufficiently in advance of any authorization or commencement of development projects; 'informed' means that all relevant information is provided in a culturally appropriate manner, language, and form; and 'consent' should be clear from all the relevant indigenous peoples affected, preferably written and verified.

The UN Working Group on Indigenous Populations has provided a clarification of this definition of FPIC:

> The right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources—a complex of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.[70]

This definition links FPIC to the right to self-determination of indigenous peoples. In addition, the Inter-American Court of Human Rights has clarified the purpose of FPIC:

> The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.[71]

This is a broad obligation on states and is reflective of the breadth of impact on indigenous peoples of the activities of states and of other actors, such as corporations.[72]

The importance of the obligation on states to consult indigenous peoples prior to engaging in development, extraction, or investment plans is highlighted by its codification in the national laws of various states, such as Bolivia, Chile, Malaysia, Norway, Peru, the Philippines, Venezuela, and, to some extent, Australia and Canada.[73] There is also an array of industry guidance and standards, such as OECD-FAO Guidance for Responsible Agricultural Supply Chains, FAO Voluntary Guidelines on the Responsible Governance of Tenure, and the World Bank's Environmental and Social Framework. These provisions are ↵ normally intended to protect indigenous peoples from the actions of states and corporations, as well as reducing the risk of, for example, deforestation or desertification. Some writers have argued that FPIC represents customary international law and so is binding on all states,[74] and may enable indigenous peoples to refuse consent to a development project. However, in practice, the negotiation powers of indigenous peoples with a state or corporation, even with FPIC, may be weak and the risks to themselves can be quite high, especially where

p. 380

their land has been so reduced that their options are very limited. In addition, the broader lack of recognition of consultation with indigenous peoples in other states continues to constitute a barrier to the effective protection of indigenous rights.

8 Conclusion

Human rights are not only in relation to individual human beings; they can also protect a group as a group. One of these group rights is the right to self-determination. This right applies to a wide range of peoples, not just those in colonial territories and not just those recognized by some states as having the right. It is a right of all peoples in all territories. This right can be limited in its exercise due to others' rights (such as others' right to self-determination) and where the general interests of the relevant society is legitimately applied. In the exercise of this right, there are many alternatives, such as internal control over the people's own cultural affairs, with independence now being difficult to justify legally in the first instance in most contexts. Both indigenous groups and minorities can assert a right to self-determination. There are also individual minority rights protected under international human rights law which encompass cultural, ethnic, linguistic, religious, and national minorities, and indigenous peoples have both individual and group rights. In exercising these individual rights, the collective rights of the group as a group will need to be taken into account.

With the right to self-determination, minority rights, and the rights of indigenous peoples, the intention is to enable the rights-holders to determine their political, economic, social, and cultural destiny as they wish, while not overriding the legitimate interests of others affected. These rights developed once it was generally accepted that the traditional approach to international law and to the determination of boundaries had a severe consequence on some groups. However, group rights are not human rights which are to be left to be considered only after individual rights have been considered.

These group rights are, therefore, a reflection of the changing values in the international community away from a state-based, and solely state-interested, system towards a more flexible system. Indeed, the reason behind many of the claims relating to the right to self-determination, and those in relation to minority and indigenous rights, is that the state-based international legal order has failed to respond appropriately and justly to the legitimate aspirations of peoples.

Further Reading

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p. 381 ↵ ANAYA, *Indigenous Peoples in International Law* (Oxford University Press, 2005).

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SAUL, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *HRLR* 609.

SHELTON, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 *AJIL* 60.

WILDE, 'Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion' (2011) 24 *Leiden JIL* 149.

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Questions for Reflection

1. Are group rights really human rights or are they just individual rights exercised by members of a group?
2. To what extent has the right to self-determination extended beyond its initial focus on colonial territories and peoples?
3. Are indigenous rights and minority rights distinct or do they overlap?
4. How might national and international law processes and procedures be improved to enable group rights to be protected better?

Notes

[1] Limitations on human rights are discussed in Chapter 7.

[2] eg *Autronic AG v Switzerland* (1990) 12 EHRR 485; *Singer v Canada*, CCPR/C/51/D/455/1991 (8 April 1993); and 155/96, *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria*, 15th Activity Report of the ACommHPR (2001).

[3] HRC, General Comment 12, HRI/GEN/1/Rev.9 (Vol I) 183, para 1 (emphasis added).

[4] *Ominayak and the Lubicon Lake Band v Canada*, A/45/40 (Vol II) Annex IX, 1, para 32.1.

[5] 266/03, *Gunme et al v Cameroon*, 26th Activity Report of the ACommHPR (2008–2009) paras 171, 176.

[6] UN Charter, Art 1(2).

[7] ACHPR, Art 20 provides:

> 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. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized 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.

[8] Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS-89/CONF.602/7 (22 February 1990). For a similar definition, see International Commission of Jurists, *Events in East Pakistan* (International Commission of Jurists, 1972) 49.

[9] See Charlesworth, Chinkin, and Wright, 'Feminist Approaches to International Law' (1991) 85 *AJIL* 613; Gaete, 'Postmodernism and Human Rights: Some Insidious Questions' [1991] *Law and Critique* 149.

[10] Kamenka, 'Human Rights, Peoples' Rights' in Crawford (ed), *The Rights of Peoples* (Clarendon Press, 1988) 127 at 133. See also Allott, 'The Nation as Mind Politic' (1992) 24 *NYUJILP* 1361.

[11] Chinkin and Wright, 'Hunger Trap: Women, Food and Self-Determination' (1993) 14 *Michigan JIL* 262, 306, propose that 'food, shelter, clean water, a healthy environment, peace and a stable existence must be the first priorities in how we define or "determine" the "self" of both individuals and groups, instead of the present definitions, which are based on masculinist goals of political and economic aggrandizement and aggressive territoriality'.

[12] See Chapter 2.

[13] Declaration on Independence for Colonial Countries and Peoples, GA Res 1514 (XV) (14 December 1960).

[14] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, paras 150–3.

[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, para 52.

[16] *Western Sahara Case* [1975] ICJ Rep 12, per Judge Dillard at 121, and see Majority Opinion, paras 54–5.

[17] eg Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1995) 140; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) in relation to Art 41; Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *HRLR* 609. See Chapter 4 for an explanation of *jus cogens*.

[18] Treaty on the Final Settlement With Respect to Germany (1990) 29 ILM 1186.

[19] eg the terms of the European Community's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991), (1992) 31 *ILM* 1486.

[20] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 118 and 122.

[21] *East Timor Case (Portugal v Australia)* [1995] ICJ Rep 90, para 29. The HRC also requires all states parties to the ICCPR to report on their protection of the right to self-determination: General Comment 12, para 3.

[22] GA Res 2625(XXV) (1970), Annex.

[23] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports, paras 82–4.

[24] *Kosovo Advisory Opinion*, Declaration of Judge Simma, para 7. See also Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24 *LJIL* 155.

[25] *Reference Re Secession of Québec* [1998] 2 SCR 217, (1998) 37 ILM 1342, para 136.

[26] For details of these and other exercises, see Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 *EJIL* 111.

[27] *Reference Re Secession of Québec*, para 126.

[28] See *Aaland Islands Opinion*, International Committee of Jurists (1920) LNOJ Spec Supp 3; *Loizidou v Turkey* (1997) 23 EHRR 513, per Judges Wildhaber and Ryssdal.

[29] Badinter Commission, Opinion 2, (1992) 31 ILM 1495, para 3.

[30] *Western Sahara*, para 55; see also *Chagos Advisory Opinion*, paras 157, 160.

[31] Badinter Commission, Opinion 4 (1992) 31 ILM 1495, para 4.

[32] See Vidmar, *Democratic Statehood in International Law* (Hart, 2013).

[33] *Western Sahara*.

[34] See Chapter 7.

[35] *Reference Re Secession of Québec*, para 139.

[36] *Frontier Dispute Case (Burkina Faso v Mali)* [1986] ICJ Rep 554 (Chamber of the ICJ), para 25.

[37] See Craven, *The Decolonization of International Law* (OUP, 2007). While Sudan accepted the secession of South Sudan, there were still disputes over the territorial boundary. See Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2012) 47 *Texas ILJ* 541; and Derso, 'International Law and the Self-Determination of South Sudan' (2012) Institute for Security Studies Paper No 231.

[38] Lord Salisbury, speaking in 1890, as quoted in the Separate Opinion of Judge Ajibola, in *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, 53.

[39] *Land, Island and Maritime Dispute (El Salvador v Honduras)* [1992] ICJ Rep 355, 388.

[40] See *Frontier Dispute (Burkina Faso v Niger)* [2013] ICJ Rep 44, Declaration of Judge Bennouna.

[41] *Frontier Dispute (Burkina Faso v Niger)*, Judgment, para 63.

[42] *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 32.

[43] *Western Sahara Case*, per Judge Nagendra Singh, 81.

[44] Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (30 September 2009); see *Georgia v Russia* (2012) 54 EHRR SE10, Annex 1.

[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art 1(4).

[46] Capotorti, UN Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1 (1979) para 242.

[47] eg the ECtHR has noted that, as a result of their turbulent history and constant uprooting, the Roma people have become a specific type of disadvantaged and vulnerable minority, and require special protection: see *Koky and Others v Romania*, App no 13642/03, Judgment of 12 June 2012.

[48] OHCHR, *Minority Rights: International Standards and Guidance for Implementation* (2010) 2.

[49] See *Koky and others*.

[50] See Macklem, 'Minority Rights in International Law' (2008) 6 *ICON* 531; Berman, 'But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law' (1992–3) 106 *Harvard LR* 1792.

[51] European Charter for Regional and Minority Languages; Framework Convention for the Protection of National Minorities; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference (now Organization) for Security and Co-operation in Europe, para 35; and Establishment of the OSCE High Commissioner on National Minorities, Helsinki Summit of Heads of State, 9–10 July 1992. In addition, protections of the rights of minorities were contained in the EC documents regarding the dissolution of the former Yugoslavia and the former USSR and were applied by the Badinter Commission: EC's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991).

[52] Badinter Commission, Opinion 2, para 2.

[53] HRC General Comment 24, HRI/GEN/1/Rev.9 (Vol 1) 210, para 8. See Chapter 14.

[54] *Sandra Lovelace v Canada*, A/36/40 at 166 (1981).

[55] *Ivan Kitok v Sweden*, CCPR/C/33/D/197/1985 (27 July 1988); *Handölsdalen Sami Village and others v Sweden*, App no 39013/04, Judgment of 30 March 2010; Report of the UN Special Rapporteur James Anaya, The situation of the Sami peoples in the Sápmi region of Norway, Sweden and Finland, A/HRC/18/35/Add.2 (6 June 2011).

[56] *Ivan Kitok*, para 15.

[57] It has been argued that the UN approach has been to accommodate the rights of indigenous peoples but to seek assimilation of minorities more generally: Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 *ICON* 5.

[58] See Macklem (2008).

[59] *Ominayak and the Lubicon Lake Band*, 27.

[60] Thornberry, *International Law and the Rights of Minorities* (OUP, 1991).

[61] Badinter Commission, Opinion 2.

[62] See Workshop on data collection and disaggregation for Indigenous Peoples, 'The Concept of Indigenous Peoples, Background prepared by the Secretariat of the Permanent Forum on Indigenous Issues', PFII/2004/WS.1/3 (2004).

[63] Working Group on Indigenous Populations, Working paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the concept of 'indigenous people', E/CN.4/Sub.2/AC.4/1996/2 (1996).

[64] UN Development Group, Guidelines on Indigenous Peoples Issues (2008) at 6.

[65] Impacts on national law include Bolivia incorporating the Declaration into its Constitution on 7 November 2007 (adopted as Bolivian National Law 3760 on the Rights of Indigenous Peoples) and the Belize Supreme Court deciding that the property provisions of the Declaration embodied 'general principles of international law' that had the same force as a treaty: *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (Consolidated) Claim Nos 171 and 17 (18 October 2007).

[66] *Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) para 217.

[67] See Shrinkhal, '"Indigenous Sovereignty" and Right to Self-Determination in International Law: A Critical Appraisal' (2021) 17 *AlterNative* 71.

[68] *Kichwa Indigenous People of Sarayaku*, paras 145–6.

[69] eg *Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007). See also Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 *Duke J Intl & Comp L* 2.

[70] Working Group on Indigenous Populations, Legal Commentary on FPIC, E/CN.4/Sub.2/AC.4/2005/WP.1 (14 July 2005).

[71] *Kichwa Indigenous People of Sarayaku*, para 177. This is also recognized in ILO Convention No 169, Art 6.

[72] See Chapter 28.

[73] See eg Johnstone, 'What is Required for Free, Prior and Informed Consent and Where does it Apply?' in Johnstone and Hansen (eds), *Regulation of Extractive Industries* (Taylor & Francis, 2020) ch 3.

[74] See Anaya, *Indigenous Peoples in International Law* (OUP, 2005).

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