

INTERNATIONAL HUMAN RIGHTS

Philip Alston

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PREFACE

This is a substantially revised edition of a human rights textbook newly-designed to be accessible to all, both in whole, or in its various parts, everywhere in the world. It is presented free of charge for all users, including students, teachers, activists and practitioners, and will be updated on an annual basis to reflect key current developments.. It is also available in a hard copy, print-on-demand format priced at cost, to ensure affordability.

This book is a successor to previous volumes entitled *International Human Rights in Context* (1996, 2000 and 2008) and *International Human Rights: Text and Materials* (2013). All four of those volumes were published by Oxford University Press. After lengthy discussions, the Press generously agreed to revert all rights to the author in order to enable this Open Access publication.

While I was a co-author for all of these editions, the lead author for the first three was Professor Henry Steiner, who founded Harvard Law School's Human Rights Program in 1984 and directed it until 2005. Henry was the driving force behind those three volumes, and they stand as a tribute to his depth of understanding, his endlessly probing intellect and his vision of how human rights should be taught. The 2008 and 2013 editions were also jointly authored with Professor Ryan Goodman whose major contributions continue to be reflected in this new edition. I am deeply grateful to both Henry and Ryan for their expertise, insights, friendship, and support.

Basic purposes

Almost eight decades after the human rights regime began to emerge out of the disasters of the Second World War, human rights norms and institutions deeply inform the rhetoric, practice and theory of international law and politics, as well as the internal constitutional structures of many states. Although the frailties and shortcomings of human rights as an ideal, an ideology or practice are all too evident in 2025, the concept of human rights has become a part of modern consciousness, a lens through which to see the world and a universal if inevitably contested discourse. The course book uses the term 'human rights regime' to include post-1945 governmental, intergovernmental and nongovernmental institutions and practices in both national and international contexts in the recognition and protection of human rights.

Although the human rights regime now forms an indelible part of our legal, political and moral landscape, and indeed perhaps precisely because of that status, recent years have witnessed some of the deepest challenges to the foundations upon which the regime has been built. These include the growing number of illiberal democratic and authoritarian governments, the Trump Administration's rejection of many of the premises of the international regime, the difficulty of reconciling many human rights with dominant neoliberal policies, ongoing questioning of the system's aspirations to universality, the societal transformation being driven by artificial intelligence and the existential threat posed by unchecked global warming. In response to these challenges, the book seeks to examine the regime's failures as well as its successes, and the dilemmas involved in seeking to achieve human rights ideals across the world's many histories and cultures.

The book aims to enable readers to see the 'big picture', to understand the history, doctrine and institutional structures of the regime, and above all, to think critically about the subject. The book seeks to describe, analyze, criticize and propose, by drawing from a diverse range of political, cultural, moral and geopolitical perspectives. It tries not to impose any single dogma, direction or method for thinking about the history or the future of human rights.

Principal features of the book

The conceptual framework for the book consists, in sequence, of the historical development and character of human rights discourse and basic norms; the dilemmas of rights and duties, and of universalism and cultural relativism; the architecture of international institutions as well as their functions, powers and interplay with norms; and the interaction of states with international law and

organizations as well as with each other. Certain major themes run through the different parts of the book — for example, the colonial and imperial objectives often pursued in the name of human rights, evolving notions of autonomy and sovereignty, the changing configuration of the public-private divide in human rights ordering, the escalating tensions between international human rights and national security, the growing awareness of the inseparability of human rights and respect for the rights of nature, and the striking evolution of ideas about the nature and purposes of the regime itself.

The book emphasizes the *international dimensions* of the human rights system, while also exploring the vital relationships between that system and states' internal orders. It provides more than a doctrinal understanding of human rights, particularly by including materials from a range of disciplines other than law. For those who do not have any background knowledge of international law, the first two or three chapters provide an introduction to basic concepts, sources, processes and norms of that field.

Practical details on materials

Most of the materials have been sharply edited in order to make them as compact as possible. Omissions (except for footnotes) are indicated by the conventional use of ellipses. Retained footnotes are renumbered within the consecutive footnote numbering of each chapter. When a final page number is not available for a publication, these materials list it as 000. The book uses British rather than American spelling, primarily because previous editions were published in the United Kingdom.

The choice of materials, and particularly the length of excerpts, is significantly dependent on the willingness of publishers to grant permission. Some publishers refuse to participate in any Open Access work available free online, others require exorbitant fees which cannot be accommodated in an enterprise that generates no royalties.

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Many people have helped to shape this book. In addition to Henry Steiner and Ryan Goodman, successive generations of students have been sharp and discerning critics. Various research assistants have made invaluable contributions over the years to the course from which the book draws. For assistance in the preparation of this edition, I am especially grateful to Lucy Forbes, Katarína Sydow, Jackson Gandour, Brianne Cuffe, Matthew Scarfo, and Youssef Farhat. Among my academic colleagues, Hélène Tigroudja was extraordinarily generous and wise with her advice, and Fionnuala Ní Aoláin, Steven Ratner and César Rodríguez-Garavito provided very helpful comments. Sally Engle Merry offered important guidance. Gráinne de Búrca was a constant and indispensable source of advice, inspiration and support.

Philip Alston
New York University School of Law, July 2025

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PART A: INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME

This book examines the world of contemporary human rights, including legal norms, political contexts and moral ideals. It takes us into diverse realms, including humanitarian laws of war, human rights discourse, state interests, international relations and institutions, governmental (state) and nongovernmental (non-state) actors, social policy, and climate change. The boundaries of the subject have steadily expanded as the human rights regime that emerged after the Second World War has become an indelible part of our legal, political and moral landscape. Given the breadth and complexity of the regime, including its engagement with law, politics, morals and radically different cultures, the book necessarily includes materials from a range of disciplines.

Three principal themes — law, politics and morals — are interrelated, indeed inseparable, for an understanding of the regime. The political and moral aspects of international human rights are self-evident; it is the international legal aspect that is novel. The rules and standards of contemporary human rights are expressed not only through states' constitutions, laws and practices, but also through treaties and international custom, as well as the work products (decisions about action, forms of adjudication, studies, investigative reports, resolutions, recommendations) of diverse international institutions and organs.

This regime is relatively young and the task of students and others committed to its ideals is to see themselves not as apprentices learning about an established, even static, framework of ideas and institutions, but rather as shapers and architects of the regime's ongoing evolution. The book aims not only to train students to work effectively within existing structures and boundaries, but also to impart a broad as well as critical understanding, and to provoke ideas about the directions in which the regime may be or ought to be heading.

Chapter 1. Human Rights Concepts and Discourse

This introductory chapter assumes no special knowledge about the foundations or content of rights, human rights and international human rights.¹ Rather it is meant to spur thoughts about a range of issues that later chapters examine.

The two sections of the chapter explore some fundamental questions from complementary perspectives. Section A involves using media reports to explore current and pressing human rights issues. In many of the relevant situations, courts are likely to have played at best a marginal role.

In Section B, by contrast, the focus is on the way that courts from different states address and argue about alleged violations of rights. The section explores challenges to the legality of capital punishment under state laws and in light of developing international human rights law. These materials illustrate the growing attention by national courts to foreign law, whether constitutional, statutory, or judicial, to learn how other countries reason and decide about the permissibility of capital punishment (and many other issues). Those inquiries lead us to what is often described as the special situation of the United States with respect to human rights (and other fields), that involves so-called U.S. exceptionalism or unilateralism.

A. GLOBAL SNAPSHOTS

One way for teachers to introduce the issues dealt with in this book is to identify a range of current media reports describing some of the diverse human rights problems that the world confronts, and ask students to identify how they think human rights might be implicated. When reading such reports, consider the following questions:

- What is the source of the rules or standards under which governmental, inter-governmental and nongovernmental organizations evaluate and criticize a state?
- What different roles do the types of organizations referred to in these reports seem to play?
- How would you identify the alleged human rights violation in each story? Is it clear from each story that (if the reported facts are true) there has been a violation?
- In addition to the rights of individuals, are there cases that implicate the rights of groups?
- Are (international) human rights violations committed only by states, or are corporations, nongovernmental forces, and individuals also accused of such violations?
- What steps, if any, seem to be, or perhaps could be, taken to bring an end to the violations?

B. HUMAN RIGHTS DISCOURSE: CAPITAL PUNISHMENT

Section A drew attention to media accounts to illustrate the range of issues implicated in human rights doctrine and discourse. For the most part, the role of courts is likely to have been limited.

Section 1 below differs in several respects. It examines one broad issue, capital punishment, either in general or with respect to a particular category of criminal defendants. And it examines some illustrative judicial decisions to explore the argument of courts, and the evolving character of human rights discourse in the hands of courts, those most 'legal' of institutions. It is important to bear in mind that much of the invocation of rights and many of the arguments in these decisions are phenomena of the last seventy or so years. Many of the international institutions to which these courts refer simply did not exist before then and such extensive consideration by courts of case law from other jurisdictions was rare.

Section 2 considers the degree to which these courts and other national and international organs (parliaments, UN or regional bodies) form part of a global framework of interaction and discourse.

¹ For excellent overviews, with each book adopting a rather different approach, see: L. Hennebel and H. Tigroudja, *International Human Rights Law: A Treatise* (2025); W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (2019); and A. Clapham, *Human Rights: A Very Short Introduction* (2nd ed., 2015).

Among the questions raised are the following: do many national courts look to international law, or to the law in foreign states, whether judicial or legislative or constitutional in form, as part of their inquiry and research into a concrete human rights issue? Do they ask (even if not formally bound by a treaty or customary law): what does international law have to say about this, or what do other states have to say about this? In a broader sense, to what extent can we say that some form of world community is developing among the judiciaries or legislatures of many states with respect to human rights issues, at least with respect to interest in what other states are saying about common issues?

Section 3 takes a look at the United States, and at the critical and sceptical stance that it has taken for many years towards international law and decisions of other states on controverted human rights issues. This stance goes by many terms that carry different shades of meaning, such as ‘unilateralism’, or ‘exceptionalism’. Sections 1 and 2 provide pertinent background for the readings about and inquiry into these terms. Indeed, Section B in its entirety raises questions that reappear and continue to be troubling in later chapters of this book.

The Rapidly Changing Law on Capital Punishment

In 1965 only 25 countries had abolished the death penalty, and by 1998 only 35 countries had done so. But by 2020 the abolitionist movement had been so influential that only 54 out of some 190 countries imposed death sentences, and only 18 actually carried them out. One factor in such dramatic progress was a series of international treaties requiring states to abolish the death penalty. They include the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) (92 states parties in 2025), the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty (13 states); and Protocols 6 (1983) and 13 (2002) to the European Convention on Human Rights (46 and 45 states respectively).

Amnesty International tracks the number of people executed around the world each year. For 2024 it recorded 1,518 executions (up from 1,153 in 2023) in 15 countries. This was the highest total number since 2015, but executions in Iran accounted for 64%, and in Iraq and Saudi Arabia for 27%. China is believed to execute thousands each year, but the data are classified as a state secret. North Korea and Vietnam are also considered to have high executions rates, but are also very secretive.²

In 2004, the Chinese Government told the UN that abolition of the death penalty ‘must proceed in pace with the respective stages in the development of a society; if it is decided to abolish the death penalty before a society has reached the necessary level of development, this may cause a number of social problems Each country should decide whether to retain or abolish the death sentence on the basis of its own actual circumstances and the aspirations of its people. (UN Doc. E/CN.4/2004/7/Add.1 (24 March 2004), para. 69. Soon thereafter, China greatly limited the range of crimes for which the death penalty can be imposed, and gave the Supreme Court oversight of all death sentences.

In 2007 the UN General Assembly adopted a heavily contested resolution calling for a global ‘moratorium on executions with a view to abolishing the death penalty’. 104 states supported the resolution. By 2024 the biennial resolution garnered 130 votes in favor, 32 against and 22 abstaining (Res. 79/179).

The Nuremberg and related trials after the Second World War imposed the death sentence on certain defendants. But the maximum penalty for persons convicted of war crimes, crimes against humanity, or genocide by the International Criminal Tribunals created by the UN Security Council for the Former Yugoslavia and for Rwanda, or by the International Criminal Court, is life imprisonment, and in practice the various courts have sought to develop global norms that are less punitive than most national jurisdictions.

² Amnesty International, *Death Sentences and Executions 2024* (2025).

Arguments about Justifications for Continuing or Abolishing the Death Penalty

For centuries, philosophers, religious figures, law enforcement agencies, defence counsel, criminologists, and the general public have argued about this issue from many different perspectives. To take one early example, Cesare Beccaria wrote in *An Essay on Crimes and Punishments* (1764), chapter XXVIII:

What right ... have men to cut the throats of their fellow-creatures? Certainly not that on which the sovereignty and laws are founded. ... Did anyone ever give to others the right of taking away his life? ...

...

[The death penalty is] a war of a whole nation against a citizen, whose destruction they consider as necessary or useful to the general good. ...

The death of a citizen cannot be necessary but in one case. When, though deprived of his liberty, he has such power and connections as may endanger the security of the nation; when his existence may produce a dangerous revolution in the established form of government. ...

[T]he punishment of death has never prevented determined men from injuring society

It is not the intenseness of the pain that has the greatest effect on the mind, but its continuance

In response to especially heinous or sensational crimes, demands to reinstate the death penalty are often heard. Just as retentionists value the principle of ‘an eye for an eye’ in response to atrocious crimes, so too have abolitionists tended to treat the death penalty as a litmus test for humane policies across the board.

The South African judicial decision below, issued at the very start of the post-apartheid regime, rehearses many of the leading contemporary arguments. Advocates and courts cast those arguments both in terms of justice and fairness, and in instrumental terms that take into account the effects/consequences of capital punishment on the incidence of crime and other matters. The arguments often fall within the broadly invoked categories of retribution, fairness (including the issue of discrimination) and deterrence. This is followed by a Kenyan case that shows a more reticent bench nonetheless relying on international precedents to eliminate the mandatory death penalty. Finally, consideration is given to a recent resurgence of judicial support for the death penalty in India, primarily in response to very serious sexual crimes.

STATE V. MAKWANYANE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA, CASE NO. CCT/3/94, [1995] 1 LRC 269

[The two appellants were convicted of murder, and sentenced to death by the Witwatersrand Local Division of the Supreme Court. The Appellate Division postponed hearing of the appeals against the death sentence until the new, post-apartheid Constitutional Court decided the question of its constitutionality under the transitional 1993 Constitution. The eleven individual opinions of the Justices of the Constitutional Court were unanimous in holding that the death sentence was unconstitutional, but focused on different constitutional provisions and arguments. The excerpts below are from the opinion of Chief Justice Chaskalson.]

Relevant provisions of the Constitution

[7] The Constitution

... provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

It is a transitional constitution but one which itself establishes a new order in South Africa; an order in which human rights and democracy are entrenched and in which the Constitution:

... shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

[8] Chapter Three of the Constitution sets out the fundamental rights to which every person is entitled under the Constitution and also contains provisions dealing with the way in which the Chapter is to be interpreted by the Courts. It does not deal specifically with the death penalty, but in section 11(2), it prohibits 'cruel, inhuman or degrading treatment or punishment' ...

...

[10] ... [S]ection 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection. Rights with which section 11(2) is associated in Chapter Three of the Constitution, and which are of particular importance to a decision on the constitutionality of the death penalty are included in section 9, 'every person shall have the right to life', section 10, 'every person shall have the right to respect for and protection of his or her dignity', and section 8, 'every person shall have the right to equality before the law and to equal protection of the law'. Punishment must meet the requirements of sections 8, 9 and 10; and this is so, whether these sections are treated as giving meaning to Section 11(2) or as prescribing separate and independent standards with which all punishments must comply.

[11] Mr. Bizos, who represented the South African government at the hearing of this matter, informed us that the government accepts that the death penalty is a cruel, inhuman and degrading punishment and that it should be declared unconstitutional. The Attorney General of the Witwatersrand, whose office is independent of the government, took a different view, and contended that the death penalty is a necessary and acceptable form of punishment and that it is not cruel, inhuman or degrading within the meaning of section 11(2)

...

[27] The principal arguments advanced by counsel for the accused in support of their contention that the imposition of the death penalty for murder is a 'cruel, inhuman or degrading punishment', were that the death sentence is an affront to human dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and that it negates the essential content of the right to life and the other rights that flow from it. The Attorney General argued that the death penalty is recognised as a legitimate form of punishment in many parts of the world, it is a deterrent to violent crime, it meets society's need for adequate retribution for heinous offences, and it is regarded by South African society as an acceptable form of punishment

International and foreign comparative law

[33] ... The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited

in all circumstances, in some it is prohibited save in times of war, and in most countries that have retained it as a penalty for crime, its use has been restricted to extreme cases. ...

[34] ... The international and foreign authorities are of value because they analyze arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution, which states:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

[35] ... In the context of *section* 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organization may provide guidance as to the correct interpretation of particular provisions of Chapter Three.

[36] Capital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of *section* 11(2). International human rights agreements differ, however, from our Constitution in that where the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorize exceptions to be made to the right to life by law

...

[40] ... From the beginning, the United States Constitution recognized capital punishment as lawful. The Fifth Amendment (adopted in 1791) refers in specific terms to capital punishment and impliedly recognizes its validity. The Fourteenth Amendment (adopted in 1868) obliges the states, not to 'deprive any person of life, liberty, or property, without due process of law' and it too impliedly recognizes the right of the states to make laws for such purposes. The argument that capital punishment is unconstitutional was based on the Eighth Amendment, which prohibits cruel and unusual punishment [In a brief discussion of U.S. constitutional law, the Court noted that the federal constitutionality of capital punishment was affirmed, subject to conditions stated, in *Gregg v. Georgia*, 428 U.S. 153 (1976).]

...

[43] ... Mr Trengove contended on behalf of the accused that the imprecise language of section 277, and the unbounded discretion vested by it in the Courts, make its provisions unconstitutional.

...

[45] Under our court system questions of guilt and innocence, and the proper sentence to be imposed on those found guilty of crimes, are not decided by juries. In capital cases, where it is likely that the death sentence may be imposed, judges sit with two assessors who have an equal vote with the judge on the issue of guilt and on any mitigating or aggravating factors relevant to sentence; but sentencing is the prerogative of the judge alone. The Criminal Procedure Act allows a full right of appeal to persons sentenced to death

[46] Mitigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors which might have influenced the accused person's conduct, and these factors must then be weighed up with the main objects of punishment, which have been held to be: deterrence, prevention, reformation, and retribution. In this

process '[e]very relevant consideration should receive the most scrupulous care and reasoned attention', and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.

[47] There seems to me to be little difference between the guided discretion required for the death sentence in the United States, and the criteria laid down by the Appellate Division for the imposition of the death sentence

[48] The argument that the imposition of the death sentence under *section 277* is arbitrary and capricious does not, however, end there. It also focuses on what is alleged to be the arbitrariness inherent in the application of *section 277* in practice. Of the thousands of persons put on trial for murder, only a very small percentage are sentenced to death by a trial court, and of those, a large number escape the ultimate penalty on appeal. At every stage of the process there is an element of chance. The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors.

[49] Most accused facing a possible death sentence are unable to afford legal assistance, and are defended under the *pro deo* system. The defending counsel is more often than not young and inexperienced, frequently of a different race to his or her client, and if this is the case, usually has to consult through an interpreter. *Pro deo* counsel are paid only a nominal fee for the defence, and generally lack the financial resources and the infrastructural support to undertake the necessary investigations and research, to employ expert witnesses to give advice, including advice on matters relevant to sentence, to assemble witnesses, to bargain with the prosecution, and generally to conduct an effective defence. Accused persons who have the money to do so, are able to retain experienced attorneys and counsel, who are paid to undertake the necessary investigations and research, and as a result they are less likely to be sentenced to death than persons similarly placed who are unable to pay for such services.

...

[54] The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems... . Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged

...

[56] ... The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path ... persuade me that we should not follow this route.

The right to dignity

[57] Although the United States Constitution does not contain a specific guarantee of human dignity, it has been accepted by the United States Supreme Court that the concept of human dignity is at the core of the prohibition of 'cruel and unusual punishment' by the Eighth and Fourteenth Amendments

[58] Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary'

[59] In Germany, the Federal Constitutional Court has stressed this aspect of punishment.

Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

[60] That capital punishment constitutes a serious impairment of human dignity has also been recognized by judgments of the Canadian Supreme Court. [In *Kindler v Canada* (1992) 6 CRR (2d) SC 4, involving murder, three] of the seven judges who heard the cases expressed the opinion that the death penalty was cruel and unusual:

It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity.

...

[61] Three other judges [concluded that] the death penalty cannot, except in exceptional circumstances, be justified

...

The International Covenant on Civil and Political Right

[63] [The two defendants in *Kindler v Canada*,] Ng and *Kindler* took their cases to the [UN] Human Rights Committee, contending that Canada had breached its obligations under the International Covenant on Civil and Political Rights. Once again, there was a division of opinion within the tribunal. In [*Ng v. Canada*, Communication No. 469/1991, 5 Nov. 1993] it was said:

The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the covenant.

[64] There was no dissent from that statement. But [Article 6 of] the International Covenant contains provisions permitting, with some qualifications, the imposition of capital punishment for the most serious crimes. In view of these provisions, the majority of the Committee were of the opinion that the extradition of fugitives to a country which enforces the death sentence in accordance with the requirements of the International Covenant, should not be regarded as a breach of the obligations of the extraditing country

...

[The opinion considered the decision by the European Court of Human Rights in *Soering v. United Kingdom* (1989) 11 EHRR 439, involving the question whether the United Kingdom would violate the provisions on inhuman and degrading treatment or punishment in Article 3 of the Convention, by extraditing a fugitive to the United States to face murder charges that were subject to capital punishment. In the circumstances, including the experience of 'death row' in the U.S. prisons and possible extradition of the fugitive by the United Kingdom for trial in another country that had abolished the death sentence, the European Court concluded that extradition to the United States would violate Article 3.

The opinion next examined a 1980 decision of the Indian Supreme Court holding that capital punishment did not violate the Indian Constitution. It distinguished the Indian decision partly by emphasizing the different wording of relevant provisions in the Constitutions of the two countries].

The right to life

[80] The unqualified right to life vested in every person by *section 9* of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of *section 11(2)* of our Constitution. In this respect our Constitution differs materially from the Constitutions of the United States and India. It also differs materially from the European Convention and the International Covenant. Yet in the cases decided under these

constitutions and treaties there were judges who dissented and held that notwithstanding the specific language of the constitution or instrument concerned, capital punishment should not be permitted.

...

[83] An individual's right to life has been described as '[t]he most fundamental of all human rights', and was dealt with in that way in the judgments of the Hungarian Constitutional Court declaring capital punishment to be unconstitutional ...

...

Public opinion

[87] ... It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.

[88] Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution... . The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

...

Cruel, inhuman and degrading punishment

...

[94] Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. No Court would today uphold the constitutionality of a statute that makes the death sentence a competent sentence for the cutting down of trees or the killing of deer, which were capital offences in England in the 18th Century. But murder is not to be equated with such 'offences'. The wilful taking of an innocent life calls for a severe penalty, and there are many countries which still retain the death penalty as a sentencing option for such cases. Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with this issue. It may possibly be that none alone would be sufficient under our Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. But these factors are not to be evaluated in isolation. They must be taken together, and in order to decide whether the threshold set by *section 11(2)* has been crossed they must be evaluated with other relevant factors, including the two fundamental rights on which the accused rely, the right to dignity and the right to life.

[95] The carrying out of the death sentence destroys life, which is protected without reservation under *section 9* of our Constitution, it annihilates human dignity which is protected under *section 10*, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of *section 11(2)* the broader meaning to which they are entitled at this stage of the enquiry, rather

than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.

...

Section 33 and limitation of rights

[98] *Section 33(1)* of the Constitution provides, in part, that:

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

- (a) shall be permissible only to the extent that it is—
 - (i) reasonable; and
 - (ii) justifiable in an open and democratic society based on freedom and equality; and
- (b) shall not negate the essential content of the right in question.

[99] *Section 33(1)(b)* goes on to provide that the limitation of certain rights, including the rights referred to in *section 10* and *section 11* ‘shall, in addition to being reasonable as required in paragraph (a)(I), also be necessary’.

[100] Our Constitution deals with the limitation of rights through a general limitations clause... [T]his calls for a ‘two-stage’ approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of *section 33*. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the ‘two-stage’ approach may often produce the same result as the ‘one-stage’ approach, this will not always be the case.

...

[102] Under our Constitution, ... [the question] is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of *section 33* ...

...

[106] Although there is a rational connection between capital punishment and the purpose for which it is prescribed, the elements of arbitrariness, unfairness and irrationality in the imposition of the penalty, are factors that would have to be taken into account in the application of the first component of this test. As far as the second component is concerned, the fact that a severe punishment in the form of life imprisonment is available as an alternative sentence, would be relevant to the question whether the death sentence impairs the right as little as possible.

...

Deterrence

[116] The Attorney General attached considerable weight to the need for a deterrent to violent crime. He argued that the countries which had abolished the death penalty were on the whole developed and peaceful countries in which other penalties might be sufficient deterrents. We had not reached that stage of development, he said. If in years to come we did so, we could do away with the death penalty. Parliament could decide when that time has come ...

[117] ... Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution ...

...

[119] The cause of the high incidence of violent crime cannot simply be attributed to the failure to carry out the death sentences imposed by the courts ...

[120] Homelessness, unemployment, poverty and the frustration consequent upon such conditions are other causes of the crime wave

[121] We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime

[122] The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

...

Retribution

[129] Retribution is one of the objects of punishment, but it carries less weight than deterrence. The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of 'an eye for an eye, and a tooth for a tooth'. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it... . A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.

...

Conclusion

[144] The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. ... And this must be demonstrated by the State in everything that it does, including the way it punishes criminals ...

...

[146] ... Taking [all the described] factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out. The requirements of section 33(1) have accordingly not been satisfied, and it follows that the provisions of section 277(1)(a) of the Criminal Procedure Act, 1977 must be held to be inconsistent with section 11(2) of the Constitution

... .

Ed's note: Zimbabwe adopted the Death Penalty Abolition Act on 31 December 2024. The *Makwanyane* case was often cited in debates.³

FRANCIS KARIOKO MURUATETU V. REPUBLIC SUPREME COURT OF KENYA [2017] EKL R

[The two petitioners were convicted of murder and sentenced to death pursuant to Section 204 of the Penal Code which states that 'any person convicted of murder shall be sentenced to death'. Before the Supreme Court they challenged the constitutionality of the mandatory death penalty that removes all judicial discretion in sentencing.⁴ In 2023, 158 people were reportedly on death row, but no executions had occurred since 1987.]

...

³Garikai Muchemwa and Clive Chiridza, 'Assessing the Convergence of Constitutional Reform, Judicial Precedent and International Human Rights Norms on Zimbabwe's Abolition of Capital Punishment', 4 *Lighthouse* (2025) 328.

⁴ See L. Chenwi, 'The Downfall of the Mandatory Death Penalty in Kenya', 63 *J. Af. L.* (2019) 25.

E. ISSUES FOR DETERMINATION

[25] ... [T]he following issues [arise] for determination:

a) Whether the mandatory nature of the death penalty provided for in the Penal Code under section 204 is unconstitutional ...

F. ANALYSIS

[The Court observed that it would not consider the constitutionality of the death sentence, since the issue did not arise in this appeal.]

i. Violation of the right to fair trial

[27] ... [T]he constitutionality of the mandatory nature of the death penalty has engaged many court in various jurisdiction globally. It is the major issue in this appeal. It has also engaged the High Court and the Court of Appeal in many cases in this country resulting in divergent opinions. It started with the Mutiso case ... in which the Court of Appeal opined that as it denied an accused person right to fair trial [and was thus] arbitrary and unconstitutional. ... [The] Court observed that:

“... section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. ... We declare Section 204 ... to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution ...”.

[28] That remained the position until the Mwaura case in which the Court of Appeal changed it holding that by the use of the word ‘shall’ Section 204 of the Penal Code was couched in mandatory terms leaving the court with no discretion but to impose the death penalty. ...

...

[Various lower courts subsequently followed this approach.]

[30] ... Some Kenyan courts have even observed that mitigating factors in such cases were at best, superfluous in terms of the sentence provided. It therefore serves no purpose for the trial judges to hear mitigating factors from convicts in such cases.

[31] On the international arena, however, most jurisdictions have declared not only the mandatory but also the discretionary death penalty unconstitutional. In *Roberts v. Louisiana*, 431 U.S. 633 (1977) a Louisiana statute provided for the mandatory imposition of the death sentence. Upon challenge, the US Supreme Court declared it unconstitutional since the statute allowed for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed. In [*Reyes v. the Queen* (2002)], the Privy Council was of the view that a statutory provision that denied the offender an opportunity to persuade the Court why the death sentence should not be passed, denied such an offender his basic humanity. And in *Spence v The Queen; Hughes v the Queen* (*Spence & Hughes*) (unreported, 2 April 2001) where the constitutionality of the mandatory death sentence for the offence of murder was challenged, the Privy Council held that such sentence did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability. In the words of Byron CJ:

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”

[32] Two Indian decisions also merit mention. In *Mithu v State of Punjab*, ... 1980, the Indian Supreme Court held that “a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just” while in *Bachan Singh v The State of Punjab* ... [1980], it was held that “It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence.”

[33] The UN ... Human Rights Committee has also had occasion to consider the mandatory death penalty. In case of *Eversley Thomson v St. Vincent*, Communication No. 806/ 1998U.N. Doc. CCPR/70/806/1998 (2000), it stated that such sentence constituted a violation of Article 26 of the Covenant, since the mandatory nature of the death sentence did not allow the judge to impose a lesser sentence taking into account any mitigating circumstances and denied the offender the most fundamental of right, the right to life, without considering whether this exceptional form of punishment was appropriate in the circumstances of his or her case.

Interrogating Section 204 of the Penal Code

...
[35] To determine the [constitutionality of Section 204 of the Penal Code], it is imperative to consider certain constitutional provisions in relation to the above section. [The court then made reference to: Article 19 (3) (a) which provides that the rights contained in the Bill of Rights “belong to each and every individual and are not granted by the State;” Article 20 stating that the Bill of Rights “applies to all law and binds all state organs and all persons”; Article 28 recognizing every person’s inherent dignity; Article 48 mandating “the State to ensure justice for all persons”; Article 50 (1) providing that “Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body”; and Article 50 (2) according every accused person the right to a fair trial, including the right “if convicted, to appeal to, or apply for review by, a higher court as prescribed by Law.”

[38] Kenya is a signatory to the International Covenant on Civil and Political Rights (ICCPR) since May 1972. ...

[39] The [UN] Commission on Human Rights has recommended the abolition of the death sentence as a mandatory sentence in ... Resolution 2005/59 [urging] all States that still maintain the death penalty:

‘...(d) Not to impose the death penalty for any but the most serious crimes ...;

...

... (f) To ensure also that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence.’

[40] These ... provisions ... bring to the fore a number of principles. Firstly, the rights and fundamental freedoms belong to each individual. Secondly, the bill of rights applies to all law and binds all persons. Thirdly, all persons have inherent dignity which must be respected and protected. Fourthly, the State must ensure access to justice to all. Fifthly, every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable. For Section 204 of the Penal Code to stand, it must be in accord with these provisions.

[41] It is evident that the trial process does not stop at convicting the accused. ... [T]he principle of fair trial must be accorded to the sentencing stage too.

[42] Pursuant to [the] Laws of Kenya, mitigation is a part of the trial process. ... Section 329 of the Criminal Procedure Code provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

[43] Therefore, ... the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

...

[45] [W]hat Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her [W]e cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.

[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in ... Article 25(c) of the Constitution The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial

...

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. ... To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

...

[54] A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law. ...

[55] [Michael Edwards] petitioned the Inter-American Commission on Human Rights. He challenged the mandatory death penalty on the basis, inter alia, that his rights to equality before the law and a fair trial enshrined in the American Declaration of the Rights and Duties of Man had been violated. The Commission held at paragraph 137:

“ ... Moreover, by reason of its compulsory and automatic application, a mandatory death sentence cannot be the subject of review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of the crime for which the sentence is mandated.”

[56] [Based on the decision of the Inter-American Commission on Human Rights in *Edwards v The Bahamas* (Report No. 48/01, 4th April 2001) [we consider] that Section 204 violates Article 50 (2) (q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. ...

...

[58] [A]ny law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

...

[65] A generous and purposive interpretation is to be given to constitutional provisions that protect human rights. ...

...

[67] It is to be noted that the mandatory nature of the death sentence provided for under Section 204 of the Penal Code long predates any international agreements for the protection of Human Rights. ...

[I]t is indeed a colonial relic that has no place in Kenya today. ...

...

[69] Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid ... For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

QUESTION

What are the advantages and disadvantages of basing opposition to the death penalty on (i) the rule of law, (ii) the prohibition of cruel, inhuman, or degrading punishment, or (iii) human dignity?

2. The Death Penalty in India

The case of India illustrates a different trajectory from that in South Africa and Kenya. The death penalty dates back to colonial times and, despite many challenges to its legality, it continues to be applied for a variety of crimes. Juveniles and those suffering serious mental illness or insanity are not subject to execution. In practice, relatively few convicted prisoners have actually been executed. For example, in 2016, India imposed 136 new death sentences, had 397 prisoners on death row, and carried out no executions. In the same year, the Supreme Court confirmed the imposition of the death penalty in none of the seven cases it considered. Out of 1,810 death sentences imposed between 2000 and 2014, only four people had been executed as of 2016, and 95 per cent of the sentences had been overturned or commuted by higher courts. A third of death sentences given by trial courts resulted in acquittals at a later stage.⁵

Economic vulnerability and a lack of education are hallmarks of those on death row. The National Law University's *Death Penalty in India Report* found that, of 385 persons on death row nationwide in 2016, almost two-thirds belonged to the 'backward classes,' religious minorities, Dalits and Adivasis. The same number were classified as economically vulnerable sections and over 80 per cent of them had not completed school. A large majority of them had been tortured in custody; less than half could understand legal proceedings; and nearly 70 per cent of them said they hardly had any interaction with their lawyers when their cases were in the higher courts. Only 8 per cent had a prior criminal conviction and 25 per cent were juveniles or very young at the time of the offence. Some 77 per cent said that they had never met their lawyers out of court, and that their interactions in court were 'perfunctory'. Legal aid lawyers were said to have tried to extort money from the families of death-row prisoners, and threatened not to turn up for hearings unless they were paid.

In 2021, the number of prisoners on death row increased by 21 per cent from 2020. The Supreme Court, however, did not confirm any sentences and applied demanding scrutiny in assessing lower

⁵ National Law University, *Death Penalty in India: Annual Statistics Report 2016* (March 2017).

court decisions. Sexual offences accounted for 54 per cent of all death penalty sentences.⁶ In 2015, the Law Commission of India had proposed the abolition of the death penalty in a phased manner, beginning by limiting it to terrorism-related offences.

The Nirbhaya Gang-rape Case

At 9.30 pm on December 16, 2012, a 23-year-old physiotherapy student named Jyoti Singh (originally given the pseudonym of 'Nirbhaya' to protect her identity), and her male companion, were waiting at a bus stop, after having seen a movie. An off-duty charter bus stopped and they boarded. When the man objected that a different route had been taken and the lights in the bus turned off, a fight broke out. The man was severely beaten, the woman was brutally gang-raped by the six occupants of the bus, including being sexually assaulted with an iron rod, their possessions were stolen, they were thrown out of the bus half naked and the bus attempted to run them over. They were found at 11 p.m. by a passerby and taken to hospital. The victim remained in a critical condition until her death on December 29, in Singapore where she had been taken for further treatment.

In response to the incident, massive protests erupted throughout India, and police used water cannons, teargas, and baton charges to control crowds. Metro stations and roads were closed and a limited curfew was imposed. The leader of the parliamentary opposition called for the rapists to be hanged and the Chief Minister of Delhi referred to the city as India's 'rape capital'.

On December 23, 2012, the Government appointed a committee headed by former Chief Justice J. S. Verma, to recommend amendments to the criminal law to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. It reported one month later, after receiving over 80,000 submissions from civil society. It made wide-ranging recommendations for reform, but it recommended a maximum penalty of life imprisonment for rape, based on considerable evidence that the death penalty did not deter serious crimes.

The committee proposed including new offences relating to stalking, voyeurism and intentional touching, higher penalties for rape and a definition of gang rape in the law. It advocated the punishment of marital rape, as well as gender sensitization measures and police and electoral reforms.⁷

Of the original six defendants, one was tried and sentenced as a juvenile. One committed suicide while awaiting trial, and the remaining four were convicted and sentenced to death in September 2013. Following the rejection of an appeal to the Supreme Court, the four convicted men were hanged on 20 March 2020.

***MUKESH & ANR. V. STATE FOR NCT OF DELHI & ORS.* SUPREME COURT OF INDIA (2017) 6 SCC 1**

DIPAK MISRA, J. [FOR HIMSELF AND ASHOK BHUSHAN, J.]

...

331. ... [In *Bachan Singh v. State of Punjab* (1980) 2 SCC 684], the Court held thus:

“(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. ...

(b) While considering the question of sentence ... the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.”

⁶ Project 39A, Death Penalty in India, Annual Statistics Report 2021 (2022) 7.

⁷ 'Nirbhaya gangrape case 2012: A look at what all has happened over the years,' *Indian Express*, May 5, 2017.

332. [The Court took note of a list of aggravating circumstances proposed by counsel but concluded that] we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.”

333. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:

...

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. ...
- (5) ... [T]he accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person.
- (7) That the condition of the accused showed that he was mentally defective

334. In the said case, the Court has also held thus:

“... A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”

335. In [Machhi Singh and Ors. v. State of Punjab (1983) 3 SCC 470], a three-Judge Bench has explained the concept of ‘rarest of the rare cases’ by observing thus:

“The reasons why the community as a whole does not endorse the humanistic approach reflected in ‘death sentence-in-no-case’ doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of ‘reverence for life’ principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection.”

336. Thereafter, the Court [added that the death penalty may be imposed] ‘in the rarest of rare cases’ when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.”

337. [In Macchi Singh], stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder.

338. [The Court concluded that] ...

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.”

...

356. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, ... [T]he gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter

of routine to throw her along with her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastiality of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy “tsunami” of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

357. When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty

R. BANUMATHI, J. [CONCURRING]

[1.] ... I entirely agree with the reasoning [and conclusions above]. However, in view of the ... role of Judiciary in addressing crime against women, I would prefer to give my additional reasoning for concurrence.

...

146. ... The present case clearly comes within the category of ‘rarest of rare case’ If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the ‘rarest of rare category’, then one may wonder what else would fall in that category. ...

147. The incident of gang-rape ... causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom [A]n unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.

148. The statistics of National Crime Records Bureau ... show that despite the progress made by women in education and in various fields and changes brought in ideas of women’s rights, respect for women is on the decline and crimes against women are on the increase. ... [I]t becomes important to ensure that gender justice does not remain only on paper.

149. We have a responsibility to set good values and guidance for posterity. ... Crime against women not only affects women’s self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident ... will be an eye-opener for a mass movement “to end violence against women” and “respect for women and her dignity” and sensitizing public at large on gender justice. ... The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. ...

RESPONSES TO THE NIRBHAYA CASE⁸

In an article titled ‘Justice?: Why Death Penalty is a Weak Response to Structural Violence’ posted on the Youth Ki Awaaz website on 25 March 2020⁹, a contributor with the username *pinjratod* highlighted

⁸ See generally B. Rajan, D. Kundu, and S. Sarkar, ‘Rape, Popular Culture, and Nirbhaya: A Study of India’s Daughter and Delhi Crime’, *J. Commun. Inq.* (2022).

⁹ Available at <https://www.youthkiawaaz.com/2020/03/justice-is-not-retribution-oppose-the-death-penalty-in-the-name-of-womens-security/>

the gendered and other structural assumptions that underpin reactions to sexual violence and demands for the death penalty to be imposed:

... Though this execution is using the trope of women's safety and rights, we need to understand that the popular outrage against rape in this case and generally in society is often rooted not so much in respecting the bodily integrity of women but the notions of honour and chastity of women. This chastity is seen to be 'defiled' by the act of rape. Rape is, therefore, exceptionalised and produces greater outrage than other acts of violence on women, which may be equally brutal and life-threatening.

Therefore, during the public outrage in 2012, feminist voices asking for understanding and dealing with the structural nature of sexual violence on women were drowned by the clamour of demands for the death penalty, castration, etc. To satisfy this sense of public outrage or 'collective conscience', a death sentence was pronounced for the convicts, which was justified by the kind brutality meted out to the victim.

...

The demand for the death penalty for the rape convicts operates on the principle of externalising the problem of sexual violence in our everyday structures and lives and locates it on a handful of convicts identified in the most publicised and brutal rape cases. As if, on exterminating these convicts can rid us of the problem of rape altogether.

Yet rape continues unabated and only becomes more brutal. Are such exemplary punishments not just a Band-Aid for a larger structural problem done to ease public rage over an issue or to reaffirm public faith in the State that refuses to take any effective structural measures for ensuring safety and well being of women?

... [T]he crime which is considered worthy of being treated as 'rarest of the rare' is constituted more by social and political exigencies than by any real response to pain and brutality inflicted.

...

Demands for death penalty are seldom made if the perpetrators are from socially and politically powerful backgrounds and more often enjoy state impunity

...

The Muslim lorry driver, the security guard or the migrant worker becomes the "other", the villain from whom the women need to be protected—completely glossing over the statistical evidence that in most cases of sexual violence the perpetrators are known to the victims.

An earlier editorial addressing the acquittal of six men, sentenced to death in a separate case, opined on the legal errors and faulty evidence that are endemic in court cases awarding the death penalty, and on the extent to which capital sentences fall disproportionately on the dispossessed:

**ECONOMIC AND POLITICAL WEEKLY, DEADLY ERRORS IN JUDGMENT
VOL. 54, NO. 11 (16 MARCH 2019)**

... [T]he Supreme Court has set aside its own judgment that had confirmed the conviction of and death penalty for the accused in *Ankush Maruthi Shinde v State of Maharashtra*.

The litany of deadly horrors in this case is long. A poverty-stricken family is set upon by unknown assailants who rob, assault, and murder them over the course of one horrific night. The police ... concoct an entirely false case against six innocent men, only because they belong to a “criminal tribe.” No actual evidence is unearthed to link them to the scene of the crime or their remote involvement in the matter. “Eyewitnesses” repeatedly change their statements as the circumstance warrants. Yet, shockingly, the trial court, the high court, and the Supreme Court confirm their convictions on the basis of this thin and unreliable “evidence.”

The men are on death row for more than a decade, living solitary, tortured, and pitiable lives in jails. ... When three of them find their death sentences commuted by the Bombay High Court, the Supreme Court overturns such commutation and awards the death penalty without hearing them at all. The Supreme Court then dismisses their review petitions without an open court hearing.

It was only when the curative petition in the Supreme Court was placed before a totally different bench and the “error” was discovered that the wheels of justice finally began to turn. ... In the end, the Supreme Court has acquitted all the accused, directed the state of Maharashtra to pay compensation to them, and attempted to hold the police accountable for this callous lapse. What it has not done is offer any sort of mea culpa for its own failings in this case.

While the Supreme Court is fond of justifying the death penalty on the grounds that it must be applied only in the “rarest of rare cases” and after carefully weighing all mitigating and aggravating factors in a case, in reality it has been happy to discard the law at the drop of a hat. The judgment awarding the death penalty to the convicts in the “Nirbhaya” case, for example, is long on impassioned rhetoric and short on the law when it comes to awarding the death penalty. ...

... [I]t is safe to assume that a large number of such death penalties have been awarded by the courts in cases with grievously faulty trials.

And, yet, this hardly seems to inform bloodthirsty calls in the public for increasing the imposition of death penalty by the courts. Politicians of all stripes are happy to accede to these demands, which are ignorant or unconcerned about the vagaries of a broken criminal justice system that only ends up creating more victims than punishing any hardened criminals. ...

With the criminal justice system being what it is, it is hard to see the death penalty as anything but an institutionalised form of murder, one that unerringly chooses its victims from the oppressed and disenfranchised sections of society. ...

3. Drugs and the Death Penalty

In 2018, the ICCPR Committee adopted General Comment No. 36 on the right to life. Article 6 of the ICCPR provides, inter alia, that: ‘1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’; ‘2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ...’; and ‘5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.’ The relevant part of the Committee’s analysis follows:

33. ... Given the anomalous nature of regulating the application of the death penalty in an instrument enshrining the right to life, the contents of paragraph 2 have to be narrowly construed.
34. ... States parties that have abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. ...
35. The term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. ...
36. Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy, establishing political opposition groups or offending a head of State. ...

In 2022, the UN reported that at least 35 states and territories retained the death penalty for drug-related offences (UN Doc. A/77/274 (2022)) and Amnesty International noted that in 2024, 42% of known executions were for drug-related offences in four countries (China, Iran, Singapore and Saudi Arabia).

Eight out of eleven Southeast Asian countries retain the death penalty for drug offences, although the majority do not generally carry it out. The most common arguments in favour of it are that it succeeds as a deterrent and that public opinion demands it. British entrepreneur, Richard Branson, described Singapore’s April 2022 execution of a Malaysian man who had attempted to smuggle the equivalent of three tablespoons of heroin, as ‘a serious stain on Singapore’s reputation’. Critics alleged, and the government denied, that the man had learning difficulties. A story in *The Guardian* (Rebecca Ratcliffe, ‘Richard Branson refuses Singapore invitation to debate death penalty’, 31 October 2022) reported that Branson was subsequently invited by the Ministry of Home Affairs to debate the Minister live on television.

The Ministry was quoted as saying that, while Branson’s views may be widely held in the UK, ‘we do not accept that Mr. Branson or others in the west are entitled to impose their values on other societies. Nor do we believe that a country that prosecuted two wars in China in the 19th century to force the Chinese to accept opium imports has any moral right to lecture Asians on drugs’. It added that its ‘priority is to protect Singapore and Singaporeans from the scourge of drugs’.

Branson declined the offer, saying that: ‘[a] television debate – limited in time and scope, always at risk of prioritising personalities over issues – cannot do the complexity of the death penalty any service. It reduces nuanced discourse to soundbites, turns serious debate into spectacle.’ Instead, he called on the government to engage Singaporean activists and human rights lawyers in such a debate, rather than ignoring or harassing them. The story noted that following the execution, ‘more than 400 people turned out for a rare protest in April at Speakers’ Corner at Hong Lim Park, the only place where demonstrations are permitted in Singapore, to call for executions to be halted.’ It added that ‘[a]t least 10 death row inmates have since been executed. Death penalty cases are rarely reported in any detail in Singapore’s tightly controlled media.’

A survey of public opinion in Singapore, reported in Wing-Cheong Chan et al., ‘How Strong Is Public Support for the Death Penalty in Singapore?’, 13 *Asian Criminology* (2018) 91, at 101 concluded that:

... Singaporeans apparently favoured the death penalty despite admitting that they knew very little about it, [were] not interested in it and could not give an accurate estimate of the number of persons executed. ...

... There was a much lower support for the death penalty when respondents were faced with scenarios of cases—all of which would have merited the mandatory sentence under the current Singapore law—than the proportion who said they favoured it in the abstract. This was particularly so for drug trafficking and firearm offences. This finding is consistent with surveys in other places which also showed that support for the death penalty dropped when respondents were given alternative sentencing options ...

Another analysis, focused on Vietnam, concluded that although the government had made a number of incremental changes to move closer to the goal of abolition of the death penalty for drug offences, abolition remained far away. Noting that the number of people executed each year remains a state secret, the authors called on Vietnam to ‘make its statistics and data on the death penalty publicly available and accessible’ and to facilitate both national and international discourse. The latter would ‘give the impression of a responsible nation trying to bring its legislation in line with universally recognised standards.’ They also called for ‘a nationwide survey on drug control measures in relation to three capital drug crimes’ since existing surveys are outdated and do not focus on the death penalty (Tien Duc Nguyen and Thu Thuy Thi Tran, ‘The Limits of Vietnam’s Incrementalism towards the Abolition of Capital Punishment for Drug Offenses’, *Asian J. Comp. L.* (2022) 1).

QUESTIONS

1. What weight should courts accord to public opinion in relation to the imposition of the death penalty? Compare the approaches in Makwanyane and Mukesh. How important is transparency and informed public debate?
2. Does the concept of the ‘rarest of the rare’ provide a meaningful safeguard against the arbitrary imposition of the death penalty?
3. Is the Human Rights Committee’s interpretation of ‘the most serious crimes’ too strict? Should weight be given to different value systems in that context?

4. The Death Penalty in the United States

In 2024, 25 executions were carried out in nine states. It was the tenth consecutive year with fewer than 30 executions.¹⁰ 48% of those executed were people of color. Nine were Black, two were Latino, and one was Native American. 80% of defendants (80%) were executed for killing at least one white victim. No white defendant was executed for the murder of a person of color. 96% of those executed had at least one of the following vulnerabilities: an IQ in the intellectually disabled range and/or brain damage; evidence of serious mental illness; and/or a history of severe childhood trauma or abuse. Since 1973, 200 wrongfully-convicted people have been exonerated from death row.¹¹

¹⁰ Death Penalty Information Center, *The Death Penalty in 2024: Year End Report* (2025).

¹¹ P. Kaplan, ‘Challenges to the Contemporary Death Penalty in the United States’, 20 *Annu. Rev. Law Soc. Sci.* (2024) 14.1.

The following opinion of the U.S. Supreme Court makes clear how dramatically the United States differs from most other states.

ROPER V. SIMMONS
SUPREME COURT OF THE UNITED STATES, 543 U.S. 551 (2005)

OPINION OF JUSTICE KENNEDY FOR THE COURT:

This case requires us to address ... whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

[Simmons committed murder at age 17 when a junior (the penultimate year) in secondary school. He was sentenced to death when he was 18. The murder was callous and premeditated. At trial, the judge instructed the jury that it could consider Simmons's age as a mitigating factor in sentencing. The jury recommended the death penalty, which the trial judge imposed. The Missouri Supreme Court affirmed.]

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. *Atkins v. Virginia*, 536 U.S. 304 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. [The Missouri Supreme Court agreed, and resentenced Simmons to 'life imprisonment without eligibility for probation, parole, or release except by act of the Governor'.]

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." 536 U.S. at 311. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion).

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime. The plurality opinion explained that no death penalty State that had given express consideration to a minimum age for the death penalty had set the age lower than 16. The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community." The opinion further noted that juries imposed the death penalty on offenders under 16 with exceeding rarity; the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948, 40 years prior.

Bringing its independent judgment to bear on the permissibility of the death penalty for a 15-year-old offender, the *Thompson* plurality stressed that "[t]he reasons why juveniles are not trusted with the

privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” According to the plurality, the lesser culpability of offenders under 16 made the death penalty inappropriate as a form of retribution, while the low likelihood that offenders under 16 engaged in “the kind of cost-benefit analysis that attaches any weight to the possibility of execution” made the death penalty ineffective as a means of deterrence

The next year, in *Stanford v. Kentucky* [*supra*], the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court’s view, indicated there was no national consensus “sufficient to label a particular punishment cruel and unusual.” ...

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. According to the Court, “the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, [did] not provide sufficient evidence at present of a national consensus.”

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. On the basis of these indicia the Court determined that executing mentally retarded offenders “has become truly unusual, and it is fair to say that a national consensus has developed against it.”

... The *Atkins* Court ... returned to the rule, established in decisions predating *Stanford*, that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect

...

III

A

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent... . In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent

... Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* [*supra*] had prohibited the practice by the time we heard *Atkins*. By contrast, the rate of change in reducing the incidence of

the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years — four through legislative enactments and one through judicial decisions.

Though less dramatic ... we still consider the change from *Stanford* to this case to be significant... [T]he same consistency of direction of change has been demonstrated

...

B

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force... . Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” This principle is implemented throughout the capital sentencing process

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” ... It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” ...

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure... .

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

... The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument... [I]t is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules... . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

...

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of

the Court's decision in *Trop* [*supra*], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment ...

... Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. ... Parallel prohibitions are contained in other significant international covenants. See [ICCPR], Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5)

... [O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

... [T]he United Kingdom abolished the juvenile death penalty before [the UN] covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." ...

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty... . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

... It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

...

JUSTICE O'CONNOR (DISSENTING)

...

... [T]he evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.

Nevertheless, I disagree with Justice Scalia's contention that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society... . But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries — that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however

...

JUSTICE SCALIA (WITH WHOM THE CHIEF JUSTICE AND JUSTICE THOMAS JOIN, DISSENTING)

...

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

...

More fundamentally, however, the basic premise of the Court's argument — that American law should conform to the laws of the rest of the world — ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law — including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American

...

... I do not believe that approval by “other nations and peoples” should buttress our commitment to American principles any more than (what should logically follow) disapproval by “other nations and peoples” should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our “fidelity” to the Constitution, our “pride in its origins,” and “our own [American] heritage.” To the contrary, they are cited to *set aside* the centuries-old American practice — a practice still engaged in by a large majority of the relevant States — of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources “affirm,” rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America

...

* * *

Justice Scalia's argument, reiterated in many other contexts, has drawn strong criticism. The Supreme Court has, over the course of many decades, referred to foreign law and no objection was raised until 1988. But Jeremy Waldron, in ‘Foreign Law and the Modern *Ius Gentium*’, in M. Andenas and D. Fairgrieve (eds.), *Courts and Comparative Law* (2015) 550, has also pointed out that ‘the Supreme Court in *Roper* failed to articulate any general ideas or standards by which its use of foreign law might be evaluated.’ His own analysis acknowledges that ‘[n]o crisp or precise litmus test defines the sort of international consensus that makes up *ius gentium* [the law of nations] on any particular subject.’ Because interpretation thus inevitably plays an important role, cherry-picking of favorable foreign cases is always a risk. But, for Waldron, it depends on how law is understood:

The real contrast between those who oppose and those who defend the use of foreign law in American legal reasoning is not that jurists in the first group are parochial and the second cosmopolitan. It is rather this contrast between law as will and law as reason. Those who approach the law as a matter of will do not see any reason why expressions of will elsewhere in the world should affect our expressions of will in America. But those who see law as a matter of reason may well be willing to approach it in a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out.

In the same volume, Thomas Graziano, in ‘Is it Legitimate and Beneficial for Judges to Compare?’ (at 26) lists several other commonly invoked arguments against the use of foreign law. They include: (i) foreign law lacks democratic legitimacy; (ii) invoking foreign law undermines the intrinsic coherence of any given national legal system; (iii) courts weigh a range of factors that are specific to the national situation and the resulting decisions are not readily transferable; (iv) ‘legal science’ is a distinctively national science; and (v) judges lack adequate knowledge of foreign law and foreign languages.

Based on a survey of the practice of courts, particularly supreme courts, Graziano identifies the following uses of a comparative approach (at 52):

- in order to demonstrate that the domestic law is fully in line with modern international trends;

- to complement the historical method of interpretation of domestic law;
- to discover and demonstrate the diversity of solutions from which the courts may choose;
- to benefit from experiences made abroad and to avoid reinventing the wheel again and again;
- to sharpen one's own understanding of certain legal problems and to compare the national solution with differing foreign solutions in order to highlight the particularities of the domestic law;
- to counter arguments that a given solution will lead to harmful or disastrous results;
- to find legal support for a value judgment by the court; and finally,
- to justify changes to domestic case law or to confront new problems, introduce new institutions or remedies.

In his Hamlin Lectures, Lord Bingham, former Lord Chief Justice of England and Wales (Thomas Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (2010) 6), commented that '[i]n no other field of intellectual endeavor – be it science, medicine, philosophy, literature, architecture, art, music, engineering or sociology – would ideas or insights be rejected simply because they were of foreign origin ... [I]t would be strange if in this field alone practitioners and academics were obliged to ignore developments elsewhere, or at least to regard them as of no practical consequence. Such an approach can only impoverish our law; it cannot enrich it.' Bingham concluded his lectures (at 83) by quoting Nobel laureate Amartya Sen: 'Even though contemporary attacks on intellectual globalisation tend to come not only from traditional isolationists but also from modern separatists, we have to recognize that our global civilization is a world heritage – not just a collection of disparate local cultures.'

QUESTIONS

1. How would you explain the contrast between the reluctance of most U.S. Supreme Court justices to invoke international standards or foreign judgments and the apparent enthusiasm of courts in South Africa, Kenya and elsewhere to do so?¹²
2. How do you react to the idea that finding 'consensus' is very helpful or indispensable to concluding that capital punishment is unconstitutional in a given context? Why are the 50 states the appropriate accounting units (as opposed, say, to the total population in states going one or the other way on the issue)? How large a majority (of states, population, etc.) constitutes a consensus? Is not a trend over a few decades more compelling than the 'consensus' at a given moment? Why should consensus be decisive for a justice who follows a different approach to the question of constitutionality?

Racial and Cultural Underpinnings of the Death Penalty

The materials that follow are designed to put the death penalty debate in a broader perspective. Carol Steiker and Jordan Steiker trace the deep role played by racism in the American context, and David Garland asks why the death penalty has been so enduring when so few people are ever actually

¹² For a comparison of the United States and South Africa, see M. Ndulo, 'International and Foreign Law in Domestic Constitutional Law', in A. L. Cantillo, et al (eds.), *Constitutionalism: Old Dilemmas, New Insights* (2021) 373.

executed in the United States. Finally, Austin Sarat compares U.S. policy in this area with European approaches. But first, the Death Penalty Information Center's report, *Facts about the Death Penalty* (April 10, 2024) takes an instrumentalist approach, in the hope that those who might otherwise support the death penalty will conclude that it is simply too costly:

- Capital trials cost more than non-capital cases because of higher costs for prosecution and defense lawyers; time consuming pre-trial investigation; lengthy jury selection process for death-qualification; enhanced security requirements; longer trials because of bifurcated proceedings; solitary confinement incarceration; and necessary appeals to ensure fairness.
- An economic analysis of independent research studies completed in 15 death penalty states from 2001-2017 found that the average difference in case-level costs for seeking the death penalty was just over \$700,000. ...
- Oklahoma capital cases cost, on average, 3.2 times more than non-capital cases. ...
- Defense costs for death penalty trials in Kansas averaged about \$400,000 per case, compared to \$100,000 per case when the death penalty was not sought.
- A study in California revealed that the cost of the death penalty in the state has been over \$4 billion since 1978. ...
- A report by the Administrative Office of the U.S. Courts in 2010 found that seeking a federal death sentence costs 8 times more than seeking a life sentence.

A historical perspective on the role of race is provided by Carol S. Steiker and Jordan M. Steiker, in 'The Rise, Fall, and Afterlife of the Death Penalty in the United States', 3 *Annual Rev. Criminol.* (2020) 299 at 304:

Capital punishment in the antebellum South was an essential part of maintaining the slave economy ... Whereas the vast majority of whites executed in the antebellum South were punished for murder, blacks were also frequently executed for rape, slave revolt, attempted murder, burglary, and arson. Owners of executed slaves were compensated by the state to discourage shielding their slaves from the harsh, racialized criminal justice system.

Following the adoption of the Fourteenth Amendment in 1868, lynching replaced official executions in many Southern states. Reduced resort to lynching in the early twentieth century led to an increase in official executions, although the distinction between the two phenomena was sometimes blurred. Steiker and Steiker note that mobs sometimes assembled 'at the court-house steps, or even in the courtroom, insisting on the swift declaration of a death sentence These "legal lynchings" prompted the Supreme Court to begin to regulate state capital systems.'

An important advocacy role was played by the National Association for the Advancement of Colored People, founded in 1909 by W. E. B. Du Bois and others. Its Legal Defense Fund (LDF), created in 1939, played a major role in linking the death penalty to racial discrimination and in bringing cases to the Supreme Court. In *Furman v. Georgia* (1972), the court held that under certain circumstances the death penalty could violate the Eighth Amendment prohibition of cruel and unusual punishment. After a temporary national moratorium, followed by significant reforms at the state level, the court effectively reinstated the death penalty in *Gregg v. Georgia* (1976) which held that it could be an

appropriate punishment for murder. In *Coker v. Georgia* (1977), the imposition of a death sentence for rape was found to violate the Eighth Amendment.

In 1983 the Baldus study,¹³ commissioned by the NAACP, examined over 2,000 murder cases since the *Furman* decision in 1972. use of the death penalty. It found that cases involving white victims were at least four times more likely to generate death sentences than cases with minority victims. In *McCleskey v. Kemp* (1987), the court accepted the study's methodological soundness but rejected the argument that system-wide racial discrimination, rather than case-specific discrimination, was sufficient to warrant relief. According to Steiker and Steiker:

McCleskey is a remarkable decision in acknowledging the presence of racial disparities and suggesting that they are not susceptible to judicial remediation. *McCleskey's* legacy remains contested. Although it possibly strengthened the political case against the death penalty by highlighting the failure of legislatures and courts to curtail its discriminatory administration, the decision may reflect a broader reluctance to engage the death penalty on racial terms, thereby contributing to a diminished role for race in contemporary abolitionist discourse.

Since *McCleskey*, the Supreme Court has focused on more discrete instances of alleged racial discrimination and misconduct. ...

Racial discrimination appears to permeate all phases of capital litigation, including investigation, charging decisions, jury selection, and sentencing. Such discrimination appears to influence not only which inmates are sentenced to death but also which are actually executed. ...

In a 2020 update, Scott Phillips and Justin Marceau, in 'Whom the State Kills', 55 *Harv. Civ. Rights-Civ. Lib. L. Rev* (2020) 585, supplemented the sentencing data in Baldus's study with their own original execution data. They concluded that 'the overall execution rate is substantially greater for defendants convicted of killing a white victim than for those convicted of killing a Black victim. Specifically, 2.26% (22/972) of the defendants who were convicted of killing a white victim were ultimately executed, compared to just 0.13% (2/1503) of the defendants convicted of killing a Black victim. Thus, the overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim'.

Various authors have sought to explain why the death penalty has survived in the United States when most of its peer countries have long since abolished it. Consider this analysis by David Garland, in *Peculiar Institution: America's Death Penalty in an Age of Abolition* (2010):

The American capital punishment system has not survived into the twenty-first century because death sentences are more necessary or more functional in the United States than elsewhere. ...

[The survival of the death penalty in America] has little to do with its instrumental value for governmental or penal purposes and everything to do with the institutional difficulty of securing abolition in the face of majority public opinion. But ... the institution has been used by groups and actors who have seized the opportunities that it provides to advance their interests or meet their needs. These actors have taken the death penalty and made it work for them, using it sometimes to express their sense of justice, sometimes to enhance their power, their profit, and their casual pleasure.

... The day-to-day uses of the American death penalty are grounded in the microphysics of local politics — of group relations and status competition,

¹³ David Baldus, Charles Pulaski, and George Woodworth, 'Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience', 74 *J. Crim. Law & Criminology* (1983) 661.

professional rivalry and ambition, and the venal give-and-take of political exchange — rather than being connected to the great ends of state. ...

...

The system of capital punishment that exists in America today is primarily a communication system. ... [The system] is about mounting campaigns, taking polls, passing laws, bringing charges, bargaining pleas, imposing sentences, and rehearing cases. It is about threats rather than deeds, anticipated deaths rather than actual executions. ...

Capital punishment in America today operates primarily on the plane of the imaginary, and the great majority of its deaths are imagined ones. But the political and economic effects of these grim fantasies are no less real for being imagined. In American criminal sentencing, the availability of the death penalty permits very lengthy sentences of imprisonment, even life imprisonment without parole, to appear comparatively humane, thereby contributing to the nation's extraordinary rates of imprisonment. In the American political system and in the entertainment zone of popular culture, talk about death permits symbolic acts, exchanges, and representations that are used by groups and individuals in their pursuit of power, profit, and pleasure. That the death penalty is increasingly declaratory and discursive makes it no less powerful in its political, legal, and cultural effects. Nor is it any less lethal for the more than twelve hundred men and women who have been put to their deaths since executions resumed three decades ago.

Focusing on U.S. exceptionalism more broadly, the same author, David Garland, in 'Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism', 22 *Punishment & Society* (2020) 321, at 336, explains why America is characterized by exceptional levels of both violence and disorder and of punishment:

... [Structural] reasons ... make social policy programs less likely than penal responses. Social policy interventions are generally more long-term and more expensive—even if they would work out cheaper in the end—and their impact upon crime is less targeted and less direct. Given powerful resistance to taxation, Republican opposition to social spending, the short-termism of election cycles, popular hostility toward ex-prisoners and people on welfare, and a division of political power that allows numerous opportunities to veto controversial legislation, American governments are generally predisposed to reject preventative social investments and rely instead upon post facto responses. Given this settled disposition, efforts to mount social interventions often require novel forms of expertise, personnel, and agencies—and a willingness to engage in long-term investment and institution-building on the part of government. In contrast, there is a ready-made resort to police, prosecution, and imprisonment that makes penal control the path of least resistance. Political barriers are lower too, since proposals to increase punishments rarely meet with organized opposition.

...

... [There is thus a] settled political preference for penal rather than social measures, especially where poor minorities are concerned. But I want to suggest that the resort to penal controls is also determined by limits of *state capacity*: that America's ultra-liberal political economy has produced a welfare state that is much less expansive and much less enabling. That, as compared to other nations, the US state (at the national, state, and local levels) has a more limited capacity for remedial social action. ...

... America's meagre welfare state is less well equipped with the kinds of soft power—the social services, personnel, infrastructure, and capacity for positive, co-ordinated action—that other nations use to deal with crime and disorders. As a consequence, it lacks social reach and effectiveness. When American politicians, policy-makers, and judicial actors are faced with urgent demands to stem the tide of criminal violence, they have fewer options at their disposal and those they have are mostly repressive. As a result, American criminal justice is charged with tasks that other nations allocate to social service agencies. Jails are America's biggest mental health facilities—a task for which they are singularly ill-suited. And America's police—relatively ill-trained as they are—are expected to manage the social and health problems of poor communities in addition to the work of law enforcement.

**AUSTIN SARAT, THE DEATH PENALTY ON THE BALLOT:
AMERICAN DEMOCRACY AND THE FATE OF CAPITAL PUNISHMENT
(2019) 1**

... Over the course of the twentieth and into the twenty-first centuries, death penalty ballot campaigns [at the state level in the US] served to mobilize affect, appeal to group thinking, and stoke fears. Images of capital punishment and its role in society have been carefully crafted and marketed, and voters have repeatedly been asked to choose sides on one of America's most charged and divisive issues.

The European Comparison

Putting important public policy questions, like whether to retain or abolish the death penalty, on the ballot exemplifies what James Whitman calls the “weakness” of the American state in comparison with European states.¹⁴ Those states, he says, are both “relatively powerful and autonomous ... They are autonomous in the sense that they are steered by bureaucracies that are relatively immune from the vagaries of public opinion.” The strength of the state allowed nations like Germany and France to abolish capital punishment when a majority of their citizens continued to support it. Describing abolition in those countries, Whitman observes that “government actors initiate abolition and slowly bring public opinion around.”

In Germany, the post-war “Basic Law” (Grundgesetz), ratified in 1949, contained Article 102, a simple four-word article that in English reads “capital punishment is abolished.” This constitutional provision reflected Germany's “revulsion at the large number of death sentences carried out in the last few years” and symbolized the state's commitment to distancing itself from the atrocities of the Holocaust. Since its enactment, there have been numerous attempts to reinstate capital punishment. One, which occurred when the Deutsche Partei filed a motion to reintroduce capital punishment in 1952, illustrates the way German political leaders think about their role in the face of public agitation to restore the death penalty. Thomas Dehler of the Free Democratic Party urged government officials to ignore the German people's preference for capital punishment. As Dehler put it, “one fails to recognize the true meaning of democracy when one believes that the parliament is the executor of the people's will.” Elected representatives, he argued, were required to demonstrate “greater insight, understanding, and responsibility than the great mass of citizens” and were called upon to respect human dignity, uphold a modern justice system, and firmly reject the contempt for human life previously exhibited by the Nazi Party.

In France, after a series of highly publicized brutal crimes fueled an increased fear of crime and pushed public sentiment in favor of capital punishment in the 1970s, abolitionists claimed that ending capital punishment was the “next urgent step in the march of human progress.” Spearheaded by legal scholar and activist Robert Badinter and by François Mitterand, France's president and leader of the Socialist Party, the French Parliament voted to end the death penalty in September 1981 by a vote of 333 to

¹⁴ J. Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003) 13–14.

117. In 2007 the French Constitution was amended to say, “No one can be sentenced to death.” As historian Robert A. Nye observes, “The abolition of capital punishment in France was accomplished as a coup d’état by a political and intellectual elite against the clearly established sentiments of the vast majority of the public.”

While European political elites “had the legal capacity and political opportunity to pass laws that abolished ... (the death penalty) once and for all,” America’s political system divides and fragments power and prevents such uniform action. The vulnerability of the American state, Whitman argues, is particularly consequential in the domain of crime and punishment, where the public tends to be more punitive in its dispositions than state officials and elites. The death penalty persists in the United States because lawmakers responsible for criminal justice policy are much more responsive to the public than are their counterparts in Europe and because the public plays a larger role in legislating about capital punishment.

What sets America apart, Whitman argues, “is the relatively easy translation of majority sentiment into policy.” When courts, legislators, or executives have been willing to face the political consequences of trying to abolish the death penalty, the public used initiative and referendum processes, like those in California, Nebraska, and Oklahoma in 2016, to parry those efforts. European “voters can exercise only gradual influence over the broad outlines of criminal justice policy, by voting for different political parties”; Americans can use initiatives and referenda to pass criminal laws as direct legislation.

...

Life Without Parole

One of the unintended consequences of the abolition of the death penalty has been the increased popularity of life without parole (LWOP) sentences. Every state in the USA, except Alaska, permits LWOP as a possible sentence. In *Graham v. Florida*, 130 S. Ct. 2011 (2010) the US Supreme Court held that the sentence of life without parole for a non-homicide offense committed by a juvenile violated the Eighth Amendment’s prohibition against cruel and unusual punishments. In *Miller v. Alabama and Jackson v. Hobbs*, 132 S.Ct. 2455 (2012) this was extended to apply to convictions for all offences, including homicide.

As countries like India and China come under increased pressure to reduce or eliminate capital punishment, there has been a marked increase in the number of LWOP sentences.¹⁵ And even countries that do not provide for such sentences per se use surrogates such as imposing ten cumulative life sentences. Between 2000 and 2014 there was an 80 percent rise in life sentences globally. In the U.S. the number increased by almost 70 percent, to 56,000, between 2003 and 2020. One in 7 people in U.S. prisons is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more), totaling 203,865 people, according to The Sentencing Project, *No End in Sight: America’s Enduring Reliance on Life Imprisonment* (2021). Over two-thirds of those serving life sentences are people of color

¹⁵ See generally, Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (2019).

Chapter 2. The Human Rights Regime: International Law Framework and Origins

In its discussion of the legality of the death penalty and related issues, Chapter 1(B) concentrated on the law — often the constitutional law — of different states. The selected opinions of state courts devoted most of their analyses to their own and to foreign legal systems. International law figured through relevant treaty provisions, but in a subsidiary way. It was not at centre stage.

Chapters 2 to 4, on the other hand, concentrate on the international law aspects of the human rights regime. Why has this path been followed? After all, it is possible to study human rights issues not at the international level but in the detailed contexts of different states' histories, socio-economic and political structures, legal systems, religions, cultures, and so on. With respect to its legal dimension, a human rights course that was so organized would stress the internal law of states as well as foreign and comparative law. It would engage in a contextual and comparative analysis of bodies of domestic law, perhaps devoting its full attention to states like China, Saudi Arabia, Nigeria, Italy, the United States, or Guatemala. It could focus on liberal constitutionalism or on recent trends towards 'democratic' or non-democratic authoritarianism.¹⁶ For such a study of human rights, international law could play a peripheral role, relevant only when it exerted some clear influence on the national scene or had a place in the basic logic of a judicial decision.

The attractiveness of such an approach becomes more apparent when one contrasts international human rights with many other international subjects where international law occupies, indeed must occupy, a central position. Imagine, for example, that this book's interest was not human rights but the humanitarian law of war as applied to interstate conflicts, or the regulation of fisheries, or immunities of diplomats from arrest, or the regulation of trade barriers like tariffs. Each of those fields is inherently, intrinsically, international in character. Each involves relations between states or between citizens of different states. We could not profitably examine any one of them without examining international custom and treaties, and international institutions and processes.

Violations of human rights are different. Not only are they generally rooted within states rather than in interstate engagements, but they need not on their surface involve any international consequences whatsoever. Of course, systemic and severe human rights violations that appear to be 'internal' matters — for example, recurrent violence against an ethnic minority — could well have international consequences, perhaps by leading to refugee flows abroad or by angering other states whose populations are related by ethnicity to the oppressed minority. In typical instances of violations, the police of state X torture defendants to extract confessions; the government of X shuts the opposition press as elections approach; access to housing or health care is denied to particular groups; prisoners are raped by their guards; courts decide cases according to executive command; women or a minority group are barred from education or certain work. Each of these events could profitably be studied entirely within a state's (or region's, culture's) internal framework, just as law students in many countries traditionally concentrate on the internal legal-political system, including that system's provision for civil liberties and human rights.

Nonetheless, since the Second World War it would be inadequate, even misleading, to develop a framework for the study of human rights in many countries without including as a major ingredient the international legal and political aspects of the field: laws, processes, and institutions. In today's world, human rights is characteristically imagined as a regime involving international law and institutions, as well as a movement supported by civil society actors. Internal developments in many states have been much influenced by international law and institutions, as well as by pressures from other states trying to uphold international law.

Internal or comparative approaches to human rights law and the truly international aspects of human rights are now broadly recognized to be complexly intertwined and reciprocally influential with respect

¹⁶ Economist Intelligence Unit, *Democracy Index 2024* (2025); *Liberties Rule of Law Report 2025*; and Freedom House, *Freedom in the World 2022: The Global Expansion of Authoritarian Rule*.

to the growth of human rights norms, the causes and effects of their violations, the reactions and sanctions of intergovernmental bodies or other states, the transformations of internal orders and so on. By the same token it is important to recognize, as subsequent chapters do, that the international law framework has been the subject of far-reaching critiques by scholars grounded in diverse areas such as feminism, critical race studies, radical ecology, and many other perspectives. For example, Antony Anghie, in ‘Rethinking International Law: A TWAIL Retrospective’, 34 *Eur. J. Int’l L.* (2023) 7, at 80-81, outlines the ways in which scholars linked to the ‘Third World Approaches to International Law’ movement (TWAIL) have addressed human rights. Some have ‘sought to amend and adapt human rights law to make it more effective and more sensitive to the realities of those societies and the particular harms suffered by minorities and women’ and ‘explored how people in the Third World have innovated to develop and expand human rights in ways that would protect human dignity more widely conceived’. Some have argued ‘that the “universal human being” posited as the foundation of international human rights law is a human being that is essentially European, white and male’. Others have argued that it ‘may replicate forms of colonialism’. A different approach has been to explore ‘affinities between human rights and the teachings of various religious and cultural traditions that have shaped non-Western societies. Finally, there has also been a critical focus on the political economy of rights and the extent to which they have been linked to neoliberal regimes of international trade and investment law that ‘have had an enormous impact on the everyday lives of people in the Third World.’ All of these critiques are considered in the pages below.

From another perspective as well it would be impossible to grasp the character of the human rights regime without a basic knowledge about international law and its contributions to it. The regime’s aspirations to universal validity are necessarily rooted in that body of law. Many of the distinctive organizations intended to help to realize those aspirations are creations of international law.

For such reasons, this book frequently examines but does not concentrate on the internal law and politics of states. It relates throughout this ‘horizontal’ strand of the human rights movement, as constitutionalism spreads among states, to the ‘vertical’ strand of the new international law that is meant to bind states and that is implemented by the new international institutions. Both the horizontal and vertical dimensions are vital to an understanding of the human rights regime. But the truly novel developments of the last 70 years have involved primarily this second dimension.

Chapter 2 has several functions. It sketches the doctrines and principles in an older international law that served as background to and precedents for the human rights regime that took root and developed immediately after the Second World War. They provide the background against which the Universal Declaration of Human Rights was drafted between 1946 and 1948 and adopted on 10 December 1948. The chapter uses national and international decisions of courts and other tribunals not only to present basic doctrines and principles, but also to convey an understanding of international law: its so-called ‘sources’, its processes of growth, particularly with respect to customary and treaty law. The two tasks are interrelated. By what means or methods have the international rules and standards of the human rights regime developed? By what processes are international legal rules made, elaborated, applied, and changed?

Several of the opinions and scholarly writings in the chapter draw on Article 38 of the Statute of the International Court of Justice (ICJ), the judicial organ of the United Nations that was created by the UN Charter of 1945.¹⁷ That article has long served as a traditional point of departure for examining questions about the ‘sources’ of international law. It repeats (largely in identical language) the similar provisions of the 1921 Statute of its predecessor court, the Permanent Court of International Justice that was linked to the League of Nations and effectively died during the Second World War. It reads:

¹⁷ The Court can only hear cases to which states are parties: Article 34 of the Statute. A state’s consent is necessary for the Court to exercise jurisdiction over it. That consent generally refers to the Court’s adjudicating all ‘legal disputes’ concerning the ‘interpretation of a treaty’, a ‘question of international law’, the existence of a fact which, if established ‘would constitute a breach of an international obligation’ and the reparation to be made for breach of an international obligation: Article 36. Statute of the International Court of Justice, T.S. No. 993 (at p. 25) (U.S.).

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59 [stating that decisions of the Court have no binding force except between the parties to the case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although Article 38 formally instructs this particular Court about the method of applying international law to resolve disputes, its influence has extended to other international tribunals, to national courts, and indeed generally to argument based on international law that is made in settings other than courts.

The Article takes a positivist perspective. It defines the task of the Court in terms of its *application* of an identifiable body of international law that in one or another sense, has been consented to ('expressly recognized', 'accepted as law', 'recognized') directly or indirectly by states. Its skeletal list expresses a formal conception of the judicial function that is radically different from that of, say, a legal realist. Consider the following comments on Article 38. The first is by José Alvarez, *International Organizations as Law Makers*, at 46 (2005):

Public international lawyers, through at least the greater part of the 20th century, have sought to define their field as relatively autonomous from either politics or morality. Their endeavor turned many, particularly in Europe and North America, towards legal positivism....

...

Nothing embodies these central positivist tenets in international law as much as the doctrine of sources. For most international lawyers trained in the West, article 38 of the Statute of the International Court of Justice remains the "constitution" of the international community. Its enumerated sources of international law — treaties, custom, and general principles of law — remain, for most, the exclusive means for generating legal obligations on states. Through the doctrine of sources, international lawyers define (and defend) their field as characteristically legal. Thanks to sources doctrine, international lawyers argue that international law, like domestic law, also has a circumscribed set of sources and rules for interpreting them; thanks to article 38, international law is distinguished from morality or politics. Thanks to sources, international rules have a distinctive either/or quality, essential to distinguish mere wishful thinking (*lex ferenda*) from black letter obligation (*lex lata*): something either is or is not within one of the recognized sources of international law and someone with the requisite skill, like a judge, can do so....

... The doctrine of sources then, has a dual agenda: it tells the lawyer where to find the law in an objective fashion because it is ostensibly based in the concrete practice of states but it also seeks to provide a normatively constraining code for states....

The second comment is by Hilary Charlesworth, 'Law-Making and Sources', in James Crawford and Martti Koskeniemi (eds.), *The Cambridge Companion to International Law* (2012), 187, at 189.

[Art. 38] allows international lawyers to sidestep complex debates about the function of international law and the relative legitimacies of state consent and claims of justice. It is a pithy mantra that offers a quasi-scientific formula for practitioners of international law, postponing (possibly indefinitely) discussion of the politics of the designated sources. The formal nature of article 38(1) obscures the fact that international law is generated by a multi-layered process of interactions, instruments, pressures and principles.

A. THE LAW OF ARMED CONFLICT AND CUSTOMARY INTERNATIONAL LAW

The following decision in *The Paquete Habana* deals with an earlier period in the development of the law of armed conflict, now more commonly called international humanitarian law (IHL) or the laws of war (here, naval warfare), and with a theme that became central in the later treaty development of this field — the protection of noncombatant civilians and their property (here, civilian fishing vessels) against the ravages of war. Within the framework of the law of armed conflict, this case involves *jus in bello*, the ways in which war ought to be waged, the rules of war itself, rather than the related but distinct *jus ad bellum*, the determination of those conditions (if any) in which a *just* or justified war can be waged, conditions in which (under contemporary international law) going to war is legal.

In its analysis of the question before it, the US Supreme Court here illustrates a classical understanding of customary international law — an understanding that, we shall see, is today open to substantial challenge and reformation. In reading the opinion, keep in mind two questions. What method does the majority opinion employ to conclude that a relevant, indeed decisive, rule of customary international law has developed? Does the dissent differ as to the method itself or as to its application in this case?

THE PAQUETE HABANA SUPREME COURT OF THE UNITED STATES, 175 U.S. 677 (1900)

MR. JUSTICE GRAY DELIVERED THE OPINION OF THE COURT

These are two appeals from decrees of the district court of the United States for the southern district of Florida condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron she had no knowledge of the existence of the war or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

...

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, 'the court not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure'.

Each vessel was thereupon sold by auction; the *Paquete Habana* for the sum of \$490; and the *Lola* for the sum of \$800. There was no other evidence in the record of the value of either vessel or of her cargo....

...

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notable in 2 Ortolan, *Règles Internationales et Diplomatie de la Mer* (4th ed.) ...; in 4 Calvo, *Droit International* (5th ed.) ...; in De Boeck, *Propriété Privé Ennemie sous Pavillon Ennemie*, ...; and in Hall, *International Law* (4th ed.) It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

The earliest acts of any government on the subject, mentioned in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406 Henry IV issued orders to his admirals and other officers, entitled 'Concerning Safety for Fishermen By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise, — it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV and the States General of Holland by mutual agreement granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing along the coasts of France, Holland, and England

The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.

...

In the treaty of 1785 between the United States and Prussia, article 23.... provided that, if war should arise between the contracting parties, 'all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price'....

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

...

On January 24, 1798, the English government by express order instructed the commanders of its ships to seize French and Dutch fishermen with their boats.... After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch

fishing vessels as prize of war. In one case the capture was in April, 1798, and the decree was made November 13, 1798. *The Young Jacob and Johanna*

On March 16, 1801, the Addington Ministry, having come into power in England, revoked the orders of its predecessors against the French fishermen; maintaining, however, that ‘the freedom of fishing was nowise founded upon an agreement, but upon a simple concession’, that ‘this concession would be always subordinate to the convenience of the moment’, and that ‘it was never extended to the great fishery, or to commerce in oysters or in fish’. And the freedom of the coast fisheries was again allowed on both sides....

Lord Stowell’s judgment in *The Young Jacob and Johanna*, ... was much relied on by the counsel for the United States, and deserves careful consideration.

The vessel there condemned is described in the report as ‘a small Dutch fishing vessel taken April, 1798, on her return from the Dogger bank to Holland’; and Lord Stowell, in delivering judgment, said: ‘In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity¹⁸ only, and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy’s trade’. And he added: ‘it is a further satisfaction to me, in giving this judgment, to observe that the facts also bear strong marks of a false and fraudulent transaction’.

Both the capture and the condemnation were within a year after the order of the English government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell’s judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

But some expressions in his opinion have been given so much weight by English writers that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels; adding, however, ‘but this was a rule of comity only, and not of legal decision’. Assuming the phrase ‘legal decision’ to have been there used, in the sense in which courts are accustomed to use it, as equivalent to ‘judicial decision’, it is true that so far as appears, there had been no such decision on the point in England. The word ‘comity’ was apparently used by Lord Stowell as synonymous with courtesy or goodwill. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law....

The French prize tribunals, both before and after Lord Stowell’s decision, took a wholly different view of the general question....

The English government [by Orders in Council of 1806 and 1810] unqualifiedly prohibited the molestation of fishing vessels employed in catching and bringing to market fresh fish....

Wheaton, in his *Digest of the Law of Maritime Captures and Prizes*, published in 1815, wrote: ‘It has been usual in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it’. Wheaton, *Captures*, chap. 2, 18.

¹⁸ A modern-day American definition of comity is ‘deference to foreign government actors that is not required by international law but is incorporated in domestic law.’ William S. Dodge, ‘International Comity in American Law,’ 115 *Colum. L. Rev.* (2015) 2071.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well as that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

...

In the war with Mexico, in 1846, the United States recognized the exemption of coast fishing boats from capture....

In the treaty of peace between the United States and Mexico, in 1848, were inserted the very words of the earlier treaties with Prussia, already quoted, forbidding the hostile molestation or seizure in time of war of the persons, occupations, houses, or goods of fishermen. ...

...

France in the Crimean war in 1854, and in her wars with Italy in 1859 and with Germany in 1870, by general orders, forbade her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary.

...

Since the English orders in council of 1806 and 1810... in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful industry has been denied by England or by any other nation. And the Empire of Japan (the last state admitted into the rank of civilized nations), by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that 'the following enemy's vessels are exempt from detention', including in the exemption 'boats engaged in coast fisheries', as well as 'ships engaged exclusively on a voyage of scientific discovery, philanthropy, or religious mission'. Takahashi, *International Law*, 11, 178.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U.S. 113

...

Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law'. 1 Kent, Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations ...

[Discussion of French treatises omitted.]

...

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In the fifth edition of his great work on international law, published in 1896, he observes ... that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States is lessened by the fact that the principles on which they are based are largely derived from the internal legislation of each country; and yet the peculiar character of

maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime law in regard to the capture of private property as prize of war. Immediately ... he goes on to say: 'Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels'....

The modern German books on international law, cited by the counsel for the appellants, treat the custom by which the vessels and implements of coast fishermen are exempt from seizure and capture as well established by the practice of nations. Heffter, 137; 2 Kalterborn, 237, p. 480; Bluntschli, 667; Perels, 37, p. 217.

...
Two recent English text-writers cited at the bar (influenced by what Lord Stowell said a century since) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels so long as they were peaceably pursuing their calling and there was no danger that they or their crews might be of military use to the enemy....

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice....

[The opinion quotes from writing from the Netherlands, Spain, Austria, Portugal and Italy.]

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war....

...
This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

...
To this subject in more than one aspect are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court: 'Undoubtedly no single nation can change the law of the sea. The law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world....Of [these facts] we may take judicial notice.

Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations'. ... *Sears v. The Scotia*, 20 L.Ed. 822

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson, commanding the North Atlantic Squadron, to 'immediately institute a blockade of the north coast of Cuba, extending

from Cardenas on the east to Bahia Honda on the west'. Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22 the President issued a proclamation declaring that the United States had instituted and would maintain that blockade, 'in pursuance of the laws of the United States, and the law of nations applicable to such cases'. ... And by the act of Congress of April 25, 1898, chap. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. ...

On April 26, 1898, the President issued another proclamation which, after reciting the existence of the war as declared by Congress, contained this further recital: 'It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice'. This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. ... But the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations....

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause; and it is therefore, in each case, –

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

MR. CHIEF JUSTICE FULLER, WITH WHOM CONCURRED MR. JUSTICE HARLAN AND MR. JUSTICE MEKENNA, DISSENTING

The district court held these vessels and their cargoes liable because not 'satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure'.

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation, or instruction granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them, which it is the duty of the court to enforce.

I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.

...

This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in terms, or the exemption must be allowed because the capture of fishing vessels of this class was not specifically authorized.

The preamble to the proclamation stated, it is true, that it was desirable that the war 'should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice', but the reference was to the intention of the government 'not to resort to privateering, but to adhere to the rules of the Declaration of Paris'; and the proclamation spoke for itself. The language of the preamble did not carry the exemption in terms, and the real question is whether it must be allowed because not affirmatively withheld, or, in other words, because such captures were not in terms directed.

...

It is impossible to concede that the Admiral ratified these captures in disregard of established international law and the proclamation, or that the President, if he had been of opinion that there was any infraction of law or proclamation, would not have intervened prior to condemnation.

In truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right, and it is extended or denied as the exigency is believed to demand.

It is, said Sir William Scott, ‘a rule of comity only, and not of legal decision’.

...

It is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded. And I am not aware of adequate foundation for imputing to this country the adoption of any other than the English rule.

...

It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Boeck, and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo, and others are to the contrary. Their lucubrations may be persuasive, but not authoritative.

In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.

...

1. International Humanitarian Law

The opinion in *The Paquete Habana* has the aura of a humane world in which, if war occurs, the fighting should be as compassionate in spirit as possible. It rests on the rule of exemption of coastal fishing vessels ‘on considerations of humanity to a poor and industrious order of men, and [on] the mutual convenience of fishing vessels’. The intricate body of international humanitarian law considered by the Supreme Court grew out of centuries of primarily customary law, although custom was supplemented, informed and developed centuries ago by selective bilateral treaties. To this day, custom remains essential to argument about IHL, including to the norms considered by international criminal tribunals examined in Chapter 16 and potentially to assessments of military measures to combat terrorism examined in Chapter 5. Like many other areas of international law, this field is increasingly dominated by multilateral instruments that have both codified customary standards and rules and developed new ones. Multilateral declarations and treaties started to achieve prominence in the second half of the nineteenth century. The treaties now include The Hague Conventions concluded around the turn of the century, the four Geneva Conventions of 1949 (as well as two significant protocols of 1977 to those conventions), and several more recent discrete treaties banning particular weapons and protecting cultural property. But in an increasingly fractious world, the prospects of successfully negotiating new multilateral treaties are diminished, which again highlights the importance of customary law.

In 2005 the ICRC published a major compendium of customary law rules and practices, which is now regularly updated (<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>). A scholarly evaluation of its impact (Marko Milanovic and Sandesh Sivakumaran, ‘Assessing the Authority of the ICRC Customary IHL Study’, 920 *Int’l Rev Red Cross* (2022) 1856) concludes that it has been highly influential as a result of its rigour, the ICRC’s special mandate and expertise, and because there is no readily accessible alternative source.

In Chapter 5, we introduce IHL in greater depth. For now, it is important to know that the basic Geneva Conventions (which have now obtained universal ratification) and the two Protocols (Protocol I, 174 parties; Protocol II, 169 parties) cover a vast range of problems stemming from land, air and naval warfare, including the protection of wounded combatants, prisoners of war, civilian populations and civilian objects, and medical and religious personnel and buildings. As suggested by this list, the provisions of the four Conventions and the two Protocols constitute the principal contemporary regulation of *jus in bello*, that is, how war ought to be waged.

This entire corpus of custom and treaties has as its broad purpose, in the words of the landmark St. Petersburg Declaration of 1868, ‘alleviating as much as possible the calamities of war’. Here lies the

tension, even contradiction, within this body of law. Putting aside the question of a war's legality (an issue central to the Judgment of the International Military Tribunal at Nuremberg (see Ch. 2D, below), and today governed by the UN Charter), a war fought in compliance with the standards and rules of the laws of war permits — one might say authorizes or legitimates — massive intentional killing or wounding and massive other destruction that, absent a war, would violate the most fundamental human rights norms.

Hence all these standards and rules stand at some perilous and problematic divide between brutality and destruction (1) that is permitted or privileged and (2) that is illegal and subject to sanction. Broad standards like 'proportionality' in choosing military means or like the avoidance of 'unnecessary suffering' are employed to help to draw the line. The powerful ideal of reducing human suffering that animates international humanitarian law thus is countered by the goal of state parties to a war — indeed, in the eyes of states, the paramount goal — of gaining military objectives and victory while reducing as much as possible the losses to one's own armed forces.

The generous mood of *The Paquete Habana* toward the civilian population and its food-gathering needs was reflected in the various Hague Conventions regulating land and naval warfare that were adopted during the ensuing decade. Note Article 3 of The Hague Convention of 1907 on Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval War, which proclaimed in 1910: 'Vessels used exclusively for fishing along the coast... are exempt from capture ...'.

The efforts to protect civilian populations and their property took on renewed vigor after the Second World War through the Geneva Conventions of 1949 and the Protocols of 1977. Consider Article 48 of Protocol I to the Geneva Conventions. Article 48 enjoins the parties to a conflict to 'distinguish between the civilian population and combatants and between civilian objects and military objectives'. Military attacks are to be directed 'only against military objectives'. Article 52 defines military objectives to be 'objects which, by their nature, location, purposes or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. Article 54 is entitled, 'Protection of Objects Indispensable to the Survival of the Civilian Population'. It states that '[s]tarvation of civilians as a method of warfare is prohibited'. Specifically, parties are prohibited from attacking or removing 'objects indispensable to the survival of the civilian population, such as foodstuffs ... for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party....' An exception is made for objects used by an adverse party as sustenance 'solely' for its armed forces or 'in direct support of military action'.

In relation to *The Paquete Habana*, note:

- (a) the emphasis on the fact that the Supreme Court here sat as a *prize court* administering the law of nations, and note its references to the international character of the law maritime. Indeed, the Court almost assumed the role of an international tribunal, a consideration stressed in the excerpts from the scholar Calvo. Nonetheless, the Court's statement that 'international law is part of our law' and must be 'ascertained and administered by courts of justice' as often as 'questions of right' depending on it are presented for determination, has been drawn on in many later judicial decisions in the United States involving unrelated international law issues.
- (b) An antiquarian aspect of the decision and period is that the naval personnel who captured the fishing vessels participated in the judicial proceedings, for at the time of the war captors were entitled to share in the proceeds of the sale of lawful prizes. That practice has ended and proceeds are now paid into the Treasury.
- (c) The Court looked to a relatively small number of countries for evidence of state practice, dominantly in Western Europe. It referred to Japan as 'the last state admitted into the rank of civilized nations'. Even at the start of the twentieth century, the world community creating international law was a small and relatively cohesive one; today's total of almost 200 states offers a striking contrast. Consider the multinational and multicultural character of an assembly of states today drafting a convention on the laws of war or a human rights

convention, and imagine the range of states to which references might be made in a contemporary judicial opinion considering the customary law of international human rights.

2. The Role of Custom

The Supreme Court decision in *The Paquete Habana* raises basic questions about custom, which has been referred to as the oldest and original source of international law. Customary law remains indispensable to an adequate understanding of human rights law. It figures in many fora, from scholarship about the content of human rights law, to the broad debates about human rights within the United Nations, to the arguments of counsel before an international or national tribunal. As this chapter later indicates, the character of such argument today differs in significant respects from the character a century ago at the time of this decision.

Customary law refers to conduct, or the conscious abstention from certain conduct, of states that becomes in some measure a part of international legal order. By virtue of a developing custom, particular conduct may be considered to be permitted or obligatory in legal terms, or abstention from particular conduct may come to be considered a legal duty.

Consider the 1950 statement of a noted scholar describing the character of the state practice that can build a customary rule of international law: (1) ‘concordant practice’ by a number of states relating to a particular situation; (2) continuation of that practice ‘over a considerable period of time’; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states.¹⁹ Other scholars have contested some of these observations, and today many authorities contend that custom has long been a less rigid, more flexible and dynamic force in law-making.

Clause (b) of Article 38(1) of the Statute of the ICJ states that the Court shall apply ‘international custom, as evidence of a general practice accepted as law’. The phrase is as confusing as it is terse. Contemporary formulations of custom have overcome some difficulties in understanding it, but three of the terms there used remain contested and vexing: ‘general’, ‘practice’ and ‘accepted as law’.

In 1987 the *Restatement (Third), Foreign Relations Law of the United States*, sought to clarify some of these issues, but it also did not shy away from the obstacles:

Each element in attempted definitions has raised difficulties. There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured? Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined. (From the Reporter’s Notes to Section 102).

The most recent attempt to shed light on the concept is a thorough study on the ‘identification of customary international law’, by the International Law Commission (ILC). The ILC was set up in 1947 to promote ‘the progressive development of international law and its codification’. Its expert membership of 34 is supposed to reflect ‘the main forms of civilization and ... the principal legal systems of the world’. After appointing Sir Michael Wood as Special Rapporteur on the subject (2012–2018), the ILC submitted its draft conclusions to the General Assembly which took note and drew them to the attention of States and other actors ‘who may be called upon to identify rules of customary international law’ (Res. 73/203 (2018)).

The ILC’s starting point is the need to ascertain whether there is a general practice and whether that practice is ‘accepted as law’. The latter formulation is the Commission’s way of presenting the

¹⁹ M. Hudson, Working Paper on Article 24 of the Statute of the International Law Commission, UN Doc. A/CN.4/16, 3 Mar. 1950, at 5.

conventional Latin phrase *opinio juris*, which in turn is an abbreviation of *opinio juris sive necessitatis*, meaning ‘an opinion of law or necessity.’ The two elements are to be separately ascertained. Practice is primarily that of states, and sometimes that of international organizations. It does not include the conduct of other (non-state) actors, although that may be relevant in assessing the practice of states or international organizations. Practice includes ‘both physical and verbal acts’ and possibly inaction:

Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts. (Conclusion 6(2)).

The practice must be ‘sufficiently widespread and representative, as well as consistent,’ but ‘no particular duration is required.’ *Opinio juris* ‘means that the practice in question must be undertaken with a sense of legal right or obligation’, and is ‘to be distinguished from mere usage or habit.’ (Conclusion 9). In addition to positive evidence of *opinio juris*, ‘failure to react over time to a practice may serve as evidence ... , provided that States were in a position to react and the circumstances called for some reaction’ (Conclusion 10). A resolution of an international organization or intergovernmental conference ‘cannot, of itself, create a rule of customary international law’, but it might reflect a customary norm or provide evidence relating to one.

The ILC confirms the concept of a ‘persistent objector’ (criticized by Chimni below) in the following terms:

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
2. The objection must be clearly expressed, made known to other States, and maintained persistently. (Conclusion 15).

Relationships between Treaties and Custom

Thus far we have considered custom independently of treaties (whose elements are described in Ch. 2C, below). But these two ‘sources’ or law-making processes of international law are complexly interrelated. For example, the question often arises of the extent to which a treaty should be read in the light of pre-existing custom. A treaty norm of great generality may naturally be interpreted against the background of relevant state practice or policies. In such contexts, the question whether the treaty is intended to be ‘declaratory’ of pre-existing customary law or to change that law may become relevant.

Moreover, treaties may give birth to rules of customary law. Assume a succession of bilateral treaties among many states, each containing a provision giving indigent aliens who are citizens of the other state party, the right to counsel at the government’s expense in a criminal prosecution. The question may arise whether these bilateral treaties create a custom that would bind a state not party to any of them. Polar arguments will likely be developed by parties to such a dispute, for example: (1) The nonparty state cannot be bound by those treaties since it has not consented. The series of bilateral treaties simply constitutes special exceptions to the traditional customary law that leaves the state’s discretion unimpaired on this matter. Indeed, the necessity that many states saw for treaties underscores that no obligation existed under customary law. (2) A solution worked out among many states should be considered relevant or persuasive for the development of a customary law setting standards for all countries. Similarly, the network of treaties may have become dense enough, and state practice consistent with the treaty may have become general enough, to build a customary norm binding all states. Article 38 of the Vienna Convention on the Law of Treaties signals rather than resolves this issue by stating that nothing in its prior articles providing generally that a treaty does not

create obligations for a third state precludes a rule set forth in a treaty from becoming binding on a third state ‘as a customary rule of international law, recognized as such’.

In contemporary international law, broadly ratified multilateral treaties are more likely than a series of bilateral treaties to generate the argument that treaty rules have become customary law binding nonparties. Some of the principal human rights treaties, for example, have from around 150 to 196 states parties from all parts of the world. Of course, one must distinguish between substantive norms in multilateral treaties that are alleged to constitute customary law that binds nonparties, and institutional arrangements created by the treaties in which parties have agreed, for example, to submit reports or disputes to a treaty organ.

MARTTI KOSKENNIEMI, THE PULL OF THE MAINSTREAM
88 MICH. L. REV. (1990) 1946

... [I]nternational lawyers have had difficulty accounting for rules of international law that do not emanate from the consent of the states against which they are applied. In fact, most modern lawyers have assumed that international law is not really binding unless it can be traced to an agreement or some other meeting of wills between two or more sovereign states. Once the idea of a natural law is discarded, it seems difficult to justify an obligation that is not voluntarily assumed.

...

The matter is particularly important in regard to norms intended to safeguard basic human rights and fundamental freedoms. If the only states bound to respect such rights and freedoms are the states that have formally become parties to the relevant instruments ... then many important political values would seem to lack adequate protection. It is inherently difficult to accept the notion that states are legally bound not to engage in genocide, for example, only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because, in the words of the International Court of Justice (ICJ), noncompliance would ‘shock[] the conscience of mankind’ and be contrary to ‘elementary considerations of humanity’.

...

... Although it seems clear that not all international law can be based upon agreement, it seems much less clear what else, then, it may be founded upon.... A Grotian lawyer would not, of course, perceive a great difficulty. He would simply say that some norms exist by force of natural reason or social necessity. Such an argument, however, is not open to a modern lawyer or court, much less an international court, established for the settlement of disputes between varying cultures, varying traditions, and varying conceptions of reason and justice. Such conceptions seem to be historically and contextually conditioned, so that imposing them on a nonconsenting state seems both political and unjustifiable as such.

It is, I believe, for this reason — the difficulty of justifying conceptions of natural justice in modern society — that lawyers have tended to relegate into ‘custom’ all those important norms that cannot be supported by treaties. In this way, they might avoid arguing from an essentially naturalistic — and thus suspect — position. ‘Custom’ may seem both less difficult to verify and more justifiable to apply than abstract maxims of international justice.

...

Professor Meron [an authority on humanitarian law whose book is here under review by Koskenniemi] follows this strategy. Although he accepts the category of ‘general principles’ as a valid way to argue about human rights and humanitarian norms, he does not use this argumentative tack. Nor does he examine whether, or to what extent, such norms might be valid as natural law. His reason for so doing is clearly stated: he wishes to ‘utilize irreproachable legal methods’ to enhance ‘the credibility of the norms’ for which he argues. The assumption here is that to argue in terms of general principles or natural justice is to engage in a political debate and to fall victim to bias and subjectivism. Following his rationalistic credo, Meron hopes to base human rights and humanitarian norms on something more tangible, something that jurists can look at through a distinct (objective, scientific) method and thus

ground their conclusions in a more acceptable way — a way that would also better justify their application against nonconsenting states.

The starting point — hoping to argue nontreaty-based human rights and humanitarian norms as custom — however, does not fare too well in Professor Meron's careful analysis of pertinent case law and juristic opinion. He accepts the orthodox 'two-element theory' of custom (*i.e.*, for custom to exist, there must be both material practice to that effect and the practice must have been motivated by a belief that it is required by law (p. 3)), yet case law contains little to actually support such a theory, although passages paying lip service to it are abundant...

...

... [The rest of material practice and the *opinio juris*] is useless, first, because the interpretation of 'state behavior' or 'state will' is not an automatic operation but involves the choice and use of conceptual matrices that are controversial and that usually allow one to argue either way. But it is also, and more fundamentally, useless because ... it is really our certainty that genocide or torture is illegal that allows us to understand state behavior and to accept or reject its legal message, not state behavior itself that allows us to understand that these practices are prohibited by law. It seems to me that if we are uncertain of the latter fact, then there is really little in this world we can feel confident about.

In other words, finding juristic evidence (a precedent, a habitual behaviour, a legal doctrine) to support such a conclusion adds little or nothing to our reasons for adopting it. To the contrary, it contains the harmful implication that it is *only* because this evidence is available that we can justifiably reach our conclusion. It opens the door for disputing the conclusion by disputing the presence of the evidence, or for requiring the same evidence in support of some other equally compelling conclusion, when that evidence might not be so readily available.

It is, of course, true that people are uncertain about right and wrong. The past two hundred years since the Enlightenment and the victory of the principle of arbitrary value have done nothing to teach us about how to know these things or how to cope with our strong moral intuitions. But one should not pretend that this uncertainty will vanish if only one is methodologically 'rigorous'. If the development of the human sciences has taught us anything during its short history, it is that the effort to replace our loss of faith in theories about the right and the good with an absolute faith in our ability to understand human life as a matter of social 'facts' has been a failure. We remain just as unable to derive norms from the facts of state behavior as Hume was. And we are just as compelled to admit that everything we know about norms which are embedded in such behavior is conditioned by an anterior — though at least in some respects largely shared — criterion of what is right and good for human life.

...

QUESTIONS

1. Does the US Supreme Court's method of 'ascertaining' the customary rule appear consistent with some of the observations about the nature of custom and the processes for its development in the preceding readings? Consider, for example, how the Supreme Court deals with:

- (a) the issue of *opinio juris*, and its relation to comity, grace, concession or discretion;
- (b) the relevance of treaties, as expressing a customary norm or as special rules (*lex specialis*) negating the existence of a custom; and
- (c) the departure from the rule of exemption during the Napoleonic wars, as a temporary interruption of or as aborting an emerging custom.

About which of these three aspects of the opinion does the dissenting opinion differ? How would you have argued against the Court's resolution of these three aspects?

2. How do you assess Koskenniemi's argument about customary law and natural law? How would you make the argument that the decision in *The Paquete Habana* in fact supports Koskenniemi's view of what underlies argument about customary law and what indeed should be brought to the forefront of argument?

3. Advocates acting on behalf of prisoners sentenced to death have argued in a number of countries that the death penalty is now barred by customary international law. Based on the materials in Chapter 1(B), and in light of the preceding discussions of custom, how would you develop the argument that customary international law bars capital punishment? How would you make the opposing argument? In developing your arguments, take account of the evidence of state practice and of *opinio juris*, and of the major difference between (a) ascertaining customary law through interaction between two states or between citizens of one state and the government of another state in a case like *The Paquete Habana*, and (b) ascertaining customary international law in a death penalty case.

3. The Changing Character of Customary International Law

The Paquete Habana exemplifies a practice of relying on bilateral rather than multilateral agreements. Since the Second World War, the international legal arena has experienced an extraordinary growth of multilateral instruments, many of them creating inter-governmental organizations (IGOs). So many fields of international law — human rights, peacekeeping, the use of force, monetary and trade agreements, environmental treaties, criminal law — contributed to this significant trend from bilateral to multilateral agreements and institutions as the preferred means by which to address some of the problems of the day. Inevitably these treaties and organizations so changed the international law context and the relationships between states and international law as well as between each other as to influence some basic concepts and doctrines, including doctrinal understanding of the sources of international law.

As we will see in the following chapters, the Universal Declaration of Human Rights (UDHR) and the major human rights treaties suggest the importance of this phenomenon for the evolution of the human rights regime. Not only do the basic duties of the state run towards its internal social and political order and population, but other states — independently or as members of various international human rights organizations — become involved in the process of attempting to assure the observance by delinquent states of those duties. IGOs become to one or another degree independent actors working toward treaties' goals. Or at least the scheme so suggests, for this book's later materials explore how far shy of that 'assurance' the system has in fact progressed.

These and other phenomena, ranging from the development of national and international human rights nongovernmental organizations (NGOs) to globalization embracing multiple cultures, have influenced the very paths of 'making' international law. For example, even outside the world of states and IGOs, there are today so many more voices and places contributing statements, resolutions, declarations, draft codes and other types of instruments about the content of international law — what it 'is', what it 'ought to be'. The UDHR, for example, has evolved from its early status as an aspirational statement to a body of norms in which many provisions are widely accepted as authoritative — as, for example, part of customary international law, or as an authoritative interpretation of the Charter's human rights provisions. Which individuals, which groups, which institutions, which states served as agents of this process? Do those who understand the UDHR, or important parts of it, as authoritative international law, as much so as a treaty, rely on the traditional criteria of customary law to support their understanding? Do UN General Assembly resolutions approved with large majorities occupy a special status? Are different criteria for the formation of custom developing, and becoming widely accepted? Such questions, addressed not only to global and regional IGOs but also to human rights NGOs, to international associations of lawyers and judges, and to a broad range of other non-state groups issuing proposals about human rights, have led to the concept of 'soft law', which is now

another, often perplexing ingredient in the multi-faceted evolution of international law. Although of direct relevance in the present context, we examine soft law in Ch. 5A, below.

**ANTHEA ROBERTS, TRADITIONAL AND MODERN APPROACHES TO CUSTOMARY
INTERNATIONAL LAW: A RECONCILIATION
95 AM. J. INT'L. L. (2001) 757**

... [C]ustom has become an increasingly significant source of law in important areas such as human rights obligations. Codification conventions, academic commentary, and the case law of the [ICJ] have also contributed to a contemporary resurrection of custom. These developments have resulted in two apparently opposing approaches, which I term “traditional custom” and “modern custom.” ...

... Custom is generally considered to have two elements: state practice and *opinio juris*.... This distinction is problematic because it is difficult to determine what states believe as opposed to what they say. Whether treaties and declarations constitute state practice or *opinio juris* is also controversial. For the sake of clarity, this article adopts Anthony D’Amato’s distinction between action (state practice) and statements (*opinio juris*). Thus, actions can form custom only if accompanied by an articulation of the legality of the action. *Opinio juris* concerns statements of belief rather than actual beliefs. Further, treaties and declarations represent *opinio juris* because they are statements about the legality of action, rather than examples of that action....

What I have termed traditional custom results from general and consistent practice followed by states from a sense of legal obligation. It focuses primarily on state practice in the form of interstate interaction and acquiescence. *Opinio juris* is a secondary consideration invoked to distinguish between legal and nonlegal obligations. Traditional custom is evolutionary and is identified through an *inductive* process in which a general custom is derived from specific instances of state practice....

By contrast, modern custom is derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions. Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.... A good example of the deductive approach is the Merits decision in *Military and Paramilitary Activities in and against Nicaragua* [1986 ICJ Rep. 14]. The Court paid lip service to the traditional test for custom but derived customs of non-use of force and nonintervention from statements such as General Assembly resolutions. The Court did not make a serious inquiry into state practice, holding that it was sufficient for conduct to be generally consistent with statements of rules, provided that instances of inconsistent practice had been treated as breaches of the rule concerned rather than as generating a new rule....

... Traditional custom is closely associated with descriptive accuracy because norms are constructed primarily from state practice — working from practice to theory. Reliance on state practice provides continuity with past actions and reliable predictions of future actions. It results in practical and achievable customs that can actually regulate state conduct. By contrast, modern custom demonstrates a predilection for substantive normativity rather than descriptive accuracy. Modern custom derives norms primarily from abstract statements of *opinio juris* — working from theory to practice. Whereas state practice is clearly descriptive, *opinio juris* is inherently ambiguous in nature because statements can represent *lex lata* (what the law is, a descriptive characteristic) or *lex ferenda* (what the law should be, a normative characteristic). The Court has held that only statements of *lex lata* can contribute to the formation of custom. However, modern custom seems to be based on normative statements of *lex ferenda* cloaked as *lex lata*, for three reasons.

... [Third], treaties and resolutions often use mandatory language to prescribe a model of conduct and provide a catalyst for the development of modern custom. Treaties and declarations do not merely photograph or declare the current state of practice on moral issues. Rather, they often reflect a

deliberate ambiguity between actual and desired practice, designed to develop the law and to stretch the consensus on the text as far as possible. For example, some rights set out in the Universal Declaration of Human Rights of 1948 are expressed in mandatory terms and have achieved customary status even though infringements are ‘widespread, often gross and generally tolerated by the international community.’ As a result, modern custom often represents progressive development of the law masked as codification by phrasing *lex ferenda as lex lata*.

...

The moral content of modern custom explains the strong tendency to discount the importance of contrary state practice in the modern approach. Irregularities in description can undermine a descriptive law, but a normative law may be broken and remain a law because it is not premised on descriptive accuracy. For example, *jus cogens* norms prohibit fundamentally immoral conduct and cannot be undermined by treaty arrangement or inconsistent state practice. Since the subject matter of modern customs is not morally neutral, the international community is not willing to accept any norm established by state practice. Modern custom involves an almost teleological approach, whereby some examples of state practice are used to justify a chosen norm, rather than deriving norms from state practice.... Thus, the importance of descriptive accuracy varies according to the facilitative or moral content of the rule involved.

...

A critique of modern custom.... Deriving customs primarily from treaties and declarations, rather than state practice, is potentially more democratic because it involves practically all states. Most states can participate in the negotiation and ratification of treaties and declarations of international fora, such as the United Nations General Assembly. The notion of sovereign equality (one state, one vote) helps to level the playing field between developed and developing countries. While formal equality cannot remedy all inequalities in power, international fora provide less powerful states with a cost-efficient means of expressing their views. ... [V]otes in the General Assembly usually receive little media scrutiny and are generally not intended to make law. For example, the General Assembly resolution on torture was adopted unanimously, while a much smaller number of states ratified the Convention Against Torture and others entered significant reservations to it.

...

The greatest criticism of modern custom is that it is descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct. The normative nature of modern custom leads to an enormous gap between asserted customs and state practice. For example, customary international law prohibits torture, yet torture is endemic. A similar criticism is made of the ‘emptiness’ of *jus cogens* norms, which are often flouted in practice. These laws lack efficacy because states have not internalized them as standards of behavior to guide their actions and judge the behavior of others. The regulatory function of modern custom is doubtful because it appears merely to set up aspirational aims rather than realistic requirements about action.... Some theorists characterize modern customs as ‘soft laws’ or sublegal obligations that do not amount to law. Indeed, norms that are honored in the breach do not yield reliable predictions of future conduct and are likely to bring themselves, and possibly custom as a whole, into disrepute.

...

HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW (2ND ED., 2019) 75

The concept of States ‘specially affected’ has provoked considerable controversy in recent years, sparked by the inclusion of that concept in the studies prepared by the ILC Special Rapporteur Vociferous opposition by a number of States led ultimately to such mention being excluded from the draft Conclusions Essentially, the opposition was based on the belief that ‘specially affected States’ meant, or would be interpreted to mean, the more powerful States, those of the ‘global North’ as distinct from those of the ‘global South’ However the concept remains available for use in negotiation over the validity of a particular alleged customary rule, and may well be judicially re-endorsed in due course.

A further indication as to the required generality and consistency of practice is given by the ICJ decision in the case of *Military and Paramilitary Activities in and against Nicaragua*. The Court observed that '[i]t is not to be expected that in the practice of States the application of the [customary] rules in question should have been perfect, in the sense that States should have [acted] with complete consistency ...'. [The Court added that it:]

... deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

While frequent repetition lends weight to a custom, the degree of frequency has to be weighed against the frequency with which the circumstances arise in which the action constituting practice has to be taken, or is appropriate. If the circumstances are such that they only present themselves from time to time, all that can be required is that the response to them has been, overall, consistent; and the fact that there have in sum been only a handful of instances is irrelevant. ...

In the view of most authors, and on the basis of ICJ jurisprudence, while the formation of a custom normally requires a more or less lengthy period of development, the transition from 'regular practice not yet binding as a custom' to 'binding rule of customary law' is something that happens at a particular moment, and in that sense is instantaneous. The word 'crystallization' is often used to refer to this decisive moment. It has, however, been suggested that the normativity of a rule in *statu nascendi* (coming to birth) could be a matter of degree: that its binding quality could 'harden', as it were, as time went by. This may be conceivable, or even probable, as a matter of theory; but the function of law being to settle disputes, at any moment it ought to be possible to say whether a rule in course of formation does or does not exist as a binding rule. ... The essence of custom, in the traditional view, is that its provisions have been hammered out in the resolution of conflicts of interests, or disputes, between States in their day-to-day relations. As has been well observed by Simma and Alston: '[A]n element of interaction—in a broad sense—is intrinsic to, and essential to, the kind of State practice leading to the formation of customary international law ... [T]he processes of customary international law can only be triggered, and continue working, in situations in which States interact, where they apportion or delimit in some tangible way.' ...

Turning to the second problem mentioned above, the concept of custom suggests that its rules emerge from the interaction of all States, all sovereign and equal, contributing to its establishment by their action or their reaction (or lack of it): a democratic means of arriving at rules applicable, and acceptable, to all. Even today, this is not necessarily an accurate picture, and that it has been less so in the past is notorious. Certain States have at all times been more powerful and influential, and have been able either to control the practice to be noted as relevant to custom, or to dominate the prevailing *opinio*, so as to influence what becomes established as 'international custom': custom is not necessarily democratic. It has been suggested that the practice hitherto invoked to support the assertion of the existence of a customary rule, has been too limited, being confined to the practice of a certain category of States, and neglecting that of the remainder. But is the fact of bias due the influence of powerful States necessarily a reason for challenging what is law, essentially merely because the observer would have preferred it to be otherwise? A customary norm is, of its nature, not a rule devised by and for an ideal community; it was devised by and for an actual community, and necessarily took into account (inter alia) the power relations within that community.

The relevant distinction between States is sometimes defined in terms of 'strong/weak', but a key element is also whether the practice of the State comes to the attention of the international community, in particular through its recording in the publications of, or within, the State itself. The contention is that this leads to an unbalanced picture of what the general international practice comprises, thus distorting the consequent vision of the law (and, incidentally, conflicting with the principle of sovereign equality of States). There is justice in this criticism, but it is perhaps over-simple. State practice is normally bilateral (at least): if action by a State does not have any impact on its fellows, this

is probably because it is within its sovereignty, or at any rate is of no particular significance for the development of the law. If there is contact—not to say conflict—between an ‘invisible’ State and a ‘visible’ State, the outcome (which is what matters for custom-development) will become visible in the publications of the ‘visible’ State. What may remain invisible is the contention of the ‘losing’ side in the controversy (which will not necessarily be the ‘invisible’ State), but if it was put forward to no avail it does not generate ‘practice’. It is only in the relations between two (or more) ‘invisible’ States that significant practice might develop, yet remain out of view.

B.S. CHIMNI, ‘CUSTOMARY INTERNATIONAL LAW: A THIRD WORLD PERSPECTIVE’
112 AM. J. INT’L L. (2018) 1, 43.

...

VII. Conclusion

The principal aim of the present article is to offer an alternative account of the historical evolution of CIL. It was argued that the doctrine of CIL originated in nineteenth century Europe in the period of the industrial revolution that saw the emergence of a shared legal consciousness and, in its second half, high imperialism. It was also the period in which the positivist method came to dominate the study of international law. Yet, at this point, the inextricable relationship between “formal” and “material” sources of CIL²⁰ was transparent and undeniable as these developments had roots in the European cultural, social, and political order. The imperial order of the times meant that CIL played a key role in facilitating the colonial project—its rules in the field of state responsibility being a case in point.

The first serious challenge to the Eurocentric doctrine of CIL came after the October revolution. The Soviet Union expressed deep skepticism about CIL as a source of international law as it reflected the practices and *opinio juris* of the leading capitalist powers. Later, the traditional doctrine of CIL came to be actively questioned by the newly independent states advancing a justice critique. These states contended that the traditional doctrine was fashioned by the ideology, interests, and power of metropolitan states. The two critiques necessitated a fresh look at the doctrine of CIL in order to advance a more sustainable theory of CIL that reflected changed times.

A first generation of efforts of western scholars to reformulate the doctrine of CIL appeared in the 1960s and 1970s. These formulations posited a distinction between “formal” and “material” sources of CIL that was given its blessings by the ICJ in the North Sea Continental Shelf case. A principal objective of this distinction was to salvage the doctrine of CIL from its historical condition—of being associated with the colonial and neocolonial projects. Besides the fact that the doctrine of CIL was a western construct, its rules came to be derived from western state practice on which the dominant positivist method placed great stress. Even today the lack of the ready availability of state practice in the instance of postcolonial states means that western states carry the day. Any talk of generality of practice or representative practice in the formation of CIL by default became a reference to the practice of western states. The absence of writings of postcolonial scholars contesting the divide between “formal” and “material” sources of CIL further reduced the possibility of supporting the claims of third world states. But western scholars did not allow matters to rest there. The possibility that postcolonial states could use their numerical strength to give rise to a particular rule of CIL that advanced their interests (as in the case of creating a NIEO) led to the invention of the persistent objector rule to offer a possible escape route to western nations from being compelled to undertake obligations that were not in their interest. Defection was made possible only through producing evidence of objection over time. The persistent objector rule did not require deliberative reasons to be considered. There was thus no room for debating the justice of CIL rules. But as has been pointed out, if “conscientious objection” is not permitted “then the parties are entitled to doubt the bona fides of those who insist on the customs as binding in the name of the community as a whole.” On the flip side, a dominant majority of members of the community must be in a position to claim that certain practices that advance the global common good have given rise to norms of CIL.

²⁰ Following Pellet, the formal sources are ‘the processes through which international law rules become legally relevant,’ while the material sources are ‘the political, sociological, economic, moral or religious origins of the legal rules.’ A. Pellet, ‘Article 38’, in A. Zimmermann et al., (eds.), *The Statute of the International Court of Justice: A Commentary*, (2nd ed., 2012), 731, at 774.

A second generation of attempts to theorize CIL began as the Cold War neared its end and the neoliberal globalization process gathered momentum. The collapse of the Soviet Union and the diminished opposition of postcolonial states in this period saw the distinction between “formal” and “material” sources emphatically endorsed by ILA and later ILC. But this phase also saw the emergence of the idea of “modern” CIL with its inclusive understanding of “state practice” and greater stress on the element of *opinio juris*. The move permitted relatively rapid development in the fields of [international investment, human rights, humanitarian, criminal and environmental law] and the greater use of CIL norms by domestic courts and international tribunals. The essential aim of the “modern” doctrine of CIL is the generation of norms that safeguard the systemic interests of the global capitalist system. These norms sought to make the international legal order responsive in the era of neoliberal globalization to the concerns of the subaltern states, peoples and groups on the one hand and ravaged nature on the other. But the idea of “modern” CIL has caused much anxiety among western realist scholars of international law who are conscious of its negative impact on the ability of advanced capitalist states to realize short-term interests. These scholars are concerned that given the growing internalization of “modern” CIL by domestic courts, the domestic and foreign policies of states may be unduly constrained. In voicing this anxiety, realist scholars like Bradley, Goldsmith, and Posner do not appreciate the salience of “modern” CIL in sustaining the stability and legitimacy of the global capitalist system in the long run.

The ILA and ILC have responded in different ways to the anxiety of realist critics. The ILA has been more sympathetic to the realist view and therefore emphasized the element of state practice in the formation of CIL, even as it has conceded that “where it can be shown that an *opinio juris* exists about a practice that will be sufficient.” However, the ILC has given importance to both the elements, leaving room for the expedient invoking of either of them for the rapid development of CIL. From a third world perspective, both the ILA and ILC do not assign sufficient weight to the fact that the state practice of weak states is not easily available and that their *opinio juris* is trumped by the invented doctrines of “specially affected states” and “persistent objectors.” Meanwhile, if decision-makers and scholars of weak states are not vigorously contesting the idea of “modern” CIL it is because the rules embody hegemonic ideas and beliefs. The hegemony of ideas and beliefs is, among other things, the function of the growing coincidence of interests between the elites of the first and the third worlds brought about by the ascendance of a transnational capitalist class. It is not that “modern” CIL does not contribute to the global common good, but it does so in an inadequate manner. Its norms can also be turned against subaltern states and actors, as in the case of the doctrine of responsibility to protect. Of course, the role of ideas and beliefs is present even when power and coercion are used to give rise to a norm of CIL. But in such cases, there is more active resistance to them.

In conclusion, it was asked whether a postmodern doctrine of CIL can be advanced to help promote the global common good and safeguard our common humanity. It was submitted that an alternative doctrine must have its roots in a decolonized, self-determined, and plural cultural and political international order in which deliberative reason plays a central role. A postmodern doctrine must therefore, to begin with, rest on the recognition that CIL has historically been an undemocratic source of international law. Indeed, it has been shorthand for norms that accommodate the reality of imperialism. If the dark past of CIL is acknowledged, the distinction between formal and material sources of CIL, endorsed by the ICJ, ILA, and ILC, should be rejected as it veils the harm done to subaltern peoples and actors. A postmodern doctrine would also address the democratic deficit that characterizes the conceptualization and formation of CIL norms. The deficit flows from, among other things, the absence of availability of state practice of third world states, the paucity of writings of its publicists, the lack of adequate weight given to qualifying resolutions of international organizations, and the nonrecognition of the practices of the global civil society. A postmodern doctrine would also distinguish between *opinio juris* as a constituent element of CIL and *opinio juris communis* representing universal conscience in order to inject progressive content into the international legal order. In the final analysis, a postmodern doctrine would redefine the epistemology and ontology of CIL formation in order to help work toward a just world order. Such a doctrine can only be given life through the sustained effort of those social forces that are dissatisfied with the current global order. In this process,

the role of critical theories of international law will be crucial as new doctrines are in the final analysis shaped by scholars of international law.

* * *

We will return in a later session to examine the concept of jus cogens norms which, in the view of most commentators, are closely related to customary international law. This session focuses first on the categories of ‘the general principles of law’.

QUESTIONS

1. Compare and contrast the perspectives on customary international law reflected in the articles by Roberts, Thirlway, and Chimni.

2. Tamar Megiddo, in ‘From Scarcity to Abundance: Customary International Law in the Age of AI’ (January 27, 2025), at <https://ssrn.com/abstract=5115997> argues that the amount of data about aspects of state practice that artificial intelligence can uncover and process ‘carries a transformative potential for the theory, doctrine and practice of customary international law research.’ Agree or disagree?

B. GENERAL PRINCIPLES AND NATURAL LAW: STATE RESPONSIBILITY

The *Chattin* case described below was decided under a 1923 General Claims Convention between the United States and Mexico, 43 Stat. 1730, T.S. No. 678. That treaty provided that designated claims against Mexico of US citizens (and vice versa) for losses or damages suffered by persons or by their properties that (in the case of the US citizens) had been presented to the US Government for interposition with Mexico and that had remained unsettled ‘shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity’. Each state was to appoint one member, and the presiding third commissioner was to be selected by mutual agreement (and by stipulated procedures failing agreement).

These arbitrations grew out of and further developed the law of state responsibility for injuries to aliens, a branch of international law that was among the important predecessors to contemporary human rights law. That body of law addressed only certain kinds of conflicts — not including, for example, conflicts originating in the first instance in a dispute between a claimant state (X) and a respondent state (Y). Thus it did not cover a dispute, say, based on a claim by X that Y had violated international law by its invasion of X’s territory or by its imprisonment of X’s ambassador.

Rather, the claims between states that were addressed by the law of state responsibility for injuries to aliens grew out of disputes arising in the first instance between a citizen-national of X and the government of Y. For example, respondent state Y allegedly imprisoned a citizen of claimant state X without hearing or trial, or seized property belonging to citizens of X — allegations which, if true, could show violations of international law. Note that these illustrations involve action leading to injury of X’s citizens by governmental officials or organs (executive, legislative, judicial) of Y. The law of state responsibility required that the conduct complained of be that of the state or, in less clear and more complex situations, be ultimately attributable to the state.

In the normal case, the citizen of X would seek a remedy within Y, probably through its judiciary — release from jail, return of the seized property or compensation for it. Indeed, before invoking the aid of his own government, the citizen of X would generally be required under the relevant treaty to pursue such a path, to ‘exhaust local remedies’. But that path could prove to be fruitless, because of lack of recourse to Y’s judiciary, because that judiciary was corrupt, or because of Y’s law adverse to

the citizen of X that would certainly be applied by its judiciary. In such circumstances, the injured person may turn to his own government X for diplomatic protection.

The 1924 decision of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions (Jurisdiction)* case, P.C.I.J., Ser. A, No. 2, gave classic expression to such diplomatic protection. It pointed out that when a state took up the cause of one of its subjects (citizens-nationals) in a dispute originating between that subject and respondent state, the dispute:

entered upon a new phase; it entered the domain of international law, and became a dispute between two States.... It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.

Precisely what action to take, what form of diplomatic protection to extend, lay within the discretion of the claimant state. If it decided to intervene and thereby make the claim its own, it might espouse the claim through informal conversations with the respondent state, or make a formal diplomatic protest, or exert various economic and political pressures to encourage a settlement (extending at times to military intervention), or, if these strategies failed, have recourse to international tribunals. Such recourse was infrequent. International tribunals to whose jurisdiction states had consented for the resolution of disputes between them were rare. Moreover, states were reluctant to raise controversies between their citizens and foreign states to the level of interstate conflict before an international tribunal except where a clear national interest gave reason to do so.

An arbitral tribunal to which the claimant state turned may have been created by agreement between the disputing states to submit to it designated types of disputes. That agreement may have been part of a general arbitration treaty (which after the Second World War found scant use) covering a broad range of potential disputes between the two parties. Or it may have been a so-called ‘compromissory clause’ (*compromis*) in a treaty dealing with a specific subject that bound the parties to submit to arbitration disputes that might arise under that treaty. Of course, two states could always agree to submit specified disputes to arbitration, as in the 1923 General Claims Convention between the United States and Mexico under which *Chattin* was decided.

In 1921, ad hoc arbitral tribunals were first supplemented by an international court, the Permanent Court of International Justice provided for in the Covenant of the League of Nations. Again, problems of states’ consent to jurisdiction and states’ reluctance to start interstate litigation limited the role of that court (and indeed the role of its successor, the International Court of Justice created under the Charter of the United Nations) in developing the law of state responsibility (or, today, in developing the international law of human rights).

The growth in the nineteenth and twentieth centuries of the law of state responsibility for injury to aliens was the product of and evidenced by a range of state interactions — diplomatic protests and responses, negotiated settlements, arbitral decisions — and the writings of scholars. Before the Second World War, there was little attempt at formal codification or creative development of this body of law through treaties — that is, treaties spelling out the content of what international law required of a state in its treatment of aliens.

As it developed, the international law of state responsibility reflected the more intense identification of the individual with his state (or later, the identification of the corporation with the state of its incorporation, or of most of its shareholders) that accompanied the nationalistic trends of that era. This body of law would not have developed so vigorously but for Western colonialism and economic

imperialism that reached their zenith during this period.²¹ Transnational business operations centered in Europe, and later in the United States as well, penetrated those regions now known as the Third World or developing countries. The protection afforded aliens under international law had obvious importance for the foreign operations of transnational corporations that were often directed by foreign nationals.

In such circumstances, given the links between the success and wealth of corporations in their foreign ventures and national wealth and power, the security of the person and property of a national or corporation operating in a foreign part of the world became a concern of his or its government. That concern manifested itself in the vigorous assertion of diplomatic protection and in the enhanced activity of arbitral tribunals. In the late nineteenth and early twentieth centuries, some such arbitrations occurred under the pressure of actual or threatened military force by the claimant states, particularly against Latin American governments.

A statement in an arbitral proceeding in 1924 by Max Huber, a Judge of the Permanent Court of International Justice, cogently expressed some basic principles of that era's consensus (among states of the developed world) about the law of state responsibility:²²

... It is true that the large majority of writers have a marked tendency to limit the responsibility of the State. But their theories often have political inspiration and represent a natural reaction against unjustified interventions in the affairs of certain nations....

... The conflicting interest with respect to the problem of compensation of aliens are, on the one hand, the interest of a State in exercising its public power in its own territory without interference or control of any nature by foreign States and, on the other hand, the interest of the State in seeing the rights of its nationals established in foreign countries respected and well protected.

Three principles are hardly debatable:

...

(2) In general, a person established in a foreign country is subject to the territorial legislation for the protection of his person and his property, under the same conditions as nationals of that country.

(3) A State whose national established in another State is deprived of his rights has a right to intervene if the injury constitutes a violation of international law....

... The territorial character of sovereignty is so essential a trait of contemporary public law that foreign intervention in relationships between a territorial State and individuals subject to its sovereignty can be allowed only in extraordinary cases....

... This right of intervention has been claimed by all States; only its limits are under discussion. By denying this right, one would arrive at intolerable results: international law would become helpless in the face of injustices tantamount to the negation of human personality, for that is the subject which every denial of justice touches.

... No police or other administration of justice is perfect, and it is doubtless necessary to accept, even in the best administered countries, a considerable margin of tolerance. However, the restrictions thus placed on the right of a State

²¹ See A. Tzvika Nissel, *Merchants of Legalism: A History of State Responsibility (1870–1960)* (2024).

²² Judge Huber delivered these remarks in his role as a Reporter (in effect, arbitrator) in a dispute between Great Britain and Spain. *British Claims in the Spanish Zone of Morocco*, 2 U.N.R.I.A.A. (1924) 615, at 639.

to intervene to protect its nationals assume that the general security in the country of residence does not fall below a certain standard....

How was it determined whether, in Huber's words, an 'injury' to an alien 'constitutes a violation of international law', or whether the administration of justice in a given country fell below 'a certain standard'? To what materials would, for example, an arbitral tribunal turn for help in defining the content of that standard? What types of argument and justifications would inform the development of this body of international law? Decisions in the many arbitrations, including the *Chattin* case below, shed light on these questions.

The *Chattin* Case

The *Chattin* case²³ is among the more interesting of the arbitral decisions. Chattin, a US citizen, was a conductor on a railroad in Mexico from 1908 to 1910, when he was arrested for embezzlement of fares. His trial was consolidated with those of several other Americans and Mexicans who had been arrested on similar charges. In February 1911, he was convicted and sentenced to two years' imprisonment. His appeal was rejected in July 1911. In the meantime the inhabitants of Mazatlán, during a political uprising, threw open the doors of the jail and Chattin escaped to the United States. In asserting Chattin's claims, the United States argued that the arrest was illegal, that Chattin was mistreated while in prison, that his trial was unreasonably delayed, and that there were irregularities in the trial. It claimed that Chattin suffered injuries worth \$50,000 in compensation.

Of the three members of the Claims Commission, one came from the United States (Nielsen) and another from Mexico (MacGregor). Each wrote an opinion. Excerpts from the opinion of the third Commissioner follow:

COMMISSIONER VAN VOLLENHOVEN

This opinion examined a range of complaints about the conduct of the trial. The Commissioner gave particular attention to three such complaints.

- (1) Chattin claimed that he had not been duly informed of the charges. The opinion concluded that this claim was 'proven by the record, and to a painful extent'. The principal complainant, an American manager of the railroad company, made full statements to the Court 'without ever being confronted with the accused and his colleagues', and indeed was 'allowed to submit to the Court a series of anonymous written accusations....It is not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the Judge's part to find out the truth'. Nonetheless Chattin was generally aware of the details of the investigation.
- (2) Van Vollenhoven dismissed Chattin's charge that witnesses were not sworn as irrelevant, 'as Mexican law does not require an "oath" (it is satisfied with a solemn promise, *protesta*, to tell the truth), nor do international standards of civilization'.
- (3) Van Vollenhoven found the charge that the hearings in open court lasted only five minutes was proven by the record. That hearing was 'a pure formality', in which written documents were confirmed and defence counsel said only a word or two. The opinion concludes that 'the whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court', and cites instances where the judge failed to follow leads or examine certain people. Excerpts follow:

Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance

²³ *United States of America (B.E. Chattin) v. United Mexican States*, United States–Mexican Claims Commission, 1927. Opinions of Commissioners under the 1923 Convention between the United States and Mexico (1927) 4 U.N.R.I.A.A. 282.

attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one.

Nonetheless, the opinion found the record sufficient to warrant a conviction of Chattin and rejected a charge that the court was biased against American citizens, since four Mexicans were also convicted.

... Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man ... and the answer here again can only be in the affirmative.

Taking all these factors into account, the opinion allowed damages in the sum of \$5,000.

COMMISSIONER NIELSEN (CONCURRING)

Nielsen observed that counsel for Mexico had stressed that during the period of investigation a Mexican judge was at liberty to receive anything placed before him, including anonymous accusations. Although European procedure allowed 'a similar measure of latitude' for judges, there was one essential difference: after proceedings before a judge of investigation, the case is taken over by another judge who conducts the actual trial. Thus, said Nielsen, under the French law of the period

the preliminary examination does not serve as a foundation for the verdict of the judge who decided as to the guilt of the accused. The examination allows the examining judge to determine whether there is ground for formal charge, and in case there is, to decide upon the jurisdiction. ... [The trial of the accused] is before a judge whose functions are of a more judicial character than those of a judge of investigation employing inquisitorial methods in the nature of those used by a prosecutor

Nielsen, 'having further in mind the peculiarly delicate character of an examination of judicial proceedings by an international tribunal, as well as the practical difficulties inherent in such examination', concluded that the Commission should render a small award based on the mistreatment of Chattin during the period of investigation.

COMMISSIONER MACGREGOR (DISSENTING)

In his dissent, Commissioner MacGregor referred to the charge that the trial proper lasted only five minutes, 'implying thereby that there was really no trial and that Chattin was convicted without being heard'. This was an 'erroneous criticism which arises from the difference between Anglo-Saxon procedure and that of other countries'. Mexican criminal procedure consisted of two parts: preliminary proceedings (*sumario*) and plenary proceedings (*plenario*). In the *sumario*, evidence is gathered, investigations occur, the judge or defendant can cross examine. When the judge concludes that there are sufficient facts to establish a case, the *sumario* ends as the record is given to all parties to be certain that they do not request more testimony and so that they can make final pleas. Then a public hearing (*plenario*) is held 'in which the parties very often do not have anything further to allege'. That hearing is formal, and serves little new function. Such occurred in the *Chattin* case.

In view of the foregoing explanation, I believe that it becomes evident that the charge, that there was no trial proper, can not subsist, for, in Mexican procedure, it is not a question of a trial in the sense of Anglo-Saxon law, which requires that the case be always heard in plenary proceedings, before a jury, adducing all the circumstances and evidence of the cause, examining and cross-examining all the witnesses, and allowing the prosecuting attorney and counsel

for the defense to make their respective allegations. International law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States. ...

...

... It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose on him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which per se cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice of Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law. For example, in some of the latter the investigation of a crime is made only by the police magistrates and the trial proper is conducted by the Judge. Hence the reluctance in accepting that one same judge may have the two functions and that, therefore, he may have to receive in the preliminary investigation (*instrucción*) of the case all kinds of data, with the obligation, of course, of not taking them into account at the time of judgment, if they have no probative weight.... [T]he foreign-law procedure is used to understand what is a trial or open trial imagining at the same time that it must have the sacred forms of common-law and without remembering that the same goal is reached by many roads. And the same can be said when speaking of the manner of taking testimony of witnesses, of cross-examination, of holding confrontations, etc.... In view of the above considerations, I am of the opinion that this claim should be disallowed.

STATE RESPONSIBILITY TODAY

The opinions of the Commissioners underscore the methodological problems in developing a minimum international standard of criminal procedure out of such diverse materials — a diversity that was restricted in *Chattin* to Europe and Latin America, hence far less perplexing than today's worldwide diversity of legal cultures and criminal processes. A treaty was relevant to *Chattin*, but as indicated above, it addressed the scope and structure of the arbitration between the United States and Mexico rather than the international norms of criminal procedure to be applied. The only reference of the General Claims Convention to applicable norms was the terse provision in Article 1 that claims should

be submitted to the tripartite Commission ‘for decision in accordance with the principles of international law, justice and equity’.

Today a dispute like that in *Chattin* could draw on a human rights treaty, the International Covenant on Civil and Political Rights (ICCPR), to be discussed later, that in 2024 had 173 state parties. Article 14 of that Covenant dealing with criminal trials provides in relevant part:

1. All persons shall be equal before the courts.... [E]veryone shall be entitled to a fair and public hearing by [an] impartial tribunal....
2. Everyone ... shall have the right to be presumed innocent until proved guilty according to law.
3. [E]veryone shall be entitled to the following minimum guarantees ...:
 - d. To be tried in his presence and to defend himself in person or through legal assistance of his own choosing
 - e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf. ...

The International Court of Justice confirmed in 2007 that the scope of international law protection ‘governing alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.’²⁴ The fact that this body of law now goes well beyond the protection of aliens was also reflected in the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). As a result, state responsibility today encapsulates a broad set of ‘secondary’ rules that determine such matters as when a state is responsible for an internationally wrongful act and the remedies for a state’s breach of ‘primary’ or substantive rules of international law (such as the prohibition on genocide). For present purposes, we provide a rough sketch of these secondary rules. They include the following subjects:

1. **Attribution:** This set of rules determine when conduct consisting of the acts or omissions of state officials or other groups and individuals can be considered the responsibility of the state. These rules are relevant in the human rights context, for example, in determining the conditions under which a state is responsible for extraterritorial human rights violations by corporations and when a state is responsible for human rights violations committed by armed opposition groups that the state supports.
2. **Circumstances Precluding Wrongfulness:** This set of rules provide defences that preclude the wrongfulness of state conduct that is not in conformity with the state’s international obligations. These rules include duress, force majeure, necessity and self-defence. In the human rights context, for example, necessity may allow a state to suspend obligations that implicate human rights but forecloses that defence if the state contributed to bringing about the condition of necessity.
3. **Consequences that follow when a state breaches an international obligation:** These rules set forth remedies that a state must provide for violation of an international obligation. The remedies include cessation, reparations, restitution, compensation, satisfaction and assurances of non-repetition. In the human rights context, these rules are relevant, for example, in determining what actions by a state are sufficient when it has subject a foreign national to execution without access to their foreign consul in violation of an international agreement.

²⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007 (II) 599, para. 39.

4. **Countermeasures:** These rules regulate the permissible range of responses to another state's breach of international law. In the human rights context, these rules may be important in determining whether and to what degree a state may employ sanctions in response to another state's human rights violations. Notably, these rules also preclude states from taking countermeasures in other contexts that would affect 'obligations for the protection of fundamental human rights' or 'obligations of a humanitarian character prohibiting reprisals' (Art. 50).²⁵

It is important to note two additional features of this area of law. First, state responsibility exists side by side with treaty law, including those treaties governing human rights. However, when the latter constitute *lex specialis*, or special rules, they take priority if there is any inconsistency. Second, the articles of state responsibility are highly focused on state-to-state interactions. That feature limits their value for human rights law. Admittedly, Article 33 (pertaining to consequences of a breach) provides that the obligations set forth by these rules can be owed to another state 'or to the international community as a whole'; and Article 33 also provides that nothing in the rules should prejudice any rights arising from the international responsibility of a state that would 'accrue directly to any person'. Nevertheless, many of the rules are framed in terms of an injury to another state and the actions that states may take in response to being unlawfully injured.

QUESTIONS

1. Why is international law relevant to this decision? Were there any international factors in the trial and conviction and, if so, how do they compare with the international factors in *The Paquete Habana*?
2. How would you identify the most serious problem in the judicial process leading to Chattin's conviction — say, on the basis of a comparison with judicial processes in other legal systems?
3. How do the Commissioners approach the task of identifying an 'international standard of civilization' (or, within the terms of the 1923 Convention, the relevant 'international law, justice and equity') against which they are to test the legality of the conviction? Do they resort to customary international law?
4. Would the tribunal's task have been much simpler if there had been a treaty between the United States and Mexico regulating treatment of aliens that reflected Article 14 of the ICCPR? Would Article 14 have resolved the basic issues on its face?

²⁵ See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction Text and Commentaries* (2002).

General Principles

OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE
(1991) 50

Chapter IV: General Principles and Equity

...

The Broad Expanse of General Principles of Law

We can distinguish five categories of general principles that have been invoked and applied in international law discourse and cases. Each has a different basis for its authority and validity as law. They are:

- (1) The principles of municipal law 'recognized by civilized nations'.
- (2) General principles of law 'derived from the specific nature of the international community'.
- (3) Principles 'intrinsic to the idea of law and basic to all legal systems'.
- (4) Principles 'valid through all kinds of societies in relationships of hierarchy and co-ordination'.
- (5) Principles of justice founded on 'the very nature of man as a rational and social being'.

Although these five categories are analytically distinct, it is not unusual for a particular general principle to fall into more than one of the categories. For example, the principle that no one shall be a judge in his own cause or that a victim of a legal wrong is entitled to reparation are considered part of most if not all, systems of municipal law and as intrinsic to the basic idea of law.

Our first category, general principles of municipal law, has given rise to a considerable body of writing and much controversy. Article 38(1)(c) of the Statute of Court does not expressly refer to principles of national law but rather general principles 'recognized by civilized nations'.... Elihu Root, the American member of the drafting committee, prepared the text finally adopted and it seemed clear that his amendment was intended to refer to principles 'actually recognized and applied in national legal systems'. The fact that the subparagraph was distinct from those on treaty and custom indicated an intent to treat general principles as an independent source of law, and not as a subsidiary source. As an independent source, it did not appear to require any separate proof that such principles of national law had been 'received' into international law.

However, a significant minority of jurists holds that national law principles, even if generally found in most legal systems, cannot *ipso facto* be international law. One view is that they must receive the *imprimatur* of State consent through custom or treaty in order to become international law. The strict positivist school adheres to that view. A somewhat modified version is adopted by others to the effect that rules of municipal law cannot be considered as recognized by civilized nations unless there is evidence of the concurrence of States on their status as international law. Such concurrence may occur through treaty, custom or other evidence of recognition. This would allow for some principles, such as *res judicata*, which are not customary law but are generally accepted in international law....

...

... The most important limitation on the use of municipal law principles arises from the requirement that the principle be appropriate for application on the international level. Thus, the universally accepted common crimes — murder, theft, assault, incest — that apply to individuals are not crimes under international law by virtue of their ubiquity....

At the same time, I would suggest a somewhat more positive approach for the emergent international law concerned with the individual, business companies, environmental dangers and shared resources. In as much as these areas have become the concern of international law, national law principles will often be suitable for international application. This does not mean importing municipal rules 'lock, stock and barrel', but it suggests that domestic law rules applicable to such matters as individual rights, contractual remedies, liability for extra-hazardous activities, or restraints on use of common property, have now become pertinent for recruitment into international law. In these areas, we may look to representative legal systems not only for the highly abstract principles of the kind referred to earlier

but to more specific rules that are sufficiently widespread as to be considered ‘recognized by civilized nations’....

The second category of general principles included in our list comprises principles derived from the specific character of the international community. The most obvious candidates for this category of principles are ... the necessary principles of co-existence. They include the principles of *pacta sunt servanda*, non-intervention, territorial integrity, self-defence and the legal equality of States. Some of these principles are in the United Nations Charter and therefore part of treaty law, but others might appropriately be treated as principles required by the specific character of a society of sovereign independent members.

...

The foregoing comments are also pertinent to the next two categories of general principles. The idea of principles ‘*jus rationale*’ ‘valid through all kinds of human societies’ ... is associated with traditional natural law doctrine. At the present time its theological links are mainly historical as far as international law is concerned, but its principal justification does not depart too far from the classic natural law emphasis on the nature of ‘man’, that is, on the human person as a rational and social creature.

The universalist implication of this theory — the idea of the unity of the human species — has had a powerful impetus in the present era. This is evidenced in at least three significant political and legal developments. The first is the global movements against discrimination on grounds of race, colour and sex. The second is the move toward general acceptance of human rights. The third is the increased fear of nuclear annihilation. These three developments strongly reinforce the universalistic values inherent in natural law doctrine. They have found expression in numerous international and constitutional law instruments as well as in popular movements throughout the world directed to humanitarian ends. Clearly, they are a ‘material source’ of much of the new international law manifested in treaties and customary rules.

In so far as they are recognized as general principles of law, many tend to fall within our fifth category — the principles of natural justice. This concept is well known in many municipal law systems (although identified in diverse ways). ‘Natural justice’ in its international legal manifestation has two aspects. One refers to the minimal standards of decency and respect for the individual human being that are largely spelled out in the human rights instruments. We can say that in this aspect, ‘natural justice’ has been largely subsumed as a source of general principles by the human rights instruments....

* * *

Different Views

The views of commentators on the role of general principles vary considerably. Bruno Simma and Philip Alston argue in ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, General Principles’, 12 *Aust. Y. B. Int’l L.* (1992) 82 that general principles have been unduly neglected in this area and in some respects offer a more consensual and structured foundation for human rights law than does traditional custom.²⁶

Alain Pellet and Daniel Müller, ‘Article 38’, in Andreas Zimmermann and Christian Tams. (eds.), *The Statute of the International Court of Justice: A Commentary* (2019) 819, at 941, downplay their significance. They observe that the Court ‘will usually only resort to them in order to fill a gap in the treaty or customary rules available to settle a particular dispute’ and ‘will decline to invoke them when other rules exist’. They explain this marginality by noting that ‘general principles are difficult to handle’, that they must ‘be discovered in domestic rules’ which are not formally a source of international law, and that they are inevitably transitory in the sense that their repeated use will transform them into custom.

²⁶ For a critique arguing that this exemplifies an expansionist and self-serving technique employed by human rights proponents see I. Aral and J. d’Aspremont, *Expansionism in International Human Rights Law* (2024) 67–75.

In contrast, Mads Andenas and Ludovica Chiussi in Andenas et al. (eds.), *General Principles and the Coherence of International Law* (2019) 34 attribute three ‘decisive roles’ to general principles: (1) as ‘a cohesive force certifying the systemic nature of international law’; (2) as a centripetal force ‘providing a common ground for interaction’ among different bodies of law; and (3) reducing the separation between international law and municipal legal systems’.²⁷ Similarly, a former President of the ICJ (Abdulqawi A Yusuf, ‘Concluding Remarks’, in Andenas et al (above) 458), has identified three ways in which general principles promote coherence in the international legal system: (1) ‘a small number of general principles can be said to underlie the conscience of humanity generally’; (2) they may reflect ‘the common views of the international community on matters that belong – to borrow Judge Cançado Trindade’s terminology – to “the domain of superior ... human values, to be safeguarded, [yet] not sufficiently worked upon in international case law and doctrine”’; and (3) they may ‘also reflect relatively uncontroversial common values regarding ... the proper functioning of the legal system.’

In 2019, the International Law Commission began working on the topic of general principles. Its Special Rapporteur, Marcelo Vázquez-Bermúdez, has identified two different categories: those ‘derived from national legal systems’, and those ‘formed within the international legal system’. The latter reflects a principle that: ‘is widely acknowledged in treaties and other international instruments; underlies general rules of conventional or customary international law; or is inherent in the basic features and fundamental requirements of the international legal system’ (UN Doc. A/CN.4/741 (2020) para. 119). In his 2022 report (UN Doc. A/CN.4/753) the rapporteur argues that, in addition to filling gaps, general principles can constitute an independent basis for rights and obligations (para. 110), may serve to clarify certain aspects of customary international law (para. 138), and may serve to ensure overall coherence not just through gap-filling but ‘by establishing substantive rights and obligations, secondary rules, procedural rules or interpretative rules’ (para. 146).

The Teachings of Publicists

The final source referred to in Article 38 is ‘the teachings of the most highly qualified publicists of the various nations’. In the era of *The Paquete Habana* this concept was readily translatable into the major treatises produced in various countries, to which the U.S. Supreme Court referred. Today, however, there are vastly more treatises and a great many other means through which leading ‘publicists’ express their views. Using the ICJ as the lens through which to make an assessment of the importance of this source, Pellet and Müller (see above), minimizes its formal significance:

338 If the influence of the doctrinal views on the Court’s decisions were to be evaluated according to the number of citations in the judgments and advisory opinions, it would be very proximate to nil ... [T]he Court seems to have only referred (and rarely) to ‘the teachings of legal authorities’, ‘legal doctrine’, ‘the opinions of writers’, or ‘legal thinking’ in general. In the *Lotus* case, the Permanent Court referred to the ‘teachings of publicists’ leaving expressly apart ‘the question as to what their value may be from the point of view of establishing the existence of a rule of customary law’.

339 It is not illogical that the weight of the legal doctrine, so eminently influential in laying the foundations of international law, decreases with the growth of international judicial activity, the development of the case law of the Court and the new means to gain knowledge of State practice. However, the scarce avowed use of the ‘teachings of publicists’ in the Court’s case law probably does not accurately reflect the influence these ‘teachings’ still have. A sign of this is given by the fairly abundant references to the opinions of writers in the opinions of the individual judges: this suggests that these views have probably been discussed during the deliberation.

²⁷ See also A. Stone Sweet and M. Andenas, ‘The Law and Politics of the General Principles of Law in the Twenty-First Century’, 62 *Colum. J. Transnat’l L.* (2023) 1.

340 Be this as it may, there is no doubt that the practice of the Court not to refer expressly to particular authors is wise and appropriate. The intrinsic scientific value and reliability of the doctrine is extremely variable, probably as much as is the exploitability of the works of scholars who, quite often, take delight in abstract discussions which can only be of little help in the adjudicating process. International law is a 'small world' not exempt from jealousy and envy and the Court is certainly well-advised not to distribute good or bad marks. Moreover, one must admit that, as unfortunate as it is, the main doctrinal 'production' still comes from the North and more particularly from a handful of countries where international law has gained a rather high degree of sophistication; too much emphasis on the 'teachings of publicists' by the Court would unavoidably throw light on this unfortunate situation while, at the same time, showing that 'the different nations', in principle required by the text of Article 38, para. 1 (d), are not so 'different'.

A very different perspective is offered by Sandesh Sivakumaran, 'The Influence of Teachings of Publicists on the Development of International Law', 66 *I. C. L. Q.* (2017) 1. He defines the category more broadly:

... Insofar as publicists are concerned, it includes entities that have been empowered by States to produce teachings; expert groups, standing and ad hoc; and ordinary publicists. Teachings are also made up of different types, and include digests, treatises, textbooks, monographs, commentaries, journal articles and blog posts. All are of different types, have different goals in mind, and appeal to different audiences. Teachings of publicists should thus not be limited either to the individual publicist or to the repository of State practice.

The influence of teachings of publicists is difficult to assess. It includes, but is not limited to, an assessment of citation by courts and tribunals. Citation is one useful measure of determining influence, but citation does not necessarily mean influence and lack of citation certainly does not mean lack of influence. More importantly for present purposes, focus on citation by courts and tribunals privileges the role of these bodies in the development of international law and downplays the role of other actors, such as States, international organizations and treaty bodies. It also understates the more pervasive influence of teachings, such as on the structure of the discipline, and on students of international law, who constitute later generations of international lawyers. Instead, influence should be assessed by reference to how all the actors within the community of international lawyers use or do not use the teachings of publicists. Individual publicists do not create law by themselves. Rather, they constitute a part of the community that does create the law. Thus, it is the interaction between teachings and the members of the community of international lawyers that is determinative of influence.

... it is evident that teachings of publicists continue to have an important influence on the making and shaping of international law. The precise nature of the influence varies considerably. It includes the publicist as the originator of ideas, as the finessor of norms, and as the 'grammarian'. The influence also varies by publicist. The balance between the influence of teachings of State-empowered entities and ordinary publicists has changed, with the former proving particularly significant. Ordinary publicists continue to play a crucial role, but their role is different to times past. Ultimately, as Wolfke put it: 'the influence of doctrine on the formation of international law in general is certainly rather behind-the-scenes and anonymous. To disregard it would, however, be to say the least, unjustified.'

In 2010, Singapore's highest court, in examining the legality of the mandatory death penalty, took into account the views expressed on the matter by two UN Special Rapporteurs. It did so on the basis that they were part of 'the teachings of the most highly qualified publicists of the various nations', as provided for in Article 38 of the ICJ Statute. The Court concluded that while the opinions were relevant, 'they are not in themselves sources of CIL. Instead, they are a subsidiary means for determining the existence or otherwise of rules of CIL.'²⁸

C. SLAVERY, THE INTERWAR MINORITIES REGIME AND THE ROLE OF TREATIES

1. Treaties and the Abolition of Slavery

Slavery is one of the most heinous violations of human rights. While it has existed in different forms since ancient times, it was not until the early nineteenth-century that those seeking its abolition began to use the tools of international law for that purpose. Up until then, international law, partly reflecting Roman law, had been an important factor in facilitating and legitimizing the slave trade.²⁹ Treaties were to play an important role in achieving eventual abolition.

The following analysis traces the evolution of the nineteenth-century treaty-making.

... Between 1501 and 1867, 10.7 million people were enslaved and transported from Africa to the Western Hemisphere — an average of over 34,000 persons every year for over three and a half centuries. The process was inhuman at every step of the way. Large numbers died en route from their homes to the ports on the African coast. The conditions on the slave ships were atrocious. Holds were packed full with men, women, and children lying "spooned" tight behind one another for five weeks or more in urine- and feces-drenched squalor. On average, fifteen percent of the "cargo" died. And conditions upon arrival, especially on the plantations in the West Indies, were generally appalling. ...

... [By 1814 Britain] was estimated to have had over one million slaves in the Caribbean ..., and British territories were producing more than fifty percent of Europe's sugar imports. At the end of the eighteenth century, British slave traders continued to land fifty thousand slaves annually in the New World.

The rise of the [British] abolition movement was surprisingly rapid and greatly assisted by the use of highly innovative techniques. Specifically, the movement relied on pamphleteering and other public relations tools, the gathering of mass petitions on a scale previously unseen, and consumer boycotts. Quaker and other activists succeeded in mobilizing diverse constituencies, and women emerged as important players. Starting in 1789, an abolition bill was put before Parliament every year for eighteen years until finally both houses of Parliament passed the 1807 Act for the Abolition of the Slave Trade.

The campaign that culminated in this Act is familiar territory. Less well known is the network of treaties that were negotiated and the mixed commissions that were established to implement the ban. Since the British legislation could apply only to British ships, it was essential that Britain find ways to extend the application of the ban or the slack would simply be taken up by ships trading under other flags. Initially, the Napoleonic Wars provided a legal justification to board ships on the high seas in order to ascertain whether they were either

²⁸ *Yong Vui Kong v. Public Prosecutor* [2010] 2 Singapore Law Reports 192, para. 97, Court of Appeal.

²⁹ A. Martineau, 'Georges Scelle's Study of the Slave Trade: French Solidarism Revisited,' 27 *Eur. J. Intl L.* (2017) 1131.

enemy ships or others providing de facto support to the enemy. Although the war was over by 1815, and peacetime searches were illegal, the practice continued until the British courts began in 1817 to invalidate the resulting seizures of alleged slave ships of other nations. The British government then initiated a series of long-drawn-out negotiations designed to create a network of bilateral treaties with the key trading states. In 1814, treaties were signed with both the Netherlands and the United States, although the treaty with the latter contained no enforcement provision. Negotiations with France and Spain stalled, but in 1815 Britain “succeeded through a combination of bribery and threats” in getting Portugal to sign a treaty that included enforcement provisions, although this did not apply to the trade south of the equator. In order to assuage fears that mutual inspection arrangements would, in practice, license the British and their own judicial system at the expense of other nations’ sovereignty, Britain proposed bilateral arrangements to create specialized tribunals. These “mixed commissions” were set up pursuant to bilateral treaties signed with Portugal, Spain, and the Netherlands in 1817–18. Eventually Sweden, Argentina, Uruguay, Bolivia, and Ecuador also signed such treaties. But France never did, and until the Civil War the United States resisted all enforcement arrangements. ...³⁰

Assessments of the importance of these early treaties vary. Jenny Martinez has argued strongly that while the treaties and tribunals ‘did not alone end the slave trade, they played an important role in consolidating the consensus against the slave trade and provided a mechanism for cooperation between nations.’³¹ Samuel Moyn, in contrast, dismisses them as ‘a minor episode in the history of anti-slavery.’³² In examining factors leading to abolition, most historians tend to focus more on the role of slave revolutions and uprising, on-board slave rebellions, the changing economics of slavery, and imperial self-interest, than on the treaties.

Nevertheless, soft law declarations and treaties did lay the foundations for abolition. Among the former was the declaration by major European powers at the 1815 Congress of Vienna that the slave trade was ‘repugnant to the principles of humanity and universal morality’ and that they wished to end ‘a scourge, which has so long desolated Africa, degraded Europe, and afflicted humanity’. Much later, towards the end of the nineteenth century, 17 states adopted the Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (1890) which stated that it would ‘put an end to Negro Slave Trade by land as well as by sea’ and ‘improve the moral and material conditions of existence of the native races.’ In 1926, the League of Nations adopted the Slavery Convention, 1926 which aimed to achieve ‘the complete suppression’ and ‘the abolition of slavery and the slave trade’. In Article 1 it defined slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,’ and the slave trade was defined to include ‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’

Thus, the Convention sought not only to end slavery and the slave trade in fact, but also in law: to abolish laws which allowed for such enslavement.³³ The Convention is wider in scope than its title suggests, as it addresses not only slavery but also compulsory or forced labour, and the slave trade. Pre-dating the establishment of international human rights law, the Slavery Convention is an instrument of penal law, mandating that the High Contracting Parties ‘adopt the necessary measures in order that severe penalties’ be imposed. The Convention creates differing obligations as between the slave trade, which requires States to ‘prevent and suppress’, and slavery where the Parties were

³⁰ P. Alston, ‘Does the Past Matter? On the Origins of Human Rights,’ 126 *Harvard Law Review* (2013) 2043, at 2045

³¹ J. S. Martinez, ‘The Anti-Slavery Movement and the Rise of International Non-Governmental Organizations,’ in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 222, at 238.

³² S. Moyn, ‘Of Deserts and Promised Lands: The Dream of Global Justice,’ *Nation*, 29 February 2012.

³³ For a strong critique of the way in which this regime has been implemented see C. Gevers, ‘Refiguring Slavery Through International Law: The 1926 Slavery Convention, the “Native Labor Code” and Racial Capitalism,’ 25 *J. Int. Econ. Law* (2022) 312.

given time to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms'. Where forced labour is concerned, the obligation set out by the Convention is to 'take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery'. In 1956 the UN adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

2. The Minorities Regime after the First World War

The *Minority Schools in Albania* opinion, which follows, illustrates treaties as a source and major expression of international law, and introduces another field of international law that influenced the growth of the human rights regime. The background to the minorities question is noted by Will Kymlicka:

The rise of the nation-state has often been catastrophic for ethnic and religious minorities. Consider the Balkans and the Middle East. For some 1,500 years, a panoply of ethnic, linguistic, and religious communities lived side by side under both the Byzantine and Ottoman empires. Yet ever since these empires were replaced with nation-states, we have witnessed a terrible "unmixing of peoples," due to civil wars, ethnic cleansing, genocide, and forced assimilation. Inter-communal relations of tolerance and conviviality that had survived for centuries were torn apart in a few short decades under the nation-state.

These conflicts are often described as evidence of "ancient ethnic hatreds," but in fact they are the result of the rise of the modern nation-state, whose very logic turns "minorities" into a "problem." It is worth noting that none of the ethnic or religious groups in the Byzantine and Ottoman empires were considered "minorities," in part because there was no "majority." These empires did not rule in the name of a particular majority nation, but rather ruled as a dynasty over all their diverse subjects. These multi-ethnic dynastic empires have now been swept away by the rise of nation-states, each of which claims to rule in the name of a particular people or nation. (What was once the territory of the Ottoman empire now comprises 43 such nation-states.) ...

... Minorities pose a persistent existential threat to state legitimacy. Each nation-state's claim to sovereignty flows from the claim that it represents "the people" in whose name it governs. It is therefore destabilizing of a state's legitimacy to have a group within the boundaries of the state who think of themselves as forming or belonging to a distinct people.³⁴

Treaties and other special regimes to protect minorities have a long history in international law dating from the emergence in the seventeenth century of the modern form of the political state, sovereign within its territorial boundaries. Within Europe, religious issues became a strong concern since states often included more than one religious denomination, and abuse by a state of a religious minority could lead to intervention by other states where that religion was dominant. Hence peace treaties sometimes included provisions on religious minorities. In the eighteenth and nineteenth centuries, the precarious situation of Christian minorities within the Ottoman Empire and of religious minorities in newly independent East European or Balkan states led to outbreaks of violence and to sporadic treaty regulation.

The First World War ushered in an era of heightened attention to problems of racial, religious or linguistic minorities. The collapse of the great Austro-Hungarian and Ottoman multinational empires, and the chaos as the Russian empire of the Romanoffs was succeeded by the Soviet Union, led to much redrawing of maps and the creation of new states. President Wilson's Fourteen Points, however compromised they became in the Versailles Treaty and later arrangements, nonetheless exerted influence on the postwar settlements. In it and other messages, Wilson stressed the ideals of the freeing

³⁴ W. Kymlicka, 'Minority Rights', in C. Brown and R. Eckersley (eds.), *The Oxford Handbook of International Political Theory* (2018) 166.

of minorities and the related ‘self-determination’ of peoples or nationalities. That concept of self-determination, so politically powerful and open to such diverse interpretations, continues to this day to be much disputed and to have profound consequences. It not only appears in the UN Charter but is given a position of high prominence in the two principal human rights covenants.

From concepts like ‘self-determination’, and out of the legacy of nineteenth-century liberal nationalism that saw the development of nation-states like Germany and Italy, the principle of nationalities took on a new force. Here was another ambiguous and disputed concept — the ‘nation’ or ‘nationality’ as distinct from the political state, the nation (often identified with a ‘people’) defined in cultural or historical terms, often defined more concretely in racial, linguistic and religious terms. One goal in displacing the old empires with new or redrawn states was to identify the nation with the state — ideally, to give each ‘nation’ its own state. Membership in a ‘nation’ would ideally be equivalent to membership in a ‘state’ consisting only or principally of that nation.

Within the pure realization of this ideal, all ‘Poles’, for example, would be situated in Poland; there would be no ‘Polish’ national minority in other states, and other ‘nationalities’ would not be resident in Poland. Indeed, the detaching of Poland after the First World War from the empires and states that had absorbed different parts of it represented one of the few instances of relatively strict congruence between the ‘nation’ and ‘state’. There were polar moves; for example, the creation of Yugoslavia as a multiethnic state that after 70 years has had such tragic consequences.

Of course the goal of total identification of state with nation — a goal itself disputed and in contradiction with other conceptions of the political state that did not emphasize cultural homogeneity or ethnic purity — could not be realized. Life and history were and remain too various and complex for such precise correlation. The nineteenth-century examples of Germany and Italy, for instance, were far from unitary; each had its national, ethnic, linguistic and religious minorities. National or ethnic homogeneity could be achieved in the vast majority of the world’s states only by the compulsory and massive migrations of minority groups, migrations far more systematic and coercive than were some of the population movements and exchanges after the First World War. A ‘nation’ defined, say, in linguistic-religious terms would generally transcend national boundaries and be located in the territories of two or several sovereign states in the new world created by the postwar settlements. A Greek-speaking Christian minority would, for example, be present in the reconfigured Muslim Albania.

Bear in mind another confusing linguistic usage. The term ‘national’ is generally used in international law to signify the subjects or citizens of a state. Hence members of the ‘German’ nation (in the sense of a ‘people’ and ‘culture’) living in Poland could be Polish ‘nationals’ in the sense of being citizens of Poland. Or they could possess only German citizenship and be alien residents in Poland. In the *Minority Schools in Albania* case that follows, members of the Greek-speaking Christian minority (part of a ‘nation’ in the cultural or ethnic sense) in Muslim Albania were ‘nationals’ (citizens) of Albania. One can imagine the ambiguity attending the frequent usage of the term ‘national minorities’, which could mean at least (1) a group in a state belonging in the cultural or ethnic sense to a ‘nation’ that constituted a minority in that state, or (2) all minorities in a state who were ‘nationals’ (citizens) of that state.

After the First World War, the victorious powers and the new League of Nations sought to address this situation. They confronted the impossibility, even if it were desirable, of creating ethnically homogeneous states. Hence, they had to deal with the continuing presence in states of minorities which had frequently been abused in ways ranging from economic discrimination to pogroms and other violence that could implicate other states, spill across international boundaries and lead to war. The immediate trigger for the outbreak of the First World War in the tormented Balkans was fresh in memory.

President Wilson had proposed that the Covenant of the League of Nations include norms governing the protection of minorities that would have embraced all members of the League. The other major powers rejected this approach, preferring discrete international arrangements to handle discrete problems of minorities in particular states of Central-East Europe and the Balkans rather than a

universal treaty system. This compromise led to the regime of the so-called ‘Minorities Treaties’ that were imposed on the new or reconfigured states of Central-East Europe and the Balkans.

For some states like Austria and Hungary, provisions for minority protection were included in the peace treaties. Other states like Poland or Greece signed minority protection treaties with the allied and associated powers. Some states like Albania and Lithuania made minority protection declarations as a condition for their membership in the League of Nations. There were also bilateral treaties protecting minorities such as one between Germany and Poland. Note that one of the features of this new regime was to insulate the victorious powers from international regulation of their treatment of their own citizens belonging to minorities.

Although there were significant variations among these treaties and declarations, many provisions were common. The 1919 Minorities Treaty between the Principal Allied and Associated Powers and Poland served as a model for later treaties and declarations. It provided for protection of life and liberty and religious freedom for all ‘inhabitants of Poland’. All Polish nationals (citizens) were guaranteed equality before the law and the right to use their own language in private life and judicial proceedings. Members of racial, religious or linguistic minorities were guaranteed ‘the same treatment and security in law and in fact’ as other Polish nationals, and the right to establish and control at their expense their own religious, social and educational institutions. In areas of Poland where a ‘considerable proportion’ of Polish nationals belonged to minorities, an ‘equitable share’ of public funds would go to such minority groups for educational or religious purposes. In view of the particular history of oppression and violence, there were specific guarantees for Jews.

Like other minority treaties and declarations, the Polish treaty’s provisions were placed under the guarantee of the League of Nations to the extent that ‘they affect persons belonging to’ minority groups. The League developed procedures to implement its duties, including a right of petition to it by beleaguered minorities claiming that a treaty regime or declaration had been violated, and including a minorities committee given the task of seeking negotiated solutions to such disputes. As shown by the *Minority Schools in Albania* case, the Council of the League could invoke in accordance with its usual procedures the advisory opinion jurisdiction of the Permanent Court of International Justice (PCIJ), the first international court (supplementing ad hoc arbitral tribunals as in the *Chattin* case). The Court was created by the League in 1921, became dormant in the Second World War, and was then succeeded by the International Court of Justice created under the UN Charter.

MINORITY SCHOOLS IN ALBANIA
ADVISORY OPINION, PERMANENT COURT OF INTERNATIONAL JUSTICE
SER. A/B, NO. 64 (1935)

[In 1920, the Assembly of the League of Nations adopted a recommendation requesting that, if Albania were admitted into the League, it ‘should take the necessary measures to enforce the principles of the Minorities Treaties’ and to arrange the ‘details required to carry this object into effect’ with the Council of the League. Albania was admitted to membership a few days later. In 1921 the Council included on its agenda the question of protection of minorities in Albania.

The Greek Government, in view of the presence of a substantial Christian minority of Greek origin in (dominantly Muslim) Albania, communicated to the League proposals for provisions going beyond the Minorities Treaties that were related to Christian worship and to education in the Greek language. The Council commissioned a report, and the reporter submitted to it a draft Declaration to be signed by Albania and formally communicated to the Council. The Declaration was signed by Albania and submitted to the Council in 1921, with basic similarities to but some differences from the typical clauses of the Minorities Treaties. The Council decided that the stipulations in the Declaration about minorities should be placed under the guarantee of the League from the date of the Declaration’s ratification by Albania, which took place in 1922.

The first paragraph of Article 5 of the Declaration, at the core of the dispute that later developed, provided as follows:

Albanian nationals who belong to racial, linguistic or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular, they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

Over the years, numerous changes in the laws and practices of the Albanian Government led to questions about compliance with the Declaration. In 1933, the Albanian National Assembly modified Articles 206 and 207 of the Constitution, which had provided that ‘Albanian subjects may found private schools’ subject to government regulation, to state:

The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed.

The new provisions affecting Greek-language and other private schools led to petitions and complaints to the League from groups including the Greek minority in Albania. Acting within its regular powers, the Council requested the PCIJ in 1935 to give an advisory opinion whether, in light of the 1921 Declaration as a whole, Albania was justified in its position that it had acted in conformity with ‘the letter and the spirit’ of Article 5 because (as Albania argued) its abolition of private schools was a general measure applicable to the majority as well as minority of Albanian nationals.

There follow excerpts from the opinion for the PCIJ and from a dissenting opinion. For present purposes, the Albanian Declaration can be understood as tantamount to a treaty. The opinions draw no relevant distinction between the two, and refer frequently to the Minorities Treaties to inform their interpretation of the Declaration.]

The contention of the Albanian Government is that the above-mentioned clause imposed no other obligation upon it, in educational matters, than to grant to its nationals belonging to racial, religious, or linguistic minorities a right equal to that possessed by other Albanian nationals. Once the latter have ceased to be entitled to have private schools, the former cannot claim to have them either. This conclusion, which is alleged to follow quite naturally from the wording of paragraph I of Article 5, would, it is contended, be in complete conformity with the meaning and spirit of the treaties for the protection of minorities, an essential characteristic of which is the full and complete equality of all nationals of the State, whether belonging to the majority or to the minority. On the other hand, it is argued, any interpretation which would compel Albania to respect the private minority schools would create a privilege in favour of the minority and run counter to the essential idea of the law governing minorities. Moreover, as the minority régime is an extraordinary régime constituting a derogation from the ordinary law, the text in question should, in case of doubt, be construed in the manner most favourable to the sovereignty of the Albanian State.

According to the explanations furnished to the Court by the Greek Government, the fundamental idea of Article 5 of the Declaration was on the contrary to guarantee freedom of education to the minorities by granting them the right to retain their existing schools and to establish others, if they desired; equality of treatment is, in the Greek Government’s opinion, merely an adjunct to that right, and cannot impede the purpose in view, which is to ensure full and effectual liberty in matters of education. Moreover, the application of the same régime to a majority as to a minority, whose needs are quite different, would only create an apparent equality, whereas the Albanian Declaration, consistently with ordinary minority law, was designed to ensure a genuine and effective equality, not merely a formal equality.

...

As the Declaration of October 2nd, 1921, was designed to apply to Albania the general principles of the treaties for the protection of minorities, this is the point of view which, in the Court's opinion, must be adopted in construing paragraph 1 of Article 5 of the said Declaration.

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

In common with the other treaties for the protection of minorities, and in particular with the Polish Treaty of June 28th, 1919, the text of which it follows, so far as concerns the question before the Court, very closely and almost literally, the Declaration of October 2nd, 1921, begins by laying down that no person shall be placed, in his relations with the Albanian authorities, in a position of inferiority by reason of his language, race or religion....

...

In all these cases, the Declaration provides for a régime of legal equality for all persons mentioned in the clause; in fact no standard of comparison was indicated, and none was necessary, for at the same time that it provides for equality of treatment the Declaration specifies the rights which are to be enjoyed equally by all.

...

It has already been remarked that paragraph 1 of Article 5 consists of two sentences, the second of which is linked to the first by the words *in particular*: for a right apprehension of the second part, it is therefore first necessary to determine the meaning and the scope of the first sentence. This sentence is worded as follows:

Albanian nationals who belong to racial, linguistic or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals.

The question that arises is what is meant by the *same treatment and security in law and in fact*.

It must be noted to begin with that the equality of all Albanian nationals before the law has already been stipulated in the widest terms in Article 4. As it is difficult to admit that Article 5 set out to repeat in different words what had already been said in Article 4, one is led to the conclusion that 'the same treatment and security in law and in fact' which is provided for in Article 5 is not the same notion as the equality before the law which is provided for in Article 4.

...

This special conception finds expression in the idea of an equality in fact which in Article 5 supplements equality in law. All Albanian nationals enjoy the equality in law stipulated in Article 4; on

the other hand, the equality between members of the majority and of the minority must, according to the terms of Article 5, be an equality in law and in fact.

It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality; that is indeed what the Court laid down in its Advisory Opinion of September 10th, 1923, concerning the case of the German settlers in Poland (Opinion No. 6), in which it said that:

There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to the first sentence of paragraph 1 of Article 5. The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of this provision.

The second sentence of this paragraph provides as follows:

In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

This sentence of the paragraph being linked to the first by the words 'in particular', it is natural to conclude that it envisages a particularly important illustration of the application of the principle of identical treatment in law and in fact that is stipulated in the first sentence of the paragraph. For the institutions mentioned in the second sentence are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State.

Far from creating a privilege in favour of the minority, as the Albanian Government avers, this stipulation ensures that the majority shall not be given a privileged situation as compared with the minority.

It may further be observed that, even disregarding the link between the two parts of paragraph 1 of Article 5, it seems difficult to maintain that the adjective 'equal', which qualifies the word 'right', has the effect of empowering the State to abolish the right, and thus to render the clause in question illusory; for, if so, the stipulation which confers so important a right on the members of the minority would not only add nothing to what has already been provided in Article 4, but it would become a weapon by which the State could deprive the minority régime of a great part of its practical value. ...

...

The idea embodied in the expression 'equal right' is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other Albanian nationals. In other words, the members of the minority must always enjoy the right stipulated in the Declaration, and, in addition, any more extensive rights which the State may accord to other nationals....

...

The Court, having thus established that paragraph 1 of Article 5 of the Declaration, both according to its letter and its spirit, confers on Albanian nationals of racial, religious or linguistic minorities the right

that is stipulated in the second sentence of that paragraph, finds it unnecessary to examine the subsidiary argument adduced by the Albanian Government to the effect that the text in question should in case of doubt be interpreted in the sense that is most favourable to the sovereignty of the State.

...

For these reasons,

The Court is of opinion, by eight votes to three,

that the plea of the Albanian Government that, as the abolition of private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and spirit of the stipulations laid down in Article 5, first paragraph, of the Declaration of October 2nd, 1921, is not well founded.

...

DISSENTING OPINION BY SIR CECIL HURST, COUNT ROSTWOROWSKI, AND MR. NEGULESCO

The undermentioned are unable to concur in the opinion rendered by the Court. They can see no adequate reason for holding that the suppression of the private schools effected in Albania in virtue of Articles 206 and 207 of the Constitution of 1933 is not in conformity with the Albanian Declaration of October 2nd, 1921.

...

The construction of the paragraph is clear and simple. The first sentence stipulates for the treatment and the security being the same for the members of the minority as for the other Albanian nationals. The second provides that as regards certain specified matters the members of the minority shall have an equal right. The two sentences are linked together by the words 'In particular' (*notamment*). These words show that the second sentence is a particular application of the principle enunciated in the first. If the rights of the two categories under the first sentence are to be the same, the equal right provided for in the second sentence must indicate equality between the same two categories, viz. the members of the minority and the other Albanian nationals. The second sentence is added because the general principle laid down in the first sentence mentions only 'treatment and security in law and in fact' — a phrase so indefinite that without further words of precision it would be doubtful whether it covered the right to establish and maintain charitable, religious and social institutions and schools and other educational establishments, but the particular application of the general principle of identity of treatment and security remains governed by the dominating element of equality as between the two categories.

The word 'equal' implies that the right so enjoyed must be equal in measure to the right enjoyed by somebody else. '*They shall have an equal right*' means that the right to be enjoyed by the people in question is to be equal in measure to that enjoyed by some other group. A right which is unconditional and independent of that enjoyed by other people cannot with accuracy be described as an 'equal right'. 'Equality' necessarily implies the existence of some extraneous criterion by reference to which the content is to be determined.

If the text of the first paragraph of Article 5 is considered alone, it does not seem that there could be any doubt as to its interpretation. It is, however, laid down in the Opinion from which the undersigned dissent that if the general purpose of the minority treaties is borne in mind and also the contents of the Albanian Declaration taken as a whole, it will be found that the 'equal right' provided for in the first paragraph of Article 5 cannot mean a right of which the extent is measured by that enjoyed by other Albanian nationals, and that it must imply an unconditional right, a right of which the members of the minority cannot be deprived.

...

As the opinion of the Court is based on the general purpose which the minorities treaties are presumed to have had in view and not on the text of Article 5, paragraph 1, of the Albanian Declaration, it

involves to some extent a departure from the principles hitherto adopted by this Court in the interpretation of international instruments, that in presence of a clause which is reasonably clear the Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added to it or substituted for it, and this even if the results following from it may in some particular hypothesis seem unsatisfactory.

...

Furthermore, the suppression of the private schools — even if it may prejudice to some appreciable extent the interests of a minority — does not oblige them to abandon an essential part of the characteristic life of a minority. In interpreting Article 5, the question whether the possession of particular institutions may or may not be *important* to the minority cannot constitute the decisive consideration. There is another consideration entitled to equal weight. That is the extent to which the monopoly of education may be of importance to the State. The two considerations cannot be weighed one against the other: Neither of them — in the absence of a clear stipulation to that effect — can provide an objective standard for determining which of them is to prevail.

International justice must proceed upon the footing of applying treaty stipulations impartially to the rights of the State and to the rights of the minority, and the method of doing so is to adhere to the terms of the treaty — as representing the common will of the parties — as closely as possible.

...

If the intention of the second sentence: ‘In particular they [the minority] shall have an equal right ...’, had been that the right so given should be universal and unconditional, there is no reason why the draftsman should not have dealt with the right to establish institutions and schools in the earlier articles [of the Declaration that set up fixed and universal standards for all Albanians on matters like protection of life and free exercise of religion]. The draftsman should have dealt with the liberty to maintain schools and other institutions on lines similar to those governing the right to the free exercise of religion, which undoubtedly is conferred as a universal and unconditional right. Instead of doing so the right conferred upon the minority is an ‘equal’ right....

...

Further Aspects of the Minority Treaties

The *Minority Schools in Albania* opinions address many current issues that remain vexing. The discussions about the nature of ‘equality’ and assurances thereof, in particular about equality ‘in law’ and ‘in fact’, inform contemporary human rights law as well as constitutional and legislative debates in many states with respect to issues like equal protection and affirmative action. The court’s approach stands in stark contrast to an Executive Order issued by President Trump on 23 April 2025, entitled ‘Restoring Equality of Opportunity and Meritocracy’ which aims to eliminate the legal concept of ‘disparate impact’. This holds that even where there is no discriminatory intent a policy might nevertheless violate civil rights if it gives rise to a disparate impact along racial and gender lines. The Order asserts that the principle of equality under the law is endangered by a ‘pernicious movement’ underpinned by disparate-impact liability which ‘undermines our national values, ... runs contrary to equal protection under the law and, therefore, violates our Constitution.’ It ‘has hindered businesses from making hiring and other employment decisions based on merit and skill, their needs, or the needs of their customers ...’.

The question whether the Declaration and the Court’s opinion recognized only the rights of individual members of a minority, or also the right of the minority itself as a collective or group, remains one that vexes the discussion of minority rights. Protection aiming at the cultural survival of minorities continues to raise the troubling issue of which types of minorities merit such protection, and whether assurance of equal protection (with the majority) is sufficient for the purpose.

But if the issues debated within the minorities regime remain, that particular regime disappeared. Over the next two decades, its norms were roundly violated. Its international machinery within the League of Nations proved to be ineffectual, partly for the same lack of political will that led to other disastrous events in the interwar period. As Susan Pedersen notes in relation to Iraq whose minorities were

notoriously persecuted, League of Nations Council members had little interest in that aspect: they ‘were more concerned to protect the privileges of their own citizens and their access to Iraq’s lucrative resources and contracts.’³⁵ Laura Robson is even more damning in presenting the whole exercise around the minorities treaties as having very little to do with minority protection and instead being primarily ‘designed to enshrine the idea that minority communities represented a legitimate site of external intervention into the affairs of the newly defined postwar European and Middle Eastern nations that housed so many Allied economic interests.’³⁶

The failure of the regime was tragic in its consequences. Its stated purposes were distorted or blunted or ignored as Europe of the 1930s moved toward the horrors of the Second World War, the Holocaust and the brutalization and slaughter of so many other minorities. The settlements, norms and institutions after the Second World War designed to prevent further savagery against minorities stressed different principles and created radically different institutions, principally within the universal human rights system built in and around the United Nations.

Nonetheless, it is important to recognize the distinctive dilemmas and advances as well as the shortcomings of this minorities regime. Sovereignty in the sense of a state’s (absolute) internal control over its own citizens was to some extent eroded. Treaties-declarations subjected aspects of the state’s treatment of its own citizens to international law and international processes — that is, citizens who were members of a racial, religious or linguistic minority. Although the norms were expressed in bilateral treaties or declarations, the regime took on a multilateral aspect through its incorporation into the League as well as through the large number of nearly simultaneous treaties and declarations. The whole scheme was informed by multilateral planning, in contrast with the centuries-old examples of sporadic bilateral treaties protecting (usually religious) minorities. Minorities became a matter of formal international concern, the treaties-declarations fragmented the state into different sections of its citizens, and international law reached beyond the law of state responsibility to protect some of a state’s own citizens.

In the 1960s, international efforts began again to grapple with the status of minorities. The 1960 UNESCO Convention against Discrimination in Education, for example, addressed the precise issue raised in the Albanian case. Domestically, assimilationist assumptions began to be replaced by the notion of multiculturalism, which accepted that the members of minority groups were entitled to maintain and practice their distinctive collective identities. Post World War II decolonization as well as post-1989 developments put a renewed spotlight on minority rights. The result was the adoption of a range of new declarations and treaties, including the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992), the Council of Europe Framework Convention for the Protection of National Minorities (1995), and the UN Declaration on the Rights of Indigenous Peoples (2007).

3. Treaties

Treaties have inevitably figured in this chapter’s prior discussions — for example, the bilateral treaties whose relevance to custom was debated in *The Paquete Habana*, or the convention underlying the *Chattin* litigation. As noted above, the Albanian Declaration can be understood for present purposes as tantamount to a treaty, for the opinions do not distinguish between the two and refer to the Minorities Treaties to advance their interpretation of the Declaration. Hence this Comment, and particularly its sections on issues like interpretation, is relevant here.

In Article 38(1) of the Statute of the International Court of Justice, the Court is instructed in clause (a) to apply ‘international conventions, whether general or particular, establishing rules expressly recognized by the contesting states’. Treaties thus head the list. They have become the primary expression of international law and, particularly when multilateral, the most effective if not the only

³⁵ S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015) 282.

³⁶ L. Robson, ‘Capitulations Redux: The Imperial Genealogy of the Post–World War I “Minority” Regimes’, 23 *Am. Historical Rev.* (2021) 978 at 1000.

path toward international regulation of many contemporary problems. Multilateral treaties have been the principal means for development of the human rights regime. One striking advantage of treaties over custom should be noted. Only treaties can create, and define the powers and jurisdiction of, international institutions in which state parties participate and to which they may owe duties.

The terminology for this voluminous and diverse body of international law varies. International agreements are referred to as pacts, protocols (generally supplemental to another agreement), covenants, conventions, charters, and exchanges of notes, as well as treaties — terms that are more or less interchangeable in legal significance. Within the internal law of some countries such as the United States, the term ‘treaty’ (as contrasted, say, with international executive agreement) has a particular constitutional significance.

Consider the different purposes that treaties serve. Some concerning vital national security interests have a basic political character: alliances, peace settlements, control of nuclear weapons. Others, outside the scope of national security, also involve relationships between governments and affect private parties only indirectly: agreements on foreign aid, cooperation in the provision of governmental services such as the mails. But treaties often have a direct and specific impact upon private parties. For many decades, tariff accords, income tax conventions, and treaties of friendship, commerce and navigation have determined the conditions under which the nationals or residents of one signatory can export to, or engage in business activities within, the other signatory’s territory. Most significant for this book’s purposes, human rights treaties have sought to extend protection to all persons against governmental abuse.

Domestic analogies to the treaty help to portray its distinctive character: contract and legislation. Some treaties settling particular disputes between states resemble an accord and satisfaction under contract law: an agreement over boundaries, an agreement to pay a stated sum as compensation for injury to the receiving nation or its nationals. Others are closer in character to private contracts of continuing significance or to domestic legislation because they regulate recurrent problems by defining rights and obligations of the parties and their nationals: agreements over rules of navigation, income taxation or the enforcement of foreign judgments. The term ‘international legislation’ to describe treaties has accordingly gained some currency particularly with respect to multilateral treaties such as human rights agreements that impose rules on states intended to regulate their conduct. The Albanian Declaration and the many bilateral treaties that formed part of the minorities regime of the period come within this description.

Nonetheless, domestic legislation differs in several critical respects from the typical treaty. A statute is generally enacted by the majority of a legislature and binds all members of the relevant society. Even changes in a constitution, which usually require approval by the legislature and other institutions or groups, can be accomplished over substantial dissent. The ordinary treaty, on the other hand, is a consensual arrangement. With few exceptions, such as Article 2(6) of the UN Charter, it purports to bind or benefit only parties. Alteration of its terms by one state party generally requires the consent of all.

Consider the institution of contract. Like the treaty, a contract can be said to make or create law between the parties: within the facilitative framework of governing law and subject to that law’s mandatory norms and constraints, courts recognize and enforce contract-created duties. The treaty shares a contract’s consensual basis, but treaty law lacks the breadth and relative inclusiveness of a national body of contract law. It has preserved a certain Roman law flavour (*‘pacta sunt servanda’*, *‘rebus sic stantibus’*) acquired during the long period from the Renaissance to the nineteenth century, when continental European scholars dominated the field. But treaty law often reflects the diversity of approaches to domestic contract law that lawyers bring to the topic, a diversity that is particularly striking on issues of treaty interpretation.

Duties Imposed by Treaty Law

Whatever its purpose or character, an international agreement is generally recognized from the perspective of international law as an authoritative starting point for legal reasoning about any dispute to which it is relevant. The maxim '*pacta sunt servanda*' is at the core of treaty law. It embodies a widespread recognition that commitments publicly, formally and (more or less) voluntarily made by a nation should be honoured. As stated in Article 26 of the Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

Whatever the jurisprudential or philosophical basis for this norm, one can readily perceive the practical reasons for and the national interests served by adherence to the principle of *pacta sunt servanda*. The treaty represents one of the most effective means for bringing some order to relationships among states or their nationals, and for the systematic development of new principles responsive to the changing needs of the international community. It is the prime legal form through which that community can realize some degree of predictability and seek to institutionalize ideals like peaceful settlement of disputes and the protection of human rights. Often such goals can be achieved only through international organizations whose powers, structure, membership and purposes will be set forth in the treaties that bring them into existence. Treaties then are the basic instruments underlying much contemporary international regulation.

Acceptance of the primary role of the treaty does not, however, mean that a problem between two countries is adequately solved from the perspective of legal ordering simply by execution of a treaty with satisfactory provisions. A body of law has necessarily developed to deal with questions analogous to those addressed by domestic contract law — for example, formation of a treaty, its interpretation and performance, remedies for breach, and amendment or termination. But that body of law is often fragmentary and vague, reflecting the scarcity of decisions of international tribunals and the political tensions which some aspects of treaty law reflect.

There have been recurrent efforts to remedy this situation through more or less creative codification of the law of treaties. The contemporary authoritative text grows out of a UN Conference on the Law of Treaties that adopted in 1969 the Vienna Convention on the Law of Treaties. That Convention became effective in 1980 and (as of 2025) had been ratified by 116 states. For reasons stemming largely from tensions between the Executive and the Congress over authority over different types of international agreements, the United States has not ratified the Vienna Convention. Nonetheless, in its provisions on international agreements, the *Restatement (Third), Foreign Relations Law of the United States* (1987) 'accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States ...'. All other major industrial countries have ratified the Convention. And the United States has signed it.

Treaty Formation

A treaty is formed by the express consent of its parties. Although there are no precise requirements for execution or form, certain procedures have become standard. By choice of the parties, or in order to comply with the internal rules of a signatory country that are considered in Chapter 12, it may be necessary to postpone the effectiveness of the agreement until a national legislative body has approved it and national executive authorities have ratified it. Instruments of ratification for bilateral agreements are then exchanged. In the case of multilateral treaties, such instruments are deposited with the national government or international organization that has been designated as the custodian of the authentic text and of all other instruments relating to the treaty, including subsequent adhesions by nations that were not among the original signatories. Thereafter a treaty will generally be proclaimed or promulgated by the executive in each country.

Consent

Given the established principle that treaties are consensual, what rules prevail as to the character of that consent? Do domestic law contract principles about the effect of duress carry over to the international field?

In a domestic legal system, a party cannot enforce a contract which was signed by a defendant at gunpoint. One could argue that victorious nations cannot assert rights under a peace treaty obtained by a whole army. It is not surprising that the large powers are reluctant to recognize that such forms of duress can invalidate a treaty. If duress were a defence, it would be critical to define its contours, for many treaties result from various forms of military, political or economic pressure. The paucity of and doubts about international institutions with authority to develop answers to such questions underscore the reluctance to open treaties to challenge on these grounds. Article 52 of the Vienna Convention states: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. Attempts at Vienna to broaden the scope of coercion to include economic duress failed, although they resulted in a declaration condemning the use of such practices.

Reservations

Problems of consent that have no precise parallel in national contract law arise in connection with reservations to treaties, i.e., unilateral statements made by a state accepting a treaty 'whereby it purports to exclude, or vary the legal effect of certain provisions of the treaty in their application to a state' (Art. 2(1)(d) of the Vienna Convention). With bilateral treaties, no conceptual difficulties arise: ratification with reservations amounts to a counteroffer; the other state may accept (or reject) explicitly or may be held to have tacitly accepted it by proceeding with its ratification process or with compliance with the treaty. With multilateral treaties the problems may be quite complex. The traditional rule held that acceptance by all parties was required. The expanding number of states has required more flexibility.

Given the increased number of reservations, some of great significance, that many states are attaching to their ratifications of basic human rights treaties, questions about those reservations' validity under general treaty law or under the terms of a specific treaty have become matters of high concern within the human rights regime. We discuss the issue of reservation at greater length in Chapter 3.

Violations of and Changes in Treaties

Violation of a treaty may lead to diplomatic protests and a claim before an international tribunal. But primarily because of the limited and qualified consent of states to the jurisdiction of international tribunals, the offended party will usually resort to other measures. In a national system of contract law, well-developed rules govern such measures. They may distinguish between a minor breach not authorizing the injured party to terminate its own performance, and a material breach providing justification for such a move. Article 60 of the Vienna Convention provides that a material breach (as defined) of a bilateral treaty entitles the other party to terminate the treaty or suspend its performance in whole or in part. These rules necessarily grow more complex for multilateral treaties, but they also entitle a party affected by the material breach of another party to terminate or suspend its obligations under certain conditions. Article 60, however, explains that termination or suspension 'do[es] not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character'. That said, it might very well apply to treaties that only indirectly affect human rights (e.g. an agreement on pharmaceutical patents; a multilateral peace agreement).

Amendments raise additional problems. The treaty's contractual aspect suggests that the consent of all parties is necessary. Parties may however agree in advance (see Art. 108 of the UN Charter) to be bound with respect to certain matters by the vote of a specified number. Such provisions in a multilateral treaty bring it closer in character to national legislation. They may be limited to changes which do not impose new obligations upon a dissenting party, although a state antagonistic to an

amendment could generally withdraw. Absent such provisions, a treaty might aggravate rather than resolve a fundamental problem of international law: how to achieve in a peaceful manner changes in existing arrangements that are needed to adapt them to developing political, social or economic conditions.

One of the most contentious issues in treaty law is whether the emergence of conditions that were unforeseeable or unforeseen at the time of the treaty's conclusion terminates or modifies a party's obligation to perform. This problem borders the subject of treaty interpretation, considered below, since it is often described as a question whether an implied condition or an escape clause should be read into a treaty. Mature municipal legal systems have developed rules for handling situations where the performance of one party is rendered impossible or useless by intervening conditions. 'Impossibility', 'frustration', 'force majeure' and 'implied conditions' are the concepts used in Anglo-American law.

At the international level, possibilities of changes in conditions that upset assumptions underlying an agreement are enhanced by the long duration of many treaties, the difficulty in amending them and the rapid political, economic and social vicissitudes in modern times. Thus, nations have occasionally used *rebus sic stantibus* as the basis for declaring treaties no longer effective. Article 62 of the Vienna Convention states that a 'fundamental change of circumstances' which was not foreseen by the parties may not be invoked as a ground for terminating a treaty unless 'the existence of those circumstances constituted an essential basis of the consent of the parties to transform the extent of obligations still to be performed under the treaty'; and 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.'

Treaty Interpretation

There is no shortcut to a reliable sense of how a given treaty will be construed. Even immersion in a mass of diplomatic correspondence and cases would not develop such a skill. In view of the variety of treaties and of approaches to their interpretation, such learning would more likely shed light on the possibilities than provide a particular answer to any given question.

One obstacle to reliable generalization about treaty interpretation is the variety of purposes which treaties serve. Different approaches are advisable for treaties that lay down rules for a long or indefinite period, in contrast with those settling past or temporally limited disputes. The long-term treaty must rest upon a certain flexibility and room for development if it is to survive changes in circumstances and relations between the parties. Changes in conditions like those that make *rebus sic stantibus* an attractive doctrine may lead a court or executive official to interpret a treaty flexibly so as to give it a sensible application to new circumstances. The type of problem that a treaty addresses will influence the approach of an official charged with interpreting it. Certain categories, such as income tax conventions, lend themselves to a detailed draftsmanship that will often be impractical and undesirable in a constitutional document such as the UN Charter. Conventions such as those relating to human rights will, for some matters, necessarily use broad terms and standards like fairness or *ordre public*. As a formal matter, a general rule of interpretation holds that a treaty should be interpreted in light of 'its object and purpose'.

Maxims similar to those found in domestic fields exist for treaties as well. The Vienna Convention contains several. Article 31 provides that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context'. Article 32 goes on to add that recourse may be had to supplementary means — including *travaux préparatoires* (literally, 'preparatory work', and analogous to legislative history) — if interpretation produces a meaning that is 'ambiguous or obscure' or an outcome 'manifestly absurd or unreasonable'. A standard form of interpretation also takes into account the subsequent practice of states in the application of the treaty.

One way to build a framework for construing treaties is to consider the continuum which lies between 'strict' interpretation according to the 'plain meaning' of the treaty, and interpretation according to the interpreter's view of the best means of implementing the purposes or realizing the principles expressed

by the treaty. Of course, both extremes of the spectrum are untenanted. One cannot wholly ignore the treaty's words, nor can one always find an unambiguous and relevant text that resolves the immediate issue.

Part of the difficulty is that treaties may be drafted in several languages. If domestic courts deem it unwise to 'make a fortress out of the dictionary', it would seem particularly unwise when interpreters need to resort to dictionaries in several languages (and in different legal systems according different meanings to linguistically similar terms). Sometimes corresponding words in the different versions may shed more light on the intended meaning; at other times, they generate greater ambiguity.

Reliance upon literal construction or 'strict' interpretation may however be an attractive method or technique to an international tribunal that is sensitive to its weak political foundation. It may be tempted to take refuge in the position that its decision is the ineluctable outcome of the drafters' intention expressed in clear text, and not a choice arrived at on the basis of the tribunal's understanding of policy considerations or relevant principles that may resolve a dispute over interpretation. Reliance on *travaux préparatoires* can achieve the same result of placing responsibility on the drafters. The charge of 'judicial legislation' evokes strong reactions in some political and legal cultures; it inevitably influences judges of international tribunals and heightens the temptation to take refuge in the dictionary.

**BAŞAK ÇALI, SPECIALIZED RULES OF TREATY INTERPRETATION: HUMAN RIGHTS
D. HOLLIS (ED.), THE OXFORD GUIDE TO TREATIES (2ND ED., 2020) 504**

...

I. International Human Rights Treaty Interpretation: Exceptional or Specialized?

Does international human rights treaty interpretation have its own interpretive scheme distinct and separate from the general principles of treaty interpretation codified in the VCLT? Or, is it a specialized regime due to the subject matter it regulates, but one nevertheless located within the confines of Article 31 of the VCLT?

There are supporters of both views. On the one hand, scholars argue that the *sui generis* nature of human rights calls for an interpretative practice that disregards traditional principles of general international law. On the other hand, there are those who say that the interpretation of human rights treaties are specialized and that this is an inevitable development in international law. On this latter view, international human rights treaty interpretation may be no more specialized than, for example, international trade law or investment law. In terms of practice, there is no evidence to suggest that UN treaty bodies, regional human rights courts, the ICJ, the ILC, or domestic courts have systematically advocated either of these views. In fact, the evidence shows that these bodies cite the VCLT as a guide to interpretation and that regional human rights courts, in particular, are creating their own specialized rules and doctrines in the course of interpreting specific provisions of human rights treaties.

Differences in opinion on this preliminary question are better conceived as disagreements on the rules of treaty interpretation in international law rather than disagreements on the correct interpretations of human rights treaties. ...

...

Even though the order in which interpretive techniques should be employed is made clear between Articles 31 and 32, it has long been debated how Article 31's tripartite interpretive formula of wording, context, and object and purpose should be understood. Some commentators have understood Article 31 as imposing a literal ordering, where wording, context and object and purpose should be employed as interpretive tools in the order they appear. This formula, associated with McNair, suggested a 'sliding scale' approach to what interpretation entails. Interpretation is only required when the wording of the treaty is not clear. In that sense, the more literally unclear a provision becomes, the more necessary it is to refer to context. If context does not bring clarity, object and purpose should be employed as a last resort.

Since 1969, however, there has been wider support for a holistic approach to Article 31. This approach emphasizes the importance of an interpreter's judgment as to how the wording, context, and object and purpose interact with each other. The original source for this perspective lies with ILC Commentaries on the draft VCLT describing treaty interpretation as a 'single combined operation' where wording, context, and object and purpose are 'thrown into a crucible', which subsequently led this approach to be called the 'crucible approach'.

...
Such strong overlap between wording and object and purpose, however, is not often the case in human rights treaty provisions—hence the controversy about the relevant regime of interpretation. This is primarily because the provisions of human rights treaties often do not lend themselves easily to tight wording. They state rights in abstract ways without stating in detail what they require for their application. One obvious explanation for this is the treaty negotiation process and the difficulties of getting agreements on certain words or concepts. Commentators in other fields of international law would concur, however, that this is not necessarily a problem *sui generis* with respect to human rights treaties, but generally permeates all international law treaty-drafting processes.

There is, however, a deeper explanation for the frequent lack of clear fit between the ordinary wording of human rights treaties, their context, and their object and purpose, which makes human rights treaties a demanding case for interpretation. This explanation is based on the very nature of the conceptual structure of these treaty provisions. As many commentators have noted, human rights treaties do not create reciprocal obligations between States parties, but instead create obligations for States in relation to their treatment of individuals under their jurisdiction. ...

...
... [N]either the exact scope of States' rights nor their duties are specified in detail in human rights treaties. This lack of precision is a function of the non-mechanical context in which human rights claims arise. Human rights treaties apply to a much larger universe of situations than many other international treaties. By their very nature, human rights provisions need to be interpreted in the light of changing political, social, and economic justifications of State policies. Human rights treaty law interpreters have to decide which interests of specific individuals are so important that they need to be safeguarded from policies that seem to respect or make better-off the majority of individuals under a particular jurisdiction. The key trigger for the interpretative task to start is a claim on behalf of an individual that her situation is within the scope of a human rights treaty, ie that she has a claim grounded in human rights law against the State. Does the lack of access to disabled facilities in a police detention centre constitute degrading treatment with respect to a disabled detainee even if there is no such intention to mistreat on the part of the authorities? Does handing out leaflets in a privatized shopping mall that has been historically a public space come under the scope of freedom of assembly? What responsibility does a State have with respect to actions of non-State military forces acting in its territory? None of these questions can be resolved solely by analysing (respectively) the text of the right to be free from torture, inhuman, or degrading treatment; the right to freedom of assembly; or the right to life provisions in various human rights treaties.

... **III. Specialized Interpretive Principles in the Field of Human Rights Treaty Law** ...

A. The effectiveness approach and human rights treaties

Even though all human rights treaties have their own distinct context and wording, there is nevertheless significant convergence around the notion that the core interpretive task for any interpreter is to make human rights treaty provisions 'effective, real, and practical' for individuals as right-holders under international law. This is sometimes called the principle of effectiveness Effectiveness is an overarching approach to human rights treaty interpretation. It animates a range of other more fine-grained, specific interpretive principles developed in the context of each human rights treaty. Examples include the interpretive principles of 'autonomous concepts', 'living instrument', and 'practicality' in the ECtHR context; the 'responsiveness to African circumstances' in the case of the African Commission on Human and People's Rights; the consideration of the 'real situation' in the case of the Inter-American Court of Human Rights; and the 'dynamic instrument doctrine' put forward by the Committee against All Forms of Discrimination against Women. These principles all

derive from the interpretive consensus that interpretations that are devoid of actual effect for human rights protections do not cohere with good faith interpretations of the wording and context of human rights treaties in the light of their object and purpose.

...[T]he principle of effectiveness has two aspects. The first aspect directs the interpreter to give meaning to each and every treaty provision so that each term has effect rather than no effect. This aspect comes from the good faith requirement of Article 31. The second aspect involves taking a teleological approach to interpretation and this is associated with the demands of the treaty's object and purpose. In human rights treaty interpretation we find that interpreters have developed both aspects of effectiveness, often in tandem with each other.

QUESTIONS

1. The types of protections or assurances given by treaty to a distinctive group within a larger polity can be categorized in various ways, including the following. The assurance can be *absolute* (fixed, unconditional) or *contingent* (dependent on some reference group). For example, treaties of commerce between two states may reciprocally grant to citizens of each state the right to reside (for business purposes) and do business (as aliens) in the other state. Some assurances in such treaties will be absolute — for example, citizens of each state are given the right to buy or lease real property for residential purposes in the other state. Other assurances will be contingent — for example, citizens of each state are given the right to organize a corporation and qualify to do business in the other state on the same terms as citizens of that other state (so called 'national treatment'). Within this framework, how would you characterize the rights given to members of a designated minority by the Albanian Declaration? Do the majority and dissenting opinions differ about how to characterize them?
2. If you were a member of the Greek-speaking Christian minority, would you have been content with a Declaration that contained no more than a general equal protection clause? If not, why not? How would you justify your argument for more protection?
3. Would Albania have been justified in imposing some control on the Greek schools, such as defining subjects to be taught and censoring teaching materials that, say, urged independence from Albania?
4. Why do the opinions refer to this minorities regime as 'extraordinary'? In what respects does it depart from classical conceptions of international law, or differ from the law of state responsibility?
5. Consider how close to or distant from the minorities regime Article 27 of the International Covenant on Civil and Political Rights appears on its face to be. It 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."

4. The ILO

Another important early twentieth-century development that was to contribute to the post-World War II international human rights regime was the creation of the International Labour Organization in 1919. It was partly a response to the Communist Revolution in Russia in 1917:

The Governments of Europe were nervous in the face of a rising industrial unrest, with unknown Bolshevik possibilities, with menacing fires of revolution in Germany and with at least one or two of the Governments represented at Paris daily in danger of being overthrown. As a result, the Allied Governments had to offer to labor some definite and formal recognition ..., both to justify themselves with reference to the war in the past, and to hold forth the hope of a larger measure of international labor agreements in the future.³⁷

The ILO was created to abolish the ‘injustice, hardship, and privation’ which workers suffered and to guarantee ‘fair and humane conditions of labour.’ It made extensive use of law-making techniques, including the adoption of treaties. At its first session, in 1919, it adopted Conventions under which ratifying states undertook to: limit hours of work in industry, closely monitor unemployment rates, provide maternity protection for working mothers, prohibit night-work by women and children under 18 except in family enterprises, and not employ children under 14 in industrial undertakings. It also produced an array of non-binding ‘recommendations’ dealing with unemployment, reciprocity of treatment, anthrax prevention, the dangers of lead poisoning to women and children, labor inspection, and white phosphorus. In its early years, it also proved to be a pioneer in developing various techniques for promotion and supervision of its standards, which the UN system partially emulated several decades later. Its adoption of standards was so prolific that, in 1951, it launched the ‘International Labour Code’ bringing together 100 Conventions and 92 Recommendations adopted since 1919. Wilfred Jenks of the ILO presented this as a ‘Codex of social justice’,³⁸ and argued that virtually all of the standards should be ‘regarded as measures for the implementation of the right to just and favourable conditions of work affirmed’ in the UDHR and the ICESCR.³⁹

D. JUDGMENT AT NUREMBERG

The Nuremberg Trial

The trial at Nuremberg in 1945–1946 of major war criminals among the Axis powers, dominantly Nazi party leaders and military officials, gave the nascent human rights movement a powerful impulse. The UN Charter that became effective in 1945 included a few broad human rights provisions. But they were more programmatic than operational, more a programme to be realized by states over time than a system in place for application to states. Nuremberg, on the other hand, was concrete and applied: prosecutions, convictions, punishment. The prosecution and the Judgment of the International Military Tribunal in this initial, weighty trial for massive crimes committed during the war years were based on concepts and norms, some of which had deep roots in international law and some of which represented a significant development of that law that opened the path toward the later formulation of fundamental human rights norms.

We do not address below the International Military Tribunal for the Far East, known as the Tokyo trial. Between May 1946 and November 1948, judges from 11 countries tried 28 wartime Japanese leaders.⁴⁰ The court heard 419 witnesses, and built a 50,000-page transcript. For many reasons, Gary J. Bass argues in *Judgment at Tokyo: World War II on Trial and the Making of Modern Asia* (2023) 10–11, that it ‘misfired and fizzled’:

Unlike Nuremberg, whose verdict has over the decades taken on an almost sacred status in democratic Germany and its neighbors, Tokyo is an ongoing source of bitter controversy across East Asia today. ... [T]here is no Japanese

³⁷ J.T. Shotwell, ‘The International Labour Organization as an Alternative to Violent Revolution’, 166 *The Annals of the American Academy of Political and Social Science* (1933) 18.

³⁸ C.W. Jenks, *Law, Freedom and Welfare* (1963) 102. On the ILO generally see G. F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

³⁹ C.W. Jenks, ‘Human Rights, Social Justice and Peace’, in A. Eide and A. Schou (eds.), *International Protection of Human Rights* (1968) 235–36.

⁴⁰ N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (2008).

equivalent of the near universal national repentance and grief that are at the core of current German politics and society. ...

The striking aspect of Nuremberg was that the trial and Judgment applied international law doctrines and concepts to impose criminal punishment on individuals for their commission of any of the three types of crimes under international law that are described below. The notion of crimes against the law of nations for which violators bore an individual criminal responsibility was itself an older one, but it had operated in a restricted field. As customary international law developed from the time of Grotius, certain conduct came to be considered a violation of the law of nations — in effect, a universal crime. Piracy on the high seas was long the classic example of this limited category of crimes. Given the common interest of all nations in protecting navigation against interference on the high seas outside the territory of any state, it was considered appropriate for the state apprehending a pirate to prosecute in its own courts. Since there was no international criminal tribunal, prosecution in a state court was the only means of judicial enforcement. To the extent that the state courts sought to apply the customary international law defining the crime of piracy, either directly or as it had become absorbed into national legislation, the choice of forum became less significant, for state courts everywhere were in theory applying the same law.

One specialized field, the humanitarian laws of war, had long included rules regulating the conduct of war, the so-called '*jus in bello*'. This body of law imposed sanctions against combatants who committed serious violations of the restrictive rules. Such application of the laws of war, and its foundation in customary norms and in treaties, figure in the Judgment, *infra*. But the concept of individual criminal responsibility was not systematically developed. It achieved a new prominence and a clearer definition after the Nuremberg Judgment, primarily through the Geneva Conventions of 1949 and their 1977 Protocols. Gradually other types of conduct have been added to this small list of individual crimes under international law — for example, slave trading long prior to Nuremberg and genocide thereafter. Recent years have seen the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda in the 1990s and the initiation of the International Criminal Court in 2002, all discussed in Chapter 16.

As the Second World War came to an end, the Allied Powers held several conferences to determine what policies they should follow towards the Germans responsible for the war and for the systematic barbarity and annihilation of the period. The wartime destruction and civilian losses were known. The nature and extent of the Holocaust were first becoming widely known. These conferences culminated in the London Agreement of 8 August 1945, 59 Stat. 1544, E.A.S. No. 472, in which the United States, the USSR, Britain and France determined to constitute 'an International Military Tribunal for the trial of war criminals'. The Charter annexed to the Agreement provided for the composition and basic procedures of the Tribunal and stated the criminal provisions for the trials in its three critical articles:

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war of the criminals European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or

deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

- (c) *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Note the innovative character of these provisions. Although the Tribunal consisted of only four judges, one from each of the victorious Allied Powers, it nonetheless had an international character in its formation and composition, and to that extent was radically different from the national military courts before which the laws of war had to that time generally been enforced. At the core of the Charter lay the concept of international crimes for which there would be ‘individual responsibility’, a sharp departure from the then-existing customary law or conventions which stressed the duties of (and sometimes sanctions against) states. Moreover, in defining crimes within the Tribunal’s jurisdiction, the Charter went beyond the traditional ‘war crimes’ (para. (b) of Art. 6) in two ways.

First, the Charter included the war-related ‘crimes against peace’ — so-called ‘*jus ad bellum*’, in contrast with the category of war crimes or *jus in bello*. International law had for a long time been innocent of such a concept. After a slow departure during the post-Reformation period from earlier distinctions of philosophers, theologians and writers on international law between ‘just’ and ‘unjust’ wars, the European nations moved towards a conception of war as an instrument of national policy, much like any other, to be legally regulated only with respect to *jus in bello*, the manner of its conduct. The Covenant of the League of Nations did not frontally challenge this principle, although it attempted to control aggression through collective decisions of the League. The interwar period witnessed some fortification of the principles later articulated in the Nuremberg Charter, primarily through the Kellogg-Briand Pact of 1927 that is referred to in the Judgment. Today, the UN Charter requires members (Art. 2(4)) to ‘refrain in their international relations from the threat or use of force’ against other states, while providing (Art. 51) that nothing shall impair ‘the inherent right of individual or collective self-defence if an armed attack occurs against a Member ...’ When viewed in conjunction with the Nuremberg Charter, those provisions suggest the contemporary effort to distinguish not between ‘just’ and ‘unjust’ wars but between the permitted ‘self-defence’ and the forbidden ‘aggression’ — the word used in defining ‘crimes against peace’ in Article 6(a) of that Charter.

Second, Article 6(c) represented an important innovation. There were few precedents for use of the phrase ‘crimes against humanity’ as part of a description of international law, and its content was

correspondingly indeterminate. On its face, paragraph (c) might have been read to include the entire programme of the Nazi government to exterminate Jews and other civilian groups, in and outside Germany, whether ‘before or during the war’, and thus to include not only the Holocaust but also the planning for and early persecution of Jews and other groups preceding the Holocaust. Moreover, that paragraph appeared to bring within its scope the persecution or annihilation by Germany of Jews who were German nationals as well as those who were aliens. This would represent a great advance on the international law of state responsibility to aliens as described in Ch. 2B, above. Note, however, how the Judgment of the Tribunal interpreted Article 6(c) with respect to these observations.

In other respects as well, the concept of ‘crimes against humanity’, even in this early formulation, developed earlier international law. War crimes could cover discrete as well as systematic action by a combatant — an isolated murder of a civilian by a combatant as well as a systematic policy of wanton destruction of towns. Crimes against humanity were directed primarily to planned conduct, to systematic conduct.

In defining the charges against the major Nazi leaders tried at Nuremberg and its successor tribunals, the Allied Powers took care to exclude those types of conduct which had not been understood to violate existing custom or conventions and in which they themselves had engaged — for example, the massive bombing of cities with necessarily high tolls of civilians that was indeed aimed at demoralization of the enemy.⁴¹

JUDGMENT OF NUREMBERG TRIBUNAL INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG (1946)

...

[*The Law of the Charter*]

The jurisdiction of the Tribunal is defined in the [London] Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law. ‘*Nullum crimen sine lege, nulla poena sine lege.*’ It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged

⁴¹ See J. von Bernstorff and E. Mensching, ‘The Dark Legacy of Nuremberg’, 36 *Leiden J. Int’l L.* (2023) 1117.

criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy and Japan at the outbreak of war in 1939. ...

... The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. ...

... The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.... The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

...

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

...

... That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

...

The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

On the other hand, the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

...

War Crimes and Crimes against Humanity

... War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of 'total war', with which the aggressive wars were waged. For in this conception of 'total war,' the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

...

... Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production, and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

...

Murder and Ill-Treatment of Civilian Population

Article 6(b) of the Charter provides that 'ill-treatment ... of civilian population of or in occupied territory ... killing of hostages ... wanton destruction of cities, towns, or villages' shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46....

...

One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps ... [which] became places of organized and systematic murder, where millions of people were destroyed.

In the administration of the occupied territories the concentration camps were used to destroy all opposition groups....

A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the 'final solution' of the Jewish problem....

...

Slave Labor Policy

Article 6(b) of the Charter provides that the 'ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory' shall be a War Crime. The laws relating to forced labor by the inhabitants of occupied territories are found in Article 52 of the Hague Convention.... The policy of the German occupation authorities was in flagrant violation of the terms of this convention.... [T]he German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture.

...

Persecution of the Jews

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, Chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union testified as to the methods employed in the extermination of the Jews....

When the witness Bach Zelewski was asked how Ohlendorf could admit the murder of 90,000 people, he replied: 'I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable'.

...

... The Nazi Party preached these doctrines throughout its history, *Der Stürmer* and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

... By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men....

It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered....

It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters....

The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories.... In the summer of 1941, however, plans were made for the 'final solution' of the Jewish question in Europe. This 'final solution' meant the extermination of the Jews....

The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union....

...

... Adolf Eichmann, who had been put in charge of this program by Hitler, has estimated that the policy pursued resulted in the killing of 6 million Jews, of which 4 million were killed in the extermination institutions.

The Law Relating to War Crimes and Crimes against Humanity

...

The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War Crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause in Article 2 of the Hague Convention of 1907. That clause provided:

The provisions contained in the regulations (Rules of Land Warfare) referred to in Article 1 as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter.

...

With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

[The opinion considered individually each of the 22 defendants at this first trial of alleged war criminals. It found 19 of the defendants guilty of one or more counts of the indictment. It imposed 12 death sentences. Most convictions were for war crimes and Crimes Against Humanity, the majority of those convicted being found guilty of both crimes.]

NOTE

Note the following statement in Ian Brownlie, *Principles of Public International Law* (4th edn. 1990), at 562:

But whatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law. The Agreement to which the Charter was annexed was signed by the United States, United Kingdom, France, and USSR, and nineteen other states subsequently adhered to it. In a resolution adopted unanimously on 11 December 1946, the General Assembly affirmed ‘the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal’.

Views of Commentators

There follow a number of authors’ observations about the charges, the Judgment and the principles in the Nuremberg trials.⁴²

(1) In a review of a book by Sheldon Glueck entitled *The Nuremberg Trial and Aggressive War* (1946), George Finch, 47 *Am. J. Int’l. L.* (1947) 334, makes the following arguments:

As the title indicates, this book deals with the charges at Nuremberg based upon the planning and waging of aggressive war. The author has written it because in his previous volume he expressed the view that he did not think such acts could be regarded as ‘international crimes’. He has now changed his mind and believes ‘that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed *custom* to be accepted as international law’ (pp. 4–5)....

The reviewer fully agrees with the author in regard to the place of custom in the development of international law. He regards as untenable, however, the argument not only of the author but of the prosecutors and judges at Nuremberg that custom can be judicially established by placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, by citing unratified protocols or public and private resolutions of no legal effect, and by ignoring flagrant and repeated violations of non-aggression pacts by one of the prosecuting governments which, if properly weighed in the evidence, would nullify any judicial holding that a custom outlawing aggressive war had been accepted in international law....

(2) In his article, ‘The Nurnberg Trial’, 33 *Va. L. Rev.* (1947) 679, at 694, Francis Biddle, the American judge on the Tribunal, commented on the definition of ‘crimes against humanity’ in Article 6(c) of the Charter:

... The authors of the Charter evidently realized that the crimes enumerated were essentially domestic and hardly subject to the incidence of international law, unless partaking of the nature of war crimes. Their purpose was evidently to reach the terrible persecution of the Jews and liberals within Germany before the war. But the Tribunal held that ‘revolting and horrible as many of these crimes were’, it had not been established that they were done ‘in execution of, or in connection with’ any crime within its jurisdiction. After the beginning of the war, however, these inhumane acts were held to have been committed in execution of the war, and were therefore crimes against humanity.

⁴² For a comprehensive collection, see G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008).

...

Crimes against humanity constitute a somewhat nebulous conception, although the expression is not unknown to the language of international law.... With one possible exception ... crimes against humanity were held [in the Judgment of the Tribunal] to have been committed only where the proof also fully established the commission of war crimes. Mr. Stimson suggested [that the Tribunal eliminate from its jurisdiction matters related to pre-war persecution in Germany], which involved 'a reduction of the meaning of crimes against humanity to a point where they became practically synonymous with war crimes'. I agree. And I believe that this inelastic construction is justified by the language of the Charter and by the consideration that such a rigid interpretation is highly desirable in this stage of the development of international law.

(3) Hans Kelsen, in 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' 1 *Int'l L. Q.* (1947) 153, at 164, was critical of several aspects of the London Agreement and the Judgment. But with respect to the question of retroactivity of criminal punishment, he wrote:

The objection most frequently put forward — although not the weightiest one — is that the law applied by the judgment of Nuremberg is an *ex post facto* law. There can be little doubt that the London Agreement provides individual punishment for acts which, at the time they were performed were not punishable, either under international law or under any national law.... However, this rule [against retroactive legislation] is not valid at all within international law, and is valid within national law only with important exceptions. [Kelsen notes several exceptions, including the rule's irrelevance to 'customary law and to law created by a precedent, for such law is necessarily retroactive in respect to the first case to which it is applied....']

A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against *ex post facto* laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility.... Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.

(4) In his biography entitled *Harlan Fiske Stone: Pillar of the Law* (1956), Alpheus Thomas Mason discussed Chief Justice Stone's views about the involvement of Justices of the US Supreme Court in extrajudicial assignments — and, in particular, Stone's views about President Truman's appointment of Justice Robert Jackson to be American Prosecutor at the trials. The following excerpts (at 715) are all incorporations by Mason in his book of quotations of Chief Justice Stone's remarks:

So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, ... I dislike extremely to see it dressed up with a false facade of legality. The best that can be said for it is that it is a political act of the victorious States which may be morally right.... It would not disturb me greatly.... if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime. Jackson is away conducting his high-grade lynching party in Nuremberg.... I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a

court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.

- (5) Herbert Wechsler, in 'The Issues of the Nuremberg Trial', 62 *Pol. Sci. Q.* (1947) 11, at 23 observed:

... [M]ost of those who mount the attack [on the Judgment on contentions including *ex post facto* law] hasten to assure us that their plea is not one of immunity for the defendants; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary proceeding under a separation of prosecutive and adjudicative powers is, in the name of law and justice, asserted to be less desirable than an *ex parte* execution list or a drumhead court-martial constituted in the immediate aftermath of the war.... Those who choose to do so may view the Nuremberg proceeding as 'political' rather than 'legal' — a program calling for the judicial application of principles of liability politically defined. They cannot view it as less civilized an institution than a program of organized violence against prisoners, whether directed from the respective capitals or by military commanders in the field.

- (6) Mark Osiel, in *Mass Atrocity, Collective Memory, and the Law* (1997), comments on charges against the defeated states (at 122):

For the Nuremberg and Tokyo courts, it mattered little to the validity of criminal proceedings against Axis leadership that Allied victors had committed vast war crimes of their own. Unlike the law of tort, criminal law has virtually no place for 'comparative fault', no doctrinal device for mitigating the wrongdoing or culpability of the accused in light of the accusers'.... For the public, however, ... it mattered *greatly* in gauging the legitimacy of the trials that they seemed tendentiously selective, aimed at focusing memory in partisan ways. It mattered for such listeners that the defendants ... had constituted only a single side to a two- or multi-sided conflict, one in which other parties had similarly committed unlawful acts on a large scale. This unsavory feature of the Nuremberg judgment has undermined its authority in the minds of many, weakening its normative weight.

- (7) David Luban, in *Legal Modernism* (1994), describes what he sees as a confusion in the Nuremberg charges (at 336):

This idea that Nuremberg was to be the Trial to End All Wars seems fantastic and naïve forty years (and 150 wars) later. It has also done much to vitiate the real achievements of the trial, in particular the condemnation of crimes against humanity. To end all war, the authors of the Nuremberg Charter were led to incorporate an intellectual confusion into it. The Charter criminalized aggression; and by criminalizing aggression, the Charter erected a wall around state sovereignty and committed itself to an old-European model of unbreachable nation-states. But crimes against humanity are often, even characteristically, carried out by states against their own subjects. The effect, and great moral and legal achievement, of criminalizing such acts and assigning personal liability to those who order them and carry them out is to pierce the veil of sovereignty. As a result, Article 6(a) pulls in the opposite direction from Articles 6(c), 7 and 8, leaving us ... with a legacy that is at best equivocal and at worst immoral.

- (8) Thane Rosenbaum, in 'The Romance of Nuremberg and the Tease of Moral Justice', 27 *Cardozo L. Rev.* (2006) 1731, argues about legal and moral justice (at 1736):

When it came to the Nazis, jurisdictional concerns, retroactive punishments, standard causation requirements, and freedom of association principles, were not going to impede moral justice and the development of international law. No one seemed to mind during Nuremberg that these constitutional principles were being upended, and that a strict adherence to constitutional safeguards seemingly did not make the trip to Germany. Given the enormity of the Nazis' crimes and the moral implications of acquitting them on procedural grounds, the Constitution, as a document, apparently was deemed not fit for travel and therefore was left behind. There was little ambivalence among the American prosecutors, including a sitting Supreme Court justice, about applying this new path to justice, one that looked legal but tilted in an entirely moral direction.

(9) Mahmood Mamdani, in 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa', Makerere Institute of Social Research, Working Paper No. 23 (2015) at 27, argues that following the logic of Nuremberg has been deeply problematic for the human rights movement:

As interpreted by the human rights movement, the lesson of Nuremberg is twofold: one, that responsibility for mass violence must be ascribed to individual agents; and, two, that criminal justice is the only politically viable and morally acceptable response to mass violence. Turned into the founding moment of the new human rights movement, Nuremberg is today the model for the ICC and is held as the fitting antidote to every incident of mass violence.

To de-ideologize Nuremberg is to recognize that the logic of Nuremberg flowed from the context of inter-state war, one that ended in victory for one side, which then put the losers on trial. The logic of a court trial is zero sum: you are either innocent or guilty. This kind of logic ill fits the context of a civil war. Victims and perpetrators in civil wars often trade places in ongoing cycles of violence. No one is wholly innocent and none wholly guilty. Each side has a narrative of victimhood. Victims' justice is the flip side of victors' justice: both demonize the other side and exclude it from participation in the new political order. A civil war can end up either as a renegotiated union or as a separation between states. The logic of Nuremberg drives parties in the civil war to the latter conclusion: military victory and the separation of yesterday's perpetrators and victims into two separate political communities. ...

The contemporary human rights movement is permeated with the logic of Nuremberg. Human rights groups focus on atrocities for which they seek individual criminal responsibility. Their method of work has a formalized name: Naming and Shaming. The methodology involves a succession of clearly defined steps: catalogue atrocities, identify victims and perpetrators, name and shame the perpetrators, and demand that they be held criminally accountable. ... [C]ontext is considered a distraction from establishing the universality of human rights.

This is problematic if one recognizes that political violence is often not a standalone incident but part of a cycle of violence.⁴³

(10) Michael Walzer, in 'The Legacy of Nuremberg', 48 *Philosophia* (2020) 1291, characterizes Nuremberg as having come at a 'moment' 'of world government – when powerful states, ... perhaps together with organizations ..., succeed in constructing the legislative basis, the executive power, and the judicial authority necessary for a strong international response to wars and massacres'. For him, this does not 'mean that all postwar justice is "victor's justice," but it is, to some degree, great power justice.'

⁴³ For a strong rebuttal of Mamdani's approach, see Jonas Bens, Ch. 16B, below.

He contrasts that type of moment with the International Criminal Court's indictment of President Bashir of Sudan for crimes against humanity in 2009:

... the ICC was acting like the judicial arm of a world government when there was no world government. This is an example of what I have called in another place "the politics of pretending." The ICC had no way of bringing Bashir to trial; nor could it control events in Darfur. Its decision put people at risk, and the court was unable to protect them. When Bashir expelled all aid organizations from the Sudan, he was retaliating against Darfurians for the ICC's action against him; he was deliberately provoking a humanitarian crisis or, more accurately, intensifying the crisis that already existed. And there was nothing that the court could do—or that any international agency could do in the name of the court. The ICC, most simply, had no executive arm, but it acted as if it did. Pretending that there is an effective system of global justice, that there is some kind of world government, when no such thing exists or will exist in the foreseeable future seems to me an example of moral and political irresponsibility.

...

QUESTIONS

1. Recall clause (c) of Article 38(1) of the Statute of the ICJ, and the comments thereon by Oscar Schachter, above. Should the Tribunal have relied on that clause to respond to charges of *ex post facto* application of Article 6(c) to individuals who were responsible for the murder of groups of Germans or aliens?
2. Do you agree with the Tribunal's restrictive interpretation of Article 6(c)? Consider the commentary above by Francis Biddle.
3. How do you evaluate the criticism by Finch of the Tribunal's use of treaties in deciding whether customary international law included a given norm? Recall the comments about the growth of customary law by Schachter.
4. How do you evaluate the criticism of the Nuremberg trial by Chief Justice Stone? By Osiel? By Luban? By Rosenbaum?
5. How do you assess the significance and consequences of Nuremberg? Even if you agree with some or several of the criticisms above, do you nonetheless conclude that the trial and judgment were justified in their actual historical forms? If so, why?

Genocide

There has been considerable expansion in the definitions of the crimes set out in Article 6. The field of individual criminal responsibility for war crimes has been broadened and clarified, through the Geneva Conventions of 1949 and the 1998 Rome Statute for the International Criminal Court (ICC). The provisions for 'grave breaches' in these conventions are discussed later. The concept of crimes against humanity has expanded greatly in coverage since Nuremberg, and is examined in Chapter 16 below. And since 2018, the ICC has been enabled to prosecute 'crimes against peace' under the rubric of the crime of aggression.

The problem of *ex post facto* trials is addressed in Article 15(1) of the International Covenant on Civil and Political Rights, which states that: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.’

Compare with the Nuremberg Judgment the following provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (153 parties in 2025) bearing on personal responsibility. The treaty parties ‘confirm’ in Article I that genocide ‘is a crime under international law which they undertake to prevent and to punish’. Article 2 defines genocide:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Persons committing acts of genocide ‘shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’ (Art. IV). The parties agree (Art. V) to enact the necessary legislation to give effect to the Convention and ‘to provide effective penalties for persons guilty of genocide’. Under Article VI, persons charged with genocide are to be tried by a tribunal ‘of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’. One of the perceived weaknesses of the Convention was its lack of a monitoring mechanism like a treaty body. Instead it provides in Article IX that:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

As will be seen below this provision has unexpectedly and belatedly taken on major importance as various states have filed cases before the International Court of Justice (ICJ) alleging acts of genocide by other states parties. These include, most recently, cases brought by The Gambia, Ukraine, South Africa and Nicaragua.⁴⁴

The first conviction for genocide by an international court came in 1998 in the *Akayesu* case before the International Criminal Tribunal for Rwanda (Ch. 16A, below). Today, the crime of genocide falls under the jurisdiction of the ICC, and has also been litigated on a number of occasions in the ICJ.

In 2007, the ICJ held in the *Bosnia v Genocide* case that the obligation ‘to prevent’ in Article I created independent and territorially unlimited obligations for states, based on their capacity to influence a specific situation. The obligation arises ‘at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.’ This might be thought of as a form of ‘due diligence’ obligation.⁴⁵

⁴⁴ H. Duffy and G. Pinzauti, ‘Genocide and Armed Conflict before the International Court of Justice,’ *QIL blog*, 31 January 2025.

⁴⁵ L. van den Herik and E. Irving, ‘Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity,’ in H. Krieger, A. Peters, and L. Kreuzer (eds.), *Due Diligence in the International Legal Order* (2020) 200.

In August 2019, an independent fact-finding commission on Myanmar, appointed by the UN Human Rights Council, reported that it had ‘reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State, that there is a serious risk that genocidal actions may recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide’ (UN Doc. A/HRC/42/50 (2019), para. 90). It also welcomed efforts by states to bring a case against Myanmar before the ICJ under the Genocide Convention.

In a November 2019 application to the court, The Gambia accused Myanmar of genocidal acts against members of the Rohingya group, described as a ‘distinct ethnic, racial and religious group that resides primarily in Myanmar’s Rakhine State’. Provisional measures were also sought to preserve the Rohingya’s rights pending the court’s final decision. In its January 2020 Order in response to this request, the court recalled that ‘The Gambia contends that Myanmar’s military and security forces and persons or entities acting on its instructions or under its direction and control have been responsible, inter alia, for killings, rape and other forms of sexual violence, torture, beatings, cruel treatment, and for the destruction or denial of access to food, shelter and other essentials of life, all with the intent to destroy the Rohingya group, in whole or in part’ (*The Gambia v. Myanmar*, Request for the Indication of Provisional Measures, Order of 23 January 2020, para. 29). Myanmar denied committing any of the alleged violations of the Genocide Convention, and claimed that there was no genocidal intent. Based in part on the UN report, the ICJ concluded that ‘there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia (para. 75)’ and ordered Myanmar to ‘take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention’ (para. 86).

One issue of particular relevance for this Chapter is the issue of standing to sue.⁴⁶ In the subsequent phase of the case, Myanmar alleged that The Gambia lacked standing because it was not an ‘injured’ or ‘specially affected’ state, and had not demonstrated an ‘individual legal interest’. The court rejected the relevance of these criteria and held, by a vote of 14 to 1, that ‘All the States parties to the Genocide Convention ... have a common interest to ensure the prevention, suppression and punishment of genocide, [which] implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case ...’ (*The Gambia v. Myanmar*, Judgment of 22 July 2022, para. 107). In dissent, Judge Xue noted that the concept of *erga omnes* obligations had not been an established part of international law when the Genocide Convention was adopted, and she concluded that the court’s reliance on that concept in a series of cases since 1970 exceeded ‘the reasonable expectations of the States parties’ and was not conducive ‘to the security and stability of treaty relations’ (dissenting opinion, para. 25).⁴⁷

Three other major cases alleging genocide should be noted. The first, *South Africa v. Israel*, was initiated on 29 December 2023 and is explored in Chapter 8 below.⁴⁸ The second is an ongoing case filed on 27 February 2022 between Ukraine and Russia.⁴⁹ The third is *Sudan v. United Arab Emirates*, initiated on 5 March 2025, alleging violations of the Genocide Convention resulting from the UAE’s support for the Rapid Support Forces in attacks against the Marsalit group in West Darfur.⁵⁰ On 5 May, 2025, the court rejected Sudan’s request for provisional measures against the UAE by a vote of 14-2, and more controversially, by 9-7, removed the case entirely from its docket on the grounds that there was a manifest lack of jurisdiction as a result of the UAE’s reservation to the convention.

* * *

⁴⁶ See B. Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *Collected Courses of the Hague Academy of International Law* (1984) 233.

⁴⁷ O. Hathaway, A. Hachem and J. Cole, ‘A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing’, 61 *Colum. J. Transnat’l L.* (2024) 259.

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

⁴⁹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

⁵⁰ On 7 January 2025, then US Secretary of State, Antony Blinken declared that the RSF and allied militias had committed genocide as well as war crimes, crimes against humanity and ethnic cleansing.

This chapter has had two main goals. It has provided an illustrative survey of different forms or sources of international law (custom, general principles, treaties) and it has surveyed the principal areas in which human rights issues have featured in traditional international law topics (laws of war, state responsibility, labour rights, slavery, minorities, and international criminal law). While the historiography of human rights has exploded as a field of study over the past two decades, generating a contentious but rich and instructive literature, the materials in this chapter provide some of the essential background to the study of the post-Second World War human rights regime. The following excerpt from the conclusion to one major historical survey helps to make the transition.

ERIC D. WEITZ, A WORLD DIVIDED: THE GLOBAL STRUGGLE FOR HUMAN RIGHTS IN THE AGE OF NATION-STATES (2019) 427
Conclusion

...

In the twenty-first century the stream of human rights politics runs far more deeply and broadly than ever before. Skeptics abound. Some charge that human rights are mere veneers that enable states to protect themselves while they carry out all sorts of inhumane acts. Others condemn human rights as mere rhetoric or evidence of Western neo-imperialism. ...

Indeed, ... we see a tidal wave of right-wing populist and extreme nationalist movements in the United States and Europe. Authoritarian dictators around the globe firm up their power and hold on to their offices for years on end. Some crisis situations, as in Syria, go on with no resolution in sight while the population endures bombardments, displacements, and malnutrition, the utter shattering of their society. Wars rage elsewhere as well, and civilians, perhaps more than ever, bear the brunt of their furies. Since the passage of the Genocide Convention in 1948, genocides have taken place in Burundi and Rwanda ..., Guatemala, the former Yugoslavia, Darfur in Sudan, among Yazidis in Iraq and Rohingya in Myanmar. The Chinese government has launched a vast “reeducation” campaign of Uighur, placing tens of thousands of them in detention. Much of the world still lives under dictatorial regimes and in conditions of extreme inequality. On a global scale, democracy seems to be in retreat. And we are witnessing today the largest refugee crisis in history.

But perhaps it is too early to sound the death knell of the human rights era. After all, who could have predicted, in the early eighteenth century, the abolition of slavery? In the early nineteenth century, the triumph of the idea of human rights? Or in late 1961, the Helsinki Final Act, the fall of the Berlin Wall, and the collapse of communism?

[H]uman rights have never proceeded in a straight line. They are complex and move in crooked paths. A future in which human rights reign supreme and we all live in peace and fellowship is a chimera. Utopian sentiments are only good insofar as they project the possibility of a better life upon humane principles. Without those hopes, we stagnate in the present without any path forward.

The very term “human rights” has moved into the center of politics at all levels—local, national, and international. It provides a powerful motivating force for people to demand lives of liberty and security. From the mothers of the disappeared in Argentina to Soviet dissidents, anti-apartheid activists in South Africa, and women all around the globe—all of them have adopted the rhetoric of human rights to rally support and make their claims in the streets, in the halls of governance, and on the floor of the UN General Assembly. The meaning of human rights has expanded over two and one-half centuries, and now includes social and economic as well as political rights.

Amid all these developments, the nation-state remains. It has shown its mettle and commands power and loyalty. It will not disappear anytime in the foreseeable future. In the best of circumstances, the nation-state is our protector if we live within the charmed circle of rights-bearing citizens. It is also our greatest threat, the powerful violator of human rights and the exclusion-enforcing institution that drives out, removes, forcibly assimilates, and kills those denied the right to have rights within its borders.

Since the 1940s, human rights have been proclaimed for everyone regardless of citizenship status. Human rights protections have moved—in part—to the international plane. The UDHR, the Genocide Convention, international tribunals, the ICC—all the measures and conventions and resolutions discussed [in this book] infringe on the absolute sovereignty of the nation-state. Thankfully so. Anything that moves the conception and enforcement of human rights to the international level moves us beyond the nation-state as the sole enforcer (and violator) of rights, and that is progress.

The nation-state remains; so do our identities as individuals of particular nationalities, ethnicities, religions (or the lack thereof), and genders. The Enlightenment fiction of an abstract individual, stripped of all markers, is just that—a fiction. A system of human rights built on that understanding will always be flawed and easily subject to attack by the heralds of an exclusive, supposedly timeless culture of nation or race or of the essential differences between men and women. Yet diversity of all sorts is the intractable reality of human existence. How we live with that difference is the critical issue. Those who somehow differ from a dominant group may be subordinated, driven out, or killed, or they may be recognized as fellow humans and accorded the same rights as everyone else—without being required to dispense with their identities.

For all the partial advances, for all the contradictions, all the sheer opposition—human rights remain our best hope for the future. Their advocates sometimes espouse utopian aspirations. A restrained perspective is more appropriate and effective. Human rights will never be implemented in the all-embracing fashion of declarations like the UDHR; they will always face opponents, some quite strong. Yet human rights provide a powerful affirmation of the human spirit. They require that people be respected and afforded recognition no matter what their specific gender, nationality, or race. They demand that all people have access to the basic necessities of life, and have the freedom to express themselves, to work and build and create as they wish, to join with others as they desire, and to be free of the scourge of violence and forced displacement. Those are our fundamental human rights. We should demand nothing less from the worlds we inhabit.

QUESTIONS

1. In Weitz's analysis, the nation-state takes centre stage. But he concludes that '[a]nything that moves the conception and enforcement of human rights to the international level moves us beyond the nation-state as the sole enforcer (and violator) of rights, and that is progress.' To what extent does that framing seem helpful or realistic in light of what has been discussed so far about the international human rights regime?

2. Samuel Moyn, in 'Human rights have lost their monopoly as a framework for reform', *Open Global Rights*, May 19, 2021, poses a challenge to Weitz's optimism. He argues that human rights have lost much of their appeal, particularly 'for young people who did not experience human rights as the morality of the obsolescence of ideological alternatives, and 'in many places around the world, where different forms of ideology and different forms of social mobilization than generally characterize human rights, have begun to beckon.' He does 'not believe the record of human rights law or movements justify much confidence that they can' take on more tasks, which would open them up to 'the risk of failing even more comprehensively'. Instead they should 'claim less and allow other movements to surge'. What might those other movements be, and what role would human rights then play?

PART B: NORMATIVE FOUNDATIONS OF INTERNATIONAL HUMAN RIGHTS

Chapter 3. Civil and Political Rights

The Nuremberg trial and several provisions of the United Nations Charter of 1945 were the major elements of the incipient human rights regime until 1948, when the UN General Assembly approved the Universal Declaration of Human Rights (UDHR). For 28 years, the UDHR occupied centre stage. The two fundamental human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both became effective in 1976. (Note: only these two human rights treaties bear the solemn title of ‘Covenant’.)

Together with the Declaration, the Covenants form the International Bill of Human Rights, which now stands at the core of the universal human rights system — universal in the sense that membership is open to states from all parts of the world. Chapter 11 examines three regional human rights systems, each open to members only from the designated part of the world: the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the ‘European Convention on Human Rights’), the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights. Each of these treaties is supported and developed (in different ways) by an intergovernmental body that in most cases is created by the treaty itself. The central institutional participants in the human rights regime also include other intergovernmental bodies, national governments and national human rights institutions, nongovernmental human rights groups, corporate actors, and a range of labour, environmental, religious, development, and other organizations.

This chapter opens with a focus on the Charter and Declaration, before undertaking an in-depth examination of civil and political rights, and economic and social rights respectively. The Declaration includes both categories. These categories are far from airtight. Many treaties declare rights that straddle the two, or that fall clearly within the domains of both of them. Many rights are hard to categorize. Nonetheless, at their core, the conventional distinctions are clear, whatever the relationships and interdependency between the two. Freedom from torture, equal protection, due process and the right to form political associations fall within the first category; the right to health or food or education come within the second.

The remaining sections of this chapter introduce basic ideas and instruments of the universal human rights regime that concern civil and political rights; the next chapter addresses economic and social rights. Section B below examines the ICCPR.

Section C then turns to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) a major treaty that took form several decades after work on drafting the ICCPR began, and that reveals different concerns, goals and strategies of the human rights regime. Comparison of the ICCPR and CEDAW offers insight into the evolution and changing character of civil and political rights and their implementation.

In Section D we focus on efforts designed to prohibit discrimination on the grounds of sexual orientation and to protect the rights of gay, lesbian, bisexual and transgender persons in order to illustrate the evolution of new norms within the international system.

Section E makes for a contrast with Section D by looking at threats posed in recent years, primarily in the context of counter-terrorism activities, to the long-established and seemingly well-entrenched norm against torture.

A. THE CHARTER, UDHR AND ORIGINS OF THE HUMAN RIGHTS REGIME

The human rights regime is not simply a systematic ordering, through treaties and customary law, of fundamental postulates, ideologies and norms (that is, ‘oughts’ in the form of rules, standards, and

principles). To the contrary, these basic elements are imbedded in institutions, some of them state and some international, some governmental or intergovernmental and some nongovernmental and in related international processes. It is impossible to grasp this regime adequately without an appreciation of its close relation to and reliance on international organizations. For example, the basic instruments of the universal system were drafted within the different organs of the United Nations and adopted by its General Assembly, before (in the case of the treaties) being submitted to states for ratification. UN organs play a major role in monitoring, officially commenting on, and applying sanctions to state behaviour.

The United Nations Charter itself first gave formal and authoritative expression to the human rights regime that began at the end of the Second World War. Since its birth in 1945, the UN has served as a vital institutional spur to the development of the regime, as well as serving as a major forum for many-sided debates about it. The purpose of the present section is to call attention to aspects of the UN and its Charter that bear particularly on the human rights regime.

Readers should now become familiar with the provisions of the Charter that are referred to below, and of the UDHR.

Charter Provisions

Consider first the Charter's radical transformation of the branch of the laws of war concerning *jus ad bellum*. Recall that for several centuries that body of law had addressed almost exclusively *jus in bello*, the rules regulating the conduct of warfare rather than the justice or legality of the waging of war. The International Military Tribunal at Nuremberg was empowered to adjudicate 'crimes against peace', part of *jus ad bellum* and the most disputed element of that Tribunal's mandate.

The Charter builds on the precedents to which the Nuremberg Judgment refers and states the UN's basic purpose of securing and maintaining peace. It does so by providing in Article 2(4) that UN members 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state', a rule qualified by Article 51's provision that nothing in the Charter 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs' against a member.

The Charter's references to human rights are scattered, terse, even cryptic. The term 'human rights' appears infrequently. Note its occurrence in the following provisions: second paragraph of the Preamble, Article 1(3), Article 13(1)(b), Articles 55 and 56, Article 62(2) and Article 68.

Several striking characteristics of these provisions emerge. Many have a promotional or programmatic character, for they refer principally to the purposes or goals of the UN or to the competences of different UN organs: 'encouraging respect for human rights', 'assisting in the realization of human rights', 'promote ... universal respect for, and observance of, human rights'. Not even a provision such as Article 56, which refers to action of the member states rather than of the UN, contains the language of obligation. It notes only that states 'pledge themselves' to action 'for the achievement' of purposes including the promotion of observance of human rights. Note that only one substantive human right, the right to equal protection, receives specific mention in the Charter (Arts. 1(3), 13(1)(b) and 55).

In retrospect, Louis Henkin, in *International Law: Politics, Values and Functions*, 216 Collected Courses of The Hague Academy of International Law (Vol. IV, 1989), at 215, argued that there has been a tendency to exaggerate what the Charter did for human rights:

The Charter made the promotion of human rights a purpose of the United Nations; perhaps without full appreciation of the extent of the penetration of Statehood that was involved, it thereby recognized and established that relations between a State and its own inhabitants were a matter of international concern. But the Charter did not erode State autonomy and the requirement of State consent to new human rights law. ...

The Universal Declaration

Despite proposals to the contrary, the Charter stopped shy of incorporating a bill of rights. Instead, there were proposals for developing one through the work of a special commission that would give separate attention to the issue. That commission was contemplated by Charter Article 68, which provides that one of the UN organs, the Economic and Social Council (ECOSOC), ‘shall set up commissions in economic and social fields and for the promotion of human rights’. In 1946, ECOSOC established the Commission on Human Rights (referred to in this book as the UN Commission), which evolved over the decades to become the world’s single most important (and perhaps most disputed) human rights organ. At its inception, the new Commission was charged primarily with submitting reports and proposals on an international bill of rights. (The UN Commission was displaced by a newly created Human Rights Council in 2006. Chapter 8 examines the work of both the Commission and Council.)

The UN Commission first met in its present form early in 1947, composed of the representatives of states. The United States was represented by Eleanor Roosevelt. Some representatives urged that the draft bill of rights under preparation should take the form of a declaration — that is, a recommendation by the General Assembly to Member States (see Charter Art. 13) that would exert a moral and political influence on states rather than constitute a legally binding instrument. Other representatives urged the Commission to prepare a draft convention containing a bill of rights that would, after adoption by the General Assembly, be submitted to states for their ratification.

The first path was followed. In 1948, the UN Commission adopted a draft Declaration, which in turn was adopted by the General Assembly that year as the Universal Declaration of Human Rights (UDHR), with 48 states voting in favour and eight abstaining — Saudi Arabia, South Africa and the Soviet Union, together with four East European states and a Soviet republic whose votes it controlled. (It is something of a jolt to realize today, in a decolonized and fragmented world with 193 UN member states, that that number stood at only 56 states in 1948.)

The UDHR was meant to precede more detailed and comprehensive provisions in a single convention that would be approved by the General Assembly and submitted to states for ratification. After all, within the prevailing concepts of human rights at that time, the UDHR seemed to cover most of the field, including economic and social rights (see Arts. 22–26) as well as civil and political rights. But during the years of drafting — years in which the Cold War took harsher and more rigid form, and in which the United States strongly qualified the nature of its commitment to the universal human rights regime — these matters became more contentious.⁵¹ The human rights regime was buffeted by ideological conflict and the formal differences of approach in a polarized world. One consequence was the decision in 1952 to build on the UDHR by dividing its provisions between two treaties, one on civil and political rights, the other on economic, social and cultural rights.

The plan to use the Universal Declaration as a springboard to treaties triumphed, but not as quickly as anticipated. The two principal treaties — the ICCPR and the ICESCR — made their ways through the drafting and amendment processes in the Commission, the Third Committee and the General Assembly, where they were approved only in 1966. Another decade passed before the two Covenants achieved in 1976 the number of ratifications necessary to enter into force.

During the 28 years between 1948 and 1976, a number of specialized human rights treaties such as the Genocide Convention entered into force. But not until the two principal Covenants became effective did a treaty achieve as broad coverage of human rights topics as the Universal Declaration. It was partly for this reason that the UDHR became so widely known and frequently invoked. During these intervening years, it was the only broad-based human rights instrument available. To this day, it:

⁵¹See, for example, O. Barsalou, ‘The United States and Human Rights Marginalization at the International Court of Justice, 1945–1950’, 24 *J. Hist. Int’l L.* (2022) 102.

... has retained its place of honor in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole.... [T]he Declaration expressed in lean, eloquent language the hopes and idealism of a world released from the grip of World War II. However self-evident it may appear today, the Declaration bore a more radical message than many of its framers perhaps recognized. It proceeded to work its subversive path through many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace.⁵²

As a declaration voted in the General Assembly, the UDHR lacked the formal authority of a treaty that binds its parties under international law. Nonetheless, it remains in some sense the constitution of the entire regime, as well as the single most cited human rights instrument.

Other UN Organs Related to Human Rights

Together with the UN Commission, other UN organs have played major roles in developing universal human rights. Their full significance with respect to drafting and approving treaties or declarations, monitoring, censuring, and authorizing or ordering state action becomes apparent in later chapters. A brief description follows.

Chapter IV of the Charter sets forth the composition and powers of the General Assembly. Those powers are described in Articles 10–14 in terms such as ‘initiate studies’, ‘recommend’, ‘promote’, ‘encourage’ and ‘discuss’. Particularly relevant are Articles 10 and 13. Article 10 authorizes the General Assembly to ‘discuss any questions or any matters within the scope of the present Charter [and] ... make recommendations to the Members of the United Nations ... on any such questions or matters’. Article 13 authorizes the GA to ‘make recommendations’ for the purpose of, *inter alia*, ‘assisting in the realization of human rights’. Throughout its history, the GA has been active in voting resolutions related to human rights issues.

Contrast the stronger and more closely defined powers of the Security Council under Chapter VII. Those powers range from making recommendations to states parties about ending a dispute, to the power to authorize and take military action ‘to maintain or restore international peace and security’ (Art. 42) after the Council ‘determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression’ (Art. 39). Under Article 25, member states ‘agree to accept and carry out’ the Security Council’s ‘decisions’ on these and other matters. No such formal obligation of states attaches to recommendations or resolutions of the General Assembly. As Chapter 9 indicates, the Security Council has in recent years used its powers to address situations involving major human rights violations.

Two of the six Main Committees of the General Assembly — committees of the whole, for all UN members are entitled to be represented on them — have also participated in drafting or other processes affecting human rights. The Social, Humanitarian and Cultural Committee (Third Committee) and the Legal Committee (Sixth Committee) have reviewed drafts of proposed declarations or conventions and often added their comments to the document submitted to the plenary General Assembly for its ultimate approval.

Historical Sequence and Typology of Instruments

That part of the universal human rights regime consisting of intergovernmental instruments — that is, excluding for present purposes both national laws and nongovernmental institutions forming part of the regime — can be imagined as a four-tiered normative edifice, the tiers described generally in the order of their chronological appearance.

⁵² H. Steiner, ‘Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond’, *Harvard Magazine* (Sept.–Oct. 1998) 45.

- (1) The UN Charter, at the pinnacle of the human rights system, has relatively little to say about the subject. But what it does say has been accorded great significance. Through interpretation and extrapolation, as well as frequent invocation, the sparse text has constituted a point of departure for inventive development of the entire regime.
- (2) The UDHR, viewed by some as an elaboration of the brief references to human rights in the Charter, occupies in important ways the primary position of constitution of the entire regime. Today many understand the UDHR — or more specifically, numbers of its provisions — to have gained formal legal force by becoming a part of customary international law.
- (3) The two principal covenants, which alone among the universal treaties have broad coverage of human rights topics, develop in more detail the basic categories of rights that figure in the Universal Declaration, and include additional rights as well
- (4) A host of multilateral human rights treaties (usually termed ‘conventions’, for there are only the two basic ‘covenants’), as well as resolutions or declarations with a more limited or focused subject than the comprehensive International Bill of Rights, have grown out of the United Nations (drafting by UN organs, approval by the General Assembly) and (in the case of treaties) have been ratified by large numbers of states. They develop further the content of rights that are more tersely described in the two covenants or, in some cases, that escape mention in them. This fourth tier consists of a network of treaties, most but not all of which became effective after the two Covenants. They include: the Convention on the Prevention and Punishment of the Crime of Genocide (153 states parties as of 2025), the International Convention on the Elimination of all Forms of Racial Discrimination (182 parties), the Convention on the Elimination of all Forms of Discrimination against Women (189 parties), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (175 parties), the Convention on the Rights of the Child (196 parties), and the Convention on the Rights of Persons with Disabilities (193 parties).

This book discusses to one or another degree most of these instruments.

QUESTION

Compare the premises, character and provisions of the UDHR with the prior illustrations in Chapter 2 of the relevant doctrines in international law that constitute the ‘background’ to the post-war human rights regime. In what respects (putting aside its legal character as a declaration rather than a treaty) does the UDHR stand out as strikingly different, as resting on premises that were not simply alien to but close to heresies within the preceding international law?

The Aspiration to Universality

From the start, the human rights regime had universal aspirations. It was not to address only the developed countries of the West/North but rather all regions and all states, whatever their form of government, socio-economic situation or religious–cultural traditions. After all, the key document at the very start of the regime was entitled the *Universal* Declaration of Human Rights (UDHR). Its language, like that of many later human rights treaties, speaks abstractly of ‘everyone’, or ‘no person’. It communicates no sense of differentiation among its subjects based on religion, gender, colour, ethnicity, national origin, wealth, region, education. To the contrary, the human rights texts fasten on equality and non-discrimination as cardinal concepts.

Over the decades, the question of how ‘universal’ the postwar catalogue of human rights are or should seek to become has assumed greater prominence. The ‘universal’ is often contrasted with the

‘particular’ or ‘culturally specific’, or ‘cultural relativism’. The different meanings of these concepts and illustrations of their significance for a number of human rights topics figure as a central theme in Chapters 6 and 7. In this Chapter we focus on conflicting views on the question of its universality and on the political and ethical traditions that inform it.

The issue of universality, *per se*, was not prominent on the agenda of the drafters of the UDHR, although there were major philosophical differences within the group. In February 1947, the UN Commission on Human Rights appointed a three-person Drafting Committee from among the governmental representatives on the Commission. The following month, it was enlarged to make it more representative (UN Doc. E/383 (1947)). It consisted of Eleanor Roosevelt (United States) Chairperson, and Alexandre Bogomolov (USSR), René Cassin (France), Peng-chun Chang (China), Charles Dukes (United Kingdom), William Hodgson (Australia), Charles Malik (Lebanon), and Hernán Santa Cruz (Chile). Hansa Mehta (India) and Carlos Romulo (The Philippines) also played important roles in the process, as did John Humphrey, the Canadian director of the UN Secretariat who compiled the first draft.

There were a great many inputs into the drafting process and contemporary debates outside the Commission context also shed light on some of the controversies. Lawyers, especially from the United States and Latin America, contributed important draft documents reflecting domestic constitutional traditions. Of particular importance were the American Law Institute’s *Statement of Essential Human Rights* (1945), and the Institut de Droit International’s report entitled *Les droits fondamentaux de l’homme, base d’une restauration du droit international* (1947).

The most significant philosophical foray at the time was undertaken by a group of philosophers and other prominent public figures convened by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1947 to give their views as to what could or should be covered in a proposed declaration of rights. The group, somewhat haphazardly chosen, almost entirely male, and far from being truly representative in cultural or philosophical terms, made it clear that there could be no consensus beyond a very thin set of shared formulations.⁵³ For example, a University of Chicago political scientist, Charles Merriam, insisted that ‘the basic right is the right to life’, without which ‘the other so-called rights lose their meaning’. Mahatma Gandhi recalled that he had learned from his ‘illiterate but wise mother that all rights to be deserved and preserved came from duty well done.’ As a result, every right that did not correspond to some ‘duty to be first performed ... can be shown to be a usurpation hardly worth fighting for.’ And the British author, Aldous Huxley, warned that ‘mere paper restrictions, designed to curb the abuse of a power already concentrated in a few hands, are but the mitigation of an existing evil’, adding that ‘personal liberty can be made secure only by abolishing the evil altogether’.

In introducing the UNESCO survey, the French Catholic philosopher, Jacques Maritain, argued that while fundamental ideological and philosophical differences could never be bridged, this did not preclude the emergence of ‘a sort of common denominator, ... at the point where in practice the most widely separated theoretical ideologies and mental traditions converge.’ This, he said, would require a pragmatic approach and the recasting of accepted formulae in order that they would be acceptable ‘as points of convergence in practice, however opposed the theoretic viewpoints.’ He concluded by observing that, despite ‘the clash of theory’ reflected in the views of the various contributors, one could nevertheless hope that ‘a few scanty features of ... a practical ideology ... are in the course of taking root in the conscience of the nations’.⁵⁴

Subsequently, the Chairman of the ‘UNESCO Committee on the theoretical bases of Human Rights’, the prominent British historian E. H. Carr, characterized the UDHR as being ‘pale, eclectic and unconvincing’. In his view, it reflected the outcome of a ‘political sparring match’ rather than a

⁵³ *Human Rights: Comments and Interpretations*, a symposium edited by Unesco, with an Introduction by Jacques Maritain, UNESCO Doc. UNESCO/PHS/3 (rev), 25 July 1948, available at <https://unesdoc.unesco.org/ark:/48223/pf0000155042>

⁵⁴ *Ibid*,

‘common agreement among men of good will’. He lamented its striking ‘emptiness’ and the fact that ‘political expediency’ had led the drafters to keep the ‘real issues’ ‘decently out of sight.’⁵⁵

Many anthropologists also had deep misgivings, as reflected in the statement submitted by the American Anthropological Association to the UDHR drafters that adopted a strong relativist position. While the statement was apparently written solely by Melville Herskovits, who was also a contributor to the UNESCO volume,⁵⁶ it nonetheless reflected a view held by many anthropologists at the time.

And prominent economists were also divided on the question of whether economic justice should form part of a declaration of rights. The emphasis on ‘freedom from want’, proclaimed in the 1941 Atlantic Charter outlining the allied war aims, and again in President Franklin Delano Roosevelt’s 1944 proposal for a second Bill of Rights in the United States, was strongly supported by many. But early neoliberal economists were strongly critical. In the Mont Pèlerin Society’s 1947 Statement of Aims, Friedrich von Hayek, Ludwig von Mises, and others saw ‘danger in the expansion of government, not least in the welfare state, in the power of trade unions and business monopoly ...’.⁵⁷ Hayek considered social justice to be a mirage and the term itself to be both ‘nonsense’ and ‘empty and meaningless’.⁵⁸ He reserved particular scorn for the economic and social rights recognized in the UDHR, arguing that they were fundamentally incompatible with civil rights, were incapable of being meaningfully designed, and would require a totalitarian system for their implementation.⁵⁹ Von Mises shared this contempt for so-called ‘basic economic rights’.⁶⁰

Some commentators have staunchly defended the UDHR’s universality. In particular, Mary Ann Glendon, in *A World Made New* (2001) at 227, argued that:

The Declaration ... was far more influenced by the modern dignitarian rights tradition of continental Europe and Latin America than by the more individualistic documents of Anglo-American lineage. ...

Dignitarian rights instruments, with their emphasis on the family and their greater attention to duties, are more compatible with Asian and African traditions. In these documents, rights bearers tend to be envisioned within families and communities; rights are formulated so as to make clear their limits and their relation to one another as well as to the responsibilities that belong to citizens and the state ...

Glendon interprets ‘the Declaration’s “Everyone” [as] an individual who is constituted ... by and through relationships with others’:

There is little doubt about how the principal framers of the Universal Declaration would have responded to the charge of “Western-ness.” What was crucial for them — indeed, what made universal human rights possible — was the similarity among all human beings. Their starting point was the simple fact of the common humanity shared by every man, woman, and child on earth, a fact that, for them, put linguistic, racial, religious. and other differences into their proper perspective.

But Makau Mutua, also cited in Glendon’s book, takes a fundamentally different position about the origin and character of the UDHR.⁶¹

⁵⁵ E. H. Carr, ‘Rights and Obligations’, *The Times Literary Supplement*, No. 2943, November 11, 1949, p. 725-26.

⁵⁶ M Goodale, *Anthropology and Law: A Critical Introduction* (New York, New York University Press, 2017) 99.

⁵⁷ Statement of Aims (April 8, 1947) at <https://www.montpelerin.org/statement-of-aims/>

⁵⁸ A. Lister, ‘The Mirage of “Social Justice”: Hayek Against (and For) Rawls’, 25 *Critical Review* (2013) 409, at 410.

⁵⁹ ‘Justice and Individual Rights: Appendix to Chapter Nine’, in F. A. von Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (1982 rev. ed.), at 101-106.

⁶⁰ L. von Mises, *Socialism: An Economic and Sociological Analysis* (1951) 56-63.

⁶¹ M. Mutua, ‘The Complexity of Universalism in Human Rights’, in A. Sajó (ed.), *Human Rights with Modesty* (2004) 51.

... Non-Western philosophies and traditions particularly on the nature of man and the purposes of political society were either unrepresented or marginalized during the early formulation of human rights.... There is no doubt that the current human rights corpus is well meaning. But that is beside the point.... International human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world. The white human rights zealot joins the unbroken chain that connects her to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise.... Thus human rights reject the cross-fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.

Glendon (at p. 221) also interpreted the UNESCO philosophers' conclusions as indicating that 'a core of fundamental principles was widely shared' across cultures and countries. But Mark Goodale, in *Letters to the Contrary: A Curated History of the UNESCO Human Rights Survey* (2018), at 30, concludes that 'if any "common convictions" can be said to emerge [from the views of the philosophers], they would be those that either doubt the value of the entire project of human rights itself, or prefer to understand it as a temporary, historically contingent, reaction to the horrors of world war ...'. E. H. Carr, Chair of the UNESCO Committee, also reached conclusions that were very different from Glendon's.

E. H. CARR, RIGHTS AND OBLIGATIONS
THE TIMES LITERARY SUPPLEMENT, NO. 2493 (11 NOVEMBER 1949) 725

...

No political party would venture to appeal to the electorate of the most orthodox democracy to-day without inscribing in its programme the right to work, the right to a living wage, and the right to care and maintenance in infancy, old age, ill-health or unemployment. These rights today – far more than the right to vote or freedom of speech and assembly – make up the popular conception of the rights of man. We have moved on from the age of bourgeois individualism to the age of mass industrial civilization. The rights of man, the things which he most wants from society, have changed with the times.

But does this mean that the new social and political rights can simply be added to the old political rights, so that we have merely broadened our conception of the rights of man in general? Things are not quite so easy as this. The fact of juxtaposition produces a process of interaction between different rights which must end by altering their character. The dilemma of reconciling political equality with political liberty was always resolved, down to the time of J. S. Mill, by defining liberty as freedom to do everything that did not restrict the liberty of others. But when equality comes to mean economic equality or – at any rate some enforced mitigation of economic inequality – and when liberty comes to mean something like liberty of opportunity, or free and equal access to the good things which society has to offer, the relation between equality and liberty takes on a much more baffling complexion. To claim that "freedom from want" is merely an extension of the older conceptions of freedom, that without freedom from want no other freedom can be real, is plausible enough. But the fact remains that "freedom from want" is not only an emanation from the old freedoms, but is incompatible with some of them; it is, for example, incompatible with the freedom of a *laissez-faire* society. The present conflict about human rights does represent to some extent the difficult choice between incompatible alternatives. Both sides are to this extent insincere when they pretend to offer a formula that makes the best of all worlds.

... The second problem is older and more familiar; for at no period of history has the correlation between rights and obligations been denied. Any definition of the rights of man is a definition of the relation between the individual and society; and this relation necessarily involves rights and obligations on both sides. ... The modern revolution comes at the end of a long period of buoyant and almost unrestrained individual enterprise, when the individual has tended more and more to claim his rights against society and to forget the corresponding weight of his social obligations. The wheel has come

round; the leaders of liberal democracies, no less than of totalitarian States, are finding it to-day increasingly necessary to dwell on what the citizen owes to the community of which he forms a part.

The truth that rights cannot be divorced from obligations would seem trite if it had not been so often overlooked in recent years. ... [The obligation attached to political rights is sometimes describes as being mainly passive, or] being confined to loyalty to the political order. This is not wholly correct. Liberal democracy worked because a sufficient number of those who profited by its privileges recognized the positive obligation to play their part in making it work. The tradition of public service - and even of unpaid public service - was one of its essential attributes. It is doubtful whether western democracy has given sufficient attention to the problem of transferring this conception of individual public service to the conditions of mass civilization. ...

... Human rights, though in principle rights recognized as valid for mankind as a whole, are generally discussed ... as the rights of the citizen. [Attention should thus be given to the rights of outcasts from society, such as "law-breakers" and "primitive peoples".] ... To remove racial discrimination is here the beginning, but certainly not the end, of wisdom.

...

**ROLAND BURKE, DECOLONIZATION, DEVELOPMENT, AND IDENTITY:
THE EVOLUTION OF THE ANTICOLONIAL HUMAN RIGHTS CRITIQUE, 1948-1978
J. QUATAERT AND L. WILDENTHAL (Eds.), THE ROUTLEDGE HISTORY OF HUMAN RIGHTS
(2020) 222**

...

... In the peak years of the anticolonial movement, human rights were embraced as a language integral to opposing empire. Liberal nationalist movements which, in the late 1940s through early 1960s, were the principal force for decolonization, saw their own aspirations in the precepts of the [UDHR]. Universalistic, promising the full swathe of freedoms - civil and political, economic and social - human rights were at once the answer to patronizing imperial claims of civilizational tutelage, the foremost weapon against colonial authoritarianism, and the most fundamental rejoinder to racial discrimination.

For around a decade, harmony prevailed between anticolonial nationalism and the form of human rights enunciated in the post-war period, which presumed the properly constituted sovereign state as the premier guarantor of freedom. If anything, the main dissenters to the incipient global human rights order were the European imperial powers, who guarded their own sovereign prerogative across overseas territories, and in a more elemental sense, the moral legitimacy of colonial rule. ... Initially, ... anticolonial critiques were limited in extent, and only episodically florid in expression. Nevertheless, by the mid-1960s, human rights, as they were understood in the late 1940s and early 1950s, were the subject of growing skepticism and even outright hostility from post-independence governments and a number of African, Asian, Arab, and Western intellectuals. Emphatic on the urgency of national mobilizations, the equilibrium between individual and state agreed at in 1948 no longer seemed sufficient for many in this later generation of anticolonial voices.

With the radical expansion of the human rights NGO movement in the 1970s, with its center of gravity firmly within the political West, anticolonialism and the new transnational human rights movement drew further apart. ... Amnesty and Human Rights Watch in particular, championed a quite different interpretation of human rights even to that posited in 1948. Their "human rights" was avowedly anti-statist in inflexion - at precisely the moment when strengthening the state was the priority concern of the Third World. Stung by the more confrontational style of the 1970s NGOs, post-independence governments began to issue strident defensive critique to specific, condemnatory NGO reports, notably those from Amnesty International. Alongside the usual dissembling characteristic of most governments indicted by an NGO denunciation, Third World states now began to repudiate key elements of universalism, and advanced subversive, particularistic, schemes of regional, religious, and traditionalist re-definition. In their rejections of NGO scrutiny, Third World governments denounced the authority of Western activists, which formed much of the early transnational human rights movement. Yet these states - and numerous others, notably apartheid South Africa - went further than debating substantive merit of NGO criticisms: they began to attack those concepts of universality,

indivisibility, and inherence, the very features which had subtended the power of human rights as an anti-imperial discourse. In the rhetoric of many post-colonial regimes, human rights scrutiny was increasingly dismissed as a new mode of imperialism.

[In focusing on] ... the dissents that emerged from the Third World [this chapter looks at] the emergence and growing acceptance of pleas for a temporary exception - an allowance for the exigencies of development, which were often an extension of imperial pleas for gradualism. These calls, which had once been treated - properly - with scorn when recited by British and French legations, were the first wave of anticolonial arguments against universality in the mid-to-late 1950s advanced by new national leaders. By the later 1960s, these arguments for a caveated and deferred universality had migrated to the center of international human rights conversation. Invoking very real imperatives for economic development, this wave of critique opened the first major, sustained breach in the conceptual foundation of the UDHR. Tension between state mobilization for material well-being, and individual civil and political freedoms, was a latent site of rupture from the late 1940s. Differences in capacity between the developed and underdeveloped had been raised repeatedly during the formulation of the UDHR, and a principal factor in the division of the human rights covenant that followed it. ...

However, the radicalization of these arguments, typically from the wave of repressive rulers that arrived after the first hopeful moment of independence, turned good faith recognition of a problem into a bald dismissal of universal human rights in any practical sense. Conditions themselves also altered the terrain of the debate - the sheer duration of the Third World's economic misery obscured any appreciable difference between transient and reluctant variation of an accepted norm - and transmuted into a permanent assertion of essential difference. The later accretion of cultural and traditionalist identity particularism, which were grafted on to the original core of developmental claims, further foreclosed the sweeping universality of 1948.

The ... divergence between anticolonialism and human rights was mutual - the former changed dramatically in character, and the latter acquired a narrower set of emphases in the 1970s. While there were doubtlessly areas of radical transformation which cut across this dynamic, exemplified by a revived international women's rights movement, the most prominent human rights NGOs had built much of their campaign on a sparing set of priority concerns. Their human rights minimalism - which devoted much effort to the most primordial subjects, torture and extra-judicial killing - was a language of limited capacity to inspire. The more radical transformations envisaged in the 1940s and 1950s, of economic sovereignty, the welfare state, and a redistribution of global power, which had been at least part of the appeal of human rights for anticolonial movements, were much less readily set in this new architecture. A logic of the least worst, and the most that could be hoped, which often seemed a breviary of the philosophy under which groups like Amnesty International operated, was a world away from revolutionary promises of a New International Economic Order. This conflict produced a deep confusion in the language, and an erosion of its normative power, as numerous hostile species of human rights proliferated. Human rights, for a substantial bloc of post-colonial states, became commingled with another project, the augmentation and development of their own states, and a repartitioning of global economic power along more equitable lines. For many Western NGOs, the state, once recognized as a vital pillar for realizing an ambitious vision of human rights, was recast as the prime enemy of a much more austere set of freedoms. Both had departed from the UDHR, while simultaneously proclaiming their fealty to it. Each variant of "human rights" was deployed to attack the other. Human rights critique was, by the 1980s, almost always conducted in the name of another "human rights."

...

QUESTIONS

1. As a principle of interpretation, in what direction (if any) would Glendon's understanding of the UDHR's 'dignitarian' tradition point with respect to, say, (a) a question of freedom of

speech as applied to hate speech, (b) a question of individual liberty in relation to the right of others to an adequate standard of living, (c) a question of equal protection in relation to a claim for gay marriage?

2. Based on Glendon's argument in these excerpts, how do you react to her position that the UDHR was at its origin and is now properly understood as having universal validity?

3. What conclusions would you draw from Burke's historical overview?

Lauterpacht and the UDHR

Understandings of the Universal Declaration have inevitably changed over time. Appreciation of earlier ideas at the start of the human rights regime illuminates its general evolution as well as suggests how perceptions of it and, more broadly, international law have developed over 75 years. There follow some excerpts from an influential book by a preeminent scholar of international law of his generation, Hersch Lauterpacht. At the time of the book's publication, the Declaration was two years old and untested as to its character and significance. His comments on the place of natural law in this context remain pertinent.⁶²

HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950) 61

Chapter 4: The Subjects of the Law of Nations, the Function of International Law, and the Rights of Man

...

What have been the reasons which have prompted the changes in the matter of subjects of international law, with regard both to international rights and to international duties? These causes have been numerous and manifold. They have included, with reference to the recognition of the individual as a subject of international rights, the acknowledgment of the worth of human personality as the ultimate unit of all law; the realisation of the dangers besetting international peace as the result of the denial of fundamental human rights; and the increased attention paid to those already substantial developments in international law in which, notwithstanding the traditional dogma, the individual is in fact treated as a subject of international rights. Similarly, in the sphere of international duties there has been an enhanced realisation of the fact that the direct subjection of the individual to the rule of international law is an essential condition of the strengthening of the ethical basis of international law and of its effectiveness in a period of history in which the destructive potentialities of science and the power of the machinery of the State threaten the very existence of civilised life.

Above all, with regard to both international rights and international duties the decisive factor has been the change in the character and the function of modern international law. The international law of the past was to a large extent of a formal character. It was concerned mainly with the delimitation of the jurisdiction of States.... In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case

...

... [I]t is in relation to State sovereignty that the question of subjects of international law has assumed a special significance. Critics of the traditional theory have treated it as an emanation of the doctrine of sovereignty. In their view it is State sovereignty — absolute, petty, and overbearing — which rejects, as incompatible with the dignity of States, the idea of individuals as units of that international order which they have monopolised and thwarted in its growth. It is the sovereign State, with its claim to

⁶² See generally T. Angier, I. Benson and M. Retter (eds.), *The Cambridge Handbook of Natural Law and Human Rights* (2022).

exclusive allegiance and its pretensions to exclusive usefulness that interposes itself as an impenetrable barrier between the individual and the greater society of all humanity....

...

... [T]he recognition of the individual, by dint of the acknowledgment of his fundamental rights and freedoms, as the ultimate subject of international law, is a challenge to the doctrine which in reserving that quality exclusively to the State tends to a personification of the State as a being distinct from the individuals who compose it, with all that such personification implies. That recognition brings to mind the fact that, in the international as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise the collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts....

... International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State.... [T]he recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that vital extent they both signify the recognition of a higher, fundamental law not only on the part of States but also, through international law, on the part of the organized international community itself. That fundamental law, as expressed in the acknowledgment of the ultimate reality and the independent status of the individual, constitutes both the moral limit and the justification of the international legal order....

Chapter 5: The Idea of Natural Rights in Legal and Political Thought

...

... The law of nature and natural rights can never be a true substitute for the positive enactments of the law of the society of States. When so treated they are inefficacious, deceptive and, in the long run, a brake upon progress.... The law of nature, even when conceived as an expression of mere ethical postulates, is an inarticulate but powerful element in the interpretation of existing law. Even after human rights and freedoms have become part of the positive fundamental law of mankind, the ideas of natural law and natural rights which underlie them will constitute that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international..

[Lauterpacht then turns to historical antecedents of 'the notion and the doctrine of natural, inalienable rights of man pre-existent to and higher than the positive law of the State'. He observes that 'ideas of the law of nature date back to antiquity', and briefly describes such ideas and notions of natural right in Greek philosophy and the Greek state, in Roman thought, in the Middle Ages and in the Reformation and the period of Social Contract. Lauterpacht then addresses 'fundamental rights in modern constitutions'.]

In the nineteenth and twentieth centuries the recognition of the fundamental rights of man in the constitutions of States became, in a paraphrase of Article 38 of the Statute of the Permanent Court of International Justice, a general principle of the constitutional law of civilised States. It became part of the law of nearly all European States....

... [T]here is one objection to the notion of natural rights which, far from invalidating the essential idea of natural rights, is nevertheless in a sense unanswerable. It is a criticism which reveals a close and, indeed, inescapable connexion between the idea of fundamental rights on the one hand and the law of nature and the law of nations on the other. That criticism is to the effect that, in the last resort, such rights are subject to the will of the State: that they may — and must — be regulated, modified, and if need be taken away by legislation and, possibly, by judicial interpretation; that, therefore, these rights are in essence a revocable part of the positive law of a sanctity and permanence no higher than the constitution of the State either as enacted or as interpreted by courts and by subsequent legislation....

...

Chapter 17: The Universal Declaration of Human Rights

The Universal Declaration of Human Rights ... has been hailed as an historic event of profound significance and as one of the greatest achievements of the United Nations.... Mrs. Roosevelt, Chairman of the Commission on Human Rights and the principal representative of the United States on the Third Committee, said: 'It [the Declaration] might well become the international Magna Carta of all mankind.... Its proclamation by the General Assembly would be of importance comparable to the 1789 proclamation of the Declaration of the Rights of Man, the proclamation of the rights of man in the Declaration of Independence of the United States of America, and similar declarations made in other countries'....

...
The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. The debates in the General Assembly and in the Third Committee did not reveal any sense of uneasiness on account of the incongruity between the proclamation of the universal character of the human rights forming the subject matter of the Declaration and the rejection of the legal duty to give effect to them. The delegates gloried in the profound significance of the achievement whereby the nations of the world agree as to what are the obvious and inalienable rights of man ... but they declined to acknowledge them as part of the law binding upon their States and Governments....

... [T]he representative of the United States, in the same statement before the General Assembly in which she extolled the virtues of the Declaration, said: 'In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation....'

...
... It is now necessary to consider the view, expressed in various forms, that, somehow, the Declaration may have an indirect legal effect.

In the first instance, it may be said — and has been said — that although the Declaration in itself may not be a legal document involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the 'human rights and fundamental freedoms' which do constitute an obligation, however imperfect, binding upon the Members of the United Nations. It is unlikely that any tribunal or other authority administering international law would accept a suggestion of that kind. To maintain that a document contains an authoritative interpretation of a legally binding instrument is to assert that that former document itself is as legally binding and as important as the instrument which it is supposed to interpret....

... [T]here would seem to be no substance in the view that the provisions of the Declaration may somehow be of importance for the interpretation of the Charter as a formulation, in this field, of the 'general principles of law recognized by civilised nations'. The Declaration does not purport to embody what civilized nations generally recognize as law.... The Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by States Members of the United Nations....

...
Undoubtedly the Declaration will occasionally be invoked by private and official bodies, including the organs of the United Nations. But it will not — and cannot — properly be invoked as a source of legal obligation....

Not being a legal instrument, the Declaration would appear to be outside international law. Its provisions cannot form the subject matter of legal interpretation. There is little meaning in attempting to elucidate, by reference to accepted canons of construction and to preparatory work, the extent of an obligation which is binding only in the sphere of conscience....

The fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance. It is possible that, if divested of any pretence to legal authority, it may yet prove, by dint of a clear realisation of that very fact, a significant landmark in the evolution of a vital part of international law

...

The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of the sacrifice of the sovereignty of States which it involves. Thus conceived, the fundamental issue in relation to the moral authority of the Declaration can be simply stated: That authority is a function of the degree to which States commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own

Its moral force cannot rest on the fact of its universality — or practical universality — as soon as it is realised that it has proved acceptable to all for the reason that it imposes obligations upon none. ...

... [C]ompare the Declaration of 1948 with that of [the French Declaration of] 1789 and similar constitutional pronouncements. These may not have been endowed, from the very inception, with all the remedies of judicial review and the formal apparatus of enforcement. But they became, from the outset, part of national law and an instrument of national action. They were not a mere philosophical pronouncement.... One of the governing principles of the Declaration — a principle which was repeatedly affirmed and which is a juridical heresy — is that it should proclaim rights of individuals while scrupulously refraining from laying down the duties of States. To do otherwise, it was asserted, would constitute the Declaration a legal instrument. But there are, in these matters, no rights of the individual except as a counterpart and a product of the duties of the State. There are no rights unless accompanied by remedies. That correlation is not only an inescapable principle of juridical logic. Its absence connotes a fundamental and decisive ethical flaw in the structure and conception of the Declaration.⁶³

...

* * *

Impact of the UDHR

The UDHR features prominently throughout this book. Note different reactions to its impact. Samuel Moyn has described it variously as ‘a funeral wreath laid on the grave of wartime hopes’, ‘death by birth’, and ‘a stillborn project’.⁶⁴ Christopher N. J. Roberts, in *The Contentious History of the International Bill of Human Rights* (2014) 225, calls the UDHR an ‘incredible achievement’ but traces the ways in which states like the United States and the United Kingdom fought successfully to circumvent its impact. In the former, those who ‘opposed the new social order implied by human rights renewed the rights and duties of the ... states vis-à-vis the federal government; they updated the obligations and privileges of US sovereignty in the face of a new communist enemy; they defended the prerogatives of racial supremacy amidst “forced integration from abroad”; and they reasserted the rights and duties associated with a free market.’

Based on an extensive empirical analysis, Zachary Elkins and Tom Ginsburg, in ‘Imagining a World Without the Universal Declaration of Human Rights’, 74 *World Politics* (2022) 327 discern a major impact:

... How would the world’s constitutions look if the UDHR had never been declared? Our conclusion is that subsequent national constitutions— the principal legal device for enforcing rights—would be much different: they would

⁶³ For a survey of the many ways of conceptualizing the role of the individual in international law today, see generally T. Sparks and A. Peters (eds.), *The Individual in International Law: History and Theory* (2024). For a critical perspective see, in that volume, B. S. Chimni, ‘The Status of the Individual in International Law: A TWAAIL Perspective’, p. 231 at 248:

The focus of any assessment of whether an individual is a subject of international law should not merely be on the atomistic individual or legal materials but on internal and global social relations as these impose structural constraints on realising the goal of human dignity.

⁶⁴ Quoted in S. Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (2016) 20-21.

likely include fewer rights, a smaller core of consensual rights, and, outside the core, a different cast of elective rights. It could also be that the societies governed by these rights are today very different places to live because of the rights. ...

...

... Writing down a set of universal rights and then grandly proclaiming them through the auspices of the United Nations, the newly created arbiter of the world order, has had strong globalizing effects. The fabric of human rights law in most countries is noticeably different from what it would have been. But this isn't to say that the UDHR was an exogenous force. Quite the contrary. We find that the UDHR clearly represented the values and trends of a new, modern world clambering over the wreckage of a human rights catastrophe. In this sense, the UDHR importantly reinforced and accelerated the uptake of these values. In other words, the document was both a reflection of its times and highly formative of what was to come. ...

B. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Relationship between the UDHR and the ICCPR

You should now become familiar with the substantive part (Arts. 1–27) of the International Covenant on Civil and Political Rights. The comparisons below between the UDHR and the ICCPR assume that familiarity. One basic similarity informs all of the following discussion; each instrument aspires to universality. The UDHR was supported by the great majority of states of its time; the ICCPR now includes the great majority of the world's states. This section's examination of the ICCPR is brief; Chapter 9 examines the Covenant more intensively through the work of the treaty body that it creates, the Human Rights Committee.

Under international law, approval by the General Assembly of a declaration like the UDHR has a different consequence from a treaty that has become effective through the required number of ratifications. Of course the declaration will have solemn effects as the formal act of a deliberative body of global importance. Its subject matter, like that of the UDHR, may be of the greatest significance. But when approved or adopted, it is hortatory and aspirational, recommendatory rather than, in a formal sense, binding.

The Covenant, on the other hand, binds the states parties in accordance with its terms and with international law, subject to such formal matters as reservations and the kinds of exceptional circumstances described in the examination of treaties, above. Of course, this statement of international law doctrine and its basic postulate, *pacta sunt servanda* (agreements must be kept), does not end discussion. The content of important provisions of a treaty may long remain in dispute among the states' parties. Differences over interpretation will likely arise; some states will disagree with others as to what even basic provisions of the Covenant (such as, in the case of the ICCPR, the 'right to life') mean and require. What indeed is the 'commitment'? Absent a consensus over meaning, which state party or international institution can provide an interpretation that most parties will view as authoritative and decisive? Even if there is a widespread consensus, one must confront the question of whether states will honour this 'binding' commitment and, if not, whether the UN or some member states will apply pressure against violators sufficient to persuade them to comply. Does or should the probability of enforcement against violators have any bearing on the legally binding character of an international agreement?

In the case of the UDHR, the years have further blurred the threshold contrast between ‘binding’ and ‘hortatory’ instruments. The countless references to and invocations of the Declaration as the fountainhead or constitution or grand statement of the human rights regime has affected how it is viewed — perhaps as shy of ‘binding’, but somehow relevant to norm formation and influential with respect to state behaviour as so-called ‘soft law’ (see Ch. 5, below). Moreover, broadly supported arguments have developed for viewing all or parts of this Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter.

1. A resolution of the General Assembly (such as that approving the Universal Declaration) with the formal status of a recommendation will not generally seek to create an international institution with defined membership, structure and powers. Neither can customary international law. A treaty can and often does. The Charter creates numerous organs, some organically part of the UN and some distinct from but related to it. The ICCPR creates an ongoing institution, a so-called ‘treaty body’: the Human Rights Committee. That organ gives institutional support to the Covenant’s norms, for the Covenant imposes on states parties formal obligations (such as the submission of periodic reports) to the Committee. This Committee is charged with the performance of the tasks defined both in the Covenant (174 states parties as of 2025) and in its Optional Protocol (116 parties).
2. Both the UDHR and ICCPR are terse about their derivations or foundations in moral and political thought. Such statements as are made that have the character of foundational assumptions, justifications or explanations appear in the preambles (with a few exceptions such as Article 21 of the UDHR and Article 25 of the ICCPR). But clearly these instruments differ radically from, say, a tax treaty that expresses a compromise and temporary convergence of interests among its states parties. They speak to matters deep, lasting, purportedly universal. What then are the intuitions that shape them, their sources in intellectual history or moral or religious thought, the important guides to their interpretation and evolution?
3. Many rights declared in the Covenant closely resemble the provisions of the Universal Declaration, although they are stated in considerably greater detail. Compare, for example, the requirements for criminal trials in Articles 10 and 11 of the Declaration with the analogous provisions in Articles 14 and 15 of the Covenant.
4. *Individual* rights characterize these instruments. Group or collective rights — that is, rights that pertain to and are exercised by the collectivity as such, perhaps by vote but more likely through representatives — are rare. In a few cases, they are either asserted or hinted at in the Covenant, most directly in Articles 1 (on self-determination of peoples) and 27 (on survival of cultures). The Universal Declaration lacks such provisions. Both the UDHR and the ICCPR refer to the family as the ‘natural and fundamental group unit of society’. On the other hand, it should be kept in mind that rights cast in terms of the individual, such as the right to equal protection or the right to practice one’s religion or participate in associations, have an inherent group character, either in the sense that the identity at issue in denials of equal protection is a group identity (race, ethnicity, gender, religion) or in the sense that the right is generally practised in community with others (as suggested by ICCPR Art. 27).
5. In both instruments the idea of *rights* dominates with respect to individuals. Duties characteristically attach to the state. Article 29(1) of the Declaration does provide that everyone ‘has duties to the community in which alone the free and full development of his personality is possible’. The Covenant contains no article referring to individuals’ *duties*, though its Preamble has such a clause.
6. Article 17 of the Declaration on the ‘right to own property’ and protection against arbitrary deprivation thereof does not figure among the rights declared in the Covenant. Ideological disputes between East and West, and disputes between the West and the South over the nationalization of industries and other resources made agreement on a consensus formulation impossible.

7. The UDHR goes little beyond declaring that everyone has the ‘right to an effective remedy by the competent national tribunals’ for violations of fundamental rights (Art. 8). The remedial structure of the ICCPR reaches much further. In Article 2, states parties agree to ‘ensure’ to all persons within their territory the rights recognized by the Covenant, and to adopt such legislative or other measures as may be necessary to achieve that goal. Moreover, the parties undertake to ‘ensure’ that any person whose rights are violated ‘shall have an effective remedy’, and that ‘the competent authorities shall enforce such remedies when granted’. They undertake in particular ‘to develop the possibilities of judicial remedy’.
8. Two types of provisions in the ICCPR limit states’ obligations thereunder:
 - a. Under closely stated conditions and limits, Article 4 dealing with a public emergency (‘which threatens the life of the nation and the existence of which is officially proclaimed’) permits a *derogation*, in the sense of a temporary adjustment to or suspension of the operation of some of the rights declared by the Covenant. Thus states may consciously, purposively depart from such rights as those in Article 9 relating to arrest and detention. Note that under Article 4(2) certain rights are non-derogable. This issue of derogation becomes a major concern in Chapter 5, which deals with national security issues.
 - b. Several articles include *limitation clauses* — that is, provisions indicating that a given right is not absolute but may be adapted to take account of a state’s need to protect public safety, order, health or morals, or national security. See, for example, Articles 18 and 19. In Articles 21 and 22, the limitation clause is phrased in terms of permitting those restrictions on a right ‘which are necessary in a democratic society’. Compare the broad provision of Article 29(2) of the UDHR, which is not linked to a specific right. Note that the limitation clauses may overlap with but are not identical with the common problem of resolving conflicts between *rights* (such as rights to speech and to privacy, as accommodated in the law of defamation) that also may lead to a ‘limitation’, in this case of one right to give space to the other.
9. Article 5 of the UDHR bans ‘cruel, inhuman or degrading’ punishment, but that instrument does not refer to capital punishment as such. See Article 6(2) of the ICCPR. The Second Optional Protocol to the ICCPR, aiming at abolition of the death penalty, had 92 states parties as of 2025. Article 1 provides that ‘No one within the jurisdiction of a State Party to the present Protocol shall be executed Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction’. Recall the discussion about measures affecting capital punishment in Chapter 1.

One can organize or classify the rights declared in the Declaration and Covenant in various ways, depending on the purpose of the typology. Consider the adequacy of the following scheme that embraces most of the Covenant’s rights, although it excludes such distinctive provisions as ICCPR Article 1 on the self-determination of peoples and Article 27 on the enjoyment by minorities of their own cultures:

- a) protection of the individual’s physical integrity, as in provisions on torture, arbitrary arrest and arbitrary deprivation of life;
- b) procedural fairness when government deprives an individual of liberty, as in provisions on arrest, trial procedure and conditions of imprisonment;
- c) equal protection norms defined in racial, religious, gender and other terms;
- d) freedoms of belief, speech and association, such as provisions on political advocacy, the practice of religion, press freedom, and the right to hold an assembly and form associations; and
- e) the right to political participation.

These five categories of rights can be imagined as on a spectrum. At one extreme lie killing or torture over which there exists a broad formal-verbal consensus among states (whatever the degree of ongoing violation of the relevant rights by many states). At the other extreme lie rights whose purposes, basic meanings and even validity are formally disputed. For example, few if any states (even those that practise it) formally justify torture (see below). A good number of states, however, may justify some form of religious or gender discrimination stemming from religious belief or customary practices, and argue that such practices should be viewed as consistent with the goals of the human rights regime — perhaps because (the argument goes) in such circumstances, equal protection rights should not be viewed as ‘universal’ so as to bind local cultures or practices or traditions that differ. Or states that reject the core practices of political democracy may justify different forms of political organization ranging from hereditary or elite (say, ‘vanguard’) leadership to a theocracy.

Among the intergovernmental organs or institutions referred to in this Chapter, some such as the UN Human Rights Council are mandated by the UN Charter, others such as the Human Rights Committee by distinct treaties (in this case, the ICCPR). As a matter of convenience, the first set is often referred to as ‘Charter-based’ organs/institutions, and the second set as ‘treaty-based’ organs/institutions or ‘treaty bodies’ (i.e., treaties other than the Charter).

But the human rights treaties adopted since the Charter are distinct from it only up to a point. Thus, the ICCPR and other human rights treaties noted all grew within the UN, from the time that they were first drafted in an organ like the UN Commission on Human Rights (now the Human Rights Council) to their final approval by the General Assembly and submission to states for ratification. Typically for such treaties, the ICCPR provides for a number of ongoing links to the UN. Article 45 indicates that the Annual Report of the ICCPR Committee should be submitted to the General Assembly. Note also the provisions for amendment of the ICCPR in Article 51. Moreover, each of these separate treaty regimes like the ICCPR depends for funding on the regular biennial budget adopted by the General Assembly.

QUESTIONS

1. Relying only on the preambles and texts of the UDHR and the ICCPR, how would you identify the reasons for those instruments, their justifications in moral and political thought, the moral and political traditions from which they derive? Why do you suppose there was such a sparse statement of reasons or justifications in these instruments?
 2. Do you see in either of these instruments any departure from ‘universal’ premises, rights and related obligations of states? That is, are there concessions in any provisions to different cultures or regions that would allow those cultures or regions to privilege their own practices and traditions rather than follow these instruments’ rules — for example, by inflicting certain severe modes of criminal punishment, or governing by theocracy or inherited rule, or imposing restrictions on minority religions or on activities of women?
 3. Article 2 of the ICCPR includes states’ undertakings ‘to respect and to ensure to all individuals’ the recognized rights. States parties must ‘ensure’ that persons whose rights are violated have an ‘effective remedy’. Competent authorities ‘shall enforce such remedies when granted’.
- (a) Is it accurate to say that rights are borne by individuals, and duties are borne only by states since the ICCPR is concerned only with state violations? Who may violate, say, your right to bodily security? Who may violate your right to political participation under Article 25, or your right to procedural due process under Article 14?
 - (b) Is it accurate to say that the duties of the state are entirely ‘negative’, in the sense of requiring no more than that the state generally keep its ‘hands off’ individuals, and refrains

from certain conduct such as torture, discrimination, or repression of hostile (to it) political opinion? Is it accurate to say that fulfilment by the state of its duties would then be cost-free?

Indivisibility and *Jus Cogens*

The 1993 Vienna World Conference on Human Rights famously proclaimed that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

This is referred to as the indivisibility or non-subordination doctrine. The following readings explore this issue of equality or hierarchy, with Eric Heinze arguing that free speech is ‘the most human right’, and Theodor Meron pointing to the pitfalls of any such hierarchical ordering. The readings then introduce the separate, but closely related, concept of *jus cogens*, or peremptory norms of international law.

Eric Heinze begins his book, *The Most Human Right: Why Free Speech is Everything* (2022) by asking ‘[w]hat distinguishes human rights as a system of justice?’. His answer is that:

... [T]he only thing that can turn government-managed human goods into citizen-directed human rights is free speech. In order for a human rights system to come into being, free speech cannot count as just another right on the Universal Declaration’s checklist. Free speech within a safe and robust public sphere furnishes a necessary prior condition for the existence of human rights
... .

... Some would argue that all or most of the rights set forth in the Universal Declaration cannot be secure without all or most of the others, so no one right can be said to found all the others. They accept that free speech is as important as those other goods, but reject any suggestion that it is more important. Yet my point will not be that free speech is more “important” than life, protections from torture, fair trials, availability of food and water, and other goods. ... My aim is not to rank human goods, but only to ask ... what turns human goods into human rights?

...

Free speech within the public sphere is the only thing that can render human rights different from other models of justice.

...

Conclusion

...

...[T]he official policy remains that of “indivisibility,” or at least “nonsubordination,” whereby no one right is deemed to be more important than any others. That principle would pose no problems if all rights were cost free, but ... all rights presuppose considerable costs if they are to be reliably implemented.

Yet given that all states operate under financial constraints, non-subordination becomes financially impossible. Indeed, the opposite policy becomes compulsory: a policy of tradeoffs, which we find everywhere practiced but

nowhere formally acknowledged, as the myth of non-subordination continues to be upheld. ...

...

...Free speech within a safe and robust public sphere stands as the ultimate recourse for individuals who, rightly or wrongly, believe their rights have been violated or neglected. Only within that sphere of public discourse can state-managed human goods become objects of citizen-directed human rights. ...

Compare Heinze's approach with that of Theodor Meron, 'On a Hierarchy of International Human Rights', 80 *Am. J. Int'l. L.* (1986) 1, at 21:

... Hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights. Historically, the notions of 'basic rights of the human person' and 'fundamental rights' have helped establish the *erga omnes* principle, which is so crucial to ensuring respect for human rights. Eventually, they may contribute to the crystallization of some rights, through custom or treaties, into hierarchically superior norms, as in the more developed national legal systems.

Yet the balance of pros and cons does not necessarily weigh clearly on the side of the pros. Resort to hierarchical terms has not been matched by careful consideration of their legal significance. Few criteria for distinguishing between ordinary rights and higher rights have been agreed upon. There is no accepted system by which higher rights can be identified and their content determined. Nor are the consequences of the distinction between higher and ordinary rights clear. Rights not accorded quality labels, i.e., the majority of human rights, are relegated to inferior, second-class, status. Moreover, rather than grapple with the harder questions of rationalizing human rights lawmaking and distinguishing between rights and claims, some commentators are resorting increasingly to superior rights in the hope that no state will dare — politically, morally and perhaps even legally — to ignore them. In these ways, hierarchical terms contribute to the unnecessary mystification of human rights, rather than to their greater clarity.

Caution should therefore be exercised in resorting to a hierarchical terminology. Too liberal an invocation of superior rights such as 'fundamental rights' and 'basic rights,' as well as *jus cogens*, may adversely affect the credibility of human rights as a legal discipline.

Some international lawyers have long advocated the notion of a hierarchy of norms with *jus cogens* (Latin for 'compelling norms') at the apex. For most commentators, these peremptory norms build upon custom, while for others they represent transcendent values, perhaps closer to natural law. They have featured prominently in recent years in international legal discourse, but their real-world impact is contested. The sources of international law are not ranked hierarchically, so there is no equivalent of constitutional norms at the domestic level. Nonetheless, arguments have long been made that certain rules should enjoy a superior status. The 1969 Vienna Convention on the Law of Treaties (VCLT) brought a breakthrough in this regard by recognizing a 'peremptory norm of general international law', or a norm of *jus cogens*, defined as one 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (Art. 53). Although the same article provided that 'a treaty is void if, at the time of its conclusion, it conflicts with' such a peremptory norm, the VCLT included no list of *jus cogens* norms and specified no procedure for identifying them.

Robert Kolb, in *Peremptory International Law – Jus Cogens: A General Inventory* (2015) observes that 'there is a greater amount of uncertainty in the context of *jus cogens* than in almost any other cardinal concept

of the legal order – with the exception, perhaps, of sovereignty.’ He is critical of ‘mainstream’ definitions which see *jus cogens* as ‘a sort of new constitutional legal order of the international community, or as a series of substantive norms of international law of fundamental importance to the collectivity.’ In his view it should not be understood as ‘a class of norms of international law with specific qualities, such as being “superior” in a hierarchy or centred on concerns of the international community.’ Rather than being ‘a series of substantive norms ... it is a quality of certain legal norms, a quality engrafted upon them in order not to allow the operation of the *lex specialis* principle in respect of them.’ They thus prevail, even over norms that would otherwise be privileged under the *lex specialis* rule, according to which more specific rules will prevail over more general rules.

Proponents often seek to endow these ‘highly cherished’ rules ‘with an unlimited number of miraculous legal consequences in the form of super-norms’. But Kolb warns in conclusion that States ‘must be able to live in peace with the concept and its ramifications.’ This means that ‘if the notion is pushed too far, it will backfire. The danger of a “do-gooder” *jus cogens* is that it may discredit the concept entirely and allow power politics to exact an all too easy revenge.’

Compare this cautionary approach with that of Antonio Cassese in ‘A Plea for a Global Community Grounded in the Core of Human Rights’, in *ibid.* (ed.), *Realizing Utopia: The Future of International Law* (2012) 137:

We should first of all draw a distinction between (i) a core of fundamental values which must be common to all nations, states, and individuals and may not, therefore, be derogated from and (ii) other values, the application of which may need to take into account national conditions. The fundamental values of the world society are those enshrined in that core of rules that constitute the international *jus cogens* ...

...

With this [evolution of thinking after the late 1960s] came a clear understanding that *jus cogens* rules included norms concerning human rights: those banning genocide, slavery, racial discrimination, and forcible denial of self-determination. Over the years national or international bodies have suggested that other international rules also enjoy the status of peremptory norms: the ban on torture, the prohibition of the slave trade, the right to life, the right of access to justice, the right of any person arrested or detained to be brought promptly before a judge (the so-called habeas corpus right), the ban on *refoulement* (refusal of entry of refugees at the frontier), the prohibition of collective penalties, and the principle of personal responsibility in criminal matters. I would also add the right to a fair trial. Other norms are likely gradually to rise to the level of *jus cogens* through a process of accretion. This normative process unfolds through judicial decisions (be they national or international), pronouncements by collective bodies such as the UN General Assembly, and declarations of states and other international legal subjects. ...

... [P]eremptory norms ... can be considered as those which have universal scope and bearing. They must be obeyed by all nations, states, and individuals of the planet. Other values, consecrated instead in international rules deprived of the nature of *jus cogens*, although still important, can be restrained in their incidence and scope by individual states, or adjusted to some extent to national conditions — as long as, however, such interpretation or adjustment does not appear to be absolutely arbitrary or unwarranted to other states or the relevant international bodies.

The existence of two different sets of values and corresponding international norms can make allowance for the coexistence of a core of indispensable and absolute values and a set of other, less imperative values. The gradual expansion

over time of the first group of norms might eventually lead in the future to the formation of a global community where all the basic norms on human rights must be equally respected by everyone in any part of the planet.

Scholars have long differed on the foundations of these norms. Bruno Simma, writing before he became a judge of the ICJ, endorsed the view expressed by Serge Sur that, rather than being a ‘strengthened form of custom’, *jus cogens* norms emerge from ‘an autonomous, original mode of formation, which perhaps does not form part of practice’. In his view, ‘once recognition by the “international community as a whole” can be established, the question from which formal source rules of peremptory law can flow is more or less irrelevant. Persistent objection is to be regarded as inadmissible ...’. The ‘peremptory quality’ of the norms results from ‘the universal recognition that these rules consecrate values which are not at the disposal of individual States (any more).’

Antonio Cassese, at p. 165, argued that ‘no consistent practice of states and other international legal subjects (*usus*) is necessary’. Dinah Shelton in *Jus Cogens* (2021) predicts that environmental, territorial and other challenges are likely to generate new claims of *jus cogens* norms and observes that many will feel that the ‘international community cannot afford a consensual regime’ in order to address such problems.

In 2002, the U.S. Supreme Court held that an undocumented Mexican migrant worker was not permitted to receive back pay owed to him after being laid off for union-organizing activities, because he was present and working in the U.S. illegally (*Hoffman Plastic Compounds v. National Relations Labor Board*, 535 US 137 (2002)). With 6 million Mexicans working outside the country, some 2.5 million of whom were undocumented and most working in the U.S., the Mexican Government turned to the Inter-American Court of Human Rights. Because the U.S. is not a party to the American Convention, no case could be brought against it, but Mexico was entitled to seek an advisory opinion. It asked the court whether depriving migrant workers of certain labour rights was compatible with the Organization of American States (OAS) Member States’ obligation ‘to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law’ as embodied in international human rights instruments. The Advisory Opinion squarely addressed the *jus cogens* dimension of the issue:⁶⁵

101. [T]his Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. ...

In strong contrast, Alain Pellet and Daniel Müller, in ‘Article 38’, in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2019) 819, at 936 argue that ‘[j]us cogens is not a ‘new’ category of formal sources of international law. It describes a particular quality of certain norms, usually of a customary nature, the existence of which is proven by an ‘intensified *opinio juris*’ which has to be established by following the same method as that relevant for demonstrating the existence of an ‘ordinary’ customary rule.’ The fact that these norms are peremptory ‘does not contradict the principle that the various sources of international law are not in a hierarchical position with regard to one another—but rather means that some norms, parts of a still rudimentary international public order, are, intrinsically, because of their content, superior to all others (whatever their source).’ They also note that the ICJ has only rarely recognized the existence of such norms and even more rarely ‘drawn consequences from them’.

⁶⁵ Inter-American Court of Human Rights Advisory Opinion OC-18/03 of September 17, 2003.

In 1993, Hilary Charlesworth and Christine Chinkin in 'The Gender of *Jus cogens*', 15 *Hum. Rts Q.* (1993) 63, at 74, criticized *jus cogens* norms as being highly gendered:

Fundamental norms designed to protect individuals should be truly universal in application as well as rhetoric, and operate to protect both men women from those harms they are in fact most likely to suffer. They should be genuine human rights, not male rights. The very human rights principles that are most frequently designated as *jus cogens* do not in fact operate equally upon men and women. They are gendered and not therefore of universal validity. Further, the choices that are typically made of the relevant norms and the interpretation of what harms they are designed to prevent reflect male choices which frequently bear no relevance to women's lives. On the other hand, the violations that women do most need guarantees against do not receive this same protection or symbolic labelling. The priorities asserted are male-oriented and are given a masculine interpretation. Taking women's experiences into account in the development of *jus cogens* norms will require a fundamental rethinking of every aspect.

Earlier in the analysis, they had addressed the question of what a feminist jurisprudence of *jus cogens* could look like:

... [One aspect] is to challenge the gendered dichotomy between public and private worlds and to reshape doctrines based on it. For example, existing human rights law can be redefined to transcend the distinction between public and private spheres and truly take into account women's lives as well as men's. Considerations of gender should be fundamental to an analysis of international human rights law.

Feminist rethinking of *jus cogens* would also give prominence to a range of other human rights; the right to sexual equality, to food, to reproductive freedom, to be free from fear of violence and oppression, and to peace. ... [There is a] dissonance between women's experiences and international legal principles generally. In the particular context of the concept of *jus cogens*, which has an explicitly promotional and aspirational character, it should be possible for even traditional international legal theory to accommodate rights that are fundamental to the existence and dignity of half the world's population. ...

...

In 2022, after seven years of debate, the International Law Commission adopted a set of draft conclusions on *jus cogens* (UN Doc. A//77/10):

Conclusion 2 ...

[A *jus cogens* norm is one] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Conclusion 3 ...

[*Jus cogens* norms] reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

...

Conclusion 5 ...

1. Customary international law is the most common basis for [*jus cogens*].
2. Treaty provisions and general principles of law may also serve as bases ...

...

Conclusion 7 ...

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of [*jus cogens*].
2. Acceptance and recognition by a very large majority of States is required ...; acceptance and recognition by all States is not required.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

Conclusion 8 ...

1. Evidence of acceptance and recognition [of *jus cogens* norms] may take a wide range of forms.
2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

...

Conclusion 23...

Without prejudice to the existence or subsequent emergence of other peremptory norms ..., a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

- (a) The prohibition of aggression;
- (b) The prohibition of genocide;
- (c) The prohibition of crimes against humanity;
- (d) The basic rules of international humanitarian law;
- (e) The prohibition of racial discrimination and apartheid;
- (f) The prohibition of slavery;
- (g) The prohibition of torture;
- (h) The right of self-determination.

QUESTIONS

1. Cassese divides human rights into two categories: fundamental and intransgressible; and flexible and contingent. What are the arguments for and against such an approach?
2. Does the ILC draft give a clear indication as to the normative foundations of *jus cogens*? Compare Conclusions 2 and 3.
3. In the 80 pages of the ILC's 2022 final report on *jus cogens*, there is not a single reference to the words 'women' or 'gender', although there are two footnote references to the article by Charlesworth and Chinkin. What factors might account for this omission?

Withdrawal from the ICCPR

The issue arose in the 1990s of a state party's right to withdraw from the ICCPR which, unlike many treaties, has no provision about termination of obligations. The Human Rights Committee issued its General Comment No. 26 (1997) on this question. Excerpts follow:

1. ... [T]he possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. . . .
- ...
3. ... [I]t is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the 'International Bill of Human Rights'. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.
4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view ... that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession. ...
5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it. ...

C. WOMEN'S RIGHTS AND CEDAW

The study of women's rights illustrates the trajectory, ambition, breadth and complexity of the human rights regime.⁶⁶ We see a proliferation of instruments and institutions, but also growing conflicts about premises and goals within the women's movement itself. The feminist literature relevant to human rights assumptions, goals and strategies has moved adventurously in many directions, sometimes polar directions; its engagement with the human rights regime has enriched and deepened thought about the entire project. The complexity and different currents of advocacy and criticism, idealism and scepticism, views of sexuality and gender, and indeed views of equality are captured in the different

⁶⁶ R. Cook (ed.), *Frontiers of Gender Equality: Transnational Legal Perspectives* (2023).

responses to an innovative and ambitious treaty adopted in 1979, the Convention on the Elimination of All Forms of Discrimination against Women, known as CEDAW (189 states parties as of 2025). Only seven UN Member States have failed to ratify the treaty: Iran, Palau, Somalia, Sudan, Tonga, the Holy See, and the United States.⁶⁷

Of the several blind spots in the early development of the human rights regime, none is as striking as the failure to accord violations of women's (human) rights the attention they require. It is not only that these problems adversely affect half of the world's population. They affect everyone, for a deep change in women's circumstances and possibilities produces change throughout social, economic and political life.

The materials in this section suggest the complexly interwoven socio-economic, legal, political and cultural strands to the problem of women's subordination and the content of women's rights. Although a systematic study of economic and social rights must await Chapter 4, this section demonstrates in many ways the interrelationships and functional interdependence of civil and political rights (CPR) and economic and social rights (ESR). CEDAW's title uses a classic CPR lens — discrimination — but the content of its rights and the work of its Committee range much more broadly. Moreover, when one focuses specifically on what are often presented as 'women's issues,' links with other aspects of social order and disorder appear pervasive and the inter-relationship of all issues is apparent.

1. Background to Women's Rights

In 1991, Hilary Charlesworth, Christine Chinkin and Shelley Wright published a path-breaking analysis entitled 'Feminist Approaches to International Law', 85 *Am. J. Int'l L.* (1991) 613. They argued that 'international legal structures and principles ... are more accurately described as international men's law':

Modern international law is not only androcentric, but also Euro-centered in its origins, and has assimilated many assumptions about law and the place of law in society from western legal thinking. These include essentially patriarchal legal institutions, the assumption that law is objective, gender neutral and universally applicable, and the societal division into public and private spheres, which relegates many matters of concern to women to the private area regarded as inappropriate for legal regulation. ...

... A feminist transformation of international law would involve more than simply refining or reforming existing law. It could lead to the creation of international regimes that focus on structural abuse and the revision of our notions of state responsibility. It could also lead to a challenge to the centrality of the state in international law and to the traditional sources of international law.

Charlesworth and Chinkin elaborated on their critique in *The Boundaries of International Law* (2000). Their central argument was 'that the absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has ... legitimated the unequal position of women around the world rather than challenged it.' They criticized the neglect of women's rights by mainstream human rights institutions, the ineffective implementation of women's rights, the negative impact of many reservations to CEDAW, the neglect of underlying structures and power relations in 'equal treatment' approaches, the lack of scrutiny given to the human rights consequences of actions by corporate and religious actors, and the disappointing results of gender mainstreaming. In the second edition of their book in 2022, Charlesworth and Chinkin look back at their earlier work and note their assumption that 'once the gendered nature of the international legal system was exposed, change would

⁶⁷ In relation to the United States, see R. de Silva de Alwis and M. Verveer, "'Time Is a-Wasting': Making the Case for CEDAW Ratification by the United States", 60 *Colum. J. Transnat'l L.* (2021) 1; and A. Comstock, 'Signing CEDAW and Women's Rights: Human Rights Treaty Signature and Legal Mobilization', 48 *Law and Soc. Inquiry* (2023) 1.

follow. 'Twenty years later, we see that apparent progress can be quickly unraveled and today the boundaries of international law remain largely unchanged.'

The same conclusion was reached by the World Economic Forum in its *Global Gender Gap Report 2022*, which noted that 'progress towards gender parity is stalling', and that this is 'a catastrophe for the future of our economies, societies and communities.' The 2025 version of the report indicated very gradual progress but estimated that, at the current rate of progress, it will take 123 years to reach full parity. While 'health and survival' and 'educational attainment' rates were around 95-96% parity globally, the rate for 'economic participation and opportunity' was 61% and for 'political empowerment' it is 22.9%.

The following materials suggest the complex relationships among diverse phenomena that bear on women's rights. Several themes recur in the readings.

- 1) Legal norms capture and reinforce deep cultural norms and community practices. They entrench ideas and help give them the sense of being natural, part of the inevitable order of things.
- 2) Reformers and advocates of deep legal and cultural transformation insist that change is possible, so that what was seen as natural or inevitable comes to be understood as socially constructed and thus contingent, open to change.
- 3) Property rights and economic dependence interact with patterns of authority within family and workplace, and with vital issues like education, health, and political participation.
- 4) Major economic and political programmes, particularly those linked to neoliberalism, such as austerity, deregulation, privatization, or tax-cutting, may impose particular and severe costs on women that are not acknowledged or immediately apparent.
- 5) The statistics and indexes created by bureaucracies or scholars structure and confine the imagination. They are often viewed as objective data, without awareness of the disputable methods and categories that determine their formulation. What they record, as well as what they do not record, influences policies as well as perceptions.

The status of women within the international human rights regime and the task of ensuring human rights for women are incomprehensible without taking into account the social and economic conditions that characterize women's lives around the world.⁶⁸ Later readings underscore the degree to which rights abuses are strongly correlated to women's slight social and economic power, and hence their limited political power. Those most vulnerable to human rights abuses often lack the favour or protection of the state, as well as the power within their communities to protect and further their basic needs and interests.

According to virtually every indicator of social well-being and status — political participation, legal capacity, access to economic resources and employment, wage differentials, levels of education and health care — women fare significantly and sometimes dramatically worse than men. The following materials reflect some of these dimensions.

A 1991 report by Guatemala to the CEDAW Committee opens a window into the status of women in that country and many others at the time.⁶⁹

**INITIAL REPORT OF GUATEMALA TO THE CEDAW COMMITTEE
CEDAW/C/GUA/1-2 (2 APRIL 1991)⁷⁰**

⁶⁸ For an important survey, see R. Cook (ed.), *Frontiers of Gender Equality: Transnational Legal Perspectives* (2023).

⁶⁹ See generally, J. E. Alvarez and J. Bauder, *Women's Property Rights under CEDAW* (2024).

⁷⁰ For an update, see Erin Beck, 'Violence against Women and Specialized Justice in Guatemala: Advances and Limitations', 49 *Law and Social Inquiry* (2024) 822.

...

46. Guatemala is a multi-ethnic, multi-cultural and multilingual country with traditional, cultural patterns that reinforce the subordination of women on the social, cultural, economic and political planes. Extended Guatemalan families in the country and nuclear families in the city are governed by a patriarchal system in which decisions are taken by men (husband, father or eldest son), who are considered the heads of the household, a role assumed by women only in their absence.
47. In Guatemalan society the man is expected to be the breadwinner, the legal representative, the repository of authority; the one who must 'correct' the children, while the mother is relegated to their care and upbringing, to household tasks, and to 'waiting on' or looking after her husband or partner. These roles often have to be performed in addition to engaging in some profitable activity which generates earnings that are always regarded as 'complementary'.
48. For their childhood, little boys and girls are guided towards work considered 'masculine' or 'feminine'; for example, boys play at working outside the home as carpenters, mechanics, farmers or pilots, and in all those jobs that are considered 'tough' or that require physical strength. Girls, on the other hand, are taught to interest themselves in cooking, weaving, sewing, washing, ironing, or cleaning the house and, especially, caring for the children and helping the mother, as a responsibility and duty more than just a game.
49. Care of the children is strictly considered the responsibility of the mother, grandmother, and/or sister ...

...

51. Notwithstanding what has been said, the woman is the chief social agent in the majority of spheres of action. An empirical profile of a Guatemalan woman may cover the following characteristics.
52. She is responsible for family health and hygiene and for the supervision of the formal and informal upbringing of the children in the home; she organizes and maintains living and sanitary conditions and a supply of water for domestic use. ... [S]he is the one in charge of the purchase, preparation, stocking and distribution of food within the home. In addition, she manages the family income ...
53. She takes responsibility for generating additional income or for producing consumer goods when her partner's income does not cover the minimum family requirements.
54. In the case of an irresponsible father, the entire responsibility for the support of the children devolves upon her, reflected in particular by a considerable increase in her hours of work.
55. Her work is poorly paid or not paid at all and is generally of low productivity owing to lack of access to capital.
56. It is falsely assumed that the man is the one who makes the principal economic contributions to the family, for which reason he is the owner and beneficiary of all payments and services.
57. The educational level of the woman is low, which reflects on the effectiveness of her efforts to maintain and improve the health, feeding, housing and other living conditions of her family.
58. In the paid work that she does, her salary is inferior to a man's and her instability in the sense of a job is greater.

...

190. The woman's rights and responsibilities in marriage are as follows:

...

- (2) The husband owes his wife protection and assistance, and must provide her with all the means necessary to maintain the household, in accordance with his financial resources. The woman has a special right and duty to nurture and care for her children during their minority, and to take charge of domestic affairs.

...

- (5) The woman may be employed or ply a trade, occupation, public office or business, where she is able to do so without endangering the interests and the care of her children, or other needs of her household.

...

197. Married women are restricted in representing the marriage and in administration of marital assets, roles which are assigned by law to the husband, and this constitutes a relative incapacity.

198. Parental authority is a right which is virtually forbidden to women, since it is assigned to the father. Women only come to exercise this right when the father is imprisoned or legally barred from such.

...

201. The legal context allows the husband to object to the wife engaging in activities outside the home, thus barring her from the right and freedom to work. The legal context restricts her right to personal fulfillment in areas outside her function as mother and housewife and restricts her personal liberty.

...

203. A judicial declaration of paternity in cases of rape, rape of juveniles and abduction is dependent on the conduct of the mother, based on what the law terms 'notoriously disorderly conduct', an express form of discrimination against women and the product of conception resulting from forced intercourse.

...

209. Adultery defined as an 'offence against honour' protects the legal right of filiation and 'the interests of the family', but makes a clear distinction concerning the gravity of the act, depending on whether it involves the man or the woman, providing a tougher sentence for the woman; the proof and the procedure are different in the two cases, so that in practice it is only applied to women.

...

211. With regard to the offence of rape, the punishment is graded according to the age of the victim and the relationship of authority which may exist between the victim and the offender. ...

212. Maltreatment of women and children and domestic violence are not defined as offences against the person and in practice are lumped together with injuries, coercion and threats, causing serious difficulties with regard to proof and other procedural problems.

HUMAN DEVELOPMENT PERSPECTIVES, TACKLING SOCIAL NORMS: A GAME CHANGER FOR GENDER INEQUALITIES UNDP (2020)

Gender disparities are a persistent form of inequality in every country. Despite remarkable progress in some areas, no country in the world— rich or poor— has achieved gender equality. All too often, women and girls are discriminated against in health, in education, at home and in the labour market— with negative repercussions for their freedoms.

...

The world is not on track to achieve gender equality by 2030. The *Human Development Report's* Gender Inequality Index (GII)— a measure of women's empowerment in health, education and economic status— shows that overall progress in gender inequality has been slowing in recent years. For instance, based on current trends, it would take 257 years to close the gender gap in economic opportunity. The

number of female heads of government is lower today than five years ago, with only 10 women in such positions among 193 countries (down from 15 in 2014).

Beyond what is measured, there are unaccounted burdens behind the achievements: the double shift at home, the harassment in public transportation, the discrimination in workplaces, and the multiple hidden constraints that women face. New social movements are emerging all around the world. Different forms of demonstration— including online campaigns, women marches and street performances— demand new ways of looking at gender equality and women’s empowerment. The #MeToo movement gives voice to many silence breakers, uncovering abuse and vulnerability. In India the #IWillGoOut movement demands equal rights for women in public spaces. In Latin America the #NiUnaMenos movement sheds light on femicides and violence against women from Argentina to Mexico. A movement born in Chile created a hymn named “a rapist in your way,” ... demanding that society stop blaming the victims of rape.

Why is progress towards some aspects of gender equality getting slower and more difficult? Are there hidden dimensions of gender inequality? ...

Social norms are central to the understanding of these dynamics. For example, societies often tell their girls that they can become anything they want and are capable of, while investing in their education. But the same societies tend to block their access to power positions without giving them a fair chance. ...

The situation of women: an inequality plateau?

There has been remarkable progress on gender equality. Over the past century, women in most countries were granted basic political, economic and social rights. Restrictions to vote, go to school and work in different economic areas were lifted, with the principle of equality typically granted in constitutions. The trend gained global momentum in the second half of the 20th century. ...

Are social norms and power imbalances shifting?

... Social norms cover several aspects of an individual’s identity—age, gender, ability, ethnicity, religion and so on—that are heterogeneous and multidimensional. Discriminatory social norms and stereotypes reinforce gendered identities and determine power relations that constrain women’s and men’s behaviour in ways that lead to inequality. Norms influence expectations for masculine and feminine behaviour considered socially acceptable or looked down on. So they directly affect individuals’ choices, freedoms and capabilities. ...

Widespread biases and backlash

... 91 percent of men and 86 percent of women show at least one clear bias against gender equality in areas such as politics, economic, education, intimate partner violence and women’s reproductive rights.

About 50 percent of men and women interviewed across 75 countries say they think men make better political leaders than women, while more than 40 percent felt that men made better business executives. Almost 30 percent of people agree it is justifiable for a man to beat his partner. ...

Globally close to 50 percent of men agree men should have more right to a job than women. This coincides with the fact that professional women currently face a challenge in finding a partner that will support their career.

More worrying, despite decades of progress in advancing women's rights, bias against gender equality is increasing in some countries, with evidence of a backlash in attitudes among both men and women.

...
...

What causes change—and what determines its nature?

How can practices and behaviours either change or sustain traditional gender roles? Norms can change as economies develop, with changes in communications technology, with new laws, policies or programmes, with social and political activism and with exposure to new ideas and practices through formal and informal channels (education, role models and media). Policymakers often focus on the tangible—on laws, policies, spending commitments, public statements and so on. This is driven partly by the desire to measure impact and by sheer impatience with the slow pace of change. Yet neglecting the invisible power of norms would miss a deeper understanding of social change.

Consider the subtle differences between descriptive and injunctive norms. Descriptive norms are beliefs about what is considered a normal practice in a social group or an area. Injunctive norms state what people in a community should do. This distinction is important for practice, as it can lead to an understanding of why some aspects of gender norms and relations shift faster than others.

The family sets norms, and experiences from childhood create an unconscious gender bias. Parents' attitudes towards gender influence children through mid-adolescence, and children at school perceive gender roles. ...

...

Social convention refers to how compliance with gender social norms is internalized in individual values reinforced by rewards or sanctions. Rewards use social or psychological approvals, while sanctions can range from exclusion from the community to violence or legal action. Stigma can limit what is considered normal or acceptable and be used to enforce stereotypes and social norms about appropriate behaviours. A social norm will be stickiest when individuals have the most to gain from complying with it and the most to lose from challenging it. Social norms have enough power to keep women from claiming their legal rights due to pressure to conform to societal expectations.

...

Restricted choices and power imbalances—a lifecycle perspective

Gender inequality within households and communities is characterized by inequality across multiple dimensions, with a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation all reinforcing each other. Human development is about expanding substantive freedoms and choices, and too often women face heavily restricted or even “tragic” choices.

Examples of restricted choices can be identified in a lifecycle approach. Some represent blatant limits to basic freedoms and human rights, and others, subtle manifestations of gender biases. Social norms can affect girls even before they are born since some countries deeply prefer bearing sons over daughters. In 1990, when only few countries had access to technology to ... determine a baby's gender, only 6 countries had imbalanced sex ratios at birth—today it is 21 countries.

Discrimination continues through the way households share resources. Girls and women sometimes eat last and least in the household. The gender politics of food—nurtured by assumptions, norms and practices about women needing fewer calories—can push women into perpetual malnutrition and protein deficiency.

Among children attending school, determinants of occupational choices appear very early. Girls are less likely to study subjects such as science, technology, engineering and mathematics, while boys are a minority of those studying health and education. ...

Early marriage condemns girls to live a life with heavily restricted choices—every year 12 million girls are victims of forced marriage. By region, the highest rates are registered in Sub-Saharan Africa, with 36 percent of women marrying before their 18th birthday, and South Asia, with 29 percent.

The disparities of childhood and adolescence are amplified when women reach adulthood. For unpaid care work, women bear a bigger burden, on average spending about 2.5 times more than men do. This affects women's labor force participation, which is consistently lower than for men, both globally and by human development grouping. In 2018 the global labour force participation rate was around 75 percent for men and 48 percent for women. ...

Older women's challenges accumulate through the life course. They are less likely than men to have access to pensions, even though they can expect to live three years longer. Along the way, social norms and path dependence—how outcomes today affect outcomes tomorrow—interact to form a highly complex system of structural gender gaps.

...

The Impact of COVID-19

Covid-19 has exacerbated many pre-existing problems. In 2022, UN Women and UNDP surveyed the consequences in *Government Responses to COVID-19: Lessons on Gender Equality for a World in Turmoil*:

Since COVID-19 was declared a pandemic in March 2020, it has claimed more than 6 million lives, destroyed countless livelihoods and forced the global economy to its knees. With an end still not in sight, the crisis has taken a disproportionate toll on women and girls. As countries locked down, violence against women and girls intensified. ...

Rising economic insecurity

Even before the pandemic, progress in closing the global gender gap in labour force participation rates had stalled, occupational segregation and gender wage gaps remained pervasive and the majority of the world's working women were stuck in informal and precarious jobs with few rights and protections. COVID-19 exacerbated these trends, taking a disproportionate toll on women's jobs and livelihoods. ...

... New projections estimate that in 2022, 124 women aged 25-34 are living in extreme poverty for every 100 men of the same age. ...

Many of these problems were exacerbated for the world's 740 million women working in the informal economy. Indeed, women informal workers experienced even sharper declines and slower recovery in working days and earnings than their male counterparts; and this pattern was more pronounced among women workers who experienced a parallel increase in unpaid care responsibilities. At the same time, these workers were least likely to enjoy access to social protection, resulting in severe economic hardship. Large-scale loss of income and limited access to social protection quickly ushered in rising food insecurity, which is affecting women disproportionately.

Increasing demand for unpaid care

While business activities ground to a halt, paid and unpaid care work increased in intensity and significance. COVID-19 exposed the extent to which the care economy relies on women's unpaid and underpaid labour as never before.

...

With the mass closure of schools, nurseries and day-care centres, families witnessed a huge shift of childcare responsibilities into their homes. ...

That unpaid care work is provided for free does not mean that it comes without costs—to economic security and financial independence, mental health and well-being—that have been borne disproportionately by women. ...

In a 2022 European Union poll, 77% of women identified a pandemic-led increase in physical and emotional violence against women in their country.⁷¹

2. CEDAW: Provisions and Committee

Early efforts to promote women's rights, beyond the very basic provisions of the UDHR, involved participants from around the world. Before examining CEDAW, the following snapshots provide some background to the events of the 1950s and 1960s.

A defining early moment in Global South solidarity was the 1955 Bandung Conference, in Indonesia. It led to the founding of the Non-Aligned Movement (NAM) in 1961. Today the NAM has 120 member states which proclaim that they are not formally aligned with any major power bloc. Aziza Ahmed, in 'Bandung's Legacy: Solidarity and Contestation in Global Women's Rights', in Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017) 450 describes its importance for women's rights:

While the Final [Bandung] Communiqué speaks to human rights, it makes no mention of women, gender, or women's rights. ... [Nevertheless,] the momentum and critique generated by Bandung and NAM enabled feminists of the Global South (GS) and their allies in the Global North (GN) to take a broader structural approach to addressing issues facing women and girls. This included acknowledging the centrality of race, colonialism, and economic inequality in struggles for women's rights.

...

Early agitation for women's rights by the few women present at the founding meetings of the UN resulted in a UN Charter calling for equality between men and women and the Commission on the Status of Women. Through the 1950s and 1960s, the Commission worked on a range of formal equality issues, including women's suffrage and a declaration specifically addressing women's rights. The 1970s were a turning point. The rise of NAM, as well as the reemergence of human rights in international law ... provided a new framework in which women could push for the centrality of women As argued by Devaki Jain and Shubha Chacko [in *Women, Development and the UN: A Sixty-Year Quest for Equality and Justice* (2005)]:

The Non-Aligned Movement's idea of the path to women's equality departed from UN strategies. The UN system at this time saw "women's status" largely as a social development issue and did not strongly connect it to the larger context of international development. Within the UN, women were still viewed as resources whose potential could be tapped. But the NAM gatherings offered a space where women from former colonies could reassert the standpoint that they were active agents in their nations, contributors to their country's progress, and not mere consumers of social services.

...

⁷¹ A. Brysk, 'Pandemic Patriarchy: The Impact of a Global Health Crisis on Women's Rights', 21 *J. Hum. Rts.* (2022) 283.

... The UN Decade on Women, which began with the First World Conference on Women held in Mexico City in 1975, inspired the formation of a global movement of women's rights activists who sought to engage UN mechanisms. GN and GS activists collaborated to push the agenda for women's rights. The initial organizing was rooted in second-wave feminist ideas of achieving women's equality through ending women's subordination to men.

Tensions emerged, however, as feminists began to challenge the assumptions of universality in the experiences of women within the context of human rights struggles. Writing ... from the GS, Gita Sen and Caren Grown reflected on the divisions between feminists in the mid-1980s: "While gender subordination has universal elements, feminism cannot be based on a rigid concept of universality that negates the wide variation in women's experience." Feminists of the GS also noted that the early organizing of Western feminists did not take into account the "shocks of the world economy" generated by the rise of neoliberalism and the negative impact of structural adjustment programs on women's well being. For GS feminists, gender was simply one category in a broader analysis of inequalities perpetuated by the legacy of colonialism and the international development agenda. Unlike the largely identity-based struggles of second-wave feminism in the GN, feminists situated in the context of NAM also framed their struggles against colonialism, capitalism, and imperialism.

During this period, the UN Commission on the Status of Women (CSW) played a central role in drafting treaties on issues such as the political status of women and the nationality of married women, while the International Labour Organization and the International Committee of the Red Cross also promoted important standards relating to women in armed conflict and in the workplace. Roland Burke, in 'Universal Human Rights for Women: UN Engagement with Traditional Abuses, 1948–1965', in Rebecca Adami and Dan Plesch (eds.), *Women and the UN: A New History of Women's International Human Rights* (2022) 71, describes how a treaty on the age of marriage came to be adopted in 1962:

In December 1954, ... the General Assembly proclaimed a sweeping programme against "ancient customs" which prevented the realization of the UDHR for women. Resolution 843 affirmed the supremacy of the UDHR over any custom, and demanded "elimination of such customs, ancient laws and practices," notably in marriage and family law, which were "inconsistent" with the precepts set down in 1948. By 1961, the animating spirit of Resolution 843 was set into a draft treaty, adopted a year later as the Convention on Consent, Minimum Age, and Registration for Marriage. ...

...

... [T]he animating impulse was a profoundly hopeful vision of universality, advanced by a small but effective cohort of women, many from the newly independent states. The Marriage Convention, its precursors, and their associated sentiments represented an effort to translate the grand abstractions of 1948 into lived reality. ...

Unlike many other forums of the UN, the human rights and humanitarian arena was a place where women found sustained presence, and substantial influence.

...

While still grossly unequal, the role and impact of women in the UN's human rights enterprise was much greater than in the notionally masculinist forums of the Security Council, and the economic components of the new international organization. The bespoke forum for women's rights, the Commission on the

Status of Women (CSW), ... was well-regarded for its commitment [and independence]. ...

[The author describes the key role played by women from the Global South]. In their proximity to the community, the local, this Third World cohort were somewhat closer to the balance of interests that would become more characteristic of the 1970s and early 1980s, across the various International Women's Year Conferences, and their NGO Tribunals, in Mexico City, Copenhagen, and Nairobi.

In 1963, the UN General Assembly, on the initiative of developing and socialist states, called for a UDHR-like declaration focused specifically on women's rights. CSW took the lead and the key drafters were women. In 1967, the Assembly adopted the non-binding Declaration on the Elimination of Discrimination against Women. It took another 12 years for the declaration to be developed into a binding treaty. More states have entered reservations to their ratification of CEDAW than to any other human rights treaty. Some reservations seriously qualify a state's commitment, particularly those that base the reservation on conflicting principles or rules in a religion or culture. This is addressed in greater detail below, including examples of reservations that are examined in the context of a discussion about universalism and cultural relativism.

CEDAW's Substantive Provisions

The Convention is among the many that elaborate in one particular field the norms and ideals that are generally and tersely stated in the Universal Declaration, and stated somewhat more amply in the ICCPR. Its preamble suggests how far-reaching the issues are and that the norms of this Convention must be placed in a broader transformative context. It recognizes 'that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'.

The reader should be familiar with the provisions of the Convention, a few of which are addressed by the following comments.

Article 1

For the purposes of the present Convention, the term "discrimination against women" 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.'

Note three vital characteristics of the definition. (a) The reference to *effect* as well as *purpose*, thus directing attention to the consequences of governmental measures as well as the intentions underlying them. (b) The definition is not limited to discrimination through 'state action' or action by persons acting under colour of law. (c) The definition's range is further expanded by the concluding phrase, 'or any other field'.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Consider the possible meanings of key terms such as ‘appropriate’, ‘without delay’, ‘equality’ in clause (a), and ‘any act of discrimination’ in clause (c). Note the breadth of clauses (e) and (f) with respect to the private, nongovernmental sectors of society, particularly in relation to the definition in Article 1. Note throughout the Convention the blurred lines between the private and public spheres of life, and the range of obligations on states to intervene in the private sector, to go beyond ‘respect’ in order to ‘protect’, ‘ensure’ and ‘promote’.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Note the grand goal set forth for states, and consider whether the other human rights instruments examined contain a similar conception for any group, or for people in general.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

This ‘affirmative action’ clause, duly qualified, appears as well in the Convention on the Elimination of all Forms of Racial Discrimination, but not in the ICCPR. Consider this article in relation to Article 2(e) and (f), and Article 11.

Article 5

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices 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;

- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

The breadth and aspiration of this article are striking. Other human rights treaties lack a similar provision, although Article 2 of the Racial Discrimination Convention comes close. Consider the arguments for and against including such an ambitious and far-reaching provision.

Articles 6–16: These articles evidence how a treaty devoted to one set of problems — here, ending discrimination against women and achieving equality — makes possible discrete, disaggregated treatment of the different issues relevant to these problems. Clearly the variety and detail in these articles would have been out of place, indeed impossible, in a treaty of general scope like the ICCPR. Note the great range of verbs that are used throughout these articles to define states parties’ duties, including: eliminate, provide, encourage, protect, introduce, accord, ensure.

Article 6 is typical of many provisions in requiring a state party to regulate specific nongovernmental activity.

Articles 7–9, to the contrary, deal with the traditional notion of state action, here barring discrimination by the state.

Article 10 concerns a particular field, education, and lists specific goals which, in their totality, take on a programmatic character. Note paragraph (h) on family planning and its relationship to three other provisions: Articles 12(1), 14(2)(b) and 16(e). The Convention does not address, as such, the question of abortion.

Article 12 together with a number of other provisions indicate the degree to which CEDAW involves and interrelates the classical categories of civil-political rights and economic-social rights. It imposes a limited duty to provide free health care.

Article 14 disaggregates women's problems in regional and functional terms. It underscores strategies for realizing goals that permeate the entire Convention, such as mobilization through functional grass roots groups and participation in local decision-making. CEDAW is not a convention in which solutions are to be provided only by the central authority of the state.

Article 16 orders the states to sweep away a large number of fundamental, traditional discriminations against and forms of subordination of women. Like several other articles, it could be understood as a complement to, as one specification of, the broad goals stated in *Article 5*.

SUBSTANTIVE EQUALITY

While the treaty covers a broad range of issues, the notion of discrimination remains central. It is thus critical to understand how international law has sought to achieve the goal of substantive equality based on this departure point. The path-breaking work done by Sandra Fredman in books such as *Human Rights Transformed* (2008) and *Discrimination Law* (2nd ed, 2011) has been reflected in various UN reports⁷² and in the following excerpt from a Concurring Opinion by Arif Bulkan and Hélène

⁷² S. Fredman and B. Goldblatt, *Gender Equality and Human Rights* (UN Women, 2015).

Tigroudja in *Eugénie Chakupewa et al. v. Democratic Republic of the Congo* (UN Doc. CCPR/C/131/D/2835/2016 (2021), Annex I). The case involved the follow up to gang rapes carried out by soldiers in South Kivu. Five persons were subsequently sentenced ‘to penal servitude (imprisonment) for life, with no mitigating circumstances, for the crime against humanity of mass rape’. The tribunal also ‘ruled that the defendants were liable *in solidum* with the State party to pay each author [complainant] US\$ 50,000 in damages for the harm suffered.’ But no such payments were ever made.

1. We anticipate ... questions ... based on an argument that the authors have not demonstrated that male victims have been compensated in domestic proceedings while female victims have not. ...
2. International human rights law has been critiqued as androcentric because of its general orientation towards male interests, an assessment thrown into sharp relief by formal approaches to sex discrimination that insist upon identifying a similarly situated male comparator who is treated more favourably. ...
3. The sterility of a purely formal analysis of discrimination, particularly in circumstances where there is no factual equivalence, is graphically illustrated by the argument of the State party in one case where it denied that the criminalization of abortion could amount to sex discrimination since any differentiation of treatment inevitably resulted from biological differences between men and women [*Mellet v. Ireland*, (CCPR/C/116/D/2324/2013)]. Likewise, the woman who complains of obstetric violence can never find a male comparator to demonstrate the inequality of treatment she may have received, [See *N. A. E. v. Spain*, below] so the importance of adopting a broader approach to claims of gender discrimination is self-evident.
4. ... The “intensely individualistic” nature of formal notions of equality, whereby the disadvantage associated with the particular status or group is not factored in the analysis, has been noted [by Fredman]. The problem with merely seeking equivalence between men and women is that doing so ignores the structural differences that account for inequality in the first place and perpetuates the disadvantage associated with the group. For this reason, the alternative model is one that proceeds upon a substantive notion of equality that seeks a more transformative outcome, in other words the elimination of social disadvantage.
5. ... Women and girls are subjected to violence precisely because they are women and girls, a longstanding disadvantage that is buttressed by societal attitudes and systematically tolerated by institutional structures. ...
6. ...
7. ... [I]n the context of what were grave crimes, the obdurate refusal of the national authorities to pay the compensation ordered is indicative of the social disadvantage and oppression the authors face as women. ... [T]he climate of impunity that inevitably results from failing to enforce judgments in cases of violence in turn encourages or at least facilitates repetition of the conduct. ...

Types of State Duties Imposed by Human Rights Treaties

To understand the significance and implications of the rights stated in the ICCPR, CEDAW and other human rights treaties, it is helpful to examine the related duties/obligations of states — even though human rights conventions rarely talk of duties. Attention to such duties clarifies the significance and even content of the related rights. It also points to strategies to realize a right, as by persuading the state to change its behaviour in one or another respect. The effort, then, is to deconstruct a right into its related state duties, perhaps duties that an advocate seeks to have imposed on the state.

Some of these duties can fairly be called correlative (corresponding) to the right — for example, implying from your right not to be tortured the state's correlative duty not to torture you. These may be the duties that come most promptly and naturally to the mind of the rights-holder. As a practical matter and from a functional perspective, other duties may be necessary implications from the nature of a given right even if they are not spelled out in treaty text — for example, a state's duty to create and operate electoral institutions and processes if the citizen's right to vote is to be realized.

Different rights may point to different types of state duties. All depends on the nature of the right, on the problems that it was meant to overcome or to prevent. Some types of state duties described below are more prominent in the ICCPR, some in CEDAW, some in the International Covenant on Economic, Social and Cultural Rights discussed in Chapter 4, or in other human rights treaties. Identifying the multiple duties that may be relevant to any one right sharpens an understanding of what is distinctive to and necessary to realize that right.

Two points should be kept in mind as we examine different kinds of rights from the perspective of related variable state duties.

First, at the start of the human rights regime, much weight was given to a distinction between so-called 'negative' and 'positive' rights. The negative rights basically imposed a duty of 'hands-off', a duty of a state not to interfere with, say, an individual's physical security. The illustration of torture noted above fits well here. Thus, the right not to be tortured was imagined to impose only such a negative duty — the state's correlative duty not to torture. Positive rights, on the other hand, imposed affirmative (positive) duties on the state — in the classic case, a duty to provide food (food stamps/subsidies and so on) if such provision was essential to satisfy the right to food. Thus economic and social rights such as the right to food were considered positive rights, which frequently required financial expenditures by the state, unlike the classic negative rights that were thought to require merely abstention from unjustified interference with another person. It will be important to consider how much of this negative-positive distinction remains valid in the light of the illustrations and analysis below, and whether it clarifies or confuses the issues before us.

Consider the following classic presentation of this distinction in Maurice Cranston, 'Are There Any Human Rights?', in 112 (4) *Daedalus* (1983) 1, at 12:

The traditional political and civil rights are not difficult to institute. For the most part, they require governments, and other people generally, to leave a man alone. ... Do not injure, arrest, or imprison him. To respect a man's right to life, liberty, and property is not a very costly exercise. As Locke and others have explained, it requires a system of law that recognizes those rights to protect those rights. But rulers are not called upon to do anything that it is unreasonable to expect of them. ... Political ... rights can be secured by fairly simple legislation. Since those rights are largely rights against government interference, the greatest effort will be directed toward restraining the government's own executive arm. But this is no longer the case where economic and social rights are concerned. ...

Second, rights are not static. They evolve. They broaden or contract over time. One way of understanding an expansion of the content of a given right (to speech, to food) is to examine the

duties related to that right, and to inquire whether and how they have expanded. The argument for a broader construction of a given right often amounts to the claim that further duties ought to be imposed on the state in order to satisfy the right. Consider some examples. The right to speech implies at a minimum the government's correlative duty not to interfere with it. It should not enjoin or penalize the rights-holder who indeed speaks. A modest expansion of this 'hands off' right imposes the further duty on government to protect a speaker against deliberate interference by non-state actors. Your right to speak loses meaning if others are permitted to block you in various ways from publishing or orally communicating your ideas. An argument for further expansion can be based on the claim that government must facilitate speech by assuring access of political groups to the media (that is, to newspapers or electronic media whether or not owned or controlled by the state). Such arguments for expansion of the kinds of state duties can constitute a strategy of change. So attention to duties, how they differ among rights within a treaty and among treaties, and how they change over time is one vital way of examining and fostering change in the human rights regime as a whole.

The following scheme of five types of state duties is a variation on a typology that emerged in the 1980s, often expressed as the 'respect, protect, fulfill' framework.⁷³ The Constitution of South Africa, 1996 (Article 7(2)), for example provides that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

(1) Respect Rights of Others

This duty requires the state to treat persons equally, to respect their individual dignity and worth, and hence not to interfere with or impair their declared rights. It is often described as 'negative' in the sense of being a 'hands-off' duty. The observance by states of this duty would itself, without the possibility of any further state duties, lead to a vast improvement in the human condition. In this sense, the duty of respect can be seen to lie at the core of the human rights regime. Compliance with it would avoid many of the worst calamities: genocides, massacres, torture.

For most rights, the duty of respect reaches beyond states to obligate individuals and non-state entities. A person's right to bodily security or to vote imposes a correlative duty on all other persons to refrain from interfering with it. Under human rights treaties, individuals or non-state entities are generally not considered to bear direct duties to protect other individuals. This section covers only state duties.

(2) Create Institutional Machinery Essential to Realization of Rights

Some rights may be impaired or effectively annulled not only by government's direct interference with them (torture, preventing a citizen from expressing ideas or voting), but also by its failure to put in place the institutional machinery essential for the realization or practice of the right. Political participation offers a simple illustration. A citizen's right to vote means little unless a government maintains fair electoral machinery that makes possible the act of voting, counting of ballots and so on. The negative–positive distinction is inadequate to describe this duty.

(3) Protect Rights/Prevent Violations

Several human rights treaties make explicit the state's duty to protect against and to prevent violations of rights. For this, institutional machinery is required. In the ICCPR, the state's duty in Article 2 is to 'ensure to all individuals' the recognized rights. Surely states must provide a police force to protect people against violations of their rights (to physical security, or free speech, or property) either by state or non-state ('private') actors. They must create normative systems like tort or criminal law, as well as institutions like courts or jails, processes like civil suits or criminal prosecutions, in order to maintain a system of justice that provides remedies for violations and imposes sanctions on violators. This duty to protect has been vital to the development of CEDAW and women's rights.

⁷³ See H. Shue, *Basic Rights* (2nd edn. 1996); G. J. H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights', in P. Alston and K. Tomasevski (eds.), *The Right to Food* (1984) 97; and D. Karp, 'What is the Responsibility to Respect Human Rights? Reconsidering the "Respect, Protect, and Fulfill" Framework', 12 *Int'l Theory* (2020) 83.

As in category (2) above, the state's duty to protect/prevent involves state expenditures. Again, the negative-positive rights distinction is not helpful. The classic 'negative' rights here demand the classic 'positive' protection. It is difficult to imagine a right for which this is not true.

(4) Provide Goods and Services to Satisfy Rights

The state's duty here is primarily to provide material resources to the rights-bearer, like housing or food or health care. Resources provided by the state may go directly from it to the individual rights-bearer, as by providing food stamps or subsidized public housing, or it may go indirectly to the ultimate beneficiary through, say, subsidies to construction firms that will then offer low-rent housing. Unlike the duty of respect (do not worsen the situation of the rights-bearer), this duty to provide generally is meant to improve the situation of the rights-bearer.

The state must expend public funds to meet its duties. It is for this reason that state duties related to welfare rights have most frequently been described as affirmative (positive). Unlike categories (2) and (3) above, both of which also involve state expenditures, these expenditures are the very essence of the individual right.

On the other hand, the realization of economic and social rights need not depend on 'direct' or 'indirect' provision by the state. Other, radically different policies may achieve the goal of satisfying a right to, say, food, such as a programme of expropriation and land reform that would increase employment and yield and thereby make more people self-sufficient with respect to food. Again, monetary or fiscal policy designed to lower unemployment and hence malnutrition and homelessness could reduce the need for direct provision of funds or goods. Such characteristic policies of the modern welfare state may then make the direct or indirect provision of funds or goods measures of last rather than first resort.

(5) Promote Rights

This state duty refers to bringing about changes in public consciousness or perception or understanding about a given problem or issue. It generally requires the state to expend funds and create the institutions necessary to promote acceptance of the right. It often involves public education — for example, school education or public campaigns meant to change attitudes about violence towards women or children. Promotion to achieve such types of cultural change plays a vital role in CEDAW. Promotion underscores the point that these categories of duties are not discrete. They are often complexly interrelated, and indeed overlap.

QUESTIONS

1. Consider CEDAW's stress on eliminating discrimination to achieve equality between men and women, as well as its means for realizing that equality. The phrase 'on the basis of equality of men and women' recurs in many of its articles. Compare the notion of equality in the ICCPR — say, in ICCPR Article 3 ('to ensure the equal rights of men and women to the enjoyment of all civil and political rights' in that covenant), or ICCPR Article 26 ('All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'). Are the two treaties' conceptions of equality identical, similar, very different?
2. Do the provisions of CEDAW on their face make any concession to cultural relativism, to cultural diversity in regional, ethnic, religious or other terms? Or do they insist throughout on universal application of its norms without variation, no matter what the cultural context, history or circumstances of the state involved?
3. Under Article 2, states parties agree to pursue the required policies, 'by all appropriate means and without delay'. Contrast the description of state obligations in Article 2 of the Covenant on Economic, Social and Cultural Rights: 'achieving progressively the full realization' of the recognized rights. Is this textual contrast accurate with respect to CEDAW? How do you understand the question of CEDAW's 'time frame' in comparison, say, with the ICCPR?

The Committee on the Elimination of Discrimination Against Women

Before the CEDAW Committee was set up in 1981, the main UN institution focused on women's rights was the UN Commission on the Status of Women. Created in 1946 and composed of governments, its contribution has been important, but has also varied considerably over the years.⁷⁴ The Committee is a 'treaty organ' rather than a 'Charter organ'. Chapter 9 will examine the ICCPR Committee. You should now read Articles 17–21 of the Convention.

ANDREW BYRNES, THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

FRÉDÉRIC MÉGRET AND PHILIP ALSTON (EDS.), THE UN AND HUMAN RIGHTS (2020) 393

...

... The Committee and its work: an overview

... In its early years the Committee existed in geographical, institutional and substantive isolation from the Geneva-based human-rights organs of the UN and the other treaty bodies During this period the Committee included a significant number of Eastern European members and the influence of

⁷⁴ See Z. Arat, 'The Commission on the Status of Women', in F. Mégret and P. Alston (eds.), *The UN and Human Rights* (2020) 253.

Cold War politics meant that conservative attitudes tended to prevail over attempts to take expansive or innovative approaches to the Committee's work.

...

The early 1990s saw an increased momentum in efforts to put gender perspectives on the international human rights agenda. ...

...

By the early 2000s, the increase in the number of ratifications brought the Convention close to universal ratification, and the Committee began its work under the Optional Protocol. The Committee continued to become more closely integrated into the human-rights framework of the United Nations, with close attention to developments elsewhere in the system, driven in part by the efforts towards harmonization of the human rights treaty bodies, and the Committee's move to Geneva from New York in early 2008.

In the last decade, the Committee has continued to develop its jurisprudence in the form of wide-ranging general recommendations and under the complaints and inquiry procedures of the Optional Protocol. ...

... The composition of the Committee

... [The 23 member expert committee] is established '[f]or the purpose of considering the progress made in the implementation of the Convention'. The Convention assumes that this task will be discharged through the examination of the reports submitted by States parties. ...

The members of the Committee are nominated and elected by the States parties from among their nationals for four-year terms, with no restriction on re-election. The members are to be 'experts of high moral standing and competence in the field covered by the Convention'; they serve in their personal capacity, not as representatives of states. The Convention requires that in the election of the members 'consideration be ... given to equitable geographical distribution and the representation of different forms of civilization and the principal legal systems.'

The geographical distribution of the Committee's membership has broadly conformed with the criteria laid down in the Convention. ...

The backgrounds of Committee members have been diverse. They include sociology, medicine, dentistry, international relations, education, political science, psychology, communications, law, and government and foreign service. Nearly all the members of the Committee have been active in promoting gender equality [I]n the last decade the number of lawyers has climbed back to around half of the committee members.

The range of professional backgrounds has made available to the Committee a breadth of knowledge that is important for assessing the implementation of the Convention. The smaller proportion of lawyers on the Committee during the 1990s was a mixed blessing. On the one hand, it meant that less attention was devoted to what might be considered sterile procedural matters (sometimes as a proxy for restricting the scope of the Committee's activities), with the Committee tending to focus on substantive issues. On the other hand, it meant that the Committee was slow to come to the view that, as a body charged with the supervision of an international human rights treaty, it had an important legal role to play in its interpretation of the Convention and the development of jurisprudence under it.

...

The presence on the Committee of members who are government officials has also given rise to concern among some observers and civil society groups. For a period in the 2000s, the number of diplomats and government officials nominated and elected to CEDAW and other treaty bodies increased, with roughly a third of the Committee membership falling into this category (not counting judges). Many of these came from equal opportunity offices or women's ministries. Of particular concern has been the presence of diplomats or high-level political appointees

...

All but six of the members of the Committee have been women. This is perhaps no surprise, since the membership of treaty bodies reflects one national selection process multiplied many times, and in most countries there is likely to be a higher percentage of women than men working on issues relating to women's equality, thus making it more likely that a woman will be nominated. ...

... The reporting procedure

... The reporting process will have the greatest impact in a state if a number of conditions are fulfilled. These include the regular submission of good quality substantive reports, the availability to the Committee of independent information (whether from NGOs, specialized agencies, NHRIs, or through other channels), a critical analysis of the report to identify deficiencies in the implementation of the Convention, a frank discussion with an appropriately qualified government delegation, the production by the Committee of detailed substantive recommendations to the state, wide publicity for the process at the national level, and the broad dissemination of the results of the hearings, and follow-up and monitoring at the national level as well as at the international level.

The procedures of the Committee for the examination of reports have changed significantly over the years to reflect the increase in the number of reports being submitted, the fact that nearly all the reports submitted are now periodic reports, the greater involvement of NGOs and other actors in the review process, the need to make as efficient use as possible of its meeting time, and the move towards greater harmonization of the procedures of all the UN human rights treaty bodies.

...

... Before the dialogue

After the Committee has received a state report, it schedules the report for consideration at a future session, appoints a country rapporteur, and schedules the report for initial consideration by its pre-sessional working group. The [latter] ... prepares a list of questions which is sent to the State party. The working group is normally made up of five members meeting for one week following each session. The working group meets in private and considers material put before it by the country rapporteur, and the secretariat, as well as written material provided by specialized agencies, national human rights institutions (NHRIs), and NGOs. The working group also meets with representatives of UN entities who wish to appear, as well as with NGOs and NHRIs who wish to meet the working group to brief it on the situation in a particular country; it also draws on information provided by UN country teams. The list of not more than thirty questions is sent to the State party, which is asked to respond (in no more than 25–30 pages) within six weeks, in time for the material to be translated and circulated before the review.

... Consideration of reports

The review of a state's report by the Committee takes place in a public meeting to which representatives of the State party are invited and which they are expected to attend, though the Committee has made use of video-conferencing to allow delegations (and NGOs) to participate in a review. The procedure is not intended to be a judicial or quasi-judicial process Rather, it is an occasion for the state [and the Committee to engage] in what has become known in UN jargon as a 'constructive dialogue'.

... Both in individual comments and in the Committee's collective concluding observations on a report, extremely critical assessments have been made, although the Committee seeks to express a balanced view. At the same time there is a perception among some observers that the Committee has been too often uncritical in its praise

...

The Committee schedules two sessions for each initial and periodic report. Country representatives are permitted up to thirty minutes to introduce the report. Questioning then follows by country task force members, who are limited in the number and duration of interventions they may make. ...

The quality of the discussions is directly influenced by the nature of the delegation sent by a state. ... The Committee is generally less than impressed where the delegation consists only of the local diplomatic representatives, who may have no particular expertise in the areas covered by the Convention. ...

...
The Committee stated in 2008 that its objective was ‘to formulate detailed concluding observations, with concrete, achievable, but non-prescriptive recommendations’. They ... encapsulate the Committee’s view of the priority areas for action in the implementation of the Convention in the country concerned, as well as providing detailed recommendations for action. It is this document which NGOs at the national level can use to lobby governments, legislatures and other decision-makers to adopt the changes recommended by the Committee.

... Follow-up procedure on Concluding Observations

...
In 2008 the Committee decided to introduce a follow-up procedure for Concluding Observations. This involves requesting that States parties implement specified recommendations in the Concluding Observations and report within two years on the steps taken to do so. The Committee also appointed a Rapporteur for Follow-up, who reports to the Committee on the responses received, and writes to (and may meet with) States which are overdue with their responses. The process is transparent, with the States parties’ responses and the Committee’s replies being made available on the Committee’s website.

The Committee’s follow-up procedure has provided an opportunity for the dialogue between the Committee and the State party (and other stakeholders such as NGOs, who have also submitted material under the procedure) to continue beyond the one-off engagement that otherwise culminates in the public hearings. In the period 2011 to 2016, 92 of the requested 120 follow-up reports were received ...

The Committee assesses whether the relevant recommendations have been ‘Implemented’, ‘Substantially implemented’, ‘Partially Implemented’, or ‘Not implemented’, or concludes that there is a ‘Lack of information received to make an assessment’; or more recently that ‘Information or measures taken are contrary to or reflect rejection of the recommendation’. The Committee may then request further information or clarification or recommend technical assistance. In its assessment of the 2011–2016 period, the Committee considered that 18 per cent of the recommendations had been implemented, 37 per cent had been partially implemented, 26 per cent had not been implemented, and in 20 per cent of cases insufficient information had been received to allow an assessment. This is something of a mixed record, though the procedure has had the effect of keeping pressure on states; whether it achieves real change is something that can be better assessed over a longer period. ...

... Developing a jurisprudence of the Convention

...
The challenge facing CEDAW has been to ensure that the Convention continues to address contemporary violations of women’s human rights. The Committee is able to interpret the Convention in a dynamic fashion through its questioning of States parties during its consideration of reports, the adoption of General recommendations, and in its work under the Optional Protocol. ...

...

... NGOs and the work of the Committee

The Convention accords non-governmental organizations no formal role in the review of the reports of States parties [R]epresentatives of NGOs are not permitted to speak at meetings at which the Committee is considering a State report, and NGO documents submitted to the Committee are not translated or circulated as official documents (though most of them now appear on the OHCHR website). Nor does the Convention envisage any role for NGOs in the other work of the Committee.

...

...

STATE REPORTING

We start our study of the Committee by looking at its function of monitoring states parties with respect to their compliance with the Convention. It does so through its examination of the periodic reports on compliance that states parties are required to submit. The Committee's recommendations are printed in bold. In June 2022, a delegation from Turkey, led by the Minister of Family and Social Services and including representatives of seven government ministries, responded to questions from the Committee, leading to the adoption of the following conclusions.

CEDAW COMMITTEE, CONCLUDING OBSERVATIONS ON THE EIGHTH PERIODIC REPORT OF THE REPUBLIC OF TÜRKİYE UN DOC. CEDAW/C/TUR/Co/8 (4 JULY 2022)

E. Principal areas of concern and recommendations

General context

1. The Committee expresses deep concern about the measures taken by the State party during the two-year state of emergency applied following the 2016 attempted coup against the Government, which ended in principle on 18 July 2018. It is particularly concerned about the impact that the government's various repressive counter-terrorism measures have had on women's human rights and the rule of law in the State party [including measures] that led to the dismissal of thousands of women from their occupations, including civil servants, judges, military personnel, and academics. ...

...

10. ... [T]he Committee reiterates its deep regret and concern about the decision of the State party [in March 2021] to withdraw from the [Council of Europe's Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence]. ... [I]t regrets ... that the decision ... was taken without a parliamentary debate and reportedly without wider consultation with civil society [The denunciation] constitutes a retrogressive measure that reduces the scope of protection of women's human rights and is inconsistent with the State party's due diligence obligations under the [CEDAW]

11. ... [T]he Committee invites the State party to reconsider its decision

...

12. The Committee takes note of the measures taken by the State party to implement gender-responsive recovery strategies related to [COVID-19] and targeted measures to alleviate the negative economic and social effects of the pandemic on women and girls. Nevertheless, [it] is concerned about the high prevalence of gender-based violence against women in the State party, including domestic violence, the longest shutdown of educational institutions globally due to the pandemic and the feminization of poverty, which disproportionately affects women and girls belonging to disadvantaged and marginalized groups, who already faced multiple and intersecting forms of discrimination and whose condition further deteriorated during the pandemic.

...

15. ... [T]he Committee recommends that the State party:
 - (a) Disseminate and give more visibility to the Convention and the Committee's concluding observations, its jurisprudence under the Optional Protocol and its general recommendations;
 - (b) Consider establishing a comprehensive mechanism for the implementation of the present concluding observations and involve non-governmental organizations ...;
 - (c) Raise awareness among women of their rights under the Convention and the legal remedies available to them to claim violations of such rights

...

18. The Committee is concerned about the negative impact that the adoption of the 2017 constitutional amendments had on the State party's judiciary, further undermining its ability to independently discharge its mandate. It is also concerned that the changes in the structure of both the Turkish Constitutional Court and the Council of Judges and Prosecutors, the body responsible for ensuring self-governance of the judiciary, seriously undermine the independence of the judiciary by positioning it under close oversight by the Executive. The Committee ... [is] concerned:

- (a) About the dismissal of approximately 20 percent of active judges and prosecutors during the state of emergency on grounds of "association with terrorism" and the failure of the State party to reinstate judges, including women, dismissed following the attempted coup despite their acquittal of criminal charges;
- (b) At the climate of fear of reprisals that these dismissals have created among incumbent judges and prosecutors;
- (c) That the dismissed judges and prosecutors have reportedly been largely replaced with often inexperienced judges and prosecutors facing an already heavy caseload ...;
- ...
- (f) About open rejection and failure to implement judgments of the European Court of Human Rights by the State party, including in cases brought by women applicants.

...

20. The Committee remains concerned about persisting barriers to women's access to justice, including:

- (a) Legal illiteracy among many women and girls;
- (b) The limited scope of legal aid, both economically and substantively, resulting in non-eligibility for legal aid of women earning the minimum wage, the cumbersome procedure to prove eligibility, and language barriers faced by women seeking justice, in particular Kurdish women, women belonging to other minorities and refugee women;
- (c) Limited knowledge of women's rights on the part of law enforcement officials and legal practitioners.

21. ... [T]he Committee recommends that the State party:

- (a) Enhance women and girls' awareness of their rights and their means of enforcing them, placing particular emphasis on the integration into curricula at all levels of education on women's rights and gender equality, including legal literacy programmes, and emphasizing the crucial role of women's access to justice;
- (b) Ensure that free legal aid and interpretation in Kurdish and Arabic, is made available to women without sufficient means, including those earning the minimum wage, for example through the establishment of legal aid clinics in rural and remote areas ...;

...

24. The Committee remains concerned about the persistence of deep-rooted discriminatory stereotypes and State party's official declarations concerning the roles and responsibilities of women and men in the family and in society, which overemphasize the traditional role of women as mothers and wives, thereby undermining women's social status, autonomy, educational opportunities and professional careers, as well as constituting an underlying cause of gender-based violence against women. It notes with concern that patriarchal attitudes persist within State authorities and society, and that the principle of gender equality is increasingly being replaced by a vaguely defined concept of "gender justice".

25. ... [T]he Committee recommends that the State party adopt a comprehensive strategy based on women's rights and empowerment aiming at eliminating patriarchal attitudes and stereotypes that discriminate against women. ...

26. The Committee remains concerned about:

- (a) The ongoing practice, especially in rural and remote areas, of giving girls as brides to settle blood feuds, and the continued payment of "bride prices" in certain regions;

- (b) The significant number of child marriages, especially in deprived rural areas, their wide acceptance in society and the insufficient efforts made by the State party to prevent them and adequately punish perpetrators.

27. ... [T]he Committee recommends that the State party:

- (a) Ensure that any form of sale or exchange of women and girls for the purpose of dispute settlement is criminalized, investigated and prosecuted and that perpetrators are adequately punished;
- (b) Effectively implement the prohibition of child marriage, and strengthen awareness-raising efforts regarding the harmful effects of child marriage on the health and development of girls.

...

28. ... The Committee reiterates its concern about the persistence of systematic and widespread gender-based violence against women in the State party, including sexual violence, and that:

- (a) At least 3,175 femicides in the State party have been reported between 2010 and 2020 and that more than 300 women were murdered in 2021, mostly by their intimate or former intimate partners or husbands or members of their families;
- (b) Official data on violence against women demonstrate that in 8.5 percent of cases of women killed between 2016 and 2021, the woman had obtained a protection order that was valid at the time of her death. In 2021 this percentage increased to 12 percent;
- (c) Gender-based violence against women and girls is considerably underreported owing to victims' stigmatization, fear of reprisals, economic dependence on the perpetrator, legal illiteracy, language barriers and/or lack of trust in the law enforcement authorities;

...

3. The Public/Private Divide: 'Private' Violence Against Women

In classical terms human rights obligations are assumed by, or imposed upon, the state. The resulting duties are 'public' or governmental. Some treaties, such as the Torture Convention, are exclusively state-centric, focusing only on actions taken 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. CEDAW, on the other hand, is explicit in also addressing conduct attributable not to the state ('public' actors) but to non-state/nongovernmental ('private') actors. The resulting divide between what is public and what is private thus becomes an especially prominent theme in relation to women's rights, although it has important ramifications in other areas as well.⁷⁵

The gendered boundary between 'public' and 'private' spheres correlated with two different kinds of claims to social resources, one based on market labor, and the other based upon family ties. (This gendered public/private dichotomy thus links to another public/private dichotomy: that between the state and the market, both arenas dominated by men.) In the 'male' sphere contractual relations of exchange flourished. Such relations existed between individuals who were presupposed to be free and independent and in control of their objects of exchange. This 'possessive individualism' correlated with the idea of self-ownership. Coverture [the legal doctrine according to which a married woman's legal rights and obligations are subsumed by those of her husband], ... like slavery, rationalized subjection of those who could not claim their labor power as their own, separating the universe into those who were free citizens, and those who were not.

⁷⁵ For example, the Convention on the Rights of Persons with Disabilities makes several explicit references to private actors.

... [E]ligibility for paid work outside the home was an explicit criterion for citizenship. Relegated exterior to citizenship were the degraded and enslaved, as well as the citizen's dependents, whose field of action was confined to the domestic sphere of the intimate family. In that sphere, resources were to flow through blood and sentiment, unlinked to any public circuit of exchange. Single mothers who faced difficulty providing such care and who became the recipients of 'mother's pensions' in the United States, so that the state stepped in for the absent male wage, were 'pitied but not entitled.' Care work was perceived to be a product of 'charity,' rather than of 'contract.' Otherwise articulated, the public sphere was characterized as the realm of rights and the pursuit of self-interest, while the private was perceived as the realm of needs, bonds, and selflessness of family.⁷⁶

In the human rights context, the terms 'public' and 'private' can refer to either actors or contexts, and the divide is often not straightforward. Thus a government official might act in ways that are entirely outside her legitimate public functions, as a result of which her actions will be deemed private. Or conduct by a private individual might be characterized as public because the state was in some way complicit, as in the acts of death squads operating with governmental connivance. And, of particular importance in the present context, a government might become liable for the entirely private acts of private individuals if it can be shown that it did not do all it could or should have to prevent such actions, or to investigate and punish them after the event.

This section examines some of the issues arising out of the public/private divide, including the practical, political and ideological significance of the divide; the shifting boundary line between the two as conceptions of their significance and content change; the degree to which human rights treaties should require states parties to regulate the relevant conduct of private (in the sense of non-state) actors; and the degree to which human rights treaties should directly regulate the relevant conduct of such private actors and impose sanctions on such actors for violations of their duties within the regulatory scheme.

We use the fight to eliminate violence against women as the lens through which to explore these issues, while highlighting both the central role of CEDAW and the interaction among key institutional actors to achieve a crucial degree of normative and policy consensus around dealing with the problem.

[O]ne third of women—and more than two-thirds in some countries—have experienced physical or sexual violence inflicted by an intimate partner or sexual violence inflicted by a non-partner. Some 20 percent of women experienced sexual violence as children. Nearly a quarter of girls ages 15–19 worldwide reported having been victims of violence after turning 15. Violence against women can be perpetuated through social norms. For example, female genital mutilation and cutting remain widespread. ... Acid attacks against women are a heinous form of violence common in communities where patriarchal gender orders are used to justify violence against women. ... In some societies women are also targets of honour-based violence, where the concept of honour and shame is fundamentally bound up with the expected behaviours of women, as dictated by their families or societies.⁷⁷

The immense gap between the evolving normative framework and the reality on the ground is illustrated by an overview report on rape (UN Doc. A/HRC/47/26), presented in 2021 by Dubravka Šimonović, UN Special Rapporteur on violence against women and girls, its causes and consequences:

Globally, ... 1 in 10 girls has been a victim of rape. Rape has been criminalized in a large number of States and yet it remains one of the most widespread crimes, with the majority of perpetrators enjoying impunity and the majority of women victims not reporting it.

⁷⁶ L. Volpp, 'Feminist, Sexual, and Queer Citizenship,' in A. Shachar, et al. (eds.), *The Oxford Handbook of Citizenship* (2017) 156–57.

⁷⁷ UNDP, *Human Development Report 2016: Human Development for Everyone* (2017) 58–9. See also E. Brodeala, I. Jelić and S. Şuteu (eds.), *Violence Against Women under European Human Rights Law: From Supranational Standards to National Realities* (2024).

9. Currently, the international human rights framework and jurisprudence recognizes rape as a human rights violation and a manifestation of gender-based violence against women and girls that could amount to torture. Under international humanitarian law and international criminal law, rape can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide when the other elements of the crimes are present.
10. However, these international standards have not been fully incorporated at the national level. States criminalize rape using different definitions (based on force or on lack of consent), protecting different persons (only women or all persons), including or excluding marital rape, covering different types of penetrations, prescribing different aggravating and mitigating circumstances, setting different lengths of sentences, prescribing ex officio or ex parte prosecution of rape, and providing or not providing at all for different statutes of limitation for its prosecution.
11. Additionally, their implementation is influenced by the surrounding general context of different forms of discrimination and gender-based violence against women, myths and gender-based stereotyping on rape by the media and the criminal justice system.
12. All these factors contribute to the fact that rape is frequently not reported. If rape is reported, it is seldom prosecuted; if prosecuted, the prosecution is rarely pursued in a gender-sensitive manner and often leads to very few convictions, the revictimization of survivors and high attrition rates, resulting in a normalization of rape, a culture of rape or silence on rape, stigmatization of victims and impunity for perpetrators.

But the issue of violence against women remained largely ‘invisible’ prior to the 1979 adoption of the CEDAW Convention, which contains not a single reference to it. World Conferences on Women in 1980 and 1985 alluded to the problem, but the first serious steps in the UN context came with resolutions by the ECOSOC in 1984 and the General Assembly in 1985 (GA Res. 40/36 (29 Nov. 1985)). These led to a path-breaking UN study on ‘Violence against Women in the Family’ (UN Doc. ST/CSDHA/2 (1989)), and a more detailed General Assembly resolution in 1990 (GA Res. 45/114). These developments occurred at the same time as the Inter-American Court of Human Rights adopted a judgment that was to become a classic in the field because of its clarification of a state’s duties with respect to violence committed by non-state actors.

VELÁSQUEZ RODRÍGUEZ CASE
INTER-AMERICAN COURT OF HUMAN RIGHTS, SER. C, NO. 4 (1988)

[A petition against Honduras was received by the Inter-American Commission of Human Rights, alleging that Velásquez Rodríguez was arrested without warrant by Honduran national security units. Knowledge of his whereabouts was consistently denied by police and security forces. Velásquez had disappeared. Petitioners argued that through this conduct, Honduras had violated several articles of the American Convention on Human Rights. After hearings and conclusions, the Commission referred the matter to the Inter-American Court of Human Rights, whose contentious jurisdiction had been recognized by Honduras. The Court concluded that Honduras had violated the Convention.

In the excerpts below, the Court addresses the issue of just what the obligations of Honduras were under the Convention. Was Honduras obligated only to ‘respect’ individual rights and not directly violate them, as by torture or illegal arrest? Or was Honduras obligated to take steps, within reasonable limits, to protect people like Velásquez from seizure even by non-state, private persons? In an earlier portion of the opinion (above), the Court had found that the Honduran state was implicated in the arrest and disappearance, and that the acts of those arresting Velásquez could be imputed to the state.

In the present excerpts, the Court reviews that information, and considers what might be the responsibility of Honduras even if the seizure and disappearance of Velásquez were caused by private persons unconnected with the government.]

161. Article 1(1) of the Convention provides:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. . . .

...

164. Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention itself.

165. The first obligation assumed by the States Parties under Article 1(1) is ‘to respect the rights and freedoms’ recognized by the Convention. ...

166. The second obligation of the States Parties is to [‘ensure’] the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the rights violated and provide compensation as warranted for damages resulting from the violation.

...

169. According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. ...

170. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority. Under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

...

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

...

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the

obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, as they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. ...

...

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner. ... Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

178. In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to ensure the investigation of the disappearance of Manfredo Velásquez and the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1(1) of the Convention.

179. As the Court has verified above, the failure of the judicial system to act upon the writs brought before various tribunals in the instant case has been proven. Not one writ of habeas corpus was processed. No judge had access to the places where Manfredo Velásquez might have been detained. The criminal complaint was dismissed.

180. Nor did the organs of the Executive Branch carry out a serious investigation to establish the fate of Manfredo Velásquez. There was no investigation of public allegations of a practice of disappearances nor a determination of whether Manfredo Velásquez had been a victim of that practice. The Commission's requests for information were ignored to the point that the Commission had to presume, under Article 42 of its Regulations, that the allegations were true...

...

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to guarantee Manfredo Velásquez the free and full exercise of his human rights.

...

General Recommendations

As observed above, one of most important techniques available to the CEDAW Committee involves the adoption of General Recommendations, through which it explains its understanding of a particular right or issue that arises under the Convention.

CEDAW COMMITTEE, GENERAL RECOMMENDATION NO. 19 ON VIOLENCE AGAINST WOMEN UN DOC. A/47/38 (1992)

6. ... The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. [The rights violated by gender-based violence amounting to discrimination include the right to life, to liberty and security of the person, to

equality in the family, to the highest standard attainable of physical and mental health, and to just and favourable conditions of work.]

...

9. ... [D]iscrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). ... Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

...

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence, the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.

...

20. In some States there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.

...

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. ...

[The Committee recommends that states parties should (among other measures) take a range of steps to ‘overcome all forms of gender-based violence, whether by public or private act’, provide adequate protective and support services for victims of family violence and provide gender-sensitive training to police and judges, take measures ‘to ensure that the media respect and promote respect for women’, take measures to eliminate prejudices and attitudes that lead to violence, and ensure that women need not resort to illegal abortion ‘because of lack of appropriate services in regard to fertility control’.]

**CEDAW COMMITTEE, GENERAL RECOMMENDATION NO. 35 ON GENDER-BASED
VIOLENCE AGAINST WOMEN, UPDATING GENERAL RECOMMENDATION NO. 19
UN DOC. CEDAW/C/GC/35 (2017)**

...

I. Introduction

...

2. For over 25 years, the practice of States parties has endorsed the Committee’s interpretation [in general recommendation No. 19]. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General recommendation No. 19 has been a key catalyst for this process.

...

4. The Committee acknowledges that civil society, especially women’s non- governmental organisations, have prioritised the elimination of gender- based violence against women; their activities have had a profound social and political impact, contributing to the recognition of gender-based violence against women as a human rights violation and to the adoption of laws and policies to address it.

5. The Committee’s concluding observations and their follow up procedures, general recommendations, statements and views and recommendations following communications and

inquiries under the Optional Protocol to the Convention condemn gender-based violence against women, in all its forms, wherever it occurs. They also clarify standards for eliminating this violence and the obligations of States parties in this regard.

6. Despite these advances, gender-based violence against women ... remains pervasive in all countries of the world, with high levels of impunity. It manifests in a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, including technology-mediated settings and in the contemporary globalized world it transcends national boundaries.

7. In many states, legislation addressing gender-based violence against women remains non-existent, inadequate and/or poorly implemented. An erosion of legal and policy frameworks to eliminate gender-based discrimination or violence, often justified in the name of tradition, culture, religion or fundamentalist ideologies, and significant reductions in public spending, often as part of “austerity measures” following economic and financial crises, further weaken the state responses. In the context of shrinking democratic spaces and consequent deterioration of the rule of law, all these factors allow for the pervasiveness of gender-based violence against women and lead to a culture of impunity.

...

II. Scope

...

15. Women’s right to a life free from gender-based violence is indivisible from and interdependent with other human rights, including the right to life, health, liberty and security of the person, the right to equality and equal protection within the family, freedom from torture, cruel, inhuman or degrading treatment, freedom of expression, movement, participation, assembly and association.

16. Gender-based violence against women, may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices, among others. In some cases, some forms of gender-based violence against women may also constitute international crimes.

17. The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that in making the determination of when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, a gender sensitive approach is required to understand the level of pain and suffering experienced by women, and that the purpose and intent requirement of torture are satisfied when acts or omissions are gender specific or perpetrated against a person on the basis of sex.

18. Violations of women’s sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

19. The Committee regards gender-based violence against women to be rooted in gender-related factors such as the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.

20. Gender-based violence against women occurs in all spaces and spheres of human interaction, whether public or private. These include the family, the community, the public spaces, the workplace, leisure, politics, sport, health services, educational settings and their redefinition through technology-mediated environments, such as contemporary forms of violence occurring in the Internet and digital spaces. In all these settings, gender-based violence against women can result from acts or omissions of State or non-State actors, acting territorially or extraterritorially, including extraterritorial military

action of States, individually or as members of international or intergovernmental organizations or coalitions, or extraterritorial actions by private corporations.

III. General obligations of States parties under the Convention relating to gender-based violence against women

21. Gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all of the obligations in the Convention. Article 2 establishes that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. This is an obligation of an immediate nature; delays cannot be justified on any grounds, including on economic, cultural or religious grounds. ...

Responsibility for acts or omissions of State actors

22. Under the Convention and general international law, a State party is responsible for acts and omissions by its organs and agents that constitute gender-based violence against women. These include the acts or omissions of officials in its executive, legislative and judicial branches. Article 2 (d) of the Convention requires that States parties, and their organs and agents, refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with this obligation. Besides ensuring that laws, policies, programmes and procedures do not discriminate against women, according to article 2 (c) and (g), States parties must have an effective and accessible legal and services framework in place to address all forms of gender-based violence against women committed by State agents, on their territory or extraterritorially.

23. States parties are responsible for preventing these acts or omissions by their own organs and agents—including through training and the adoption, implementation and monitoring of legal provisions, administrative regulations and codes of conduct- and to investigate, prosecute and apply appropriate legal or disciplinary sanctions as well as provide reparation in all cases of gender-based violence against women, including those constituting international crimes, as well as in cases of failure, negligence or omission on the part of public authorities. In so doing, women's diversity and the risks of intersectional discrimination stemming from it should be taken into consideration.

Responsibility for acts or omissions of non-State actors

24. Under general international law, as well as under international treaties, a private actor's acts or omissions may engage the international responsibility of the State in certain cases. These include:

a) *Acts and omissions by non-state actors attributable to the States.* The acts or omissions of private actors empowered by the law of that State to exercise elements of the governmental authority, including private bodies providing public services, such as healthcare or education, or operating places of detention, shall be considered as acts attributable to the State itself, as well as the acts or omissions of private agents in fact acting on the instructions of, or under the direction or control of that State, including when operating abroad.

b) *Due diligence obligations for acts and omissions of non-State actors.* Article 2(e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women. This includes actions by corporations operating extraterritorially. In particular, States Parties are required to take necessary steps to prevent human rights violations abroad by corporations over which they may exercise influence, whether by regulatory means or by the use of incentives, including economic incentives. Under the obligation of due diligence, States parties have

to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors. They are required to have laws, institutions and a system in place to address such violence. Also, States parties are obliged to ensure that these function effectively in practice, and are supported and diligently enforced by all State agents and bodies. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.

...

IV. Recommendations

...

28. The Committee also recommends that States parties take the following measures in the areas of prevention, protection, prosecution, punishment and redress; data collection and monitoring and international cooperation to accelerate elimination of gender-based violence against women. All these measures should be implemented with a victim/survivor-centred approach, acknowledging women as subjects of rights and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence. Also, these measures should be designed and implemented with the participation of women and taking into account the particular situation of women affected by intersecting forms of discrimination.

...

QUESTIONS

1. While acknowledging the overall importance of General Recommendation No. 35, Ramona Vijeyarasa in 'CEDAW's General Recommendation No. 35: A Quarter of a Century of Evolutionary Approaches to Violence against Women', 19 *J. Hum. Rts* (2020) 153 has called it a 'shopping list' that reflects a cut-and-paste exercise rather than new thinking. In her view, 'many issues are dealt with in too cursory a manner and ... fall short of providing concrete guidance to states ...'. How detailed and specific should such a document be?

2. How would you respond to critiques by various authors that the emphasis on violence against women has: (i) reflected a conservative agenda that reinforces the gendered distinction between victims and protectors; (ii) encouraged a focus on violence as opposed to the inequalities that generate it; and (iii) promoted a narrow focus on sexual violence that reinforces a restrictive ideal of female sexuality?⁷⁸

FOLLOW-UP

CEDAW's 1992 General Recommendation was followed soon after by the UN General Assembly's adoption of the Declaration on the Elimination of Violence against Women (GA Res. 48/104 (20 December 1993)) which, in practice, amounted to endorsement by governments of the Committee's approach. The Declaration defined violence against women as meaning 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (Art. 1). The formally non-binding Declaration stated that 'States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women. ...' (Art. 4).

⁷⁸ H. Charlesworth, 'Feminist Futures in Human Rights', in N. Bhuta (ed.), *Human Rights in Transition* (2024) 182, at 200-01.

The legacy of the *Velásquez Rodríguez Case*, combined with the developments traced above was solidly entrenched through the Inter-American Commission on Human Rights decision in *Jessica Lenahan (Gonzales) et al. v. United States* (Report No. 80/11, Case 12.626, 21 July 2011). Ms. Lenahan had obtained a restraining order against her ex-husband and claimed that the police failed to adequately respond to her repeated and urgent calls seeking help in response to the father's subsequent abduction of their children. They were later found dead in his truck after he exchanged gunfire with the police. Investigations into the deaths of the children were entirely inadequate and no effective judicial remedies were available. The Commission noted the 'broad international consensus over the use of the due diligence principle to interpret ... State legal obligations' in such contexts and 'the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence (paras. 123 and 127).'

In 1994, the UN Commission on Human Rights appointed a Special Rapporteur 'on violence against women, its causes and consequences,' who was authorized to undertake field missions and submit analytical and other reports to the Commission. Successive rapporteurs (Radhika Coomaraswamy, 1994–2003; Yakin Ertürk, 2003–2009; Rashida Manjoo, 2009–2015; Dubravka Šimonović, 2015–2021; and Reem Alsalem, 2021-) have undertaken detailed studies on a wide range of issues affecting women in annual reports to both the Human Rights Council and the General Assembly.

For its part, the CEDAW Committee, having played the crucial role of catalyst in developing the initial normative consensus, has continued to deepen the understanding of the issue and its implications through the use of two other techniques, in addition to state reporting and General Recommendations. They are the undertaking of 'inquiries' and the consideration of 'communications' (complaints). Both of these procedures are laid down in an Optional Protocol to CEDAW (the 'OP'), adopted in 1999. The OP is open to ratification only by parties to CEDAW itself, and is a way in which they can extend, or deepen, their commitments to cooperate with the Committee. As of 2025, 115 states had agreed to the OP, compared with 189 parties to CEDAW itself. (Chapter 9, below, on the Human Rights Committee created by the ICCPR examines in more detail the work of that Committee under a similar OP to the ICCPR, which also enables it to examine complaints.)

THE INQUIRY PROCEDURE

This procedure under the OP begins with a submission to the Committee, most likely by an NGO, of 'reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention'. The government concerned is then asked to comment on the information before the Committee decides whether or not to 'designate one or more of its members to conduct an inquiry and to report urgently to the Committee.' The OP provides that '[w]here warranted and with the consent of the State Party, the inquiry may include a visit to its territory.' The inquiry is conducted confidentially, ideally with the government's cooperation at all stages. The resulting report, including recommendations, is sent to the government, which is invited to respond and the issues can subsequently be pursued under the Convention's regular reporting procedures. As of 2025, the Committee has published reports on inquiries undertaken in relation to Poland, Mexico, the Philippines, Canada, Kyrgyzstan, the United Kingdom (twice), Mali, and South Africa.

The Canadian inquiry was requested by the Feminist Alliance for International Action and the Native Women's Association of Canada. These organizations claimed that 'aboriginal women and girls experience extremely high levels of violence in Canada, as shown by the high number of disappearances and murders of aboriginal women in particular; they report rates of violence, including domestic violence and sexual assault, that are 3.5 times higher than those for non-aboriginal women; young aboriginal women are five times more likely than other Canadian women of the same age to die as a result of violence; and aboriginal women and girls experience high levels of sexual abuse and violence in their families and communities and in society at large.' In response, the Committee found

(para. 214) ‘that the measures taken to protect aboriginal women from disappearance and murder have been insufficient and inadequate, that the weaknesses in the justice and law enforcement system have resulted in impunity and that no efforts have been made to bring about any significant compensation or reparation.’ It made a series of recommendation to the government, including that a national inquiry be established. In 2016 an inquiry was set up.⁷⁹ The resulting 2019 report (*Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*) ‘is comprised of the truths of more than 2,380 family members, survivors of violence, experts and Knowledge Keepers shared over two years of cross-country public hearings and evidence gathering. It delivers 231 individual Calls for Justice directed at governments, institutions, social service providers, industries and all Canadians.’

The South African inquiry was triggered by information submitted in 2013 by 11 organizations claiming that the high levels of domestic violence in South Africa and the state’s failure to comply with its due diligence obligation to protect women from such violence amounted to grave or systematic violations of the Convention. They also pointed to exacerbating factors including: (a) The prevalence of harmful practices such as *ukuthwala* (i.e., elopement leading to child and forced marriages) and polygamy; (b) Persistent stereotypes that legitimize domestic violence and discourage women from reporting such violence; (c) The lack of statistical data and research; and (d) The lack of public awareness-raising and capacity-building for law enforcement agencies and health and social workers. After considering the information, the Committee invited the government to respond, which it did in 2015. In 2019, it agreed to a country visit. Two members of the Committee spent 12 days in South Africa in September 2019. In the resulting report (UN Doc. CEDAW/C/ZAF/IR/1 (14 May 2021)), the Committee found the State party responsible for:

- (a) Grave violations of rights under the Convention, considering that the State party has failed to protect a significant number of women and girls from domestic violence and to provide adequate access to justice, protection and support to enable women to leave abusive domestic relationships, thereby exposing them to or unnecessarily prolonging their severe physical and mental suffering;
- (b) Systematic violations of rights under the Convention, considering that the State party has knowingly omitted to take effective measures:
 - (i) To address patriarchal attitudes and social norms that legitimize domestic violence and to destigmatize victims;
 - (ii) To specifically criminalize domestic violence and femicide, enforce and monitor civil remedies against perpetrators, repeal provisions that tolerate harmful practices giving rise to domestic violence, enforce general criminal law provisions punishing domestic violence and prosecute ex officio domestic violence and rape;
 - (iii) To establish appropriate institutional arrangements, oversight and accountability measures to protect victims of and prevent domestic violence;
 - (iv) To remove the economic and social barriers faced by victims of domestic violence and create a supportive environment that enables victims to obtain access to justice.

117. The Committee considers that the State party has knowingly accepted these omissions, which are not a random occurrence, as evidenced by the extremely

⁷⁹ Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol, UN Doc. CEDAW/C/OP.8/CAN/1 (30 March 2015).

high levels of domestic violence in the State party. They constitute elements of systematic violations of rights under the Convention.

The Committee made a large number of detailed recommendations to the State Party.

THE COMPLAINTS PROCEDURE

Under this procedure, states parties to the OP agree to recognize the competence of the Committee ‘to receive and consider communications’. Individuals or ‘groups of individuals’ under the ‘jurisdiction’ of a state party may submit communications to the Committee, ‘claiming to be victims of a violation [by the state] of any of the rights set forth in the Convention’. Communications must meet certain conditions and criteria to be judged admissible — for example, submission following exhaustion of domestic remedies. The Committee brings the communication confidentially to the attention of the state party involved. After finding the communication admissible and examining it, the Committee transmits its ‘views’ on the communication, ‘together with its recommendations’, to the concerned parties. The state party ‘shall give due consideration’ to the Committee’s views and recommendations. By February 2024 216 communications had been registered, with 56 of those awaiting the Committee’s consideration (UN Doc. A/79/38). Most emanated from European states. Under the Committee’s communications follow-up procedure, a Committee member seeks to engage with the State party in relation to each communication to ensure implementation of the decision. Information is also sought from victims, NGOs and others and the resulting information is reflected in the Committee’s annual reports, thus seeking to maintain pressure for compliance.

N. A. E. v. SPAIN, VIEWS OF THE COMMITTEE ... **IN RESPECT OF COMMUNICATION** **NO. 149/2019, UN DOC. CEDAW/C/82/D/149/2019 (27 JUNE 2022)**

...

1.1 The author of the communication is N.A.E., a Spanish national born on 12 September 1986. The author maintains that Spain violated her rights under articles 2, 3, 5 and 12 of the [CEDAW] owing to the obstetric violence she experienced in hospital during childbirth. ...

1.2 ... [T]he Committee received 11 submissions from third parties, which were transmitted to both parties for their comments.

Facts as submitted by the author

...

2.1 During the 25-year-old author’s first pregnancy, which had been monitored and healthy throughout, she and her partner submitted a birth plan to the public hospital ... [T]hey stated that they did not want drugs to be administered to induce or accelerate labour, that any decisions taken by the medical staff should have their consent, that, if a caesarean section were necessary, the baby should be with its mother immediately following birth ... and that the baby should not be bottle-fed.

2.2 At 8 a.m. on 9 July 2012, at 38 weeks of pregnancy, the author went to the hospital because her waters had broken. ...

2.3 The hospital’s protocol sets out a waiting period of 24 hours before inducing labour. At 4 p.m. the same day, however, a gynaecologist informed the author that labour would be induced because, in the gynaecologist’s words, “we do not induce at night”. The author claims that there was no medical need to induce labour [and that the decision was] for the convenience of the attendants. ...

2.4 The author did not consent to the induction of labour; her repeated requests for information on the risks and alternatives went unanswered.

2.5 Before labour was medically induced, the author requested permission to eat, which was denied by the hospital despite the fact that the Spanish Ministry of Health ... guidelines ... recommends that food be provided ... to ensure maternal and fetal well-being.

...

2.8 At 9.30 a.m. on 10 July 2012 ... despite the fact that the fetal monitoring recordings were fine, the midwife informed the author that a caesarean section was being considered because the labour was supposedly “stalled”. ... When the doctors arrived, however, they had already made the decision, stating “yes, a caesarean section and that’s that”. When the author asked for information, the doctor did not provide any, but rather spoke to her like a child, replying “calm down, I’m going to take care of you”.

2.9 At 10 a.m., the students began the operation without the author’s consent. The doctors did not allow the author’s husband to be present. According to the author:

I was placed on the operating table like a doll. No one introduced themselves; no one spoke to me; no one looked me in the face. No one bothered to try to calm me down. I was crying a lot. They placed my arms out to the sides. The operating room was full of people ... I was there alone and naked, and people were coming and going ... They were talking among themselves about ... what they had done over the weekend ...

...

2.11 The author’s son was born at 10.12 a.m. After the caesarean section had been performed, the protocol was once again not followed. According to the protocol, the newborn should remain with its mother from the moment she is responsive in order to initiate breastfeeding and skin-to-skin contact between mother and child, which improves the baby’s heart rate, temperature, blood glucose, immune system and sleep. However, the baby was separated from his mother to be taken to the paediatrician for no reason, and the author had no opportunity to have skin-to-skin contact with him; she caught a glimpse of him only from afar. ... The author requested that the baby be given to his father and was told: “Calm down, little girl, it’s all over.” The author could hear instructions on how to sew her up being given to the students. They finished without saying a word to her.

2.12 Over the next few hours, the author asked for the baby to be brought to her, but he was not, contrary to the recommendations of the Spanish Paediatric Association on care and assistance for healthy newborns.

2.13 ... [T]he baby was bottle-fed, despite the parents’ having stated that they wanted him to be breastfed. ...

2.14 Later, the author suffered from abdominal pain in the caesarean scar and lower abdomen and from urinary incontinence. ...

2.15 ... In a report dated 7 June 2013 ... the author was diagnosed with post-partum post-traumatic stress disorder, anticipatory distress and anxiety, emotional instability and reactive depression ...

...

Consideration of the merits

...

15.2 The Committee notes that the author claims that [the problems described above] ... were the result of structural discrimination based on gender stereotypes regarding childbirth. The author maintains that these stereotypes were perpetuated in the administrative and judicial proceedings. The judge did not take into account the disregard of the protocols, the reports provided by the author to prove malpractice or the reports submitted concerning the diagnosis of post-partum post-traumatic stress disorder, but rather described the injuries suffered by the author as a mere matter of perception.

...

15.3 The Committee recalls that, according to its general recommendation No. 24 (1999) on women and health, quality health-care services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. ...

15.4 The Committee also [takes note of the phenomenon described of obstetric violence as used to refer to violence suffered by women during childbirth in health-care settings, which is widespread and systematic. According to the UN Special Rapporteur on violence against women ‘it is part of a continuum of the violations that occur in the wider context of structural inequality, discrimination and patriarchy, and also the result of a lack of proper education and training, as well as lack of respect for women’s equal status and human rights’.] ...

...

15.6 The Committee recalls that it is generally for the authorities of States parties to evaluate the facts and evidence and the application of national law in a particular case, unless it can be established that the evaluation was conducted in a manner that was biased, based on gender stereotypes that constitute discrimination against women or clearly arbitrary or that amounted to a denial of justice. ... According to the gynaecological and obstetric clinical reports provided by the author, both to the domestic courts and to the Committee, the medical personnel did not comply with *lex artis*, namely, the protocols were not followed, not enough time had elapsed before performing a caesarean section, a diagnosis of stalled labour had been made in haste, there were alternatives to the caesarean section and there are no consent forms for the induction of labour or the caesarean section as required by the Patient Autonomy Act. As the reports make very clear, had the applicable standards and protocols been followed, the author was very likely to have experienced a normal birth. ... [T]he Committee notes that ... the national authorities did not carry out an exhaustive analysis of these elements of the evidence

15.7 ... [None of the principal allegations] has been contested by the State party

15.8 ... [U]nder articles 2 (f) and 5, States parties have the obligation to take all appropriate measures to modify or abolish ... customs and practices that constitute discrimination against women. The Committee considers that stereotyping affects the right of women to be protected against gender-based violence, in this case obstetric violence, and that the authorities responsible for analysing responsibility for such acts should exercise particular caution in order not to reproduce stereotypes. ... [I]n the present case, the State party’s administrative and judicial authorities applied stereotypical and therefore discriminatory notions, for example by assuming that it is the doctor who decides whether or not to perform a caesarean section without duly analysing the evidence and reports submitted by the author which point to there having been alternative courses of action to a caesarean section, or by assuming that the psychological injuries suffered by the author were a matter of mere perception.

15.9 ... [T]he Committee is of the view that the facts before it reveal a violation of the rights of the author under articles 2 (b), (c), (d) and (f), 3, 5 and 12 of the Convention.

16 ... [It] makes the following recommendations to the State party:

(a) Concerning the author: provide her with the appropriate reparation, including adequate financial compensation for the damage that she suffered to her physical and psychological health;

...

(b) General:

(i) Ensure women’s rights to safe motherhood and access to appropriate obstetric services, in accordance with general recommendation No. 24 (1999) on women and health; and, in particular, provide women with adequate information at each stage of childbirth and establish a requirement for their free, prior and informed consent to be obtained for any invasive treatment performed during

childbirth, thereby respecting their autonomy and their capacity to make informed decisions about their reproductive health;

(ii) Conduct research into obstetric violence in the State party in order to shed light on the situation and thus provide guidance for public policies to combat such violence;

(iii) Provide obstetricians and other health workers with adequate professional training on women's reproductive health rights;

(iv) Ensure access to effective remedies in cases in which women's reproductive health rights have been violated, including in cases of obstetric violence, and provide specialized training to judicial and law enforcement personnel.

(v) Establish, publicize and implement a Patients' Bill of Rights.

...

QUESTIONS

1. Why would such a case be taken to the CEDAW Committee rather than elsewhere?
2. What sort of evidence base should the Committee have to ground such a decision? How would you respond to the assertion that it is not for some UN committee to be shaping Spanish obstetrics policy?
3. Eva Brems, in 'UN Human Rights Treaty Bodies Talking to Domestic Adjudicators Through Their Quasi-judicial Work: An Examination of CERD and CEDAW', 45 *Hum. Rts. Q.* (2023) 568, argues that *N. E. A. v. Spain* exemplifies the Committee's failure to provide 'generalizable interpretations' which would 'offer guidance to domestic monitoring bodies on how to address' the issue of obstetric violence.' Discuss.

4. Affirmative Action and Quotas

Nigeria ratified CEDAW in 1985. Following the 2023 national elections women occupied 3 percent of seats in the Senate and 4 percent in the House of Representatives. Only 10 percent of candidates were female. Such statistics provide an indication of why CEDAW explicitly endorses the need for affirmative action or what are termed 'temporary special measures'. This includes measures designed to enhance women's participation in the political process. The CEDAW Committee has adopted expansive interpretations of Article 4 of the CEDAW Convention in particular ('Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination ...').

In General Recommendation No. 23: Political and Public Life (1997) the Committee noted (para. 5) that:

Article 7 obliges States parties to take all appropriate measures to eliminate discrimination against women in political and public life and to ensure that they enjoy equality with men in political and public life. ... The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional

and local levels. The concept also includes many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life.

...

16. ... Research demonstrates that if women's participation reaches 30 to 35 per cent (generally termed a "critical mass"), there is a real impact on political style and the content of decisions, and political life is revitalized.

...

22. The system of balloting, the distribution of seats in Parliament, the choice of district, all have a significant impact on the proportion of women elected to Parliament. Political parties must embrace the principles of equal opportunity and democracy and endeavour to balance the number of male and female candidates.

...

29. Measures that have been adopted by a number of States parties in order to ensure equal participation by women in senior cabinet and administrative positions and as members of government advisory bodies include: adoption of a rule whereby, when potential appointees are equally qualified, preference will be given to a woman nominee; the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body; a quota for women members of cabinet and for appointment to public office; and consultation with women's organizations to ensure that qualified women are nominated for membership in public bodies and offices and the development and maintenance of registers of such women in order to facilitate the nomination of women for appointment to public bodies and posts. ...

...

31. Examination of the reports of States parties also demonstrates that in certain cases the law excludes women from exercising royal powers, from serving as judges in religious or traditional tribunals vested with jurisdiction on behalf of the State or from full participation in the military. These provisions discriminate against women, deny to society the advantages of their involvement and skills in these areas of the life of their communities and contravene the principles of the Convention.

32. ... Political parties should be encouraged to adopt effective measures to ... ensure that women have an equal opportunity in practice to serve as party officials and to be nominated as candidates for election.

33. Measures that have been adopted by some political parties include setting aside for women a certain minimum number or percentage of positions on their executive bodies, ensuring that there is a balance between the number of male and female candidates nominated for election, and ensuring that women are not consistently assigned to less favourable constituencies or to the least advantageous positions on a party list. ...

34. Other organizations such as trade unions and political parties have an obligation to demonstrate their commitment to the principle of gender equality in their ... memberships with gender-balanced representation on their executive

boards so that these bodies may benefit from the full and equal participation of all sectors of society and from contributions made by both sexes. ...

...

39. The globalization of the contemporary world makes the inclusion of women and their participation in international organizations, on equal terms with men, increasingly important. The integration of a gender perspective and women's human rights into the agenda of all international bodies is a government imperative. ...

...

In General Recommendation No. 25: Temporary Special Measures (2004), the Committee noted that: '[T]he application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of nondiscrimination and equality' (para. 14).

The Committee's most comprehensive statement (29 pages in length) is General Recommendation No. 40 (2024) on the equal and inclusive representation of women in decision making systems:

...

2. ... [The Committee] defines "equal and inclusive representation" as fifty-fifty parity between women and men in all their diversity in terms of equal access to and equal power within decision-making systems It defines "decision-making systems" as encompassing decision-making that takes place through formal and informal processes in all sectors, including in political, public, economic and digital spaces. Achieving parity ... requires ... dismantling all obstacles that prevent women from accessing decision-making systems on an equal footing with men.

...

11. ... Patriarchy is a system of power deeply embedded in political, social, economic and cultural structures. It creates a hierarchy, historically assigning distinct roles, worth and qualities to women and men. It results in a division of labour whereby women are primarily responsible for the private sphere of the home and family, while men are the main actors in the public sphere of politics and economy, based on differential weights assigned to efforts in the two domains. Patriarchy permeates all societies. At its most severe, it takes the form of an institutionalized regime of systematic oppression and domination of women, committed with the intention of maintaining a regime that is increasingly referred to as "gender apartheid". ...

12. A transformative approach addressing patriarchy ... is in line with article 5 (a) of the Convention, which commits States parties to eliminating prejudices and practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

13. To this end, the Committee identifies seven pillars of equal and inclusive representation in decision-making systems: (a) fifty-fifty parity between women and men in decision-making systems as a starting point and universal norm; (b) effective youth leadership conditioned by parity; (c) intersectionality and the inclusion of women in all their diversity in decision-making systems; (d) a comprehensive approach to decision-making systems across spheres; (e) equal power and influence exercised by women in decision-making systems; (f) structural transformation for the equal and inclusive representation of women in

decision-making systems; and (g) civil society representation in decision-making systems.

...

Political Representation

In 2025, according to UN Women (*Facts and figures: Women's leadership and political participation*) 18 countries had a woman Head of State, and 20 had a woman Head of Government. Less than 23 percent of government ministers were women and very often they held ministries assumed to be of particular relevance to women such as family, environment, labour, and women's affairs. In 1995, 11 percent of all national parliamentarians were women, but by 2025 the figure was 27.2 percent. Six countries had 50 percent or more women in parliament in single or lower houses: Rwanda (64%), Cuba (56%), Nicaragua (55%), Andorra (50%), Mexico (50%), and the United Arab Emirates (50%). In 21 countries, women accounted for less than 10 percent of lower house parliamentarians.

In the United States, in 2025, women held 29 percent of seats in the House of Representatives, and 26 percent in the Senate. No woman has been elected President and only one has held the Vice-Presidency. Twelve of 50 governors were women and 33.5 percent of legislators at the state level were women (five times as many as in 1971).

Before the adoption of CEDAW in 1979, only a handful of countries had adopted quotas to promote women's representation in the political arena. Today, over 100 countries have such quotas. There are three main forms: (1) parliamentary seats reserved by law for women (20 percent of countries with quotas have this type — mostly in South Asia and Africa); (2) legal quotas requiring a percentage of political party nominees to be women (38 percent, mainly in Latin America and Africa); and (3) voluntary quotas adopted by the political parties themselves (61 percent, mainly in Western Europe). Quotas might apply at the local, regional or national levels; they might set a low or a high percentage; and they might be weakly or strongly enforced.

Scholars have identified a range of benefits linked to quotas. They 'raise awareness about the underrepresentation of women in politics', 'send a clear signal that a persistent imbalance is a social problem that exists and must be redressed', and increase public support for more women in politics.⁸⁰ Empirical studies show that 'quotas are followed by greater legislative attention to the interests and priorities of women as a group', especially in relation to women's rights, public health, and poverty alleviation. Quotas 'send cues to all officeholders, prompting broad changes in legislator behavior, and by bringing more women into legislatures, they increase women's ability to collectively influence legislative decisions.'⁸¹

But quotas are not without controversy. Krook points out that both feminist and non-feminist actors might promote quotas for 'distinct and even contradictory reasons', and she cites four concerns held by at least some feminists: 'that quotas further neoliberal projects, demobilize women's movements, result in the election of non-feminist women, promote a static view of "women" as a group, and decrease the effectiveness of women as political actors.'⁸²

A different concern centres around the concept of 'autocratic genderwashing' which 'occurs when autocrats take credit for advances in gender equality in order to turn attention away from persistent nondemocratic practices, such as violations of electoral integrity and human rights. In doing so, they exploit the often simplistic association between gender equality and democracy to seek legitimacy and achieve regime stability.'⁸³ Consistent with this critique, it has been claimed that dictatorships have

⁸⁰ J. Fernández and C. Valiente, 'Gender Quotas and Public Demand for Increasing Women's Representation in Politics: An Analysis of 28 European Countries', 13 *Eur. Pol. Sci. Rev.* (2021) 351.

⁸¹ A. Clayton, 'How Do Electoral Gender Quotas Affect Policy?', 24 *Annu. Rev. Political Sci.* (2021) 235.

⁸² M. L. Krook, 'Quota Laws for Women in Politics: Implications for Feminist Practice', 15 *Social Politics* (2008) 345, at 360.

⁸³ E. Bjarnegård and P. Zetterberg, 'How Autocrats Weaponize Women's Rights', 33 *J. of Democracy* (2022) 60.

vigorously enacted gender-related legislation, at a rate that surpasses democracies in the developing world. This enables them to signal adherence to international norms by demonstrating progress on gender equality, while maintaining authoritarian rule. It also ensures access to certain forms of foreign aid and enables avoidance of more politically costly reforms.⁸⁴ Rwanda, where women occupied 61 percent of seats in the Chamber of Deputies after 2018, is often cited by way of example.

Another perspective on gender quotas is provided by Ruth Rubio Marín, in ‘A New European Parity-Democracy Sex Equality Model and Why It Won’t Fly in the United States’, 60 *Am. J. Comp. L.* (2012) 99. She contrasts the European model with reluctance in the United States to address such issues directly. One reason is the shadow cast by ‘the political underrepresentation or disempowerment of blacks and other minorities.’ Another is that ‘conservative forces in the United States, often mobilized by Christian religious fundamentalism, have historically succeeded in presenting every instance of affirmation of women’s rights and fight for equality as a threat to the family.’ In Europe, gender parity has been promoted on instrumental grounds that it is better for society and the economy and as a matter of justice. But a very different approach has prevailed in the United States:

Underlying the U.S. rejection of strict and mandatory gender quotas is of course the critical understanding that quotas on the basis of sex violate formal equality and a gender neutral reading of the Equal Protection Clause. ... [S]trict quotas are not uncontroversial in Europe either because despite the prevalent substantive equality model and the application of indirect discrimination as a constitutional doctrine, the formal equality principle still exists forcing a proportionality analysis. Such analysis is more likely to succeed with regard to measures that are less invasive than strict quotas and closer to the ideal of ensuring equal opportunities but not equal results. ...

The greater resistance towards the enactment of legislative measures to ensure women’s access to positions of power in both the political and the economic domains is also related to the stronger U.S. individualist tradition and its faith in both autonomy and meritocracy as expressed through the free functioning of the market and of social forces, including capital and political parties, that constitutional provisions such as First Amendment associational rights of political parties help to protect. In Europe, the social or welfare state tradition with its post-World War II constitutional embedding has less difficulty advancing the notion that political and economic imbalances of powers may require positive corrections by the State to protect the more vulnerable. ...

D. Anti-essentialism and Anti-stereotyping

... In Europe, quotas have been defended both by those who believe that women can add a distinctive way of ruling (more collaborative, less competitive or ego driven) and those who sustain that this is ultimately irrelevant because the point is simply treating women as equal citizens. In contrast, in the United States, quotas would most likely be seen as rigid and essentializing, and the affirmation of the difference that women can make is likely to be controversial enough to prevent feminists of different strands from joining forces to support the initiative.

⁸⁴ D. Donno, S. Fox and J. Kaasik, ‘International Incentives for Women’s Rights in Dictatorships’, 55 *Comparative Political Studies* (2022) 451.

QUESTIONS

1. How do you react to the provisions in both General Recommendations on affirmative action, either by the state or by political parties? As a member of the Committee, which if any of these provisions would you oppose? Is it consistent with Article 25 of the ICCPR, guaranteeing the right to vote? How do you react to paragraph 31 of General Recommendation No. 23?
2. If the United States were to ratify CEDAW would it need to lodge a reservation in relation to Article 7 of the Convention ('States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country ...')?
3. Is it problematic that CEDAW norms affect states differentially, depending on whether the international community can exert pressure through development assistance and other forms of influence?

5. Sexual and Reproductive Rights

The sexual and reproductive health rights of women and girls have long been a battleground in society at large, and within the international human rights regime. The U.S. Supreme Court's overruling in 2022 of the constitutional right to abortion, previously recognized in *Roe v. Wade*, further elevated the prominence of the issue. The UN Human Rights Council's Working Group on discrimination against women has observed that these rights 'are systematically neglected, not because of a lack of resources or technical knowledge but because of the widespread disregard for women's dignity, bodily integrity and autonomy. Sexual and reproductive health matters are intrinsic to every woman and girl and tied to their ability to live with dignity and exercise their agency' (UN Doc. A/HRC/47/38 (2021)). According to the group:

16. ... An estimated 810 maternal deaths occur each day globally, and 25 million unsafe abortions take place annually, resulting in approximately 47,000 deaths every year, primarily in developing countries and among members of socioeconomically disadvantaged and marginalized populations. Every 16 seconds there is a stillbirth. More than 200 million women who want to avoid pregnancy are not using modern contraception, due to a range of barriers. Millions of women and girls are denied the ability to manage their monthly menstrual cycle safely and with dignity.

...

18. ... A woman's right to control her fertility is central to the realization of those rights and to her autonomy and agency. States are obligated to ensure that sexual and reproductive health services are available, accessible, affordable, acceptable and of good quality. The distinct sexual and reproductive health needs of women and girls must be addressed to ensure substantive equality. ...

The most contentious issue in this context is the right to safe and legal abortion. World Health Organization statistics paint a grim picture (WHO, *Preventing Unsafe Abortion*, 25 September 2020). Each year between 2015 and 2019 there were 73 million induced (safe and unsafe) abortions worldwide. This amounted to 39 induced abortions per 1000 women aged between 15 and 49 years. Three out of ten of all pregnancies, and 6 out of 10 of all unintended pregnancies, ended in an induced abortion. Estimates from 2010 to 2014 showed that around 45 percent of all abortions were unsafe.

The CEDAW Convention is silent on contraception and abortion rights, a lacuna that Martha C. Nussbaum, ‘Women’s Progress and Women’s Human Rights’, in Bardo Fassbender and Knut Traisbach (eds.), *The Limits of Human Rights* (2020) 231 has described as a notorious defect:

... [T]he Roman Catholic Church, together with some conservative religious authorities in other religions, made specific language on these points impossible. Access to reliable contraception is surely of the greatest importance to women’s equality. The issue is mentioned in CEDAW, but in an evasive way. In Article 16, subsection (e), women are accorded ‘The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise those rights.’ The same as men, that is. This surely stops well short of guaranteeing access to legal artificial contraception, since a nation could totally ban contraception for both women and men equally without running afoul of this section. Or, more likely, it could decide that what is permissible is education in ‘natural’ methods of contraception, such as the so-called ‘rhythm method’, but continue to ban all artificial contraception. It’s obvious that conservative religious leaders could be happy with this section.

Abortion rights are simply not mentioned at all ... [and] the subsequent recommendations of the Committee are also quite vague. ...

Was there any purpose of the vague language of Article 16? Would it not have been better to leave this out? The women’s movement could reasonably regard this article as a placeholder for their urgent concerns. Had these concerns not been mentioned at all, it would seem that the movement had capitulated to external pressures and agreed simply to remove them from consideration. As it is, the document makes it evident that control over family planning is an important issue for women’s full equality. ... In terms of the further development of the international women’s movement, it is an important statement: we may have encountered an obstacle, but we are here to stay and are not backing down.

In fact, most human rights treaties steer clear of these issues. When drafting the UDHR, a proposal to state that the right to life begins ‘from the moment of conception’ was rejected by six votes to two (UN Doc. E/CN.4/AC.1/SR.35 (1948), 6). The phrase was, however, included in the American Convention on Human Rights (Article 4(1)) which states that: [e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.’ While a preambular paragraph of the Convention on the Rights of the Child states 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’, most commentators do not consider this to restrict abortion rights.⁸⁵

In interpreting relevant rights, most UN treaty bodies have addressed the issue of abortion.⁸⁶ The Committee on Economic, Social and Cultural Rights, in General Comment No. 22 (2016), paragraph 28, states that:

... Preventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents; to liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion care,

⁸⁵ D. Archard and J. Tobin, ‘Art.1 The Definition of a Child’, in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (2019) 24.

⁸⁶ For a survey, see R. Smyth, ‘Abortion Exceptionalism in International Human Rights Law’, 46 *Hum. Rts. Q.* (2024) 671.

including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health. ...

Similarly, in General Comment No. 20 (2016) the Committee on the Rights of the Child in paragraph 60:

...urges States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions.

The most detailed, and nuanced treatment is the Human Rights Committee's General Comment No. 36 (2019):

8. Although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, and where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly. For example, they should not take measures such as criminalizing pregnancies by unmarried women or apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion. States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and, especially, girls and boys, to quality and evidence-based information and education about sexual and reproductive health and to a wide range of affordable contraceptive methods, and prevent the stigmatization of women and girls seeking abortion. States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances, and on a confidential basis.

In 2018, an on-site 'inquiry' by the CEDAW Committee, pursuant to Article 8 of the Optional Protocol, examined the situation relating to abortion in Northern Ireland (UN Doc. CEDAW/C/OP.8/GBR/1). It concluded that:

83. The Committee finds that the State party is responsible for:

- (a) Grave violations of rights under the Convention considering that the State party's criminal law compels women in cases of severe foetal impairment, including FFA, and victims of rape or incest to carry pregnancies to full term, thereby subjecting them to severe physical and mental anguish, constituting gender-based violence against women; and

- (b) Systematic violations of rights under the Convention considering that the State party deliberately criminalises abortion and pursues a highly restrictive policy on accessing abortion, thereby compelling women to:
- (i) carry pregnancies to full term; (ii) travel outside NI to undergo legal abortion; or (iii) self-administer abortifacients.

The United Kingdom Government subsequently adopted the *Abortion (Northern Ireland) (No. 2) Regulations 2020*, which permit abortions up to 12 weeks, and beyond 12 weeks under certain circumstances.

In 2024 the Committee published the results of an inquiry conducted in Poland (UN Doc. CEDAW/C/POL/IR/1):

106. ... The Committee finds systematic violations of rights under the Convention, considering that Poland deliberately criminalizes abortion, pursues a highly restrictive policy and practice on access to abortion, thereby compelling women to carry pregnancies to full term, to travel outside the country to undergo legal abortion or to seek clandestine and potentially unsafe abortion services.

In recent years, abortion law reform has led to decriminalization and safe access in countries such as Chile, Colombia, Gabon, Gambia, India, Ireland and South Korea. But the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) to end the constitutional right to abortion that had been recognized since 1973, and to entrust the respective states to decide on appropriate regulation, has generated even greater contention around the issue.⁸⁷

One of the countries with the strictest laws against abortion is El Salvador, in which it is 'illegal under all circumstances. Women face two to eight years in prison for having an abortion. Providers face prison sentences of 6 months to 12 years.' Women 'who suffered miscarriages or obstetric emergencies, have been sentenced to up to 40 years in prison' (*Human Rights Watch World Report 2022*). One such case began with a complaint to the Inter-American Commission on Human rights, which in turn referred it to the Inter-American Court.

MANUELA ET AL. V. EL SALVADOR

INTER-AMERICAN COURT OF HUMAN RIGHTS, JUDGMENT, 2 NOVEMBER 2021

...

VII - Facts

A. Factual framework

35. In 1998, a new Criminal Code ...eliminated the grounds for non-punishable abortion, and also the classification as mitigated homicide for cases in which a "mother kills her child during the delivery or within the following seventy- two hours."

...

37. [In 1999, the Constitution was amended to recognize as a human person] "every human being from the moment of conception."

38. ... Article 37 [of the Health Code provides that] [p]rofessional secrecy is an obligation derived from the very essence of the profession. ...

...

⁸⁷ K. Young, 'Human Rights in the Constitutional Era of Dobbs', 56 *Columbia Hum. Rts L. Rev.* (2025) 000.

40. [But the Criminal Code provides that physicians and other health professionals are obliged to report if they] “become aware [...] [of actionable offenses] while providing the care required by their profession ... “. ...

B. Factual context

41. In its Merits Report, the Commission included information on the criminalization of abortion in El Salvador and the alleged effect that this has had in cases of obstetric emergencies and infanticide. Even though the criminal laws on abortion were not applied in this case, the Court notes that this information relates to the alleged criminalization of women who have suffered obstetric emergencies in El Salvador. ...

42. [The Court takes note of the relevant jurisprudence of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the CEDAW Committee.]

...

45. ... A report ... revealed that, between 1998 and 2003, 80% of obstetric gynecologists in El Salvador believed that reporting obstetric emergencies was compulsory in all cases.

46. Lastly, the Court notes that most of the women prosecuted for such facts had few if any financial resources, came from rural or marginalized urban areas and had little schooling. In addition, many of them were detained and handcuffed while receiving medical care.

C. Manuela and her family unit

47. [Manuela was born in 1977, married in 1997, and had two children. Her husband left her and she lived with her family.] Neither Manuela nor her parents knew how to read or write.

48. On August 24, 2006, Manuela went to the Cacaopera Health Unit because she was suffering from a headache, nausea, pain in the pit of her stomach and tiredness. She was diagnosed with acute gastritis. On May 14, 2007, Manuela visited the unit again due to headaches and it was recorded that she had what “appeared to be a painful lump behind her ear”; she was diagnosed with cervical adenitis and was prescribed analgesics. Manuela then developed several lumps in her neck, which were visible and caused her pain; therefore, she had further appointments in June and August 2007 and was then diagnosed with right neck lymphadenopathy and referred to the San Francisco Gotera National Hospital. The case file does not reveal whether the presumed victim went to that hospital or whether she received treatment there.

D. Manuela’s pregnancy

...

50. On February 26, 2008, Manuela [who was pregnant] was washing clothes in the river with her elder son, when she fell heavily and injured her pelvic area. ...

E. The medical treatment of the obstetric emergency

52. On February 27, 2008, at 3:25 p.m., Manuela was admitted to [hospital]. ... [T]he preoperative diagnosis was “delivery outside the hospital, retained placenta and perineal tear.”

53. [The hospital record stated] that she was admitted due to abortion. [It quoted] Manuela indicating: “I don’t know if it fell to the floor or if the umbilical cord broke, or if my mother cut it. My sister says that my mother cut the cord and buried the baby; my sister told me that the baby was born dead.” ... [S]he was advised that the prosecution service would be notified.

...

56. The report does not mention the lumps on Manuela’s neck [which had been misdiagnosed during treatment in 2006 and 2007].

F. The criminal prosecution of Manuela

57. On February 27, 2008, the physician ... filed a complaint against Manuela with the ... Prosecution Service ..., and this initiated the criminal proceedings

58. [The physician told the police that the [information provided by the patient did not match the clinical picture

59. ... [At 9 a.m., a forensic physician reported:]

Umbilical cord [...] with a clean cut, not ruptured. Based on the foregoing, the patient gave birth outside a hospital, if not full-term at least very nearly

60. [On the same date, Manuela's house was searched based on a warrant and the body of a 'full-term newborn' was found inside a septic tank.]

...

62. The case file also includes a statement by Manuela's father, in which he indicated that he "felt ashamed because [his daughter's] husband is [...] in the United States, but [...] his daughter told him that she got pregnant from another man" and that "he was sorry for his daughter, but this would never have made her get rid of the child." This statement bears a fingerprint because the presumed victim's father does not know how to read or write.

63. Subsequently, Manuela's father indicated that the police "put pressure on him and made him sign a piece of paper" and "threatened him until placed his fingerprint." ...

G. The presumed victim's detention and subsequent investigation procedures

64. [Hospital records show that Manuela was arrested in hospital on February 28, 2008, and] detained in flagrante delicto "for the crime of the murder of her newborn son ...". The record indicates that Manuela refused to sign it....

...

68. On February 29, 2008, the Prosecutor General issued an order requiring a formal investigation with the provisional detention of Manuela for the crime of the aggravated homicide of a newborn. He indicated that the detention was necessary "to ensure that this case does not remain unpunished and that the normal outcome of the proceedings is not frustrated ...". ...

...

[After various hearings, on August 11, 2008 Manuela was sentenced to 30 years' imprisonment for the crime of aggravated homicide. No appeal was filed. In February 2009 she was diagnosed with Hodgkin's lymphoma, and she died in hospital on April 30, 2010.]

VIII - Merits

91. In the instant case, there is no dispute regarding the facts that Manuela was pregnant, gave birth and suffered from preeclampsia [which constitutes] an obstetric emergency.

92. What is in dispute is the State's alleged responsibility for the detention, prosecution and conviction of the presumed victim for aggravated homicide following the obstetric emergency that she suffered, and also for the medical care that the presumed victim received, and the alleged violation of professional secrecy by the medical staff who attended her. Bearing in mind that this case does not refer to the occurrence of a therapeutic abortion, the context established above will only be taken into account to the extent that it relates to the purpose of the dispute.

...

VIII-1 - Rights to personal liberty and presumption of innocence ...

A. Arguments of the parties and the Commission

....

95. The representatives argued that “Manuela’s detention was unlawful and arbitrary because: (a) she was detained by application of a presumption of in flagrante delicto which is contrary to the object and purpose of the treaty; (b) she was not informed of the reasons for her detention and the charges against her; (c) her pretrial detention was ordered based on a legal presumption of guilt; (d) her criminal trial was conducted in contravention of judicial guarantees and judicial protection, and (e) the laws applied were contrary to the principle of the legality of criminal proceedings.” They emphasized that the pretrial detention ordered against the presumed victim was based on the court’s presumption of guilt and also argued that the presumed victim had no remedy to contest the imposition of pretrial detention.

96. The State pointed out that the initial detention was in keeping with the Code of Criminal Procedure.

...

B. Considerations of the Court

...

112. Taking into account that the order of pretrial detention against the presumed victim was arbitrary because it did not contain a reasoned and objective legal justification for its admissibility, and also its duration of more than five months without its pertinence having been duly reviewed by the judicial authorities, the Court declares that El Salvador violated Manuela’s right to the presumption of innocence established in Article 8(2) of the American Convention

VIII-2 - Rights to judicial guarantees, personal integrity and equality ...

A. Arguments of the parties and the Commission

...

115. The representatives argued that the criminal trial was conducted in violation of judicial guarantees and judicial protection because: (i) the minimum conditions for the rigorous determination of Manuela’s criminal responsibility were not provided; (ii) Manuela gave a statement before she was notified of the charges brought against her; (iii) she did not have a suitable State-appointed defense counsel, in violation of the right to adequate time to prepare her defense, to communicate freely and privately with her legal counsel, and to have a public defender; iv) there was no effective remedy available to appeal the first instance judgment, and (v) Manuela was never heard at her trial, ... because she was prevented from doing so by the public defender on call that she had for the hearings.

...

B. Considerations of the Court

...

119. In this case, a series of violations of judicial guarantees has been alleged. The Court only has sufficient evidence to examine: (1) the right to defense; (2) the use of gender stereotypes and judicial guarantees, and (3) the sentence imposed on Manuela.

B.1 The right to defense

...

130. The Court considers that ... the actions of the public defender harmed Manuela’s rights and interests, leaving her defenseless, which constituted a violation of the essential right to be assisted by legal counsel. [Her] substantive right to defense was also violated because she was prevented from defending her interests.

B.2 The use of gender stereotypes and judicial guarantees

131. Article 8(1) of the Convention establishes that every person has the right to be tried by an impartial court. ...

B.2.a The investigations

146. ... [T]he Court considers that Manuela's guilt was presumed from the very start of the investigation. Moreover, little effort was made to determine the truth of what happened and to take into account the probative elements that could have disproved the thesis of the presumed victim's guilt. This attitude was also encouraged by the investigators' prejudices against women who do not comply with the role of self-sacrificing mothers who must always seek to protect their children. The prejudices and negative gender stereotyping affected the objectivity of the agents in charge of the investigations, closing possible lines of investigation into the actual circumstances. The Court also notes [the failure to investigate] the possibility that the mother is not responsible for causing the death of which she is accused.

B.2.b The reasoning behind the guilty verdict

147. ... [This court's] purpose is not to determine Manuela's innocence or guilt, but rather to decide whether the judicial authorities violated obligations established in the Convention; particularly, the obligation to provide the reasons for a decision, the principle of presumption of innocence, and the right to be tried by an impartial court.

...

155. ... [T]his Court notes that the reasoning provided by the Trial Court demonstrates that gender stereotypes were used to supplement the court's lack of sufficient evidence. Thus, the judgment convicting Manuela suffers from all the prejudices inherent in a patriarchal system and downplays the factual circumstances and motivations. It reprimands Manuela as if she had violated duties considered inherent in her gender and indirectly criticizes her sexual conduct. It minimizes and disregards that a possible reason for the desire to conceal her supposed error was to evade the disapproval of an environment created by traditional androcentric values. Consequently, it constituted a violation of the right to presumption of innocence, the right to be tried by an impartial court, and the obligation to state the reasons for judicial decisions.

...

159. ... The application of those stereotypes was only possible because Manuela was a woman; and the impact was exacerbated because she was poor and illiterate and lived in a rural area. Therefore, the Court considers that the distinction made in the application of the criminal law was arbitrary and, consequently, discriminatory.

...

B.4 Conclusion

173. Based on all the above considerations, the Court concludes that the investigation and trial to which the presumed victim was subjected did not comply with the right to defense, the right to be tried by an impartial court, the presumption of innocence, the duty to provide the reasons for a decision, the obligation not to apply laws in a discriminatory manner, the right not to be subjected to cruel, inhuman or degrading punishment and the obligation to ensure that the purpose of punishments consisting in deprivation of liberty is the reform and social readaptation of prisoners. Consequently, the State violated Articles 8(1), 8(2), 8(2)(d), 8(2)(e), 24, 5(2) and 5(6) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Manuela.

...

[Reparations]

[The Court, in paragraph 327, required the State to, inter alia: publicly acknowledge international responsibility; grant scholarships to Manuela's sons; provide medical, psychological and/or psychiatric treatment to Manuela's parents; regulate the obligation of medical professional secrecy and the confidentiality of medical records; elaborate an action protocol for the treatment of women who require emergency medical attention for obstetric emergencies; adapt its regulations on pretrial detention; implement an awareness-raising and training course for judicial officials, as well as the health

personnel of the Rosales National Hospital; adapt its regulation concerning the dosimetry of the sentence for infanticide; implement an education program on sexuality and reproduction; ensure comprehensive care in cases of obstetric emergencies; pay compensation for pecuniary and non-pecuniary damage and reimburse costs and expenses; and, within one year of the judgment, report back to the Court on measures taken to comply with it.]

* * *

Among other important treaty body cases on reproductive rights,⁸⁸ is *Camila v. Peru*, in which the UN Committee on the Rights of the Child (Communication No. 136/2021 of 13 June 2023) considered the case of a 13-year-old Peruvian indigenous victim of rape and incest starting at the age of nine. Her request for access to legal therapeutic abortion was ignored. Following a spontaneous abortion, she was prosecuted and convicted for self-abortion, although later acquitted on appeal:

8.15. ... The Committee notes that the author, an Indigenous girl living in a rural area who was the victim of rape, was repeatedly revictimized in both police and health-care contexts when her request for an abortion was repeatedly ignored and her privacy was invaded at both her home and her school, resulting in the harassment of the author by her family and community. Lastly, the Committee considers that the author's lack of access to safe abortion and her subsequent prosecution for self-abortion constituted in themselves differential treatment based on the author's gender, as she was denied access to a service that was essential for her health and was punished for not complying with gender-based stereotypes relating to her reproductive role. In the light of the foregoing, the Committee concludes that the facts before it disclose discrimination against the author on the basis of age, gender, ethnic origin and social status, in violation of article 2 of the Convention.

Conscientious Objection to Abortion

In situations in which women are legally entitled to obtain an abortion, some states recognize that a health care worker, or perhaps an institution, can refuse to provide relevant services on the grounds of conscience or religious belief. In *R. R. v. Poland* (App. No. 2761/04 (2011)) the European Court of Human Rights observed that, in such situations '[s]tates are obliged to organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation' (paragraph 206).

But especially in predominantly Catholic countries, such as Argentina, Ireland, Italy, and Mexico, the legalization of abortion has been accompanied by widespread invocation of conscientious objections by medical personnel, thereby making it extremely difficult to actually obtain an abortion in practice.⁸⁹ The Colombian Constitutional Court addressed this issue, among others, in an important 2022 judgment.

⁸⁸ See: *María Elena Carbajal Cepeda et al. V. Peru*, UN Doc. CEDAW/C//89/D/170/2021 (25 October 2024) (forced sterilization, lack of redress, lack of investigation); *Susana (pseudonym) v. Nicaragua*, UN Doc. CCPR/C/142/D/3626/2019 (17 January 2025) (forced motherhood following rape (incest) and lack of access to abortion and adoption services); *Norma (pseudonym) v. Ecuador*, UN Doc. CCPR/C/142/D/3628/2019 (17 January 2025) (forced motherhood following incest and lack of access to abortion and adoption services).

⁸⁹ 'In Argentina and Mexico, abortion is not a crime. But many women struggle to access the procedure', *New York Times* (21 February 2022).

SENTENCE C-055/22
CONSTITUTIONAL COURT OF COLOMBIA (21 FEBRUARY 2022)
[UNOFFICIAL, ELECTRONIC, TRANSLATION]

The Full Chamber of the Constitutional Court ... decides on the complaint filed by the citizens of the reference in exercise of the public action of unconstitutionality ... against Article 122 of Law 599 of 2000 (Criminal Code), the text of which is as follows:

...

“Article 122. Abortion. A woman who causes her own abortion or allows another to cause it shall be sentenced to [16 to 54] months’ imprisonment.

The same penalty shall apply to anyone who, with the woman’s consent, engages in the conduct referred to in the preceding subparagraph.

This article was declared conditionally constitutional by the Constitutional Court in Ruling C-355 of May 10, 2006, “on the understanding that the crime of abortion is not committed when, with the woman’s consent, the pregnancy is terminated in the following cases: (i) When the continuation of the pregnancy constitutes danger to the life or health of the woman, certified by a physician; (ii) When there is serious malformation of the fetus that makes its life unviable, certified by a physician; and, (iii) When the pregnancy is the result of conduct, duly reported, constituting carnal access or sexual act without consent, abusive or non-consensual artificial insemination or transfer of fertilized egg, or incest.”

II. The Claim

1. The plaintiffs seek a declaration of the total unenforceability of the impugned provision. In their view, it violates [16 different provisions] of the Political Constitution [and various provisions of the UDHR and the American Convention on Human Rights].

[Because the Court had already ruled on related issues, the doctrine of *res judicata* meant that it was necessary to show that this challenge was materially different.]

...

247. [A substantive pronouncement in the present case is warranted because of several changes in the normative context relevant to Article 122].

248. First, the issuance of the 2015 Statutory Health Law. In [relation to] the Criminal Code, health is presented as an autonomous and inalienable fundamental right, individually and collectively, while in the review developed in Ruling C-355 of 2006 health was considered as a “fundamental right by connection with life”.

...

250. The autonomous justifiability of the right to health requires that the institutions, rules, procedures, participants and actors in the system focus on the dignity of individuals as the cornerstone [T]he challenged provision has been introduced in a new regulatory context of health insurance

251. Second, subsequent to Judgment C-355 of 2006, multiple international organizations, including the [Committee on Economic, Social and Cultural Rights], the Special Rapporteur on the right to health, and the CEDAW Committee, have raised the need to decriminalize abortion as a measure in favor of the sexual and reproductive health and rights of this population, as well as a way to act against violence against women. ... [T]here are international documents of varying normative value that have advocated for the decriminalization of abortion beyond the three grounds defined in Ruling C-355 of 2006 and, therefore, have an impact on a new constitutional understanding of the phenomenon.

252. Third, criminal policy has seen a reassessment of the meaning of proportionality and the purposes of punishment.

...

11.... [T]he freedom of conscience of women, girls and pregnant women ...

...

11.2. Constitutional characterization of freedom of conscience

376. ... [T]he concept of conscience [enshrined in Article 18 of the Constitution] ... refers to the power of each person to discern between what is morally right or wrong ..., without any of such determinations being encouraged or subject to disproportionate intervention by the State or third parties. ...

379. This freedom protects three fundamental guarantees: first, the right to keep one's convictions secret Secondly, once the thoughts are expressed or communicated, the guarantee extends to not being pressured or disturbed by the manifestation of such convictions. Finally, it protects the prerogative of not being forced to act against one's intimate personal convictions

...

385. ... [C]onscientious objection ... can be based on religious, moral, ethical, humanitarian or similar grounds. However, it is possible for the legislator to establish restrictions to this right, as long as they are reasonable and proportionate [T]he general principle is that, given the silence of the Legislator in relation to the characteristics of beliefs, any profound conviction that opposes the legal good guaranteed by the norm that establishes a legal duty to act or refrain from acting, can be adduced to excuse oneself from its fulfillment. Conscientious objection, however, cannot be invoked by judicial authorities and notaries in the performance of public functions or, in some cases, by physicians in cases of voluntary termination of pregnancy, among other events.

...

394. The decision to assume motherhood, therefore, is (i) highly personal, because it has an impact on the life project of the woman, girl, adolescent or pregnant person who decides to continue and carry a pregnancy to term ...; (ii) individual, due to the physical and emotional impact that the development of the pregnancy has on her life experience and her own existence; and (iii) non-transferable, because the autonomy of the decision to assume motherhood cannot be transferred to a third party, except in exceptional cases [T]his is a decision that cannot be appropriated by the State or other individuals

...

VII. Summary of the Decision

...

650. The Court found that there was a tension of constitutional relevance between, on the one hand, the protection of life in gestation ... and, on the other hand, the rights to health and reproductive rights; the equality of women in vulnerable situations and in irregular migratory situations; freedom of conscience; and the constitutional purpose of general prevention of punishment

651. ... [T]his constitutional tension cannot be resolved by giving preference to one of the guarantees in tension, since this would entail the absolute sacrifice of the others. For this reason, it considered it necessary to adopt a formula that recognizes the constitutional relevance of each of these guarantees, in such a way that, as opposed to subtracting protection from them -because of the result that would follow from giving preference to one of them- a greater realization of all the rights, principles, and values in conflict is achieved.

652. The Court resolved this tension ... by identifying an optimal point in the term of gestation that, in the abstract, avoids the wide margins of lack of protection for the dignity and rights of women ... and, at the same time, protects as much as possible the life in gestation, based on three elements:

653. The first is constituted by the three “extreme hypotheses of affectation of [the] dignity” of women, as evidenced by the Court in Judgment C-355 of 2006.

654. The second, constituted by the concept of “autonomy,” which allows for the abstract maximization of the goods in tension, since it refers to the moment in which it is possible to demonstrate that the dependence of the life in formation on the pregnant person is broken, which justifies its reinforced protection by criminal law in the current normative context. In effect, to totally decriminalize abortion with consent, without the existence of alternative measures for the protection of life in gestation, would place the Colombian State in a situation of non-compliance with its constitutional and international obligation to adopt measures for this purpose. ...

655. The third, promotes a dialogue in the bodies of democratic representation, so that ... they formulate and implement a comprehensive public policy that avoids the wide margins of lack of protection for the dignity and rights of pregnant women, ... [and] gradually and incrementally protects life in gestation, without intensely affecting such guarantees.

...

VIII. Decision

[The Court]

RESOLVES

FIRST: [In applying Article 122 of the Penal Code, abortion] shall only be punishable when it is performed after the twenty-fourth (24) week of gestation and, in any case, this time limit shall not apply to the three cases in which Ruling C-355 of 2006 established that abortion is not a crime ...

SECOND. TO EXHORT the Congress of the Republic and the national government, without prejudice to the immediate compliance with this judgment, to formulate and implement, as soon as possible, a comprehensive public policy This policy must contain, at a minimum, (i) clear disclosure of the options available to pregnant women during and after pregnancy, (ii) the elimination of any obstacle to the exercise of the sexual and reproductive rights recognized in this decision, (iii) the existence of instruments for the prevention of pregnancy and planning, (iv) the development of education programs on sexual and reproductive education for all persons, (v) support measures for pregnant mothers that include adoption options, among others, and (vi) measures that guarantee the rights of those born in the circumstances of pregnant women who wish to have an abortion.

...

Responses

Responses to the Court’s ruling have varied. One anti-abortion group expressed satisfaction that the court: did not characterize abortion as a fundamental right; did not obligate ‘the health system to perform abortions’; and did recognize ‘the need to protect the right to life of the unborn legally’.⁹⁰ On the other hand, a pro-choice group argued that the court ‘should have considered complete decriminalization, with regulations on abortion approached as health care’ and characterized the fact that abortion beyond 24 weeks could still be punished ‘as a symbolic and patriarchal punishment of the reproductive autonomy of women.’⁹¹

Douglas NeJaime and Reva Siegel, in ‘Conscience Wars in the Americas’, 5 *Lat. Am. L. Rev.* (2020) 1, note that in paradigmatic cases, religious accommodation has been recognized to individuals ‘from a minority faith to engage in ritual observance or religiously-motivated dress or grooming that runs afoul of generally applicable laws’.⁹² But, in recent years, religious conscience claims have increasingly been invoked in ‘culture wars’, especially in relation to issues of sexuality such as LGBTQI+ rights, or reproductive rights. In the case of abortion, conservative religious groups argue first for comprehensive criminalization and, when that fails, seek to invoke a wide-ranging right to conscientious objection on the part not just of physicians but of all healthcare workers.

⁹⁰ R. Gómez, ‘The Reality of Abortion in Colombia up to 24 Weeks’, *Americans United for Life* (August 25, 2022).

⁹¹ Center for Reproductive Rights, Colombia: Historic Advancement in the Decriminalization of Abortion (2022), at 5.

⁹² See also F. de Londras et al, ‘The Impact of ‘Conscientious Objection’ on Abortion-related Outcomes: A Synthesis of Legal and Health Evidence’, 129 *Health Policy* (2023) 104716.

The authors note that the latter claims differ from the paradigmatic cases, such as Sikh men being permitted to wear turbans or Jewish men to wear the yarmulke when others may not cover their heads, in that culture war conscience claims are asserted to defend majority rather than minority norms and may inflict significant harms on other citizens. In line with the approach reflected in the work of several UN treaty bodies, in order for a legal system to avoid aligning itself with the belief system of the objector and against the rights to which the objector objects, a system that seeks to accommodate objections should also apply principled limits, including:

1. Protecting Patients

Laws can endeavour to protect conscience while providing for the patient's welfare by, first and foremost, prioritizing the health and safety of the individual seeking services. Accommodation regimes can be designed in ways that require institutions to anticipate problems and ensure patient access. Some laws require objectors to identify themselves to their employers or to the government in advance. The government or employer must ensure that willing providers are available and that the patient does not endure a stigmatizing encounter with an objecting provider.

2. Limiting Accommodation of Complicity Objections

Laws can also differentiate between those directly involved in the objected-to service and those who object on the basis of indirect involvement. ... Complicity claims can be constrained by limiting the range of actors who can claim conscience exemptions, as well as the range of acts subject to conscience exemptions.

3. Ensuring Alternative Access

Legal systems may be able to afford affected individuals with an alternate source of goods and services by requiring objectors to provide information and refer patients to willing providers. ...

4. Limiting Conscientious Objection to Individuals

Institutions, including hospitals and other religiously affiliated organizations, assert rights of conscientious objection—raising conceptual questions given that ... conscientious objection is premised on an individual ethical imperative.

This institutional dimension assumes particular importance in an era of widespread privatization. Elizabeth Sepper and James Nelson, in 'Government's Religious Hospitals', 109 *Va. L. Rev* (2023) 61 note that under the U.S. Constitution, 'States are not supposed to own or operate religious institutions, but they now do' as a result of the merging of the public and the private, which results in 'public' hospitals being treated for certain purposes as private religious institutions. These 'government religious hospitals' threaten religious freedom and equal citizenship. For example, 'State Medicaid contracts go to religiously affiliated insurers that refuse to cover reproductive healthcare for the many women of childbearing age covered by the public program.' In other sectors as well, 'faith-based organizations are sole providers of emergency shelter for unhoused people, a service funded by and often explicitly the duty of local governments. ... Legislatures delegate public functions – ranging from policing to child welfare – to religious entities.' They conclude that litigation will not resolve the problems and that 'creative solutions—from fostering competition to developing public options—will be required ...'.

In October 2022, the World Medical Association revised the provisions relating to conscientious objection in the International Code of Medical Ethics:

29. This Code represents the physician's ethical duties. However, on some issues there are profound moral dilemmas concerning which physicians and patients may hold deeply considered but conflicting conscientious beliefs.

The physician has an ethical obligation to minimise disruption to patient care. Physician conscientious objection to provision of any lawful medical interventions may only be exercised if the individual patient is not harmed or discriminated against and if the patient's health is not endangered.

The physician must immediately and respectfully inform the patient of this objection and of the patient's right to consult another qualified physician and provide sufficient information to enable the patient to initiate such a consultation in a timely manner.

Given the backlash against women's reproductive rights in the United States, what role should be played by international law in domestic debates? Frédéric Mégret, in 'Overturning of *Roe v Wade*: Time to Rethink US Engagement With International Human Rights Law?', *Int'l J. Const. L. Blog* (8 July 2022) argues that, in the aftermath of *Dobbs v. Jackson Women's Health Organization*,⁹³ U.S. lawyers should use international law because it provides 'a sophisticated framework to understand what might be wrong with outright bans and thus a clear opening for some access to abortion.' He argues that 'the international system is a pluralistic one marked by national and regional differences of appreciation about the scope of certain rights that does not mandate a single, one-size fits all approach, all the more so on an internationally divided issue such as abortion.'

Mégret suggests three reasons justifying the use of international law-based arguments in the domestic context. First, 'international human rights law provides a particularly pared down version of the argument about abortion, unencumbered by domestic idiosyncrasies. Precisely because it is universal and not implicated in the local constitution of the political, it acts as a kind of abstract dramatization of the human stakes'. Second, 'internationalizing the debate is sometimes simply the only option when a system has become stubbornly rigged against the rights of some. A fragile democracy facing major backsliding of key rights and whose judiciary shows significant problems of bias, the US is in some ways an excellent test case of the supra-constitutional utility of international human rights. Its situation highlights the importance of anchoring human rights commitments to international obligations as a guarantee against rollback.' And third, it 'expresses the global dimensions of the abortion issue. If nothing else, US dynamics stand to have an outsize impact on other countries' abortion debates, as they have had quite perniciously for example through the global "gag rule", that has in the past prohibited US aid to any international family planning groups that are even indirectly involved with clinics providing or promoting abortion.'

In November 2023, the UN Human Rights Committee's 'concluding observations' on the United States expressed alarm at post-*Dobbs* developments including 'the criminalization of various actors linked to their role in providing or seeking abortion care, including health care providers, persons who assist women to procure an abortion, notably family members, and the pregnant women seeking an abortion' as well as 'restrictions to inter-state travel, bans on medication abortion, and surveillance of women seeking abortion care through their digital data for prosecution purposes' (UN Doc. CCPR/C/USA/CO/5 (2023) para. 28).

⁹³ See generally D.S. Cohen, G. Donley and R. Rebouché, 'The New Abortion Battleground', 123 *Colum. L. Rev.* (2023) 1.

QUESTIONS

1. How would you describe the current state of international law in relation to a ‘right to abortion’?
2. What criteria would you use to evaluate the different impacts that CEDAW has had at the national and international levels?

6. Reservations: CEDAW and Other Treaties

The CEDAW treaty has been ratified with more reservations than any other human rights treaty. In the materials that follow we look at: (1) the general practice of the United States in relation to treaty ratification; (2) reservations to CEDAW, and United States policy in that regard; and (3) questions of international law relating to the effect of treaty reservations.

a. U.S. Treaty Ratification and Reservations

In comparison with other democratic states, and even with many one-party and authoritarian states that are persistent violators of human rights, the United States has a low record of ratification of human rights treaties. In theory, that comparison could be interpreted in two very different ways. One would be to say that the United States has a lesser commitment to and concern for international human rights standards than do many (say, European and Commonwealth) states of a roughly similar political and economic character. As the world’s leading power, its lesser commitment necessarily weakens the human rights normative regime. The other would be to argue that the United States does not engage in the hypocrisy of many states in ratifying and then ignoring treaties. If it ratifies, it means to comply, and hence will take a careful look to be certain that full compliance is possible.

But neither of these ‘pure’ explanations captures the complexity of the arguments within the Executive Branch and the Senate about ratification of these treaties. Consider a very different account.

**CHRISTOPHER N. J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS
(2014) 225**

After World War II, the structures that protected America’s post–Civil War racial and social hierarchies were in danger of crumbling. The federal government expanded dramatically and the United States plunged itself into international affairs. Yet there were those that wished to preserve the social status quo. Amidst a changing world, proponents of a “traditional” social order were forced to reinvent the arguments about limited government, states’ rights, and isolationism that they had used in the past. During battles over human rights, those that opposed the new social order implied by human rights renewed the rights and duties of the several states vis-à-vis the federal government; they updated the obligations and privileges of US sovereignty in the face of a new communist enemy; they defended the prerogatives of racial supremacy amidst “forced integration from abroad”; and they reasserted the rights and duties associated with a free market.

... Between 1951 and 1953 there were at least four Senate resolutions for constitutional amendments restricting the president’s treaty-making powers, motivated by those who, for various reasons, sought to maintain the existing constellation of social relationships. By January of 1953, Senator John Bricker of Ohio – the leader of this movement – announced that he had garnered enough support among his colleagues for one such proposed amendment to pass. A February 1953 State Department memo dryly summed up the situation:

The Covenants are under attack by large and important groups in this country such as the American Bar Association and a number of members of the U.S. Senate. For the administration to press ahead with the Covenants would tend to keep alive and strengthen support for the Bricker amendments to the Constitution.

... [T]he State Department outlined ... [three] options. ... First, the United States could just end its support for the Covenants altogether. This might quell the rising tide of domestic opposition and quiet the push for a constitutional amendment Second, the United States could focus only on the [ICCPR], ignore the [ICESCR], and work on shaping the former in the image of the US Bill of Rights. To a certain extent, ... [this] had always been a part of the US strategy – this angle of attack though, probably would not placate Bricker and company. The initial option would be to stall the creation of the Covenants indefinitely by employing delay tactics.

In the spring of 1953, Eisenhower chose to quit the Covenants: the United States would not attempt to ratify the Covenants, but it would continue to take part in their drafting. ...

... During the drafting of the International Bill of Human Rights, Great Britain and the United States were often forced to act on two conflicting imperatives: the first was to support certain human rights in the international sphere for the sake of geopolitical interests and friendly relations between states. But the very human rights principles that fostered international unity, also threatened their domestic spheres with monumental upheaval. As a result, the second imperative was to prevent human rights from redefining the human relationships in specific areas of society. From these imperatives came lasting solutions that were integrated into the very foundation of the modern international system of human rights.

Both the United States and Great Britain responded to the dual imperative to simultaneously confirm and contest human rights through a campaign to develop a human rights framework that could flip back and forth between alternate, conflicting modes of social organization. If “successful,” this had the power to not only neutralize the prerogatives of the human rights instrument, but also, through various legal mechanisms, to allow entirely contrary practices to flourish amidst a state’s apparent support for a human rights treaty.

Such successes are evident in the Reservations, Understandings, and Declarations (RUDs) that accompanied the international treaties. RUDs are legal footnotes that can limit, alter, or negate entire portions of the treaty’s text with respect to a particular signatory. From a social reading, they also identify where the boundaries of the lost struggles exist.

... [T]he United States incorporated a series of RUDs to go along with its ratification of the ICCPR. One such reservation is [the federal-state clause]. ...

... [This] represents a framework in which a social relationship defined by racial inequality could flourish while others social relationships – for example, those embodying racial equality – would falter. The intensity of debate over the colonial clause and the federal-state clause reveal the social battles that were fought through legal proxy. The now-accepted division between socioeconomic rights, on the one hand, and civil and political rights on the other is not in any way natural and inevitable. ... [I]t is the product of a series of struggles over how to organize global and domestic relations.

* * *

In the years that followed, the United States did ratify a few human rights treaties, including the Slavery Convention, the Protocol Relating to the Status of Refugees, the Convention on the Political Rights of Women and the four Geneva Conventions on the laws of war. But it was not until the Carter Administration in the late 1970s that a President sought the Senate’s consent for ratification of a number of major treaties (including the two Covenants).

The United States became a party to the Genocide Convention in 1988 (with one of its reservations stating that ‘nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.’), the ICCPR in 1992, the Convention against Torture in 1994 (with detailed and controversial reservations), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), also in 1994. But there has never been sustained debate in the Senate or broader political debate in the country about participation in other major and widely ratified treaties, including CEDAW, the American Convention on Human Rights, ICESCR, the Convention on the Rights of the Child (CRC), or the Convention on the Rights of Persons with Disabilities (CRPD).

THE ICCPR

In 1978, the Carter Administration proposed a list of reservations, understandings and declarations (RUDs) when it submitted four human rights treaties to the Senate. The treaties were the ICCPR, ICESCR, CERD and the American Convention on Human Rights. The Senate approved none of them. In 1991, the Bush Administration revived the ICCPR alone among the four treaties, noting that ‘[s]ubject to a few essential reservations and understandings, [the Covenant] is entirely consonant with the fundamental principles incorporated in our own Bill of Rights. U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community’. In its submission to the Senate Foreign Relations Committee it explained its reasons for proposing several of the RUDs. The treaty was subsequently ratified on the basis of these caveats.

PROPOSALS BY BUSH ADMINISTRATION OF RESERVATIONS TO INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS REP. OF S. COMM. FOR. REL. TO ACCOMPANY EXEC. E, 95–2 (1992) ¹⁰

General Comments

In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution and laws, both state and federal

In a few instances, however, it is necessary to subject U.S. ratification to reservations, understandings or declarations in order to ensure that the United States can fulfill its obligations under the Covenant in a manner consistent with the United States Constitution, including instances where the Constitution affords greater rights and liberties to individuals than does the Covenant. Additionally, a few provisions of the Covenant articulate legal rules which differ from U.S. law and which, upon careful consideration, the Administration declines to accept in preference to existing law. ...

Formal Reservations

1. Free Speech (Article 20)

Although Article 19 of the Covenant specifically protects freedom of expression and opinion, Article 20 directly conflicts with the First Amendment by requiring the prohibition of certain forms of speech and expression which are protected under the First Amendment to the U.S. Constitution (i.e., propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence). The United States cannot accept such an obligation.

Accordingly, the following reservation is recommended:

Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

...

2. Article 6 (capital punishment)

Article 6, paragraph 5 of the Covenant prohibits imposition of the death sentence for crimes committed by persons below 18 years of age and on pregnant women. In 1978, a broad reservation to this article was proposed in order to retain the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment. The Administration is now prepared to accept the prohibition against execution of pregnant women. However, in light of the recent reaffirmation of U.S. policy towards capital punishment generally, and in particular the Supreme Court's decisions upholding state laws permitting the death penalty for crimes committed by juveniles aged 16 and 17, the prohibition against imposition of capital punishment for crimes committed by minors is not acceptable. Given the sharply differing view taken by many of our future treaty partners on the issue of the death penalty (including what constitutes 'serious crimes' under Article 6(2)), it is advisable to state our position clearly.

Accordingly, we recommend the following reservation to Article 6:

The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age.

3. Article 7 (torture/punishment)

[Proposed reservation:]

That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

4. Article 15(1) (post-offense reductions in penalty)

Article 15, paragraph 1 ... [provides]: 'If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.' Current federal law, as well as the law of most states, does not require such relief and in fact contains a contrary presumption that the penalty in force at the time the offense is committed will be imposed, although post-sentence reductions are permitted ... and are often granted in practice when there have been subsequent statutory changes. Upon consideration, there is no disposition to require a change in U.S. law to conform to the Covenant. [A reservation was proposed.]

Understandings

1. Article 2(1), 4(1) and 26 (non-discrimination)

The very broad anti-discrimination provisions contained in the above articles do not precisely comport with long-standing Supreme Court doctrine in the equal protection field. In particular, Articles 2(1) and 26 prohibit discrimination not only on the bases of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth' but also on any 'other status.' Current U.S. civil rights law is not so open-ended: discrimination is only prohibited for specific statuses, and there are exceptions which allow for discrimination. For example, under the Age Discrimination Act of 1975, age may be taken into account in certain circumstances. In addition, U.S. law permits additional distinctions, for example between citizens and non-citizens and between different categories of non-citizens, especially in the context of the immigration laws.

...

Notwithstanding the very extensive protections already provided under U.S. law and the Committee's interpretive approach to the issue, we recommend [an understanding that expresses the preceding concerns.] [Eds.: The text of that understanding is here omitted.]

4. Article 14 (right to counsel, compelled witness, and double jeopardy)

In a few particular aspects, this Article could be read as going beyond existing U.S. domestic law... Under the Constitution, double jeopardy attaches only to multiple prosecutions by the same sovereign and does not prohibit trial of the same defendant for the same crime in, for example, state and federal courts or in the courts of two states. See *Burton v. Maryland*, 395 U.S. 784 (1969).

To clarify our reading of the Covenant with respect to these issues, we recommend the following understanding, similar to the one proposed in 1978:

... The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

Declarations

1. Non-self-executing Treaty

For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.

We recommend the following declaration ...

The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

...

3. Article 41 (state-to-state complaints)

Under Article 41, States Party to the Covenant may accept the competence of the Human Rights Committee to consider state-to-state complaints by means of a formal declaration to that effect...

Accordingly, we recommend informing the Senate of our intent, subject to its approval, to make an appropriate declaration under Article 41 at the time of ratification, as follows:

The United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims another State Party is not fulfilling its obligations under the Covenant.

...

* * *

The proposed RUDs were accepted by the Senate and conveyed to the UN when the US ratified the ICCPR on 8 June 1992.

QUESTIONS

1. Several NGOs participating in the Senate hearings on ratification of the ICCPR opposed the proposed (and later adopted) non-self-executing declaration. Note the following comments by Human Rights Watch and the ACLU:⁹⁴

⁹⁴ Human Rights Watch and American Civil Liberties Union, (1993), at 2.

“... Americans would have been able to enforce the treaty in U.S. courts either if it had been declared to be self-executing or if implementing legislation had been enacted to create causes of action under the treaty. The Bush administration rejected both routes. The result was that ratification became an empty act for Americans: the endorsement of the most important treaty for the protection of civil rights yielded not a single additional enforceable right to citizens and residents of the United States.”

Do you agree with these observations about the need for a self-executing Covenant? What arguments would you make against this position?

2. Consider the following warning by Jack Goldsmith in 2001 against the incorporation of the ICCPR in US domestic law:

“[A] domesticated ICCPR would generate enormous litigation and uncertainty, potentially changing domestic civil rights law in manifold ways. Human rights protections in the United States are not remotely so deficient as to warrant these costs. Although there is much debate around the edges of domestic civil and political rights law, there is a broad consensus about the appropriate content and scope of this law. This consensus has built up slowly over the past century. It is the product of years of judicial interpretation of domestic statutory and constitutional law, various democratic processes, lengthy and varied experimentation, and a great deal of practical local experience. Domestic incorporation of the ICCPR would threaten to upset this balance. It would constitute a massive, largely standardless delegation of power to federal courts to rethink the content and scope of nearly every aspect of domestic human rights law.⁹⁵”

3. Ratification by the United States of the ICCPR Optional Protocol does not seem to have been discussed. No such proposal was put to the Senate. (a) Why do you suppose this to have been the case? (b) As a member of the State Department, would you have argued for or against joining the Optional Protocol? (c) Would ratification of the Optional Protocol have been the correct solution, preferable to making the ICCPR self-executing?

b. CEDAW and Reservations

Of the 189 States parties to CEDAW, as of 2024, 79 had entered reservations or declarations to parts of the treaty (though some of those were simply to Article 29 providing for arbitration and adjudication by the ICJ). And 24 states had registered objections to the reservations of one or more other states. A considerable number of the original reservations have since been withdrawn. The CEDAW Committee has consistently urged states to do so and it has been suggested that the Universal Periodic Review process (Ch. 8, below) has also played an important part in this regard.⁹⁶

Unlike the ICCPR, which is silent on the issue, CEDAW addresses reservations in Article 28(2), which prohibits those incompatible with the ‘object and purpose’ of the Convention. Tolerance of reservations has been urged on various grounds — for example, the desirability of securing widespread participation in treaties serving a ‘purely humanitarian and civilizing purpose’ (in the words of the Genocide Convention Advisory Opinion), and hence the reluctance to view a ratification as invalid because of reservations. Another reason is to protect states’ freedom to maneuver.

Some commentators have characterized reservations to Article 2 of CEDAW as ‘manifestly incompatible’ with the object and purpose of the Convention, and other states have objected that some of them threaten the integrity of the Convention and the human rights regime in general. Reservations that purport to be consistent with Article 28(2) of CEDAW raise issues of religious

⁹⁵ J. Goldsmith, ‘Should International Human Rights Law Trump US Domestic Law’, 1 *Cbi. J. Int’l L.* (2000) 327, at 332.

⁹⁶ F. Cowell, ‘Reservations to Human Rights Treaties in Recommendations from the Universal Periodic Review: An Emerging Practice?’, 25 *Int’l J. Hum. Rts.* (2021) 274.

intolerance and of cultural relativism. The net result is said to have been the diffuse and widespread view that international obligations assumed through the ratification of CEDAW are somehow 'separate and distinct' from and less binding than those of other human rights treaties.⁹⁷

Selected illustrations of the reservations and objections follow.

RESERVATIONS

Austria (subsequently withdrawn)

Austria reserves its right to apply the provision of article 7(b) as far as service in the armed forces is concerned, and the provision of article 11 as far as night work of women and special protection of working women is concerned, within the limits established by national legislation.

Bahrain

[The original reservations submitted in 2002 were subsequently 'edited' so that in 2014 the formulation was:] The Kingdom of Bahrain is committed to implement the provisions of Articles 2, 15 paragraph 4 and 16 of [CEDAW] without breaching the provisions of the Islamic Shariah.

Bangladesh (subsequently withdrawn with respect to Articles 13(a); 16(1)(c) and (f))

... Bangladesh does not consider as binding upon itself the provisions of articles 2, 13(a) and 16(1)(c) and (f) as they conflict with Shariah law based on Holy Koran and Sunna.

Belgium (subsequently withdrawn)

The application of article 7 shall not affect the validity of the provisions of the Constitution ...which reserves for men the exercise of royal powers

Brazil (subsequently withdrawn)

The Government of the Federative Republic of Brazil hereby expresses its reservations to article 15, paragraph 4, and to article 16, paragraph 1(a), (c), (g) and (f)....

Brunei Darussalam

The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam and, without prejudice to the generality of the said reservations, expresses its reservations regarding paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention.

Egypt

Reservation to the text of article 9, paragraph 2, concerning the granting to women of equal rights with men with respect to the nationality of their children, without prejudice to the acquisition by a child born of a marriage of the nationality of his father [Reservation withdrawn in 2008.]

⁹⁷ B. Clark, 'The Vienna Convention Reservations Regime and the Convention on the Discrimination Against Women', 85 *Am. J. Int'l L.* (1991) 281.

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Shariah provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses, not a quasi-equality that renders the marriage a burden on the wife... The provisions of the Shariah lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Shariah therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

The Arab Republic of Egypt is willing to comply with the content of [Article 2], provided that such compliance does not run counter to the Islamic Shariah.

France

[Declarations:] The Government of the French Republic declares that article 9 of the Convention must not be interpreted as precluding the application of the second paragraph of article 96 of the code of French nationality.

...

The Government of the French Republic declares that no provision of the Convention must be interpreted as prevailing over provisions of French legislation which are more favourable to women than to men.

Ireland

[Re Article 16(1)(d) and (f)] Ireland is of the view that the attainment in Ireland of the objectives of the Convention does not necessitate the extension to men of rights identical to those accorded to women in respect of the guardianship, adoption and custody of children born out of wedlock and reserves the right to implement the Convention subject to that understanding.

Malta

The Government of Malta does not consider itself bound by subparagraph (e) of Article 16, insofar as the same may be interpreted as imposing an obligation on Malta to legalize abortion.

Oman

1. All provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman;

...

Singapore

In the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.

Singapore interprets article 11, paragraph 1, in the light of the provisions of article 4, paragraph 2 as not precluding prohibitions, restrictions or conditions on the employment of women in certain areas, or on work done by them where this is considered necessary or desirable to protect the health and safety of women or the human foetus. ...

Turkey

The Government of the Republic of Turkey [makes reservations] with regard to the articles of the Convention dealing with family relations which are not completely compatible with the provisions of the Turkish Civil Code. ...

OBJECTIONS

Germany

The Federal Republic of Germany considers that the reservations made by Egypt regarding article 2, article 9, paragraph 2, and article 16, by Bangladesh regarding article 2, article 13 (a) and article 16, paragraph 1 (c) and (f), by Brazil regarding article 15, paragraph 4, and article 16, paragraph 1 (a), (c), (g) and (h), by Jamaica regarding article 9, paragraph 2, by the Republic of Korea regarding article 9 and article 16, paragraph 1 (c), (d), (f) and (g), and by Mauritius regarding article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g), are incompatible with the object and purpose of the Convention (article 28, paragraph 2) and therefore objects to them. In relation to the Federal Republic of Germany, they may not be invoked in support of a legal practice which does not pay due regard to the legal status afforded to women and children in the Federal Republic of Germany in conformity with the above-mentioned articles of the Convention.

This objection shall not preclude the entry into force of the Convention as between Egypt, Bangladesh, Brazil, Jamaica, the Republic of Korea, Mauritius and the Federal Republic of Germany.

QUESTIONS

1. Which of the preceding reservations do you view as objectionable within the criteria of the Vienna Convention? Consider the reservations of Egypt. What arguments would you make for the validity of its reservations under the criteria stated in the Vienna Convention and CEDAW?
2. Which of the reservations raise issues of cultural relativism? Only those based on a state's local custom or religion?
3. Why do you suppose that CEDAW has attracted more reservations by states than other human rights treaties?

Ratification has been considered by the United States on several occasions. In 1994, the Senate Committee on Foreign Relations, after hearings, recommended ratification to the Senate, by a vote of 13–5, subject to various reservations, understandings and declarations, including the following:

[T]he Constitution and laws of the United States establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3 and 5. The United States does not accept any obligation under the Convention to enact legislation

or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.⁹⁸

The Committee also proposed reservations to the right to equal pay understood as comparable worth, the right to paid maternity leave, and any obligation under Articles 5, 7, 8 and 13 of the Convention that might restrict constitutional rights to speech, expression and association.

Five senators (a Republican minority) on the Committee objected to ratification. In their Minority Views they endorsed the goal of eliminating discrimination against women, but felt that CEDAW was not the best means of pursuing that objective. The Minority Views made the following points:

- 1) CEDAW may enable ratifying states to generate ‘political capital’, but is ‘unlikely to convince governments to make policy changes they would otherwise avoid’.
- 2) Countries like the United States ‘must guard against treaties that overreach’, and must not promise ‘more than we can deliver or we risk diluting the moral suasion that undergirds existing covenants’.
- 3) More than 30 states, including Islamic states, had made significant and sometimes problematic reservations when ratifying CEDAW. The statement questioned ‘whether such behavior does not, in fact, “cheapen the coin” of human rights treaties generally’. These reservations suggest that CEDAW ‘may reach beyond the necessarily restrictive scope of an effective human rights treaty’.
- 4) ‘Improvement in the status of women in countries such as India, China, and Sudan will ultimately be made in those countries, not in the United States Senate’.
- 5) Evolution of ‘internationally accepted norms’ on human rights must ‘take place within an international system of sovereign nations with differing cultural, religious and political systems. Pushing a normative agenda beyond that system’s ability to incorporate it leads, we believe, to what is represented by this convention.’ ...

The Convention was not brought to a vote in the full Senate. Since 1994 there has been little action.⁹⁹ In 1998, President Clinton sought congressional support for gaining Senate consent to ratification. In 2002, the Senate Foreign Relations Committee held a brief hearing on CEDAW and voted 12–7 for ratification, subject to most of the earlier proposed reservations, understandings and declarations, plus two additional ones. Democratic Senator Biden, chairman of the Committee, sponsored an understanding to the effect that ‘the CEDAW Committee has no authority to compel parties to follow its recommendations’. Republican Senator Jesse Helms proposed an understanding that ‘nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.’¹⁰⁰

In October 2020, the Trump administration signed the ‘Geneva Consensus Declaration’, calling on states to promote women’s rights and health, but without access to abortion.¹⁰¹

⁹⁸ See S384–10, Exec. Rep. Sen. Comm. on For. Rel., 3 October 1994. The text of all proposed reservations is in 89 *Am. J. Int’l L.* (1995) 102.

⁹⁹ In 2010, the Senate Judiciary Committee’s Subcommittee on Human Rights and the Law held CEDAW hearings, at which the Obama Administration expressed support for ratification.

¹⁰⁰ See generally, Congressional Research Service, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate* (August 7, 2009 – July 23, 2015).

¹⁰¹ J. Borger, ‘US signs anti-abortion declaration with group of largely authoritarian governments’, *The Guardian*, 22 October 2020.

The Effect of Treaty Reservations

Following U.S. ratification of the ICCPR, a number of states parties objected to one or more of the U.S. reservations. Several states — including Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden — objected to the reservation regarding Article 6, paragraph 5, prohibiting the imposition of the death sentence for crimes committed by persons below 18 years of age, and found that reservation incompatible with the object and purpose of the Covenant. Most of these states also objected to other reservations (or to understandings), particularly the one relating to Article 7. The objections, however, stressed that (to take one illustration) the state's position on the relevant reservations 'does not constitute an obstacle to the entry into force of the Covenant between the Kingdom of Spain and the United States of America'. Compare in this respect Articles 20–21 of the Vienna Convention on the Law of Treaties.

In objecting to three reservations and three understandings, Sweden observed that under international treaty law, the name 'assigned to a statement' that excluded or modified the effect of certain treaty provisions:

[D]oes not determine its status as a reservation to the treaty. Thus, the Government considers that some of the understandings made by the United States in substance constitute reservations to the Covenant.

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.

Two legal analyses are of particular relevance in assessing the question of the legal effect of reservations. The first is a General Comment by the Human Rights Committee and the second is the outcome of work by the International Law Commission. You should notice, as you read, several points of agreement and disagreement between the two texts.

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 24 CCPR/C/21/REV. 1/ADD. 6 (2 NOVEMBER 1994)

[This General Comment focuses 'on issues relating to reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.' It was adopted after the United States' ratification of the ICCPR, and before the Committee considered the United States' first periodic report in 1995. It refers to the provisions of the Vienna Convention on the Law of Treaties.

The General Comment notes that 46 of the then 127 states parties to the ICCPR had entered a total of 150 reservations, ranging from exclusion of the duty to provide particular rights, to insistence on the 'paramountcy of certain domestic legal provisions' and to limitations on the competence of the Committee. Those reservations 'tend to weaken respect' for obligations and 'may undermine the effective implementation of the Covenant'. The Committee felt compelled to act, partly under the necessity of clarifying for states parties just what obligations had been undertaken, a clarification that would require the Committee to determine 'the acceptability and effects' of reservations.

The General Comment observed that the ICCPR itself makes no reference to reservations (as is true also for the First Optional Protocol; the Second Optional Protocol limits reservations), and that the

matter of reservations is governed by international law. It found in Article 19(3) of the Vienna Convention on the Law of Treaties ‘relevant guidance’. Therefore, that article’s ‘object and purpose test ... governs the matter of interpretation and acceptability of reservations’.]

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, 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 engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, ... a State [may not] reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. ... [I]t falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11)... .At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character [e.g., torture] While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. ... The Committee’s role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee’s competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. ... Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

...

17. ... [Human rights] treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations Because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The

absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to the presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.

...

INTERNATIONAL LAW COMMISSION, GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES

[In 2011, the International Law Commission (ILC) adopted the Guide to Practice on Reservations to Treaties. The Guide was the culmination of 17 years of work by Special Rapporteur, Alain Pellet. As with other ILC documents of its kind, early drafts of the guidelines were scrutinized annually by the UN General Assembly's Sixth Committee, a body of governmental representatives, which gave states an opportunity to express their views on the general endeavour and specific details. Through this process of governmental review and continued refinement of the text, the Guide increased its legitimacy and support among states. Accompanying the publication of the Guide, the Commission also published a lengthy (nearly 600 pages) set of Commentaries.¹⁰² The following excerpts from the Guide and Commentaries include sections that are relevant to important areas of international human rights law and practice.]

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.

Commentary

[N]either the object — defined as the actual content of the treaty — still less the purpose — the outcome sought — remain immutable over time ...

...

... [I]n an endeavour to avoid too high a 'threshold', the Commission chose the adjective 'necessary' in preference to the stronger term 'indispensable', and decided on the verb 'impair' (rather than 'deprive') to apply to the '*raison d'être*' of the treaty, it being understood ... that the question could even arise of whether the *raison d'être* might change over time.

¹⁰² See UN Docs. A/CN.4/SER.A/2011/Add.1 (Part 2), and Add.2 (Part 3).

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

Commentary

Since, under article 19 (c) of the Vienna Conventions, ... a reservation must be compatible with the object and purpose of the treaty, and since other States are required, under article 20, to take a position on this compatibility, it must be possible for them to do so. This will not be the case if the reservation in question is worded in such a way as to preclude any determination of its scope, in other words, if it is vague or general

...

[The problem that the ‘text of the reservation does not allow its meaning to be understood’] often happens when a reservation invokes the internal law of the State that has formulated it without identifying the provisions in question or specifying whether they are to be found in its constitution or its civil or criminal code. In such cases, it is not the reference to the domestic law of the reserving State *per se* that is the problem, but rather the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them

...

The same applies when a State reserves the general right to have its constitution prevail over a treaty, as for instance in the reservation by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide: ‘... nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.’

Some of the so-called ‘sharia reservations’ give rise to the same objection, a case in point being the reservation by which Mauritania approved the 1979 [CEDAW] ‘in each and every one of its parts which are not contrary to Islamic sharia’. Here again, the problem lies not in the fact that Mauritania is invoking a law of religious origin which it applies, but, rather that, as Denmark noted, ‘the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character’. ...

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

Commentary

... Guideline 3.1.5.3 therefore sets out the principle that a reservation to a treaty rule which reflects a customary rule is not *ipso jure* incompatible with the object and purpose of the treaty, even if due account must be taken of that element in assessing such compatibility.

On occasion States parties to a treaty have objected to reservations and challenged their compatibility with its object and purpose on the pretext that they were contrary to well established customary rules.

...

...

- Customary rules are binding on States, independently of their expression of consent to a treaty rule but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation ...;

- A reservation concerns only the expression of the rule in the context of the treaty, not its existence as a customary rule, even if, in some cases, it may cast doubt on the rule's general acceptance 'as law' ...;
- If the customary nature of the rule is well-established, States remain bound by it, independently of the treaty;

...

- And, lastly, a reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law.

The question has been raised, however, whether this solution can be transposed to the field of human rights... .[The Commission finds no reason to make a distinction on this basis.]

...

The Commission did not consider it necessary to draft a specific guideline on reservations to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*). Such a norm is, in almost all cases, customary in nature. It follows that the reasoning applicable to reservations to treaty provisions reflecting 'normal' customary rules can be transposed to reservations to provisions reflecting *jus cogens* norms.

...

3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances [Eds.: e.g., Article 5 of the ICCPR], unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

- (i) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*

...

3.2 Assessment of the permissibility of reservations

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- contracting States or contracting organizations;
- dispute settlement bodies;
- treaty monitoring bodies.

Commentary

In the first place ... it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction vis-à-vis the States

concerned, whether in their consideration of complaints by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations ... [T]hirdly ... they may not substitute their own judgement for the State's consent to be bound by the treaty. It goes without saying that the powers of the treaty bodies do not affect the power of States or organizations to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Conventions.

...

3.2.3 Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

Commentary

[T]here is no question but that [treaty bodies] may assess the permissibility of reservations to treaties whose observance they are required to monitor. On the other hand, they may not ...[t]ake the place of the author of the reservation, in any case, in determining the consequences to be drawn from the impermissibility of a reservation

* * *

Reactions to General Comment No. 24

France, the United Kingdom and the United States submitted observations to the ICCPR Committee on General Comment No. 24. The U.S. Government stated that the General Comment 'appears to go much too far' and that the ICCPR does not 'impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive interpretations of the Covenant.' The observations stated that paragraphs 16–20 of the General Comment 'appear to reject the established rules of interpretation of treaties' in the Vienna Convention and in customary international law. It criticized the General Comment's condemnation of the types of reservations that the United States had entered.

The observations were particularly critical of paragraph 18, which stated that in the indicated circumstances, 'the Covenant will be operative for the reserving party without benefit of the reservations'. This conclusion is 'completely at odds with established legal practice and principles' If it were determined that any one or more of the U.S. reservations were Ineffective, the consequence would be that the ratification as a whole could thereby be nullified, and the United States would not be party to the Covenant. France and the United Kingdom submitted similar observations. On the severability question, France 'reject[ed] this entire analysis [I]f these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.' On this point of law, the UK Government stated similar concerns and added a pragmatic one: 'questions of principle aside, an approach as outlined in ... the General Comment would risk discouraging States from ratifying human rights conventions (since they would not be in a position to reassure their national Parliaments as to the status of treaty provisions on which it was felt necessary to reserve).'

Despite these responses, other treaty bodies subsequently endorsed General Comment No. 24, and the Human Rights Committee employed its severability approach. In a communication submitted to the ILC, the chairpersons of the treaty bodies stated: 'The Chairpersons express ... their firm support for the approach reflected in General Comment No. 24 of the Human Rights Committee and they

urge ... that the conclusions proposed by the International Law Commission should be adjusted accordingly to reflect that approach.’ Shortly thereafter, the Human Rights Committee applied its severability approach in a First Optional Protocol proceeding involving a death row inmate. See *Kennedy v. Trinidad and Tobago*, Communication No 845/1999, 31 Dec. 1999, UN Doc. CCPR/C/67/D/845/1999. For a detailed analysis of the question of severability, see Ryan Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’, 96 *Am. J. Int. L.* (2002) 531.

QUESTIONS

1. Why was there near unanimity among the states parties to the ICCPR that objected to the reservations by the United States about the particular reservation concerning Article 6, paragraph 5 (death sentence)? Did that reservation raise a special problem under the Covenant? On the other hand, was there special reason for the United States to reserve as to that provision?
2. In light of General Comment No. 24, if you were a Senator committed to U.S. ratification of the major human rights instruments, would you have voted for any reservation? Did any one of the reservations have a special justification?
3. Is General Comment No. 24 consistent with the spirit of the Genocide Convention Advisory Opinion described above? Using that opinion, how would you argue that the reservations of the United States should be accepted in their entirety as valid under international law?
4. The ILC Commentary admits that, if every treaty body and various other institutions all have the authority to assess the permissibility of a reservation, multiple conflicting decisions may result. Nevertheless, the Commentary concludes that ‘it is probably better to have too much assessment than no assessment at all’ (Commentary to 3.2). Do you agree? Is the comparison to ‘no assessment at all’ the correct one? Is there a point — and if so, what is it — whereby the costs of multiple venues of assessment would undermine the goals of the human rights regime?
5. The Vienna Convention on the Law of Treaties does not include an express prohibition on ‘vague’ or ‘general’ reservations. Did the ILC Commentary go too far in developing this doctrine and in describing the reservations that it would discredit or does this section of the Commentary seem well tethered to existing law and practice?

7. The Impact of CEDAW

It is notoriously difficult to evaluate the impact of human rights treaties or of different forms of human rights advocacy. Any ‘victory’ will have multiple authors, and disaggregating the local, national, and international elements is likely to be impossible. Governments rarely ever acknowledge that change was driven by human rights advocacy, and the interaction between normative statements (or treaty obligations) and the many ways in which they might influence key social movements, or political and other actors is often indirect and subtle.

The impact of CEDAW is, inevitably, contested. Martha Nussbaum, in *The Cosmopolitan Tradition: A Noble but Flawed Ideal* (2019), at 220, acknowledges that, in some areas of women’s rights, there has been great progress around the world in recent decades:

... [I]nternational agreements are important parts of international movements, and the moral work that is done in international society is often enormously important, bringing people together around a common set of demands and complaints, and giving them opportunities to meet, exchange ideas, and reinforce one another. ... The various women's congresses have built a valuable type of solidarity and ferment, and this energy has surely contributed greatly to the progress of women in most nations of the world.

...

[While CEDAW's ratification gave new impetus to domestic political efforts, it] accomplished little directly. It is also a deeply flawed document, skirting around some of the most important issues, such as access to artificial contraception and counting women's work as work in national income accounts. It has also not altered the relentlessly male-centered perspective of other human-rights documents. As Eleanor Roosevelt warned from the beginning, giving women a separate lobby and a separate document is a double-edged sword, possibly sidelining women's energies, which might have been used to fight in the more inclusive forum. In this case, however, there is no doubt that, despite the efforts of many, the United Nations has always been and remains a profoundly patriarchal institution, hostile to women's equality. Fighting in the more inclusive forum would have been frustrating and probably doomed, whereas the mobilization of women worldwide to create a text that stands before all the world, affirming women's equality, has proved politically and strategically valuable, no matter what the defects of the document and the yet greater defects of its implementation, which basically amounts to a handful of domestic court cases in countries with woman-friendly judiciaries (India and Botswana) in which the fact that the nation ratified the treaty has been used to effect legal change.

In short, ... international documents are not legally enforced and do not amount to a world constitution. That is actually good It is more appropriate that these documents remain sources of persuasive norms, to be enforced through domestic policies, including constitution-making, legislation, and judicial interpretation—occasionally citing the document itself, but more often influenced by the arguments and the persuasive climate of the international community that led to and received additional impetus from the document. International society remains primarily a moral realm of persuasion, and only becomes a truly political realm occasionally. This does not mean, however, that the process of creating and ratifying documents is useless: it creates solidarity and a sense of common goals, enabling powerful transnational movements to arise and to influence national policies.

Fareda Banda, in 'The Limits of Law: A Response to Martha C. Nussbaum', in Bardo Fassbender and Knut Traisbach (eds.), *The Limits of Human Rights* (2019) 267, at 278, pushes back against some of Nussbaum's critique:

While true that CEDAW as drafted is a thin version and vision of women's rights, the Committee has not allowed itself to be constrained by its drafting. As the human rights corpus has grown, so too has CEDAW's framing of the problems. It has worked with other agencies. Its influence can be seen in the lobbying work of civil society, in interactions with governments in national and international forums. Moreover, its widespread citation in domestic case law points to its growing legitimacy and persuasive power. Of all the international human rights instruments, CEDAW, more than any other, has demonstrated its efficacy.

Other scholars have argued that CEDAW has had an important impact in relation to abortion policies. According to Kate Hunt and Mike Gruszczynski in ‘The Ratification of CEDAW and the Liberalization of Abortion Laws’, 15 *Politics & Gender* (2019) 722, at 741:

... states that ratify CEDAW without reservations have more liberal abortion laws. These effects are stable and consistent, remaining the same regardless of the state’s level of democracy, number of women in parliament, GDP per capita, and percentage of the population that is Catholic, Protestant, or Muslim. ... [T]hese results suggest that CEDAW is an important factor in explaining cross-national liberalization of abortion laws and therefore could be an important factor in explaining when states are likely to create policy change in order to respect other rights of women as outlined in that treaty.

One positive impact assessment comes from Mala Htun and Francesca R. Jensenius, in ‘Expressive Power of Anti-Violence Legislation: Changes in Social Norms on Violence Against Women in Mexico’, 74 *World Politics* (2022) 1:

There are reasons to believe that violence against women legislation, and other rights enacted by transitioning and consolidating democracies, have little impact. States adopted many new laws quickly in order to look good abroad and gain legitimacy at home, without developing the bureaucratic infrastructure required for effective enforcement. The problem is not just low state capacity. Many social groups lack the resources to compel state actors to enforce the law, while groups with resources – such as politicians and upper classes – often have little interest in abiding by legal rules themselves and imposing the law on others. Sticky social norms that uphold power hierarchies and inequality among groups and individuals also reduce compliance with equal rights laws. The result is that in much of the Global South there is a large gap between the letter of the law and behavior on the ground.

In this paper, we propose that violence against women legislation, even when weakly enforced and unevenly implemented, may nonetheless change social relations through the mechanism of normative expression. ...

Expressive law theory implies that legal changes will be associated with changes in social norms to align with the law. To empirically measure the norm changes associated with legal changes, we operationalize Richard McAdam's proposed conditions for the emergence of a new norm. We argue that if norm change on violence against women is occurring, we should see it in four patterns: a gradual reduction in experiences of violence, a decline in shares of people with attitudes that condone violence, a rise in shares of women who speak about their experiences to public authorities and people in the local community, and widespread knowledge of women's rights. ...

In contrast to skepticism about VAW laws as ‘window dressing’ institutions that look good but are otherwise inconsequential, and the view that the problem of violence is getting worse, armed by frightful accounts of femicides in the Mexican media and nationwide strikes against violence by hundreds of thousands of women, the data reveal a sharp decline in abuse by intimate partners. Between 2003 and 2016, ... the share of women who say they had experienced some form of domestic abuse during the previous year drops from 40.7% to 27.4%. At the same time, there is a sharp reduction in the share of women saying that a man has the right to hit his partner, that a woman must obey her spouse, and that the violence they have experienced is “unimportant.” The share of women victims who report episodes of violence to the authorities increased, there is growth in the share of women who speak about their

experiences with friends or family, and most women claim familiarity with the 2007 VAW Law.

Our findings support a cautiously optimistic assessment of current trends on violence against women in Mexico, the ability of laws on violence to change norms, and the law's power to undermine societal resistance to the egalitarian principles upheld by consolidating democracies. Our argument does not exclude the possibility that laws affect society in other ways, such as through enforcement and implementation by state actors. Nor do we rule out that economic growth and the global diffusion of ideas contribute to the changes we observe over the four waves of survey data. However, by comparing the empirical implications of our own argument with the implications of alternative explanations, we show that these other explanations do not, on their own, seem to account for the major behavioral and attitudinal changes we see across the survey waves. ...

Janice K. Gallagher also finds room for hope in the struggle against disappearances in Mexico. In *Bootstrap Justice: The Search for Mexico's Disappeared* (2022) 228 she describes impunity as the status quo equilibrium in Mexico which means that in the normal course of events 'crimes will not be investigated; perpetrators will not be punished; and no steps will be taken to provide redress to victims or to prevent disappearances in the future.' But she nevertheless concludes that impunity 'has been meaningfully challenged by the sustained mobilization of the family members of the disappeared' who as a result 'became rights-claiming, and ultimately rights-bearing citizens.'

An analysis by Cosette Creamer and Beth Simmons, 'The Dynamic Impact of Periodic Review on Women's Rights', 81 *Law and Contemporary Problems* (2018) 31, assesses the impact of the CEDAW process, especially in Latin American countries. The authors are responding to oft-heard criticism 'that UN treaty bodies constitute a bloated, toothless bureaucracy that is unable to contribute much to rights protections' (at 32). They conclude that:

[S]elf-reporting and dialogue between state representatives and international experts ... generates new ideas, advice, and domestic pressure for change in practice. The periodic review process may well have been important to making improvements in law and in practice to guarantee full political and economic rights for women in many societies

... The number and the density of reports and reviews are crucial to the process of rights improvements. This is certainly far more realistic a finding than to expect last year's reporting cycle to yield one-shot improvements in women's political and economic rights in the following year or so. Reporting and review histories have had a causal influence on the probability of improved women's rights, in law and in practice. ...

[There are] three mutually reinforcing pathways through which the self-reporting process encourages domestic actors to demand and implement change. Domestic shadow reports are on the rise and indicate local CSOs follow the process closely and provide information that supplements and sometimes contradicts government reports. Media reports about the CEDAW spike during the reporting and review process, signifying the penetration of information about the Geneva process to local stakeholders. And finally, legislatures pay attention to the review process and specific [CEDAW Committee] recommendations do have an impact on the lawmaking process. Taken together, the evidence points to the catalytic role of self-reporting and review in putting important women's rights issues on national agendas, thereby creating an occasion for their national discussion.

... CEDAW may be consequential for its influence on a number of channels, from influencing donor's development assistance policies to clarifying violations through the optional individual complaint process. States have quite heterogeneous experiences in their interactions with the [Committee], and no amount of dialogue can or should create homogeneous outcomes. The quality of interactions as well as the legal, cultural, and political context can be expected to produce quite different results across states.

The evidence supporting the contribution of constructive dialogue to rights improvements is reasonably strong. One reason is that the review process sparks shadow reporting and gains a domestic audience through the national media. ... The national media in Latin America, for example, is replete with discussions and debates about what governments are telling the experts, how shadow reports shape the conversations, what [the Committee] has asked, and how governments have responded. There is plenty of official excuse-making going on, but a surprising amount of criticism as well. Legislators take up these themes in official sessions. These patterns are consistent with a theory that treaties matter because discussing human rights engages interested domestic publics, who are in a better position, armed with legal rights and better information, to hold their governments accountable.

It might be useful to move away from conceptions of the treaty body report-and-review process as a strong enforcement measure, and instead to think of the whole process as more of a dialogue, or as Zwingel puts it, "a constant process of negotiating and re-negotiating norms." ...

Finally, the reporting regime is not a comprehensive solution to the world's worst human rights abuses. Even though CEDAW ratification is now nearly universal, it has proved impossible to coerce a meaningful conversation out of unwilling states. Constructive dialogue only has effects when it actually takes place. ...

Finally, Hilary Charlesworth and Christine Chinkin, in 'Between the Margins and the Mainstream: The Case of Women's Rights', in Bardo Fassbender and Knut Traisbach (eds.), *The Limits of Human Rights* (2019) note that:

'CEDAW's broad notion of equality ... is limited conceptually by its general requirement of a male comparator. ... [T]he Convention's standard of equality is that of male lives and experience. This account of equality thus excludes human rights violations that have no counterpart in men's lives, such as women's reproductive rights. Another normative limitation is that the exclusive focus on the categories of men and women emphasizes the significance of biological sex and heterosexual relations.

...

IV. Conclusion

... There appears to be an unruly array of agendas for women's rights, implicating many different types of legal standards, instruments, and institutions. Specialist regimes promote focused attention to women's lives, but allow the mainstream to proceed undisturbed: human rights remain men's rights and women's rights become issues of development or 'special cases' in light of women's 'special needs'. When women's human rights are mainstreamed, as in the WPS [the UN's Women, Peace and Security agenda, described in Ch. 8D, below], they quickly lose their bite. This can occur through their focus on only fragments of women's lives and experiences, or by being co-opted into serving other political agendas, or simply by being ignored or overlooked. Despite all

the activity, there is little attention given to the structural causes of human rights abuses against women. The movement between the areas of human rights and WPS shows that the locations of both margins and mainstream are fluid, changing, and contingent. Indeed, there are locations at which margins and mainstream meet, merge, and separate again.

The oscillation between the margins and the mainstream is echoed in debates in the feminist international legal literature about whether feminist scholars should aim for the margins or the centre of the discipline. The margin is often understood as the place we want to leave behind as we head for the centre, the mainstream, where, it is assumed, power resides and all the action takes place. However, the periphery also has its pleasures and virtues. It can be an attractive vantage point, offering a sense of adventure, of originality, of solidarity with the (often vaguely defined) oppressed against those with power.

Feminist scholarship pays attention to the locations of power within a society. Power is often dispersed and is not always concentrated in a centre. Patriarchal power exists at the level of the state, but it also shapes local communities and family relationships. Power is thus best understood as a network, operating in complex and inconsistent ways. For this reason, although international women's groups have long campaigned for enhanced legal regulation, one might conclude that international law will always be an imperfect tool to unravel patriarchal power and will be most effective when it is woven with other forms of regulation and influence.

D. EVOLUTION OF HUMAN RIGHTS: SEXUAL ORIENTATION DISCRIMINATION

In this section we turn to the evolution of new norms, and consider the particular case of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) rights.¹⁰³ These rights are very important in themselves, but they also illustrate important issues for the understanding of international human rights law more generally. For example, how does a new human rights norm emerge? What relationship might it have to the existing legal framework? How does it overcome strong political resistance from different corners of the globe? How do like-minded states work strategically to promote the wider recognition of a new norm? What are the consequences of normative evolution being driven by elites rather than reflecting popular opinion?

National and Transnational Social and Legal Change

Formal recognition of LGBTQI rights at the international level began in the 1980s, in response to fundamental social change at the national level. Efforts to forge a new legal regime were galvanized, in particular, by two key developments. In England, a government-appointed expert commission issued a report in 1957 (the Wolfenden Report), which recommended that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. The ensuing public debate culminated in legal reforms and substantial (though incomplete) decriminalization of same-sex conduct in 1967. In the United States, a new social movement began with an uprising among gay residents in New York City in response to systematic police harassment. A flashpoint occurred at a gay bar, the Stonewall Inn, in 1969. The following year on the anniversary of the 'Stonewall Riots', the first Gay Pride marches took place in major cities of the United States. These social changes were also emboldened by changes within the medical establishment, and especially the 1973 decision of the American Psychiatric Association (APA) to no longer classify homosexuality as a mental disorder. This gave an important impetus to social change in the United States (and globally). At the same time,

¹⁰³ L. Zong et al., 'International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy', 25 *Geo. J. Gender & L.* (2024) 627.

leading NGOs such as the American Civil Liberties Union became active in this area. In 1973 the ACLU set up a Sexual Privacy Project (later renamed the Lesbian, Gay, Bisexual, Transgender and AIDS Project), and the Lambda Legal Defense and Education Fund was established as the first legal organization dedicated to achieving equal rights for lesbian and gay people. Not until 1990, however, did the World Health Organization follow the lead of the APA.

These social and legal changes soon acquired a transnational dimension. LGBTQI organizations formed in multiple countries, advocating decriminalization of same-sex conduct. Between 1965 and 2005, almost 80 countries decriminalized sodomy.

The Road to Formal Recognition at the International Level

At the international level, the formal recognition of LGBTQI rights has been advanced in diverse fora. In general, international bodies composed of judges and independent experts — rather than state officials or representatives — led the way. The European Court of Human Rights was the first with its landmark 1981 decision in *Dudgeon v. United Kingdom*. It held that sodomy laws violated the right to privacy under the European Convention,¹⁰⁴ a finding subsequently reaffirmed in cases arising out of Ireland in 1988 and Cyprus in 1993. Beginning in 1994, the United Nations High Commissioner for Refugees recognized that individuals persecuted for their sexual orientation qualified as a ‘particular social group’ eligible for protection under international refugee law. Also in 1994, the UN Human Rights Committee, the supervisory body of the ICCPR, concluded that Tasmania’s local sodomy law violated the ICCPR (*Toonen v. Australia*, Ch. 9, below). Its reasoning rested primarily on the right to privacy but it also invoked the right to equality. In 1995, after reviewing the report of the United States, the Committee expressed its concern ‘at the serious infringement of private life’ due to US sodomy statutes. By 2001, four of the other five universal human rights treaties were interpreted by their respective supervisory organs to cover sexual orientation discrimination (CEDAW in 1999, CESC in 2000, CRC in 2000 and CAT in 2001).

At the Fourth World Conference on Women, in Beijing in 1995, explicit references to sexual orientation supported by various states remained in the draft until the very final hours of the conference. At 4 a.m. on the final day the drafting group eliminated all such references in response to significant opposition. A provision was also inserted in the final report explaining that the word ‘gender’ was not being used in any way that expanded the sense in which it had previously been used in other UN settings. Over 25 states objected to the deletion and some indicated that they would interpret particular parts of the final text to include sexual orientation.

Also in the 1990s, independent experts working under UN mandates on violence against women and extrajudicial executions took up the issue of discrimination based on sexual orientation. Others followed in the early 2000s, including those dealing with torture, arbitrary detention, human rights defenders (all in 2001); the independence of judges and lawyers (2002), minority issues (2006), housing (2010) and health (2009).

These efforts were complemented by a second wave of international endeavours, especially in Europe. In 1997, the Amsterdam Treaty (amending the Treaty of the European Union) became the first international agreement to prohibit discrimination based on ‘sexual orientation’. Similarly, states applying to join the EU had to agree to decriminalize homosexual conduct and eliminate laws violating LGBTQI rights.

Early efforts in the UN General Assembly to promote state recognition of LGBTQI rights were led by Brazil, France, and South Africa. Starting in the mid-1990s, the UN Commission on Human Rights passed an annual resolution calling for strictly circumscribing, and eventually abolishing, the death penalty. In 2002, the text was extended to urge states to ensure that ‘the death penalty is not imposed for non-violent acts such as ... sexual relations between consenting adults’.

¹⁰⁴ In contrast, the Inter-American Court of Human Rights decided its first case recognizing LGBTQI rights only in 2012.

In the same year, the biennial General Assembly resolution on extrajudicial executions called ‘upon Governments concerned to investigate promptly and thoroughly ... all killings committed for any discriminatory reason, including sexual orientation’. By 2010, however, at the committee stage, a coalition of African, Arab, and Islamic states successfully proposed the deletion of this provision (79 in favour, 70 against and 17 abstentions). Before the final plenary vote, then UN Secretary-General Ban Ki-moon made an uncharacteristically passionate plea for the rejection of discrimination based on sexual orientation and gender identity, and the U.S. Ambassador also pushed a proposal to restore the reference to ‘sexual orientation’ in the text. In a major victory, the final vote was 93-55-27.

At the same time, efforts to get the UN Human Rights Commission to adopt a specific resolution on sexual orientation began with a Brazil-sponsored resolution in 2003. Although also supported by 18 European countries and Canada, strong opposition led to the withdrawal of the proposal in both 2003 and 2004. With international NGOs becoming more active on this issue an initiative by a group of 29 international human rights experts led to the adoption in 2006 of the ‘Yogyakarta Principles on the Application of Human Rights Law in relation to Sexual Orientation and Gender Identity’ which invoked existing legal standards in support of a wide range of LGBTQI rights. A decade later, these principles were updated and significantly extended.¹⁰⁵

In 2008, at the UN General Assembly, 66 states called for abolition of criminal penalties based on sexual orientation or gender identity’ and the investigation and prosecution of human rights violations based on sexual orientation or gender identity. A second group, of 57 states led by Syria, promptly issued a response expressing serious concern about two problematic notions:

The notion of orientation spans a wide range of personal choices that expand way beyond the individual’s sexual interest in copulatory behavior with normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts including pedophilia. The second [notion attributes] particular sexual interests or behaviors to genetic factors, a matter that has been scientifically rebuffed repeatedly.

...

... We note with concern the attempts to create “new rights” or “new standards” by misinterpreting the Universal Declaration and international treaties to include such notions that were never articulated nor agreed by the general membership. These attempts ... seriously jeopardize the entire international human rights framework.

Notwithstanding this pushback, the Human Rights Council adopted the UN’s first ever resolution on ‘human rights, sexual orientation and gender identity’ in 2011 by a vote of 23-19-3 (Res. 17/19). Its main thrust was to request the OHCHR to conduct a study ‘to document discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world’. During the Council debate, Nigeria noted that ‘more than 90 per cent of the African people did not support this draft resolution,’ and urged that notions of ‘sexual orientation should not be imposed on countries’. Saudi Arabia argued that it ‘was not appropriate to impose values without considering them as counter to Sharia in Islam, and other religions.’ Bahrain said the Council was attempting ‘to create new standards and new human rights by misinterpreting the existing international human rights standards.’

When the resulting report was debated the following year, most Arab and African nations walked out. The Vatican representative was ‘seriously concerned at the use ‘of terms such as “sexual orientation” and “gender identity” which do not enjoy mention in binding [UN] documents [and] lack specific definition in international Human Rights instruments.’ He added that the Council risked ‘demeaning the sacred and time-honoured legal institution of marriage between man and woman, between husband and wife If marriage were to be re-defined in a way that makes other relationships

¹⁰⁵ A. Park, ‘Yogyakarta Plus 10: A Demand for Recognition of SOGIESC’, 44 *North Carolina J. Int’l L.* (2019) 223.

equivalent to it, ... the institution of marriage, and consequently the natural family itself, will be both devalued and weakened.’¹⁰⁶

In 2016, the Council established the position of ‘Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ (Res. 32/2),¹⁰⁷ and renewed the mandate three years later (Res. 41/18) by a vote of 27-12-7, with Afghanistan, Bahrain, Bangladesh, China, Egypt, Eritrea, Iraq, Nigeria, Pakistan, Qatar, Saudi Arabia, and Somalia voting against. In 2020, Austria made a formal statement to the Council on behalf of 32 states¹⁰⁸ (four more later subscribed) calling on all States “as a matter of urgency, to protect the autonomy of intersex adults and children and their rights to health, and to physical and mental integrity so that they live free from violence and harmful practices”.

In a statement to the Copenhagen Human Rights Forum on 17 August 2021, the UN High Commissioner for Human Rights welcomed the fact that over 70 countries have decriminalized consensual same-sex relations, but she added that ‘69 countries continue to have discriminatory laws today. These are laws used to arrest, harass, blackmail, and exclude on the basis of the perceived sexual orientation, and often, the gender identity of individuals. In five of these countries, these laws are so extreme as to include the death penalty.’

In 2021, the Independent Expert, Victor Madrigal-Borloz, reported to the Human Rights Council (UN Doc. A/HRC/47/27) on aspects of ‘gender theory’. He framed the report in these terms:

1. The notion that there is a gender norm, from which identities and expressions vary or depart, is based on a series of preconceptions that must be challenged Among these ... is the idea that it is a legitimate societal objective that persons adopt roles, forms of expression and behaviours that are considered entitlements or burdens according to their sex assigned at birth. Only by acknowledging the stereotypes, power asymmetries, inequality and fundamental violence that lies at the foundation of this system does the State comply with its obligation

In concluding his analysis, the expert called for the recognition of ‘two fundamental duties of the State’:

- (a) To prevent, prosecute and punish violence and discrimination on the basis of sexual orientation, gender identity and gender expression and, if relevant, provide reparation to the victims;
- (b) To recognize every human being’s freedom to determine the confines of their existence, including their gender identity and expression.

...

79. Gender describes a sociocultural construct that ascribes certain roles, behaviours, forms of expression, activities and attributes determined to be appropriate according to the meaning given to biological sex characteristics. Under this definition, gender and sex do not substitute each other, and gender identity and gender expression are inextricably linked to them as practices of concern in anti-discrimination analysis.

80. The use of the terms gender and gender identity and expression in international human rights law includes all persons, communities and populations. Whether self-defining into a specific gender, or remaining gender-fluid, across binaries,

¹⁰⁶ 9 March 2012, at www.radiovaticana.org/EN1/Articolo.asp?c=569943.

¹⁰⁷ For a review of the first seven years of the mandate, see I. Saiz, *A Catalyst for Equality* (2024, Harvard Law School Human Rights Program).

¹⁰⁸ Note that voting in the Council is restricted to the 47 elected members, whereas any state can endorse a statement or co-sponsor a resolution.

gender is in operation through the work of naming things as masculine and feminine. The concepts of gender, sex, and gender identity and expression are related, but can be applied independently as protected grounds.

81. The work of addressing and ultimately eradicating violence and discrimination based on sexual orientation and gender identity demands the adoption of intersectional analysis, the sites of which include laws and policies which claim to be gender-neutral or are gender-specific (and may discriminate both against cisgender hetero- and lesbian-identified women and trans and other gender-nonconforming women and men).
82. Legal recognition of gender identity, and protection from violence and discrimination related to it, to gender expression and to sexual orientation, are inextricably connected with bodily autonomy. ...

...

Regional Systems

In 2008, the OAS unanimously adopted a resolution expressing concern about ‘acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity’. In 2014, the Inter-American Commission on Human Rights appointed a Rapporteur on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons. The Inter-American Court has adopted several important judgments on these issues.

INTER-AMERICAN COURT OF HUMAN RIGHTS, GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES, ADVISORY OPINION OC-24/17, 24 NOVEMBER 2017

[Costa Rica requested an Advisory Opinion from the Court in relation to several questions, including:

- Does the Convention imply that states must ‘recognize and facilitate the name change of an individual in accordance with his or her gender identity’;
- Is it contrary to the Convention if those interested in changing their given name have access only to a judicial rather than an administrative procedure;
- Does the Convention require states to recognize all the patrimonial (economic) rights deriving from a same-sex relationship;
- Must there be a legal institution that regulates same sex relationships for the state to recognize those rights.]

78. ... [S]exual orientation and gender identity, as well as gender expression, are categories protected by the Convention. ...

79. With regard to gender expression, this Court has indicated that a person may be discriminated against on the grounds of the perception that others have of his or her relationship with a social sector or group, regardless of whether this corresponds to the reality or to the self-identification of the victim.

...

...

116. ... [T]he answer to the first question raised by Costa Rica ... [is]:

The change of name, the rectification of the image and the rectification of the sex or gender in the public records and identity documents, so that they correspond to the self-perceived gender identity is a right protected by Article 18 (Right to a Name), but also by Articles 3 (Right to Recognition of Juridical Personality), 7(1) (Right to Personal Liberty), and 11(2) (Right to Privacy) of the American Convention. Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24 of the Convention), and the obligation to adopt domestic legal

provisions (Article 2 of the Convention), States are obliged to recognize, regulate and establish the appropriate procedure to this end.

...

160. ... [T]he answer to the second question ... [is]:

States may determine and establish, in keeping with the characteristics of each context and their domestic law, the most appropriate procedures for the [required changes] ..., regardless of whether these are of an administrative or judicial nature. However, these procedures should comply with the following requirements established in this Opinion: (a) these should be centered on the complete rectification of the self-perceived gender identity; (b) these should be based solely on the free and informed consent of the applicant without involving requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing; (c) these should be confidential, and the changes, corrections or amendments to the records and on the identity documents should not reflect the changes made based on the gender identity; (d) these should be prompt and, insofar as possible, cost-free, and (e) these should not require evidence of surgery and/or hormonal therapy.

...

182. [Although Article 17(2)] ... recognizes the “right of men and women of marriageable age to marry and to raise a family,” this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court’s opinion, this wording does not necessarily mean either that this is the only form of family protected by the American Convention.

...

189. [A] restrictive interpretation of the concept of “family” that excludes the emotional ties between a same-sex couple from the inter-American protection would defeat the object and purpose of the Convention. ...

...

192. ... [T]he Court agrees with its European counterpart in that it would be “artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life.’” ...

...

199. [In response to Costa Rica’s fourth question] ... the Court concludes that:

... [T]he American Convention protects the family ties that may derive from a relationship between persons of the same sex. The Court also finds that all the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected

...

224. ... [T] here would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. ... [T]he existence of two types of formal unions ... would create a distinction based on an individual’s sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention.

225. In addition, as already indicated, the Court understands that the principle of human dignity derives from the complete autonomy of the individual to choose with whom he or she wishes to enter into a permanent and marital relationship, whether it be a natural one (*de facto* union) or a formal one (marriage). ... [T]he Court is not diminishing the institution of marriage but, to the contrary, considers marriage necessary to recognize equal dignity to those persons who belong to a human group that has historically been oppressed and discriminated against.

226. ... [T]his Court cannot ignore the possibility that some States must overcome institutional difficulties to adapt their domestic law [T]he Court urges those States to promote, in good faith, the legislative, administrative and judicial reforms required to adapt their domestic laws, and internal interpretations and practice.

227. That said, States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them

...

Gender Identity Cases

Note also two cases involving violence against LGBTIQ individuals in which the Court has broken important ground. The first is *Azul Rojas Marín et al. v. Peru*, Inter-American Court of Human Rights, Judgment of March 12, 2020. Azul Rojas Marín was born in 1981. When arrested in 2008 she self-identified as a gay man but as of 2020 identified herself as a woman. She was arrested after midnight by police who used disparaging terms referring to her sexual orientation. At the police station she was forcibly undressed, beaten, and a police baton was inserted in her anus. The arrest was not recorded. Prosecutions against the responsible officers were dismissed.

The Court found the detention to be unlawful, discriminatory and arbitrary, concluded that the abuse and aggression suffered by Azul Rojas Marín, including rape, constituted an act of torture by state agents, and found that the State failed to act with due diligence in investigating the sexual torture. In addition to reparations for the individual concerned, the State was ordered: to adopt a protocol for the investigation and the administration of justice in criminal proceedings in cases involving members of the LGBTIQ community who are victims of violence; to create and implement a plan to raise awareness and provide training on violence against members of the LGBTIQ community; to design and implement a system for producing and compiling statistics on such violence; and to eliminate the goal of eradicating ‘homosexuals and transvestites’ from Public Security Plans.

The second case, *Vicky Hernández et al. v. Honduras*, Judgment of 26 March 2021, involved a transgender woman who was a sex worker and a recognized trans activist. On 28 June 2009, a police patrol tried to arrest Vicky Hernández and two companions. The women fled, but the next day Hernández’s body was found with a bullet wound in the head. Based on the evidence, including a context of discrimination and police violence against LGBTIQ persons, and particularly against transwomen sex workers, the Court concluded that agents of the State were responsible, and that the violence was committed due to her gender expression or gender identity. The Court found violations of the rights to recognition as a person before the law, to liberty, to privacy, to freedom of expression, to a name, and to equality and non-discrimination. The right to gender identity was violated at the time of her killing, in the subsequent investigation, and in the State’s general legal framework which denied her the opportunity to reflect her gender identity and her chosen name on her identity card, thus fostering discrimination and social exclusion.

Among the more innovative reparations ordered, the State was required to make an audiovisual documentary on the discrimination and violence experienced by trans women in Honduras; and to create a ‘Vicky Hernández’ educational scholarship for trans women.

The Court also held that the State had violated its obligations under the Convention of Belém do Pará (on the Prevention, Punishment, and Eradication of Violence against Women). In a partially dissenting opinion, the President of the Court, Judge Elizabeth Odio Benito, insisted on the need to distinguish ‘gender identity’ from sex.

40. ... [V]iolence against women derives from the social hierarchy established according to the gender roles assigned on the basis of biological sex, while the violence that was directed against Ms. Hernández ... was due to her nonconformity and act of resistance against the social and cultural impositions of the heteropatriarchy. ...
41. ... [If the Court fails to recognize this] distinction, there is a risk that violence against women becomes invisible or is diluted in the face of other violence and violations and is not adequately analyzed within policies as a structural phenomenon linked to the system of domination and gender stereotypes against women. On the

contrary, the analysis of violence against transgender people from a perspective that only analyzes violence against women because they are women, while not going to the origin of the specific violence suffered by this group, is clearly counterproductive and ineffective.

Children's Rights

A major area in which international law has brought significant transformation is the rights of the child, especially as spelled out in the 1989 UN Convention on the Rights of the Child. The following materials survey the approaches taken by different UN and regional bodies, especially in the context of LGBTQI persons.

CASE OF BAYEV AND OTHERS V. RUSSIA
EUROPEAN COURT OF HUMAN RIGHTS (THIRD SECTION)
20 JUNE 2017

[The cases were brought by three different applicants, described by the Court as gay rights activists, who had each been found guilty of the administrative offence of “public activities aimed at the promotion of homosexuality among minors.” concerning regional laws prohibiting public activities aimed at the promotion of homosexuality among minors. The first had demonstrated outside a secondary school in 2009 with banners stating “Homosexuality is normal” and “I am proud of my homosexuality”. In 2012 the second and the third applicants demonstrated in front of a children’s library. One held a banner stating “Russia has the world’s highest rate of teenage suicide. This number includes a large proportion of homosexuals. They take this step because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!” The other applicant’s banner stated “Children have the right to know. Great people are also sometimes gay; gay people also become great. Homosexuality is natural and normal.” The Constitutional Court of the Russian Federation rejected challenges to the applicants’ convictions.]

...

2. The Court's assessment

(a) Whether there was interference with the exercise of the applicants' freedom of expression

61. ... [T]he central issue in this case is the very existence of a legislative ban on promotion of homosexuality or non-traditional sexual relations among minors The applicants complained about the general impact of these laws on their lives, in that it not only prevented them from campaigning for LGBT rights but in effect required them to be aware of the presence of minors in their daily activities, in order to conceal their sexual orientation from them. ...

...

(b) Whether the interference was justified

...

63. ... [T]he Court's assessment in this case will focus on the necessity of the impugned laws as general measures

(i) Justification on the grounds of protection of morals

65. ... [T]he Government ... alleged that an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values.

66. The Court would generally accept a wider margin of appreciation in the absence of consensus among member States where the subject matter may be linked to sensitive moral or ethical issues. In the instant case, however, the Court notes that there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms. ...

67. ... [T]he Government advanced the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality. The Court sees no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life" and the acknowledgement of the need for their legal recognition and protection. The Government failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing "traditional families" or would compromise their future.

68. The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority

69. The legislation at hand is an example of such predisposed bias, unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as "to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships" ... Even more unacceptable are the attempts to draw parallels between homosexuality and paedophilia

70. The Court takes note of the Government's assertion that the majority of Russians disapprove of homosexuality and resent any display of same-sex relations. ... The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. ...

71. In view of the above considerations, the Court rejects the Government's claim that regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.

(ii) Justification on the grounds of protection of health

72. ... [T]he Government have not demonstrated that the applicants' messages advocated reckless behaviour or any other unhealthy personal choices. In any event, the Court considers it improbable

that a restriction on potential freedom of expression concerning LGBT issues would be conducive to a reduction of health risks. ...

...

(iii) Justification on the grounds of protection of the rights of others

74. Finally, the Government's third line of argument focused on the need to shield minors from information which could convey a positive image of homosexuality, as a precaution against their conversion to a "homosexual lifestyle" which would be detrimental to their development and make them vulnerable to abuse. ...

...

78. The position of the Government ... remains unsubstantiated. The Government were unable to provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence. The Court therefore dismisses these allegations as lacking any evidentiary basis.

79. In so far as the Government alleged a risk of exploitation and corruption of minors, referring to the latter's vulnerability, the Court upholds the applicants' objection to the effect that protection against such risks should not be limited to same-sex relationships; the same positive obligation should, as a matter of principle, be equally relevant with regard to opposite-sex relationships. ...

...

81. Even assuming that the authorities' obligation to respect parents' religious or philosophical views may be interpreted as requiring them to take measures beyond setting the curricula of educational institutions, it would be unrealistic to expect that parents' religious or philosophical views would have to be given automatic priority in every situation, particularly outside school. The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions

82. In sensitive matters such as public discussion of sex education, where parental views, educational policies and the right of third parties to freedom of expression must be balanced, the authorities have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience. ...

(c) Conclusion

83. ... [T]he Court finds that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others. ... [B]y adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. ...

...

DISSENTING OPINION OF JUDGE DEDOV

...

Vulnerability of children

This element of privacy was not seriously taken into consideration by the Court. The ... Convention on the Rights of the Child (CRC) ... provides that the child, by reason of his physical and mental immaturity, needs special safeguards and care. The CRC obliges the States to respect the right of the child to preserve his or her identity without unlawful interference. ... States should take measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity (Articles 8, 9 and 34).

Mental immaturity is a decisive element of vulnerability. It is well known that children are vulnerable and credulous because of their lack of experience and incapacity to judge. Children may easily become interested in any information or ideas, especially in homosexual relations, without understanding their

nature. The idea that same-sex sexual relations are normal indeed creates a situation where they are ready to engage in such relations, just because of the curiosity which is an integral part of a child's mind. This is how the dissemination of ideas works *vis-à-vis* children. ...

...

I would agree with the applicants that this is just a neutral dissemination of information if the problem of paedophilia were completely resolved. According to the statistics, every year up to 50,000 children in Russia are subjected to sexual abuse [S]ame-sex violence constitutes a significant part of such cases, so that it deserves to be taken into consideration by making a special reference to same-sex relations in the law.

...

Freedom of expression

The Court, in the present case, did not seriously take into account the fact that the private life of children is more important than the freedom of expression of homosexuals.

It appears from the circumstances of the case that all the demonstrations were held in order to promote non-traditional sexual relations (which is not itself an issue of public interest); they were not held to express opinions on issues of public interest such as same-sex marriage or adoption. ...

...

Conclusion

... Until now, the Council of Europe has favoured unrestricted public recognition of non-traditional sexual relations, even in sensitive areas such as the vulnerability of a particular group of persons (children) owing to their immaturity, the religious and philosophical convictions of their parents (on how the family should be organised), the national traditions and values including maternity, the national demographic policy and the sensitivity of sexuality education.

* * *

Prior to the CRC's adoption in 1989, many states accorded very few rights to children and treated them in some respects as though they were the property of their parents or guardians. The CRC recognizes that children enjoy the full range of rights and that '[i]n 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' (Article 3). In its General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence (UN Doc. CRC/C/GC/20), the Committee on the Rights of the Child takes a very different approach to adolescence:

1. The [CRC] defines a child as every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier [T]he implementation of rights should take account of children's development and their evolving capacities. Approaches adopted to ensure the realization of the rights of adolescents differ significantly from those adopted for younger children.

...

Lesbian, gay, bisexual, transgender and intersex adolescents

...

34. The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. It condemns the imposition of so-called "treatments" to try to change sexual orientation and forced surgeries or

treatments on intersex adolescents. It urges States to eliminate such practices, repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures.

The Right to Bodily Autonomy and Physical Integrity

International human rights bodies have also recognized that the rights of LGBTQI people extend beyond freedom from the more obvious forms of discrimination and violence. The right to bodily autonomy and physical integrity informs the rights of trans, gender-diverse and intersex people, including children, to make decisions about their gender expression and medical care. This includes the right to access gender-affirming care without abusive or invasive requirements, as well as the right not to be subjected to ‘conversion therapy’ or (in the case of intersex people) ‘normalising’ medical interventions.

Gender-diverse people are often denied these rights due to the dominance of societal sex and gender norms in legal and medical spaces. In 2021, the UN Independent Expert on Sexual Orientation and Gender Identity described early surgeries on intersex children as ‘a blatant and cruel effect of gender binary norms’ and called on states:

to protect the right to bodily integrity, autonomy and self-determination of intersex children by prohibiting what are heinously called “normalising” medical procedures. The definition of bodily autonomy is also of fundamental importance for trans persons who face cruel, inhuman and degrading treatment, and possible torture, in the form of abusive requirements for gender recognition such as medical certification, surgery, treatment, sterilization or divorce. It is the State’s duty to confer every human being with the freedom to determine the confines of their existence – that means establishing no invasive preconditions to legally recognize a person’s gender identity by way of self-determination.

The Inter-American Commission on Human Rights (OEA/Ser.L/V/II., Doc. 239 (7 August 2020)) has also emphasized the way in which pathologization of gender diversity by legislative and medical institutions – for example, requirements for trans persons to obtain a diagnosis of ‘gender dysphoria’ before accessing gender-affirming care or changing their identity documents – impacts their rights to health, bodily autonomy and physical integrity.

One of the most far-reaching statements on the rights of intersex persons was adopted by the African Commission on Human and Peoples’ Rights:¹⁰⁹

RESOLUTION ON THE PROMOTION AND PROTECTION OF THE RIGHTS OF INTERSEX PERSONS IN AFRICA – ACHPR/RES.552 (LXXIV) 2023

Considering that Article 5 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa and Article 21 of the African Charter on the Rights and Welfare of the Child prohibit harmful social and cultural practices;

¹⁰⁹ See also UN Human Rights Council Res. 55/14 (2024) on Combating discrimination, violence and harmful practices against intersex persons.

Recognizing that intersex persons, who are born naturally with a chromosomal abnormality and reproductive or sexual anatomy that does not appear to fit the typical definitions of female or male, exist in all African societies;

Recognizing that intersexuality is an inherent handicap at birth and that it should not be considered a taboo in all African societies;

Recognizing also that non-consensual and unnecessary surgical and other genital normalization procedures performed on intersex persons, in a medical or other setting, may cause them lifelong physical and psychological suffering, permanent sterility, incontinence, and loss of sexual pleasure;

Further recognizing that the above-mentioned non-consensual and unnecessary surgical and other genital normalization procedures have irreversible consequences similar to genital mutilation and can be considered as such;

Concerned about human rights violations against intersex persons ...;

...

The Commission calls on States Parties to:

1. Promote and protect the rights of intersex persons on the continent;
2. Stop non-consensual genital normalization practices on intersex persons, such as surgical, hormonal and sterilization procedures that alter the sexual characteristics of intersex persons and ensure respect for their rights to make their own decisions regarding their bodily integrity, physical autonomy and self-determination;
3. Ensure that any action concerning an intersex minor is carried out with the permission of the parents and after medical analysis, taking strict account of the best interests of the child;
4. End human rights violations against intersex persons, such as infanticide and abandonment of intersex children;
5. Prohibit discrimination based on intersex traits and characteristics or intersex status ...;
- ...
7. Incorporate intersex education into prenatal counselling and support services, and provide training for health care personnel ...;
8. Enact enabling legislation and institutionalize administrative processes that allow intersex persons to change the gender designation on their birth certificates and other official documents, based on decision taken through medical intervention;
- ...

Pushback or Backlash Against LGBTQI and Women's Rights

The relative success of efforts to promote the rights of LGBTQI people, alongside the deepening of the women's rights agenda, has prompted significant pushback from a variety of actors.¹¹⁰ Perhaps the most dramatic policy reversal has come from the second Trump administration. In January 2025, the President rescinded a range of existing Executive Orders designed to promote equality and replaced them with a succession of orders designed to limit a wide range of LGBTQI rights. For example, in an order 'Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government' (20 January 2025) defined sex as 'an individual's immutable biological classification as either male or female', denounced the concept of 'gender ideology' defined to include 'the idea that there is a vast spectrum of genders that are disconnected from one's sex', and proclaimed

¹¹⁰ C. Roggeband, 'International Women's Rights: Progress Under Attack?', in H. Krieger and A. Liese (eds.) *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (2023) 252.

that ‘gender identity’ fails to ‘provide a meaningful basis for identification and cannot be recognized as a replacement for sex’. But the most concerted backlash has been against transgender rights. Nicholas Confessore, in ‘How the Transgender Rights Movement Bet on the Supreme Court and Lost’, *New York Times*, 19 June 2025, notes that the administration ‘has sought to strip trans people of the right to choose the sex marker on their passports and bar them from the military, arguing that they inherently lack the integrity and moral fitness to serve — that their very identity is a dishonorable lie.’ At the same time the U.S. Supreme Court, in *United States v. Skermetti* (18 June 2025) upheld, by a vote of 6-3, Tennessee’s ban on certain medical treatments (blockers and hormones) for transgender minors. Confessore noted that this ‘effectively closed the door on extending new constitutional protections to trans people’.

The following materials provide examples relating to the response of different legal, religious, cultural, and political groups.

a. International Law Critique

LI-ANN THIO, EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW

THE HERITAGE FOUNDATION, SPECIAL REPORT NO. 240, 31 DECEMBER 2020

... [T]he original understanding underlying “non-discrimination” in [the UDHR has] evolved through the expansive and contested interpretations of human rights bodies as a method of standard-setting, which has been criticized as advancing a subjective ideological agenda ...

...

Human Rights Treaty Law

...

Many human rights bodies with cosmopolitan drives have sought to promote their vision of substantive equality by expansively interpreting what equality and non-discrimination requires or by a radical interpretation of the text not contemplated by the authors of an instrument. ...

To read sexual orientation into “sex” is a method that has no basis in historical intent or, indeed, the conventional method of treaty interpretation The point is to detect the parties’ intention, not to supplant them, as U.N. bureaucrats do not have legislative powers to speak for the international community— nor do U.N. monitoring bodies have determinative power to declare what the treaty means. ...

...

Argument by Reiteration

...

... Various regional human rights courts and U.N. bureaucrats appear to favor reading human rights treaties as “living instruments,”—discounting historical intent—and allow their preferred value-laden interpretations to be advanced. This renders texts infinitely malleable, enlisted to serve whatever the interpreter deems a worthy cause. The strategy of reiteration is to keep repeating opinions until they achieve actual or perceived canonical status, with successive iterations relying for authority mostly upon one another. Each victory is celebrated as the acme of progressivism, and dissenting views are silenced through intimidation, shaming, and slurs. ...

...

Soft-Law Instruments

...

[The Yogyakarta Principles] are not the product of government negotiation and agreement, but of a group of self-selecting experts, U.N. bureaucrats, and LGBT ... pressure groups attempting to present a radical social policy vision as binding norms. Some states have utilized it as a tool ...

...

Clash of Rights: Sexual-Orientation Discrimination and the Assault on the Human Rights and Fundamental Freedoms

...

Principles of SOGI discrimination in particular, have far-reaching and negative effects on public discourse—and threaten to diminish other human rights. ...

Right to Education. Demands that governments should promote tolerance and respect for diverse sexual orientations through public education programs aimed against “homophobia” and “transphobia” through “comprehensive sexuality education” violate the human right of parents to instill values in their children. ...

...

Freedom of Religion and Expression. Expansive readings of non-discrimination on grounds like sexual orientation promotes liberty and equality for some at the expense of equality and liberty for others—particularly in relation to freedom of religion, conscience and expression ...

...

Recommendations

...

... [P]olicymakers should recognize a global margin of appreciation to respect principles of pluralism, subsidiary and the democratic will of national societies. While some jurisdictions may, for example, recognize same-sex marriage as part of privacy or equality rights, whether based on the democratic views of that society or their courts, policymakers should respect the political independence of other states by letting their societies decide what they wish their social fabric and sense of social morality to be—without external coercion, pressure, or intervention.

Conclusion

Human rights law is not made by the pronouncements of human rights experts or monitoring bodies. Though they wield considerable influence in shaping human rights discourse, they have no authority to impose a moral diktat by declaring a controversial political claim to be a legal human right. ...

b. ‘Gender Ideology’

During the 1990s a coalition led by the Vatican, with strong support from other predominantly Christian and Muslim states, opposed the use of the term ‘gender’ in the context of the 1995 Fourth World Conference on Women and the 1994 International Conference on Population and Development. Juan Marco Vaggione in ‘The Conservative Uses of Law: The Catholic Mobilization against Gender Ideology’, 67 *Social Compass* (2020) 252, describes how for ‘the Catholic Church, legal reforms allowing contraception, abortion, assisted reproductive methods, same-sex partnerships, or gender identity are not only immoral but also illegal and should be resisted by believers and citizens worldwide.’ Much of the Church’s advocacy is based on the idea of ‘gender ideology’ as ‘a conceptual tool that, despite the absence of a clear definition ..., provides an effective frame to capture (while reducing) the complex politics of feminist and LGBTIQI movements. According to this frame, these movements are actively seeking to impose an agenda contrary to scientific rationality and Christian values.’

Law is a key focus of this struggle, and human rights debates have become a favoured battleground. Populist leaders in a range of countries have taken up the rallying cry against ‘gender ideology’ and Vaggione argues that it is being used to demand public action ‘in order to defend a series of values, such as family, life, national sovereignty and human rights’. ‘In Latin America, this fight is being waged through three linked actors who constitute the neoconservative movement: factions of the Catholic and evangelical hierarchies, pro-life/pro-family NGO’s, and anti-gender politicians. This movement, which transcends the religious secular dichotomy, is changing the political map of the Latin American region’.

Ruth Rubio-Marín, in ‘On Constitutionalism and Women’s Citizenship’, 74 *Current Legal Problems* (2021) 361, describes the implications of different types of constitutionalism for ‘women’s equal

citizenship: (1) exclusionary constitutionalism, which locks in the separation between public and private spheres; (2) inclusive constitutionalism, which grants equal rights to women; (3) participatory constitutionalism, which emphasizes the importance of women's equal participation in a broadly conceived public sphere; and (4) transformative constitutionalism, which not only incorporates women in the public sphere but also reinterprets the domestic sphere in a way that disestablishes gender roles. But across these different approaches, recent years have seen an alliance between religious and far-right actors who have promoted:

‘constitutional reforms to (re)entrench the traditional family order in the constitutions (*constitutional entrenchment*); constitutional litigation to invalidate or reduce previously granted rights in favour of women, and sexual and gender minorities (*constitutional erosion*); and *constitutional co-option*, which ... co-opts the discourse of rights to preserve majority values from their perceived erosion. Since the last two rely on judicial activity they can certainly prosper with governments that, suspicious of what they denounce as “gender ideology”, pack the court system in ways they deem fit to offer resistance.

...

[C]onstitutional co-option ... uses victimization narratives which describe an ‘oppressed majority’ allegedly threatened by a totalitarian ‘gender ideology’ and combines the subversion of the constitutional logic of fundamental rights with the supra-ordination of religious freedom or freedom of conscience, to limit or even de facto empty the rights and freedoms granted to women and sexual and gender minorities by claiming protection for conscientious objection. Thus, if originally the accommodation of religious exemptions had been able to serve to protect religious minorities (in the observance of their practices, food or dress standards), now religious and ideological exemptions are affirmed as a way of preserving majority religious values to the detriment of the constitutional equality of women and sexual minorities. Conscientious objections in relation to the right to abortion are the subject of constitutional litigation in several countries Objections are also raised against the sale and coverage by insurers of abortion and contraceptive methods, including emergency contraception. And they have also become a key mode of objection to LGBT rights, mainly in relation to same-sex marriage and antidiscrimination policies. ‘Invoking freedom of conscience, religious pluralism, and non-discrimination’, rather than religious doctrine itself, ‘opponents of women’s reproductive rights and LGBT equality seek more persuasive justification for their positions and partly disable liberals from objecting’ [Quoting NeJaime and Siegel].

ISLAMIC COUNTRIES’ RESPONSE

The Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation undertook a study in 2017 to consider the implications of the SOGI agenda in light of ‘Islamic interpretations’.¹¹¹ The study described the ‘natural family, composed of a father, mother and children’ as being ‘under assault by those who are attempting to radically redefine it to include ... ‘*same-sex unions*’. It characterized the efforts of the LGBT community ‘to practice their way of life as normal families’ as ‘the most controversial subject that continue [sic] to pitch traditional societies in the Muslim and most African countries as well as many of the religious communities against Western societies’. It warned of ‘disastrous consequences of this suicidal social experiment’ if the LGBT community is successful, noting that ‘there is a real danger that other groups, citing genetic predisposition claims, would also be encouraged to demand legalizing incest, bestiality and other such deviant sexual behaviors and personal choices as a matter of “human right”’.

¹¹¹ OIC-IPHR Study on Sexual Orientation and Gender Identity in the Light of Islamic Interpretations and International Human Rights Framework (May 2017, Jeddah).

The study relied on several arguments to show ‘that the concept of sexual orientation does not fall into the purview of international human rights law:’

i. ... [P]roponents of sexual rights falsely claim that such rights are covered under the existing rights of equality, non-discrimination and sexual and reproductive health. But the fact remains that none of the above has ever been defined or accepted in any of the human rights instruments or UN documents by consensus.

ii. ... [A]ny attempt to introduce such concepts or notions, that have no legal foundation in international human rights law and directly impinge on the socio-cultural and religious sensitivities of a large group of UN countries, would only lead to further polarization and undermining of the cooperative and consensual nature of the international human rights architecture;

...

v. While reaffirming commitment to combating all forms of violence and discrimination against any person or group on any ground, attempts to universalize SOGI are clearly meant to imposing [sic] one set of values and preferences on the rest of the world, which counteracts the fundamentals of universal human rights that call for respecting diversity, national and regional particularities and various historical, cultural and religious backgrounds, as clearly set out in various international human rights instruments;

...

vii. While attempting to implement such controversial concepts, the international community must accord respect for the sovereign right of each country as well as its national laws, development priorities, the various religious and ethical values and cultural backgrounds of its people in full conformity with universally recognized international human rights

c. ‘Traditional Values’ Debate

Beginning in 2009, the Russian Government, with strong domestic support from the Russian Orthodox Church, began promoting an agenda within UN fora focusing on ‘traditional values’ and ‘protection of the family’.¹¹² The text of the latter appears below. McCrudden observes that these resolutions aim to have concepts such as “dignity”, “freedom” and “responsibility”, interpreted through the lens of the idea of “traditional values”, which is left undefined.’ He argues that although the resolutions are ‘rightly regarded with suspicion’ given the darker side of the ways in which traditional values and religious faith have been used in political and legal affairs, and ‘threaten to further divide rather than unite’, they also raise important issues because ‘they indicate a deep unease with aspects of the human rights project that needs to be taken seriously. ... Reorientation of the human rights project towards concern for the exploited, drawing on traditional values embedded in societies and cultures throughout the world, could be an important way in which the traditional values debate produces a more positive outcome ...’.¹¹³

Stoeckl and Medvedeva are more skeptical, suggesting that the Russian initiative has succeeded in putting a ‘specific group of actors into a situation of an argumentative double bind. Some religious NGOs from Western countries overlap with the traditionalist agenda on functional grounds, but

¹¹² K. Stoeckl, ‘Traditional Values, Family, Homeschooling: The Role of Russia and the Russian Orthodox Church in Transnational Moral Conservative Networks and their Efforts at Reshaping Human Rights’, 21 *Int’l J. Const. L.* (2023) 224.

¹¹³ C. McCrudden, ‘Human Rights and Traditional Values’, in U. Baxi, C. McCrudden, and A. Paliwala (eds.), *Law’s Ethical, Global and Theoretical Contexts* (2015) 38.

disagree on strategy and political implications. Moderate conservative actors express puzzlement to find themselves on one side with Russia, against liberal democratic governments they otherwise support.’ In their view, the political motivation behind Russia’s ‘traditionalist agenda ... appears to be polarisation, not advancement on topics of common concern’.¹¹⁴

**HUMAN RIGHTS COUNCIL, PROTECTION OF THE FAMILY ...
RESOLUTION 29/22 (3 JULY 2015)**

The Human Rights Council,

...

4. Reaffirms that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State;

...

6. Recognizes that the family, while respect for the rights of its members is ensured, is a strong force for social cohesion and integration, intergenerational solidarity and social development, and that the family plays a crucial role in the preservation of cultural identity, traditions, morals, heritage and the values system of society;

7. Conscious that families are sensitive to strain caused by social and economic changes, and expresses deep concern that conditions have worsened for many families owing to economic and financial crises, lack of job security, temporary employment and lack of regular income and gainful employment, as well as measures taken by Governments seeking to balance their budget by reducing social expenditure;

8. Recognizes that the family unit is facing increasing vulnerabilities;

...

10. Reaffirms the need to promote and protect the rights of the child, and in this regard calls upon States to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities ...;

11. Stresses that equality between women and men, women’s equal participation in employment and shared parental responsibility are essential elements of a policy on the family;

12. Regrets that women’s social and economic contributions to the welfare of the family and the social significance of maternity and paternity continue to be inadequately addressed and that women continue on many occasions to bear a disproportionate share of household responsibilities and the care of children, the sick and elderly, and in this regard emphasizes the need to consistently address such imbalances and to ensure that maternity, motherhood, parenting and the role of women in procreation is not a basis for discrimination nor for restricting the full participation of women in society;

...

16. Stresses that persons with disabilities and their family members should receive the necessary protection and assistance ... ;

17. Recognizes the positive impact that policies and measures to protect the family can have on protecting and promoting the human rights of its members and can contribute to, inter alia, decreasing drop-out rates from educational institutions, achieving equality between women and men and girls and boys, empowering women and girls and enhancing the protection against violence, abuses, sexual exploitation, harmful practices and the worst forms of child labour ...;

...

[Adopted by a vote of 29-14-4:

¹¹⁴ K. Stoeckl and K. Medvedeva, ‘Double Bind at the UN: Western Actors, Russia, and the Traditionalist Agenda’, 7 *Global Constitutionalism* (2018) 383, at 412.

d. Neoliberalism

Judith Butler, in ‘Anti-Gender Ideology and Mahmood’s Critique of the Secular Age’, 87 *J. Am. Acad. of Religion* (2019) 955, locates the backlash against feminist and LGBTQI approaches partly in the needs of a neoliberal economy.¹¹⁵

The platform of the anti-gender ideology alliance of right-wing Catholics and Evangelicals is clear: they oppose feminism, LGBTQI rights, especially gay marriage and trans legal and medical rights, single mothers, gay parents, and more. My wager is that as neoliberal economic policies devastate the work lives and the sense of futurity for many people who face contingent labor and unpayable debt, the turn against “gender” is a way of shoring up a traditional sense of place and privilege. It also draws the line between public and private, walling off the family and its patriarchal privilege from the market, where humiliation and dispensability have become the norm. Both the nationalist and traditionalist investment in prohibiting gay marriage, gay and lesbian families and adoption rights, trans and *travestis* rights, single parent adoption and access to reproductive technology, gender inequality, and the concept of “gender” itself follows from the fact that the heteronormative family is now being defended, sometimes violently, as the sole defense against devastating market forces. ...

... [T]he withdrawal of state support for families, dependent children, and social services has shifted the burden of basic support back to families, which is one reason why the fierce rehabilitation of the traditional family has taken place at the same time as its financial stability has been severely challenged. The authority of the Evangelical Church has stepped in, as it were, not just to give moral order to the family, without which the economy cannot function, but to aid and abet free market economics. ... Moreton argues that white Christian women who constitute the driving force of the evangelical movement understand quite clearly that “family values are an indispensable element of the global service economy, not a distraction from it”. Indeed, the evangelical church is itself part of free enterprise, or what some call Christian enterprise, and this convergence is consistently claimed to be the only alternative to socialism or communism or to elites on campus. ... Just as family values are indispensable to maintaining the service economy, as only the free labor of the family can render its economic terms even marginally livable, so faith-based welfare networks are indispensable to the withdrawal of government from the mandate to provide social services to those in need. In departing from the basic ideals of social democracy, the private realm of the family and of religion assume a more central role in the economic and political functioning of society.

...

e. National-Level Cultural Responses

In 2015, the US Supreme Court held that the Constitution grants same-sex couples the right to marry, thus effectively overturning a ban that had persisted in 13 of the 50 states. In 1996 only 27 percent of Americans approved of same-sex marriage, but by 2020 polls put the figure at 70 percent. Globally in 2021 same-sex marriage is legal in 28 countries, and various others recognise civil partnership for same-sex couples. But most of these countries are in Europe or the Americas. In 2023, the Indian Supreme Court ruled that it was for Parliament, not the courts, to recognize same-sex marriage.

¹¹⁵ See also Judith Butler, *Who’s Afraid of Gender* (2024).

There has been especially strong resistance in some African countries, often based on an appeal to traditional values.¹¹⁶ In 2021 a Ghanaian Member of Parliament introduced the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 aiming ‘to provide for proper human sexual rights and Ghanaian family values; proscribe LGBTQ+ and related activities; proscribe propaganda of, advocacy for, or promotion of LGBTTTQQAAP+ and related activities; provide for the protection of, and support for, children, persons who are victims or accused of LGBTTTQQAAP+ and related activities and other persons; and related matters.’ Penalties of three to five years in prison were prescribed for any non-heterosexual sex acts. A ‘grossly indecent act’, with a penalty of 6-12 months in prison, included any ‘public show of amorous relations between or among persons of the same sex’. In July 2023 the Supreme Court dismissed a legal challenge to the Bill and the President announced that a modified version would be adopted by the Government.

Z. Z. Devji, in ‘Forging Paths for the African Queer: Is There an “African” Mechanism for Realizing LGBTIQ Rights?’, 60 *J. African L.* (2016) 343, highlights the contrast between South Africa’s very progressive constitutional law in this area, and societal values:

The recognition of queer rights in the law of South Africa is perhaps one of the most advanced in the world. The language of the country’s 1996 constitution, which included the sexual orientation of individuals as a class towards whom discrimination was prohibited, drove the recognition of queer rights. In 2006, South Africa was the first country in Africa to extend full marriage rights to same sex couples. Prior to ruling that the state’s refusal to recognize marriage for same sex couples was unconstitutional, South African courts also overturned the prohibitions against sodomy, held that permanent same sex partners of South Africans should receive the same benefits as heterosexual spouses, legalized same sex adoptions, recognized the right to change one’s sex, and invalidated a provision of the Children’s Status Act that classified children born to same sex couples, through the aid of artificial insemination, as illegitimate. All these fundamental victories for the South African queer population were achieved under the constitution’s equality provision. In addition to establishing concrete rights, the Constitutional Court has interpreted the term “sexual orientation” broadly, by defining it as erotic attraction

... [T]he court broadly reads the proscription of discrimination based on sexual orientation to outlaw discrimination based on conduct, as well as discrimination based on sexual identification.

However, despite progressive policies and interpretations of the South African Constitution, public opinion and majoritarian sentiments are largely contrary to the liberal nature of the law. “The vast majority of South Africans condemn [the queer].” One South African constitutional law scholar offers three explanations for why the law was able to progress in South Africa, despite public opinion: the rise of queer visibility during key moments of transitional justice; the dominant ideology of the liberation movements, which was grounded in prohibiting discrimination and promoting equality; and the actual process of drafting the constitution, which allowed for its approval despite a lack of public support.

... Thus, although the constitution gives a strong legal basis for queer rights, South Africa remains a deeply conservative country that highly values heteronormativity. ... [T]he South African case study serves to demonstrate that good policies and progressive constitutions are not enough to shape a society’s values and sustain the clear rule of law.

¹¹⁶ Mariel Reiss and Monica Tabengwa, ‘Tug-of-war: LGBTIQ+ Rights in the African Human Rights Architecture’, 24 *African Hum. Rts. L. J.* (2024) 000.

Sylvia Tamale, in ‘Confronting the Politics of Nonconforming Sexualities in Africa’, 56 *African Studies Rev.* (2013) 31 argues that ‘nonconforming sexualities have been instrumentalized to entrench dictatorships and to weaken democracy’ and that ‘homophobia has become a political tool used by conservative politicians to promote self-serving agendas.’ But she is also very critical of western responses to African homophobia:

When the Anti-Homosexuality Bill was [first] introduced in Uganda, a number of Western government leaders called on Uganda to recognize the sexual citizenship of all its people. Overnight this was turned into a “conditionality” for aid to government and nongovernmental human rights organizations alike. Prior to this debacle, Ugandan activists had shouted themselves hoarse regarding rigged elections, detentions without trial, abuses of media freedoms, corruption, and many other human rights violations. But Western governments failed to respond, and instead dubbed [Ugandan President] Museveni one of only a handful of a “new breed” of African leaders. The selective conditionality when it comes to the rights of LGBTI individuals therefore smacks of hypocrisy.

In 2014 Uganda’s Parliament adopted the Anti-Homosexuality Act, but it was subsequently annulled by the Supreme Court on procedural grounds. In May 2023, Uganda’s President, Yoweri Museveni, signed into law the Anti-Homosexuality Act. All but two of Uganda’s 389 Members of Parliament voted in favor of the law. Its stated purpose is ‘to prohibit any form of sexual relations between persons of the same sex; to prohibit the promotion or recognition of sexual relations between persons of the same sex; and for related matters.’ Some excerpts follow:

Article 2

- (1) A person commits the offence of homosexuality if the person performs a sexual act or allows a person of the same sex to perform a sexual act on him or her.
- (2) A person who commits the offence of homosexuality is liable, on conviction, to imprisonment for life.

...

Article 3

- (1) A person who commits the offence of homosexuality in any of the circumstances specified in subsection (2), commits the offence of aggravated homosexuality and is liable, on conviction, to suffer death.
- (2) The circumstances referred to in subsection (1) are where—
 - (a) the person against whom the offence is committed is a child;
 - (b) the offender is a parent, guardian or relative of the person against whom the offence is committed;
 - (c) the person against whom the offence is committed contracts a terminal illness as a result of the sexual act;

...

- (i) the sexual act is committed against a person by means of threats, force, fear of bodily harm, duress or undue influence, intimidation of any kind, or through misrepresentation as to the nature of the act; ...

...

Article 11

- (1) A person who promotes homosexuality commits an offence and is liable, on conviction, to imprisonment for a period not exceeding twenty years.
- (2) A person promotes homosexuality where the person—
 - (a) encourages or persuades another person to perform a sexual act or to do any other act that constitutes an offence under this Act;
 - (b) knowingly advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcasting or distribution by any means, including the use of a computer, information system or the internet, of any material promoting or encouraging homosexuality or the commission of an offence under this Act;
 - (c) provides financial support, whether in kind or cash, to facilitate activities that encourage homosexuality or the observance or normalisation of conduct prohibited under this Act;
 - (d) knowingly leases or subleases, uses or allows another person to use any house, building or establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act; or
 - (e) operates an organisation which promotes or encourages homosexuality or the observance or normalisation of conduct prohibited under this Act.

...

Kapya Kaoma, in *Christianity, Globalization, and Protective Homophobia: Democratic Contestation of Sexuality in Sub-Saharan Africa* (2018) 171 explores the religious and colonial roots of ‘protective homophobia’ in Africa:

The growing influence of Christianity amidst the challenges of globalization and democracy is directly related to the resurgence of protective homophobia in sub-Saharan African politics. ...

...

... [T]he claim of battling “the global homosexual agenda” is established on the continent. This conspiracy presents Africa and the youth as helpless victims to be rescued from this evil agenda. ...

The contestation of sexuality, however, is not new to the continent—in Christian Africa, it dates to the seventeenth- to nineteenth-century colonial and the Christianization projects. At that time Africans contested the Victorian sexual norms that sought to displace sexuality from its central place in their worldviews. After many years of resistance, these Victorian norms were re-appropriated—the Victorian sexual norms became African and so did Christianity. ...

...

... [C]ultural, religious, and postcolonial predispositions inform sexuality politics in Africa. The history of colonialism, Christianization, and civilization/globalization is the lens through which sexuality is debated. Since sexuality revolves around social and religious values, Christian sexual norms become the basis for public policy. For this very reason, African sexual politics is a contest between localized religiously informed norms and the globalized human rights cultures. Paradoxically, both the defense of cultural values and sexual orientation and gender identity are acknowledged human rights.

...

Domestically, the claim that homosexuality is a donor-driven agenda gives African religious and political leaders ammunition to oppose sexual rights. Because politicians understand the frustration of many Africans over supposed global injustices, they package their anti-gay messages as defending an African cultural identity and religion. Moreover, by defining homosexuality as a Western imposition, politicians negatively define the West. In doing so, they attract support from the overtly religious electorate, while negatively projecting Africa's socio-economic plight on the West. Yet the growing visibility of sexual minorities also destabilizes the hetero-sexualization of the African identity. Through the politics of being, sexual minorities are not just reclaiming their political and to some extent cultural space, but also reforming and informing the public deliberations on sexuality.

...

... The contestation of sexuality by pro-gay and anti-gay rights advocates is interpreted as exercising one's democratic rights of expression and freedom of associations which are fundamental to human rights cultures. In short, both groups are active political actors in sexual rights democratic deliberations—they know that they can influence public policy through social activism.

...

... [T]he emphasis placed on same-sex sexual acts as opposed to sexual minorities' humanity robs them of their authentic humanity or *ubuntu*. Sexual minorities are not just fighting for the rights to have sex—despite the emphasis placed on it. They are fighting for the rights to exist as human beings with equal rights to other vehicles of social life—employment, legal protection, and accessing health services, among many others. ...

In May 2025, Human Rights Watch issued a report entitled *"They're Putting Our Lives at Risk": How Uganda's Anti-LGBT Climate Unleashes Abuse*:

... [A]uthorities have raided and suspended nongovernmental organizations, conducted arbitrary arrests and detentions, engaged in entrapment via social media and dating apps, and extorted money from LGBT people in exchange for releasing them from police custody. Ugandan authorities have also failed to hold to account individuals responsible for physical and sexual violence and online harassment against LGBT people.

... [The resulting] have affected a wide range of people and intensified existing vulnerabilities, harming the rights of many seeking to access essential services such as health care and housing, especially women and other at-risk groups.

QUESTIONS

1. Discuss the following comment on the dissent of Judge Odio Benito in *Hernández v Honduras*:

“To insist ... on a static definition of woman as “female” serves to maintain a binary system of gender that oppresses those who defy it. Odio Benito’s interpretation does not seek to understand in structural terms the situation of gender-based oppression, but instead to attach intrinsic characteristics to some persons and from there to infer legal results. ...

By contrast, a progressive interpretation of rights must be situated, open, and possibilistic, and the categories on which it is based must be “explicitly tentative, relational, and unstable.” One must understand how social hierarchies operate in different contexts and historical moments in order to, on the one hand, recognize persons who suffer oppression and, on the other, try to dismantle the body of prejudices, stereotypes, and violence which work to maintain said system of domination. In this sense, cis (biological) and trans women both suffer patriarchal gender-based violence. ...¹¹⁷”

2. How should states and international organizations respond to laws like that adopted in Uganda? According to Outright International, in 2023 the World Bank was providing \$US 5.5 billion in multi-year financing to the Ugandan government, whose total annual expenditure budget is \$US 13 billion. On 8 August 2023 the Bank announced that the Act ‘fundamentally contradicts’ its values. ‘We believe our vision to eradicate poverty on a livable planet can only succeed if it includes everyone irrespective of race, gender, or sexuality. This law undermines those efforts.’ It added that there would be no new public financing for Uganda until unspecified measures have been implemented and tested for efficacy. The Bank has no such general policy in place and it has long argued that, because its Articles of Agreement prohibit it from interfering in the political affairs of member states, it can take no position on human rights obligations. But in June 2025, the Bank announced that it was resuming lending based on new ‘mitigation measures that would ensure that its funding would not harm or discriminate against LGBTQ people.

E. TORTURE

1. Norm Regression: The Torture Prohibition

If one were to ask an average group of people to rank rights in order of importance, torture would be near the top of the list. It could be said, ‘If anything is a human right, then it’s the right not to be tortured.’ Consider its prominence in human rights texts. Article 5 of the UDHR states that no one shall be subject ‘to torture or to cruel, inhuman or degrading treatment or punishment’. Article 7 of the ICCPR restates this language. An entire treaty — the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment — addresses the problem of state-inflicted torture. As of 2024, that treaty had 173 states parties. The regional conventions reveal the same emphasis on the prohibition, in both general and torture-specific treaties.

Nonetheless, despite this broad normative consensus over prohibition of torture by states, its incidence remains significant and widespread. It is more common in authoritarian than liberal regimes and in the developing than the developed world, but occurs in developed and democratic countries as well. Some amount of torture by the state will stem from truly aberrational conduct by an official, in

¹¹⁷ A. M. Alterio, ‘Latin American Feminists, Gender, and the Binary System of Human Rights Protection’, 116 *Am. J. Int’l L. Unbound* (2022) 390.

violation of state policy and possibly attracting sanctions for unlawful conduct. But torture by the state predominantly takes place because of state policies expressly allowing or requiring it or because authorities quietly tolerate violations of formal policy. Undoubtedly, sheer venality — the satisfaction of sexual and sadistic desires or the desire to humiliate and exercise total physical dominion over another's body — has always played its role. It appears that periods of mass violence of horrific proportions weaken inherent or acquired inhibitions against vile behaviour so as to make commonplace the torture of helpless civilian populations and prisoners. Such abominations, themselves often fostered by state propaganda to enlist the participation of non-state actors in the savaging of the target population, may constitute both a response to and heightening of the process of dehumanization that underlies mass violence, to the extreme of genocide.

Torture by state officials is, then, rarely gratuitous or attributable simply to aberrational conduct stemming from the dark side of human nature. It generally serves as a means to some further goal, as in a broad sense dehumanization serves a genocidal programme. A state, for example, may systematically employ torture as a method for terrorizing a population and discouraging dissent or other behaviour condemned by the government.¹¹⁸

Torture as broadly understood today has figured in many cultures as a part of punishment itself after the criminal process has ended in a conviction. The historical punishments of being drawn and quartered, placed on the rack, or burned at the stake, provide classic illustrations. Today few such formal institutions of punishment remain, though dispute continues over methods of capital punishment used in many countries, and over methods of punishment that may be religiously based such as amputation of limbs. In the West, however, torture served for hundreds of years another, related, function. It had long been a routine, formal and judicially sanctioned part of criminal procedure, used in many European states to investigate a suspect once some threshold of facts leading to suspicion had been uncovered. It was employed (subject to certain safeguards designed to heighten the credibility of what was revealed or confessed) both to extract incriminating information and to achieve a confession that, despite the coercion, was used by courts to establish guilt. The interrogative function of torture was largely abolished by the eighteenth century, but its legacy remains.

While progress has been made, principally in normative terms but also in the diminishing incidence of torture as part of a broad system of investigation or punishment, the debates that unfolded after the attacks on the United States on 11 September 2001 showed that the prohibitions of state conduct once thought settled as a matter of normative consensus could be abruptly re-opened for debate, leading many commentators, especially in the United States, to again contemplate either the legality or the inevitability, or both, of officially-sanctioned torture.¹¹⁹ Interrogations of suspected terrorists were carried out, and defended, on the grounds that the information thereby obtained could bring heinous killers to justice and prevent attacks from occurring that could cost thousands of lives. This section focuses almost exclusively on United States policies since 2001 and on their impact on the global anti-torture regime.¹²⁰

International Instruments Prohibiting Torture

The following illustrations are drawn from treaties and listed in chronological order.

Universal Declaration of Human Rights, 1948

Article 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

¹¹⁸ See generally, R. Hassner, *Anatomy of Torture* (2022); and D. Rejali, *Torture and Democracy* (2007).

¹¹⁹ E. Kearns and J. Young, *Tortured Logic: Why Some Americans Support the Use of Torture in Counterterrorism* (2020).

¹²⁰ Note that many other governments also used or covered up torture during these years. In relation to the United Kingdom, see R. Blakeley and S. Raphael, 'Accountability, Denial and the Future-proofing of British Torture', 96 *Int'l Aff.* (2020) 691.

Geneva Conventions, 1949

All four Geneva Conventions of 1949 prohibit torture. In addition, ‘torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health’ are classified as ‘grave breaches’, which must be the subject of ‘effective penal sanctions’ in national law.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

Article 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

International Covenant on Civil and Political Rights, 1966

Article 7: contains the same text as in the UDHR. Article 4(2) provides that no derogation may be made from Article 7.

African (Banjul) Charter on Human and Peoples’ Rights, 1981

Article 5: ‘... All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Article 1(1): ‘For the purposes of this Convention, the term ‘torture’ means 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.’

Article 2(2): ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’

Article 4(1): ‘Each State Party shall ensure that all acts of torture are offences under its criminal law.’

Article 16: ‘Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.’

Inter-American Convention to Prevent and Punish Torture, 1985

Article 2: ‘For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.’

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.’

Article 5(1): ‘The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.’

Rome Statute for the International Criminal Court, 1998

Article 7(1): ‘For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

....

(f) Torture;

...

(2): For the purpose of paragraph 1: ...

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.’

PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL V. GOVERNMENT OF ISRAEL **SUPREME COURT OF ISRAEL, H.C. 5100/94 (6 SEPTEMBER 1999)**

[The applications for relief brought before the Court concerned interrogation methods used by the General Security Service (GSS) to investigate individuals suspected of committing crimes against Israel’s security. The Court noted the ‘unceasing struggle’ of Israel for its existence and security, in particular the combat against terrorist organizations committed to Israel’s annihilation. Terrorist attacks that included suicide bombings against civilian and military targets led to 121 deaths and 707 injured people from 1996 to May 1998.]

PRESIDENT A. BARAK:

Shaking

9. A number of applicants claimed that the shaking method was used against them. ... [This] is defined as the forceful shaking of the suspect’s upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly. According to an expert opinion submitted in one of the applications, the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

... To [the State’s] contention, there is no danger to the life of the suspect inherent to shaking; ... In any event, they argue, doctors are present. ...

All agree that in one particular case the suspect in question expired after being shaken. ... [T]he State argues ... that the shaking method is ... a last resort. The interrogation directives define the appropriate circumstances for its application and the rank responsible for authorizing its use. ... [It claims] shaking is indispensable to fighting and winning the war on terrorism. ... Its use in the past has led to the thwarting of murderous attacks.

Waiting in the “Shabach” Position

10. ... [A] suspect investigated under the “Shabach” position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room. ... [S]uspects are detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals.

...

[The opinion described three additional ‘physical means’ included in the applications: (1) the ‘frog crouch’, consecutive, periodical crouches on tip toes each crouch lasting five minutes, (2) excessive tightening of hand or leg cuffs, allegedly leading to serious injuries, and (3) sleep deprivation while being tied in the ‘Shabach’ position, involving long interrogations without breaks.]

Applicants’ Arguments

14. ... [Applicants] argue that the physical means employed by GSS investigators not only infringe upon ... human dignity..., but ... constitute criminal offences. These methods, argue the applicants, are in violation of International Law as they constitute “Torture,” which is expressly prohibited under International Law. Thus, the GSS investigators are not authorized to conduct these interrogations. ...

We asked the applicants’ attorneys whether the “ticking time bomb” rationale was not sufficiently persuasive to justify the use of physical means, for instance, when a bomb is known to have been placed in a public area and will undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once. This question elicited a variety of responses from the various applicants before the Court. There are those convinced that physical means are not to be used under any circumstances; the prohibition on such methods to their mind is absolute, whatever the consequences may be. On the other hand, there are others who argue that even if it is perhaps acceptable to employ physical means in most exceptional “ticking time bomb” circumstances, these methods are in practice used even in absence of the “ticking time bomb” conditions. The very fact that, in most cases, the use of such means is illegal provides sufficient justification for banning their use altogether, even if doing so would inevitably absorb those rare cases in which physical coercion may have been justified. ...

The State’s Arguments

15. ... [T]he State argues that these [methods] do not violate International Law ... [and] cannot be qualified as “torture,” “cruel and inhuman treatment” or “degrading treatment” ...

Moreover, the State argues that these means are equally legal under Israel’s internal (domestic) law. This is due to the “necessity” defence outlined in article 34(11) of the Penal Law (1977). ...

The [Landau] Commission of Inquiry’s Report [1987]

16. ... The Commission approved the use of “a moderate degree of physical pressure” with various stringent conditions including directives that were set out in the second (and secret) part of the Report, and for the supervision of various elements both internal and external to the GSS. The Commission’s recommendations were duly approved by the government.

[The Court explored bases for the authority of the GSS to conduct interrogations and concluded that it was so authorized.]

The Means Employed for Interrogation Purposes

21. [The state] argued before this Court that some of the physical means employed by the GSS investigators are permitted by the “law of interrogation” itself. ...

22. ... In crystallizing the interrogation rules, two values or interests clash. *On the one hand*, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. *On the other hand*, is the wish to protect the dignity and liberty of the individual being interrogated. This having been said, these interests and values are not absolute. A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth. ... At times, the price of truth is so high that a democratic society is not prepared to pay it. To the same extent however, a democratic society, desirous of liberty seeks to fight crime and to that end is prepared to

accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary. ...

...

23. [The Court identifies] a number of general principles ...:

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. ... This conclusion is in perfect accord with (various) International Law treaties — to which Israel is a signatory These prohibitions are “absolute”. There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable. *Second*, a reasonable investigation is likely to cause discomfort; It may result in insufficient sleep; The conditions under which it is conducted risk being unpleasant. ... In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. ...

From the General to the Particular

24. ... Plainly put, shaking is a prohibited investigation method. ... [T]here is no doubt that shaking is not to be resorted to in cases outside the bounds of “necessity” or as part of an “ordinary” investigation.

...

Physical Means and the “Necessity” Defence

33. ... [A]n explicit authorization permitting GSS to employ physical means is not to be found in our law. An authorization of this nature can, in the State’s opinion, be obtained in specific cases by virtue of the criminal law defense of “necessity”, prescribed in [Article 34 (1) of] the Penal Law. ...

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm.

The State’s position is that by virtue of this “defence” to criminal liability, GSS investigators are also authorized to apply physical means, such as shaking, in the appropriate circumstances, in order to prevent serious harm to human life or body, in the absence of other alternatives. ... It is choosing the lesser evil. Not only is it legitimately permitted to engage in the fighting of terrorism, it is our moral duty to employ the necessary means for this purpose. ... [T]here is no obstacle preventing the investigators’ superiors from instructing and guiding them with regard to when the conditions of the “necessity” defence are fulfilled and the proper boundaries in those circumstances. From this flows the legality of the directives with respect to the use of physical means in GSS interrogations. In the course of their argument, the State’s attorneys submitted the “ticking time bomb” argument. ... Is a GSS investigator authorized to employ physical means in order to elicit information regarding the location of the bomb in such instances? The State’s attorneys answer in the affirmative.

34. We are prepared to assume that — although this matter is open to debate — the “necessity” defence is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature. Likewise, we are prepared to accept — although this matter is equally contentious — that the “necessity” exception is likely to arise in instances of “ticking time bombs”, and that the immediate need (“necessary in an immediate manner” for the preservation of human life) refers to the imminent nature of the act rather than that of the danger. ...

...

35. ... This however, is not the issue before this Court. ... The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of “necessity”. ...

36. In the Court's opinion ... [the nature of the] "necessity" defence does not ... allow it to serve as the source of a general administrative power. ... The very fact that a particular act does not constitute a criminal act (due to the "necessity" defence) does not in itself authorize the administration to carry out this deed, and in doing so infringe upon human rights. The Rule of Law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect. ...

37. ... If the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. ...

38. Our conclusion is therefore the following: According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual GSS investigator — like any police officer — does not possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.

An investigator who insists on employing these methods, or does so routinely, is exceeding his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the "necessity" defence, and according to our assumptions, the investigator may find refuge under the "necessity" defence's wings (so to speak), provided this defence's conditions are met by the circumstances of the case. ...

A Final Word

39. This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. ... Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. ... If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations ... this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. ...

40. Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension ... that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our brethren require us to act according to the law. ...

Consequently ... we declare that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position ... force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. ...

[Seven Justices agreed with the opinion. Justice J'Kedmi accepted the opinion's conclusion but would have suspended the judgment's effectiveness for one year.]

**DAVID KRETZMER AND YAËL RONEN, THE OCCUPATION OF JUSTICE:
THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES
(2ND EDN., 2021) 359**

... First, when asked in earlier cases to intervene in real time on the basis of the same arguments that it eventually accepted in the PCATI case, the Court desisted. In [PCATI, it] was not required to intervene in an ongoing interrogation. ...

Second, ... [the] Court referred to standards of international human rights law ... but refrained from ruling whether all, or any, of the interrogation methods mentioned in the judgment were covered by this prohibition. ...

...

Finally, ... the Court ... left a loophole for extreme cases. ...

...

... [T]he PCATI judgment ... led to creation of a new term, namely ‘necessity interrogations’.

3.3 Aftermath of the PCATI Case

... [T]he judgment ... had an immediate and dramatic effect on the interrogation practices of the ISA. Some of the specific practices that the Court had ruled out—shaking detainees, tying them to a low chair, and playing extremely loud noise—were abandoned. However, soon after the judgment was delivered the Attorney General followed the ‘advice’ included in the judgment and issued guidelines under which interrogators would not face criminal prosecution ...:

In cases in which, during an interrogation, an interrogator has used means of interrogation that were needed immediately in order to gain essential information for the purpose of preventing a concrete danger of severe harm to state security, human life, liberty or bodily integrity, where in the circumstances there was no other reasonable way of immediately obtaining the information, and where the means of interrogation used were reasonable in the circumstances to prevent the harm, the Attorney General will consider not opening criminal proceedings.

...

... [T]he Attorney General’s guidelines ... clearly open the road for an institutional mechanism that allows interrogators to exceed their authority on the strength of the expectation that they will not be subject to criminal liability if they do so. In this situation the lack of legal authority to employ the ‘special methods of interrogation’ becomes a meaningless formality.

[The authors then analyse two major cases in which the Court considered the legitimacy of ‘necessity interrogations’: *Abu Ghosh v. Attorney General*, HCJ 5722/12 (2017) and *Tbeish v. Attorney General*, HCJ 9018/17 (2018)]

4. Assessment

...

... [W]hat is abundantly clear from the Court’s judgments is that it has granted judicial imprimatur to the use of means of interrogation that the ISA is not authorised to use, and that are prohibited by criminal law. How can we explain this?

... [First, faced] with claims that if the security authorities’ hands are tied they will not be able to protect the public from real security risks, domestic courts are notoriously reluctant to intervene in the actions of those authorities. ...

... [Second is] the notion of ‘Israeli exceptionalism’, namely the notion that Israel’s situation is unique, and this uniqueness justifies departing from accepted norms. ... [I]n the *Tbeish (No 1)* case ... Justice Elron stated:

The ‘necessity’ which was the basis for the interrogation of the petitioner does not exist in a vacuum. One must understand and interpret it in light of the complex security reality of the State of Israel. The petitioner was active in a terrorist organisation, which carried out, and continues to carry out, serious terrorist attacks, including murder in cold blood, with great cruelty and no mercy on innocent men, women and children, solely because they are Israelis.

This dictum reflects the way the Court has decontextualised the problem, and perceives only the Israelis as victims without any awareness of the nature of the occupation.

...

... [We are] faced with the fundamental question ...: What has been the main function of the Court—legitimising the practices of the military and security authorities, or mitigating them as much as it thought possible?

* * *

International human rights law played a minor part in the PCATI judgment. But a broader review of its role in the jurisprudence of the Israeli Supreme Court is provided by Natalie Davidson and Tamar Hostovsky Brandes, in ‘Israeli Courts and the Paradox of International Human Rights Law’, 33 *Eur. J. Int’l L.* (2022) 1243:

Existing studies of the Supreme Court have pointed to the pre-eminence of the European Convention on Human Rights in citation practices, to the deployment of IHRL to develop doctrine in the area of social rights and to an overall superficial engagement with IHRL. In addition, they have found a practice of invoking IHRL to justify state action. We find that courts refer to IHRL primarily with respect to children’s rights and due process, seldom invoking IHRL in relation to ethnic and gender equality. That is, Israeli courts refer to IHRL predominantly in relation to those issues and actors least challenging to the political order in Israel

QUESTIONS

1. Is allowing the defence of ‘necessity’ consistent with an ‘absolute’ view of protection against torture, such that exceptions and balancing are both forbidden (see para. 23)? How would you state the criteria for and the conditions to a ‘necessity’ defence?
2. What is the relationship between, on the one hand, a required standard of reasonableness and fairness in the policies and practices of the state during interrogations, and on the other hand, an absolute protection against torture? Would you expect a consensus among states about what kind of conduct in what circumstances would clearly violate an absolute ban, but might be viewed as permissible within the reasonableness standard?
3. How would you answer Kretzmer and Ronen’s final question?

Debating the Merits

A couple of years after the events of 9/11, and as a vibrant public debate occurred over the merits and legality of torture, Sanford Levinson edited *Torture: A Collection* (2004). Consider some of the reflections it contained.

Jean Bethke Elshtain, ‘Reflection on the Problem of “Dirty Hands”’, at 77:

...

Let’s sum up this unhappy subject. Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to “torture” one guilty or complicit person. One hopes and prays such occasions

emerge only rarely. Were I the parent or grandparent of a child whose life might be spared, I confess, with regret, that I would want officials to rank their moral purity as far less important in the overall scheme of things than eliciting information that might spare my child or grandchild and all those other children and grand-children. But I do not want a law to “cover” such cases, for, truly, hard cases do make bad laws. Instead, we work with a rough rule of thumb in circumstances in which we believe an informant might have information that would probably spare the lives of innocents. In a world of such probabilities, we should demur from Torture 1 — the extreme forms of physical torment. But Torture 2 [‘torture lite’], for which we surely need a different name, like coercive interrogation, may, with regret, be used. This is a distinction with a difference.

Oren Gross, ‘The Prohibition on Torture and the Limits of Law’, at 229:

...

I peg my belief on the twin notions of *pragmatic absolutism* and *official disobedience*. . . . [T]he way to reconcile that absolute ban on torture with the necessities of the catastrophic case is not through any means of legal accommodation (such as recognizing an explicit legal exception to the ban on torture that applies to catastrophic cases) but rather through a mechanism of extralegal action that I would term *official disobedience*: in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats *may* entail going outside the legal order, at times even violating otherwise accepted constitutional principles.

Going completely outside the law in appropriate cases preserves, rather than undermines, the rule of law in a way that bending the law to accommodate for catastrophes does not. . . . [T]o say that governments are going to use preventive interrogational torture in the catastrophic case is not the same as saying that they should be authorized to do so through a priori, ex ante legal rules. It is extremely dangerous to provide for such eventualities and such awesome powers within the framework of the existing legal system because of the large risks of contamination and manipulation of that system and the deleterious message involved in legalizing such actions

Instead, my proposal calls on public officials having to deal with the catastrophic case to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions. Those officials must assume the risks involved in acting extralegally. . . . Society retains the role of making the final determination whether the actor ought to be punished and rebuked or rewarded and commended for her actions.

...

. . . [T]he acting official may . . . for example, need to resign her position, face criminal charges or civil suits, or be subjected to impeachment proceedings. Alternatively, the people may approve the actions and ratify them. . . . [L]egal modes of ratification may include exercising prosecutorial discretion not to bring criminal charges against persons accused of using torture, jury nullification where criminal charges are brought, executive pardoning or clemency where criminal proceedings result in conviction, or governmental indemnification of state agents who are found liable for damages to persons who were tortured. . . .

Alan Dershowitz, ‘Tortured Reasoning’, at 257:

...

... I sought a debate [after September 11]: ... if torture would, *in fact* be employed by a democratic nation under the circumstances, would the rule of law and principles of accountability require that any use of torture be subject to some kind of judicial (or perhaps executive) oversight (or control)? ... My answer, unlike that of the Supreme Court of Israel, is yes. To elaborate, I have argued that unless a democratic nation is prepared to have a proposed action governed by the rule of law, it should not undertake, or authorize, that action. As a corollary, if it needs to take the proposed action, then it must subject it to the rule of law. Suggesting that an after-the-fact “necessity defense” might be available in extreme cases is not an adequate substitute for explicit advance approval

... In explaining my preference for a warrant, I [earlier] wrote the following.

...

There is, of course, a downside: legitimating a horrible practice that we all want to see ended or minimized. Thus we have a triangular conflict unique to democratic societies: If these horrible practices continue to operate below the radar screen of accountability, there is no legitimation, but there is continuing and ever expanding *sub rosa* employment of the practice. If we try to control the practice by demanding some kind of accountability, then we add a degree of legitimation to it while perhaps reducing its frequency and severity. If we do nothing, and a preventable act of nuclear terrorism occurs, then the public will demand that we constrain liberty even more. There is no easy answer.

...

The strongest argument against my preference for candor and accountability is the claim that it is better for torture — or any other evil practice deemed necessary during emergencies — to be left to the low-visibility discretion of low-level functionaries than to be legitimated by high-level, accountable decision-makers. Posner makes this argument:

Dershowitz believes that the occasions for the use of torture should be regularized — by requiring a judicial warrant for the needle treatment, for example. But he overlooks an argument for leaving such things to executive discretion. If rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules. Having been regularized, the practice will become regular. Better to leave in place the formal and customary prohibitions, but with the understanding that they will not be enforced in extreme circumstances.

...

QUESTION

Which approach do you prefer, out of the PCATI judgment, Gross, or Dershowitz?

2. U.S. Law and Policy on Torture after September 11

The events of 11 September 2001 led the Administration at the time to develop and institutionalize a broad policy of counter-terrorism. It proposed, and Congress enacted, broad legislation like the Patriot Act. In important part, the Administration also proceeded through the Executive Branch,

independently of Congress — for example, in establishing interpretations of both domestic legislation and treaties that bore on vital matters including the question of prohibited methods of interrogation of persons detained on suspicion of participation in terrorism.

When it ratified the Convention against Torture in 1994, the U.S. entered a reservation:

That the United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as [that] term ... means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

A similarly worded reservation was made when the U.S. ratified the ICCPR in 1992. The ratification of the Convention against Torture was also made subject to the following ‘understanding’:

That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

On 1 August 2002, Assistant Attorney General Jay Bybee sent a Memorandum to Alberto Gonzales, Counsel to the President, analyzing standards of conduct for interrogating detainees outside the United States under the Torture Act (18 U.S.C. §§2340–2340A) which implemented the Convention against Torture (CAT) and the provisions for grave breaches in the Geneva Conventions. It separately analysed the statute and treaty. It quoted part of Section 2340:

(1) ‘torture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

...

Bybee observed that the statute did not define the critical word ‘severe’. Turning to dictionary definitions to identify the ‘ordinary or natural meaning’ of that term, the memo concludes that ‘the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure’. Turning to other statutes using the term ‘severe’ such as those defining an emergency medical condition for the purpose of providing health care, Bybee understood them to suggest that ‘severe’ pain in Section 2340:

must rise to a similarly high level — the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions — in order to constitute torture.

The memo then refers to the statute’s four-part definition of severe ‘mental’ pain or suffering, and summarizes its views:

Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed.

The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm.

The memo recalled that CAT distinguishes between ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment which does not amount to torture as defined in Article 1.’ It argued that CAT’s text, ratification history and negotiating history confirmed that torture ‘is a step far-removed from other cruel, inhuman or degrading treatment or punishment’. CAT reaches only ‘the most heinous acts’. Such an interpretation gave the Executive Branch more leeway in deciding on methods of interrogation seeking information from suspected terrorists that were shy of the ultimate prohibition of torture.

The memorandum also considers ‘defenses’, including that of ‘necessity’. Such a defence could eliminate criminal liability even if the statutory definition of torture was found to have been violated. The memo stresses two factors: (1) The greater the certainty of government officials that the person under interrogation has information needed to prevent a serious attack, the more necessary the interrogation. (2) The greater the likelihood that a terrorist attack will occur, and the greater the damage expected from such an attack, the more the interrogation would be necessary. Much then depends on the knowledge of the government official conducting the interrogation. ‘While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances would support such a defense.’

A subsequent Memorandum, on 30 December 2004, from Daniel Levin, Acting Assistant Attorney General indicated that the August 2002 Memorandum had been ‘withdrawn’, but also suggested that specific interrogation methods previously approved would still be valid even under more restrictive legal definitions adopted. It was later revealed that another (Top Secret) 1 August 2002 Memorandum by Bybee had discussed and approved a wide range of specific techniques including ‘waterboarding’ — forcibly pouring water down the throat of a restrained individual to create the uncontrollable physiological sensation of drowning — sleep deprivation, throwing an individual against a flexible false wall, and confining the individual inside a box and introducing an insect into the box. In 2005, the Office of Legal Counsel issued an opinion stating explicitly — and explaining in detail — that these techniques, including waterboarding, were consistent with the 2004 Memorandum by Levin and thus did not constitute torture.

Following the widespread publication of graphic photos depicting the abuse of detainees in the Abu Ghraib prison facility in Iraq, President Bush stated on 26 June 2004 that on the UN ‘International Day in Support of Victims of Torture, the United States reaffirms its commitment to the worldwide elimination of torture. ... Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. ... We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction.’

**SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL
INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM
APPROVED 13 DECEMBER 2012, UPDATED FOR RELEASE 3 APRIL 2014, DECLASSIFICATION
REVISIONS 3 DECEMBER 2014**

...

Findings and Conclusions

#1: The CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.

...

While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. ...

...

#2: The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.

...

The Committee reviewed 20 of the most frequent and prominent examples of purported counterterrorism successes that the CIA has attributed to the use of its enhanced interrogation techniques, and found them to be wrong in fundamental respects. ...

...

#3: The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others.

... The waterboarding technique was physically harmful, inducing convulsions and vomiting. Abu Zubaydah, for example, became "completely unresponsive, with bubbles rising through his open, full mouth." ...

Sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads. ...

...

#4: The conditions of confinement for CIA detainees were harsher than the CIA had represented to policymakers and others.

... CIA detainees at the COBALT detention facility [in Afghanistan] were kept in complete darkness and constantly shackled in isolated cells with loud noise or music and only a bucket to use for human waste. ...

At times, the detainees ... were... subjected to what was described as a "rough takedown," in which approximately five CIA officers would scream at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched.

...

Throughout the program, multiple CIA detainees ... exhibited psychological and behavioral issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation. ...

[The next sections of the report addressed these issues, *inter alia*: #5: The CIA repeatedly provided inaccurate information to the Department of Justice ...; #6: The CIA has actively avoided or impeded congressional oversight of the program; #7: The CIA impeded effective White House oversight and decision-making; ...[and] #9: The CIA impeded oversight by the CIA's Office of Inspector General.]

#12: The CIA's management and operation of its Detention and Interrogation Program was deeply flawed ...

... The CIA kept few formal records of the detainees [at COBALT] Untrained CIA officers at the facility conducted frequent, unauthorized, and unsupervised interrogations of detainees using harsh physical interrogation techniques that were not-and never became-part of the CIA's formal "enhanced" interrogation program. ...

#13: Two contract psychologists devised the CIA's enhanced interrogation techniques and played a central role in the operation, assessments, and management of the CIA's Detention and Interrogation Program. By 2005, the CIA had overwhelmingly outsourced operations related to the program.

The CIA contracted with two psychologists to develop, operate, and assess its interrogation operations. ... Neither psychologist had any experience as an interrogator, nor did either have specialized knowledge of al-Qa'ida, a background in counterterrorism, or any relevant cultural or linguistic expertise.

On the CIA's behalf, the contract psychologists developed ... the list of enhanced interrogation techniques that was approved for use against Abu Zubaydah and subsequent CIA detainees. The psychologists personally conducted interrogations ... [and] evaluated ... detainees' psychological state The psychologists carried out inherently governmental functions, such as acting as liaison between the CIA and foreign intelligence services, assessing the effectiveness of the interrogation program, and participating in the interrogation of detainees in held in foreign government custody.

...

In 2006, the value of the CIA's base contract with the company formed by the psychologists with all options exercised was in excess of \$180 million; In 2007, the CIA provided a multi-year indemnification agreement to protect the company and its employees from legal liability

...

* * *

For over two decades after 9/11, a large number of UN bodies and the Inter-American Commission on Human Rights challenged U.S. conduct. Two recent examples follow:

In 2022, the UN Human Rights Council's Working Group on Arbitrary Detention gave its assessment (Opinion No. 66/2022, UN Doc. A/HRC/WGAD/2022/66) of a complaint brought by Abu Zubaydah against the United States and states that had 'hosted' CIA detainees (Pakistan, Thailand, Poland, Morocco, Lithuania, Afghanistan and the United Kingdom).

The report states that Abu Zubaydah is a Palestinian, born in 1971, who grew up in Saudi Arabia. He was captured in Pakistan in March 2002, and was wounded in the process. Following medical attention, he was flown by the CIA to a secret detention site in Thailand. The U.S. identified him as a key terrorist threat and a 'member of Usama bin Laden's inner circle'. These allegations, based on torture-induced information, were recanted in 2002. The CIA's own documentation did not support those claims and the 'Agency was informed on 10 August 2002 that it was highly unlikely that Mr. Zubaydah had the intelligence sought'. In February 2008, the U.S. conceded that he was not a member of Al-Qaida. In 2017, the U.S. removed him from the sanctions list. The U.S. nonetheless continued 'to assert its right to detain him indefinitely'.

Between 4 and 23 August 2002, Mr. Zubaydah was subjected to combined enhanced interrogation techniques almost 24 hours a day. During this time, he spent 266 hours in a coffin-size confinement box and 29 hours in a small confinement box. He was threatened with death and waterboarded at least 83 times. He was previously kept in isolation for 47 days and subjected to sensory manipulation. He was also subjected to ice baths, rectal rehydration, forced nudity and sexual violence. The UN Working Group held that the U.S. and the other countries involved had violated a wide range of human rights.

In 2023, the UN Special Rapporteur on human rights and counter-terrorism, Fionnuala Ní Aoláin, reported on a visit to the Guantánamo Bay detention facility. For over two decades, the U.S. had denied full access to the camp to a range of UN experts. The Rapporteur expressed gratitude to the

Biden Administration and noted certain improvements in treatment over the preceding 22 years. She noted (para. 15) that 780 Muslim men had been held in Guantánamo and reaffirmed previous UN findings of ‘structured, discriminatory, and systematic rendition, secret detention, and torture and ill-treatment at multiple (including black) sites and at Guantánamo Bay.’ She reaffirmed that the prohibition of arbitrary detention and torture are *jus cogens* norms and that the U.S. Government has a continuing obligation to ‘complete thorough, independent, and effective investigations’ to ‘sanction those responsible’ and to provide reparations. None of these steps had yet been taken.

In terms of the right to a fair trial (para. 44) she observed that ‘of the 30 men remaining at Guantánamo, 19 men have **never** been charged with a single crime’ and observed (para. 48) not only that the U.S. had failed to respect fair trial guarantees, but that it had ‘severely impeded the detainees’ access to justice’.

The Impact of U.S. Policies on the Norm against Torture

In the same report, the Rapporteur concluded (para. 67) that ‘the exceptionalism, discrimination, securitization, and anti-terror discourse perpetuated by the continuing existence of and justification for Guantánamo have ... [had] enormous human rights consequences in multiple countries.’ Adopting a broader perspective, Averell Schmidt and Kathryn Sikkink, in ‘Breaking the Ban? The Heterogeneous Impact of US Contestation of the Torture Norm’, 4 *J. Glob. Sec. Stud.* (2019) 105 conclude that ‘US actions presented a direct challenge to the laws, treaties, and values that constitute the core of the norm against torture, especially its status as a nonderogable norm. ... [S]tates that participated with the United States in its torture program later showed increased levels of physical integrity rights violations ...’. In their view, U.S. actions ‘damaged the torture norm’s robustness by injecting a greater degree of legal and cultural acceptance for the situational use of torture and by disregarding the obligation of accountability.’

But, perhaps surprisingly, each of three scholars writing in H. Krieger and A. Liese (eds.) *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (2023) concluded that the torture norm had been unexpectedly resilient in response to U.S. policies.

- (1) Wayne Sandholtz, in ‘Is Winter Coming? Norm Challenges and Norm Resilience’ (*ibid*, 47) noted that U.S. torture ‘triggered vigorous pro-norm arguments from other governments, NGOs, civil society, and from segments of the United States government itself’ as well as ‘efforts by activists, lawyers, and legislators within the United States’. In his view, ‘the anti-torture norm may well have emerged strengthened internationally.’
- (2) Max Lesch and Lisbeth Zimmermann, in ‘There’s Life in the Old Dog Yet: Assessing the Strength of the International Torture Prohibition’ (*ibid*, 115), identify three factors that enabled the norm to ‘weather the storm’: (i) ‘anti-norm arguments’ put forward by Israel and the United States contested only the application rather than the validity of the norm; (ii) the norm is deeply embedded in many parts of the international legal system; and (iii) domestic and international legal institutions played a crucial role. In particular, the UN Committee against Torture ‘was able to sort out the disputes and contribute to a stabilization of *opinio juris*’.
- (3) Dominik Steiger, in ‘*Ex iniuria ius oritur?* Norm Change and Norm Erosion of the Prohibition of Torture’ (*ibid*, 118) concludes that because the legal and institutional regimes are so embedded, the norm ‘is very hard to erode’, in part because even the many states that use torture continue to assert their ‘continued support for the prohibition of torture’.

QUESTION

Is the prohibition of torture unique among human rights norms in being so resilient? If so, what do you think explains its strengths? Could the same be said of the norm of gender equality discussed earlier?

Chapter 4. Economic, Social, and Cultural Rights

OVERVIEW

The Universal Declaration of Human Rights recognizes two sets of human rights: the ‘traditional’ civil and political rights (CPR), as well as economic, social and cultural rights (ESCR). In transforming the Declaration’s provisions into legally binding obligations, the United Nations adopted two separate International Covenants which, taken together, constitute the bedrock of the international normative regime for human rights. The issues raised in earlier chapters concentrated on CPR, although ESCR have a clear and direct relevance in relation to women’s rights and even the death penalty. This chapter explores the rights recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

While cultural rights are of major importance (Article 15(1) recognizes ‘the right of everyone ... to take part in cultural life’), and are dealt with in a range of cases elsewhere in this coursebook (including Chapter 7), their practical implementation has tended to raise issues that make them much closer to CPR than ESR (bans on the use of cultural symbols, exclusion of certain languages from official sanction, ethnicity-based forms of discrimination, and forced cultural assimilation). They have thus tended to be dealt with under the ICCPR, including its non-discrimination clause (Art. 2(1)), the minorities provision (Art. 27) or specific rights such as freedoms of expression, religion and association and the right to ‘take part in the conduct of public affairs’. Thus, except for the case from the Inter-American Court of Human Rights, in Sec. E, below, most of this chapter focuses on economic and social rights (ESR). These form a reasonably coherent category, even if all of the classifications reflected in the dichotomy between the two sets of rights are somewhat arbitrary, as explained below.

The ‘official’ UN position, dating back to the Universal Declaration and reaffirmed in innumerable resolutions since that time, is that the two covenants and sets of rights are, in the words adopted by the 1993 second World Conference on Human Rights in Vienna, ‘universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’ (Vienna Declaration, para. 5). But this oft-restated formal consensus masks a deep and enduring disagreement over the proper status of ESCR. At one extreme lies the view that these rights are superior to civil and political rights in terms of an appropriate value hierarchy and in chronological terms. Of what use is the right to free speech to those who are starving and illiterate? The homeless cannot register to vote, the illiterate cannot fully exercise their political rights, and those living in poverty are systematically discriminated against. At the other extreme we find the view that economic and social rights do not constitute rights (as properly understood) at all. Treating them as rights undermines the enjoyment of individual freedom, distorts the functioning of free markets by justifying state intervention in the economy, and provides an excuse to downgrade the importance of civil and political rights. And a democratic society will inevitably ensure respect for ESR.

The complexity of the political and other challenges in implementing ESR as human rights is well illustrated by comparing the positions of the two nations that are currently the main protagonists in UN human rights debates, China and the United States. China ratified the ICESCR in 2001. In official ‘White Papers’ and ‘Human Rights Action Plans’ it consistently states that its top priority is to safeguard citizen’s ESCR. It also prioritizes and champions these rights in its international diplomacy. But while the list of ‘fundamental rights and duties of citizens’ in Chapter 2 of the 1982 Constitution addresses *issues* dealt with in the ICESCR, the Chinese Constitution uses generic rather than rights-based formulations and omits some ESR altogether. And the provisions of the Covenant have not been transformed into domestic law, which means courts cannot apply them. Nor have these rights generally been reflected as human rights in Chinese legislation.¹²¹

¹²¹ P. Alston, Report of the Special Rapporteur on extreme poverty and human rights on his mission to China, UN Doc. A/HRC/35/26/Add.2 (2017).

In China, implementation arrangements for ESR are largely absent. There is no national human rights institution because, according to the government, numerous departments already perform the relevant functions. This explanation has been rejected by the UN Committee on ESCR. There are almost no effective accountability mechanisms that would enable individual citizens to claim their ESR. One commentator put it succinctly: ‘the authorities have sought to close down rhetoric (constitutionalism), channels (court trials) and social forces (lawyers) that activists had used to mobilize greater changes.’¹²² Writing about China, Amartya Sen has highlighted the ‘serious fragility in any authoritarian system of governance, since there is little recourse or remedy when the government leaders alter their goals or suppress their failures.’¹²³ This was vividly demonstrated in relation to policies for responding to Covid-19 in 2020-22.

The United States, on the other hand has, since the advent of the Reagan Administration in 1981, rejected the idea that ESR are full-fledged human rights, and contested the notion that it is bound to implement such rights. While Jimmy Carter signed the ICESCR in 1978, the U.S. has never ratified it, nor has the Senate ever really debated doing so. Significantly, despite its immense wealth, a 2018 report showed that about 40 million Americans lived in poverty, 18.5 million in extreme poverty, and 5.3 million in absolute poverty. It has the highest youth poverty rate in the Organization for Economic Cooperation and Development (OECD), and the highest infant mortality rates among comparable OECD States. Its citizens live shorter and sicker lives compared to those living in all other rich democracies, it has the world’s highest incarceration rate, one of the lowest levels of voter registrations among OECD countries, and the highest rate of income inequality among Western countries.¹²⁴ Yet its diplomats continue to contest ESR whenever they arise in international forums.

Although variations on these extreme positions vis-à-vis ESR have dominated both diplomatic and academic discourse, most other governments have taken some sort of intermediate position. In general, that position has involved (1) support for the equal status and importance of ESR (as of 2025, 173 states were parties to the ICESCR, compared with 174 parties to the ICCPR), together with (2) failure to take steps to entrench those rights constitutionally, to adopt legislative or administrative provisions based explicitly on the recognition of specific ESR as international human rights, or to provide effective means of redress to individuals or groups alleging violations of those rights. Nevertheless, the importance of ESR in domestic legal systems has clearly grown in recent years. In particular, the impact of COVID-19, rapidly growing inequality, and sustained inflation have compelled greater attention to the consequences of their neglect.

Even before the final adoption of the UDHR, the debate over the relationship between the two sets of rights had become a casualty of the Cold War: Communist countries abstained from voting on its adoption by the General Assembly on the grounds that the ESR provisions were inadequate, and Western states were so keen to cabin ESR that they insisted that there should be two Covenants rather than a single integrated one. Since the 1970s, the debate has also taken on important North-South dimensions. These sometimes include claims that developing countries should not necessarily be held to the same ESR standards, and that respect for rights by poorer states must be linked to international aid, trade and other concessions. To a significant extent, the debates and policy initiatives that are so urgently needed at the international level have been replaced by futile ideological contestation. At the national level, neoliberal economic policies have replaced ideals of community solidarity with notions of individual responsibility, diminished government revenues, and substituted governmental responsibility with corporate control over vast areas of economic and social policy.

In a statement to the Vienna World Conference in 1993, the UN Committee on Economic, Social and Cultural Rights (hereafter the ESCR Committee) drew attention to:

[t]he shocking reality ... that States and the international community as a whole continue to tolerate all too often breaches of [ESCR] which, if they occurred in

¹²² C. Minzner, ‘China at the Tipping Point? The Turn against Legal Reform’, 24 *J. of Democ.* (2013) 69.

¹²³ A. Sen, ‘Quality of life: India vs. China’, *The New York Review of Books* (12 May 2011).

¹²⁴ P. Alston, Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, UN Doc. A/HRC/38/33/Add.1 (2018), para. 4.

relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of [CPR] continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of [ESCR]

... Statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue. Such muted responses are facilitated by a reluctance to characterize the problems that exist as gross and massive denials of [ESCR]. Yet it is difficult to understand how the situation can realistically be portrayed in any other way.¹²⁵

In the UN and in the international ‘development’ context, ESR have been marginalized by an overwhelming preoccupation with the Sustainable Development Goals (SDGs), adopted by the UN General Assembly in 2015. The stated aim of the SDGs is to provide a ‘shared blueprint for peace and prosperity’ and they have become the dominant framework through which poverty eradication efforts and development policy are structured globally. This is a partial list:

Goal 1. End poverty in all its forms everywhere

Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture

Goal 3. Ensure healthy lives and promote well-being for all at all ages

Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

Goal 5. Achieve gender equality and empower all women and girls

Goal 6. Ensure availability and sustainable management of water and sanitation for all

Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all

Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all

Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation

Goal 10. Reduce inequality within and among countries

...

Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

Goal 17. Strengthen the means of implementation ...

While huge efforts have been made to promote these goals, progress has been deeply disappointing. The *Sustainable Development Report 2023* concluded that the ‘SDGs are seriously off track’. ‘At current trends, based on simple projections, there is a risk that the gap in SDG outcomes between HICs [high-

¹²⁵ UN Doc. E/1993/22, Annex III, paras. 5 and 7.

income countries] and LICs [low-income countries] will be wider in 2030 ... than it was in 2015
... If we look at each of the 17 individual SDGs, not a single SDG is projected to be met at the global level.’

Every four years, the UN publishes a *Global Sustainable Development Report*. The 2023 report notes that:

... In 2023, the situation is much more worrisome For Goals where progress was too slow in 2019, countries have not accelerated enough, and for others, including food security, climate action and protecting biodiversity, the world is still moving in the wrong direction. In addition, recent crises including the ongoing COVID-19 pandemic, cost-of-living increases, armed conflict and natural disasters have wiped out years of progress on some SDGs including eradication of extreme poverty. Progress has slowed down on targets including ending preventable deaths under 5, vaccine coverage and access to energy.

These crises are not independent events: they are entwined through multiple environmental, economic, and social strands, each fuelling the other’s intensities.

...

...

Compounding the effects of the pandemic is the highest level of state-based armed conflict since 1945. By the end of 2020, around two billion people were living in conflict-affected countries. In 2021, the number of refugees and internally displaced persons was the highest on record at 89 million, and, for the first time, global military expenditure exceeded \$2 trillion.

While the SDGs contain preambular references to human rights, specific rights and rights-based targets are largely absent from the agenda, as a result of strong resistance during the drafting process. Jaye Ellis and Dylan Edmonds, in ‘Coming to Terms with the SDGs: A Perspective from Legal Scholarship’, 36 *Leiden J. Int’l L.* (2023) 251, at 253, criticize the technocratic approach reflected in the SDGs:

The passive voice in which the Goals are communicated strengthens the impression of a turn to technocracy, and this may be deliberate: by drawing attention away from agency, this presentation suggests that progress towards goals will depend to a much greater extent on scientific – and therefore, presumably, objective, universally valid – expertise, rather than being subjected to the vagaries of political will. ...

In terms of ESR, ending poverty and reducing inequality are among the key SDGs. But it has been argued that the approach adopted to each is problematic:

**PHILIP ALSTON, THE PARLOUS STATE OF POVERTY ERADICATION
REPORT OF THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS, UN
DOC. A/HRC/44/40 (2020)**

[SDG 1] begins with a call for an end to poverty in all its forms everywhere. Yet the targets set do not actually seek to eliminate poverty. The first target is aimed at ending poverty as measured by the World Bank’s international poverty line, at best a bare subsistence goal that, even if met, would leave billions facing serious deprivation. The second calls for reducing the proportion of people living in poverty under national measures by just half, a failure of ambition in a period of unparalleled wealth and inequality. ...

... [SDG] 10 calls for reducing inequality within and among countries In reality, as Oxfam has noted, “economic inequality is out of control”. ...

... [But] the targets and indicators set for realizing [SDG] 10 are weak by design. They set an agenda of “shared prosperity”, focusing on inclusive growth rather than actual reduction of inequalities. Target 10.1, for example, focuses entirely on the rate of income growth within the bottom 40 per cent of the population – ignoring the situation of the wealthiest. This conveniently sidesteps necessary questions around wealth redistribution, elite capture of economic gains, growth achieved through carbon emissions, and inequitable fiscal policies. It treats inequality reduction as a problem to be solved through overall income growth, which flies in the face of recent history and is even more deeply problematic in light of the impacts of COVID-19 and climate change. And despite the importance of tackling gender inequality, at the current rate of economic growth, closing the gender gap in economic opportunity is projected to take 257 years.

[The biggest problem is that the SDGs marginalize the key components of a viable theory of change in this area, which are empowerment, funding, partnership and accountability.]

Empowerment

The [SDGs] are replete with references to transformation, empowerment, collaboration and inclusion. But these concepts are illusory if people are unable to exercise their human rights. Despite almost 20 mentions of human rights in the text, there is not a single reference to any specific civil and political right, and human rights in general remain marginal and often invisible in the overall [SDG] context. ...

Most SDG reports by the [UN] and the World Bank pay little heed to rights, with the exception of gender. They rarely discuss substantively the impact of discrimination, the absence of rights-respecting institutional decision-making structures, or the development consequences of even egregious rights violations. At a time when civil society is under sustained attack in many countries around the world, and space for meaningful democratic engagement is shrinking dramatically, in one 2020 report, the Department of Economic and Social Affairs limply observes that “some countries are providing support to non-state actors to build their capacities for engagement on the 2030 Agenda, establishing funding mechanisms to empower their actions and engagement”. Unfortunately, [SDG] reporting too often tends to describe the glass as being one-fifth full rather than four-fifths empty.

Funding and partnership

The success of the [SDGs] relies heavily on adequate funding, but ... “international economic and financial systems are not only failing to deliver” ..., but there has also been “substantial backsliding in key action areas”. ...

The response of the international community has been to rely ever more heavily on private sector funding, which is increasingly presented as the only viable way forward. ... The Secretary-General stated that business must “move further and faster ... to meet the global goals”

The central strategy is “to use public funds more sparingly [and] ensure a better mobilization of private capital”. But there are many problems with this approach. First, it begs the crucial question as to whether privatization in its various forms is capable of achieving many of the [SDGs], especially for the most vulnerable, whose inclusion may not be profitable. There are powerful reasons to doubt this. Second, it recasts the overall [SDG] enterprise as one focused largely on the building of infrastructure and prioritizes an enabling business environment over empowering people. Third, the role of Governments is downplayed, often relegated to insuring private investments. Fourth, all too little is done to promote domestic revenue mobilization, leaving in place destructive fiscal policies, systematic tax avoidance strategies, and illicit outflows that entrench poverty and inequality. Fifth, the commitment in the 2030 Agenda to “a revitalized Global Partnership”, promoting “solidarity with the poorest and with people in vulnerable situations”, is lost in the fog of an overriding focus on public-private partnerships with troubling track records.

Accountability

The drafters of the 2030 Agenda explicitly rejected the concepts of monitoring and accountability in designing the [SDG] follow-up and review processes. The resulting system is characterized by its voluntary nature, deference to national choices, and institutional arrangements that minimize opportunities for sustained scrutiny. ...

...

Instead of promoting empowerment, funding, partnerships and accountability, too much of the energy surrounding the [SDG] process has gone into generating portals, dashboards, stakeholder engagement plans, bland reports and colourful posters. Official assessments are rarely critical or focused, and they often hide behind jargon.

* * *

In other words, there is a huge gap between the idea of legally binding governmental obligations to ensure ESR for their populations and the entirely voluntary and heavily outsourced aggregate targets of the SDGs.

Note: In 2025, the United States denounced the SDG's. Edward Heartney, US Minister Counselor to ECOSOC, stated on 4 March 2025 that 'Agenda 2030 and the SDGs advance a program of soft global governance that is inconsistent with U.S. sovereignty and adverse to the rights and interests of Americans. ... [G]lobalist endeavors like Agenda 2030 and the SDGs lost at the ballot box [in the 2024 Presidential election]. Therefore, the United States rejects and denounces the 2030 Agenda for Sustainable Development and the Sustainable Development Goals ... '.

A. THE HISTORICAL ORIGINS OF ESR

The historical origins of the recognition of ESR are diffuse. Those rights have drawn strength from the injunctions expressed in different religious traditions to care for those in need and those who cannot look after themselves. In Catholicism, papal encyclicals have long promoted the importance of the right to subsistence with dignity, while 'liberation theology' has sought to build upon this 'preferential option for the poor'. Virtually all major religions manifest comparable concern for the poor and oppressed. Other sources include philosophical analyses and political theory from authors as diverse as Thomas Paine, Karl Marx, Immanuel Kant and John Rawls; the political programmes of the nineteenth-century Fabian socialists in Britain, Chancellor Bismarck in Germany (who introduced social insurance schemes in the 1880s) and the New Dealers in the United States; and constitutional precedents such as the Mexican Constitution of 1917, the first and subsequent Soviet Constitutions, and the 1919 Constitution of the Weimar Republic (embodying the *Wohlfahrtsstaat* concept).

This comment concentrates on the evolution of these ideas in international human rights law. The most appropriate starting point is the International Labour Organization (ILO). Established by the Treaty of Versailles in 1919 to abolish the 'injustice, hardship and privation' which workers suffered and to guarantee 'fair and humane conditions of labour', it was conceived as the response of Western countries to the ideologies of Bolshevism and Socialism arising out of the Russian Revolution.¹²⁶

In the interwar years, the ILO adopted international minimum standards in relation to a wide range of matters which now fall under the rubric of ESR. They included, *inter alia*, conventions dealing with freedom of association and the right to organize trade unions, forced labour, minimum working age, hours of work, weekly rest, sickness protection, accident insurance, invalidity and old-age insurance, and freedom from discrimination in employment. The Great Depression of the early 1930s underscored the need for social protection of those who were unemployed and gave a strong impetus

¹²⁶ J. T. Shotwell, 'The International Labor Organization as an Alternative to Violent Revolution', 166 *Annals Am. Acad. Pol. & Soc. Sci.* (1933) 18.

to full employment policies such as those advocated by Keynes in his *General Theory of Employment, Interest and Money* (1936).

Partly as a result of these developments, various proposals were made during the drafting of the UN Charter for the inclusion of provisions enshrining the maintenance of ‘full employment’ as a commitment to be undertaken by member states. The strongest version, known after its principal proponents as the ‘Australian Pledge’, committed UN members to take action to secure ‘improved labour standards, economic advancement, social security, and employment for all who seek it’.¹²⁷

Despite significant support, the United States opposed the proposal on the grounds that any such undertaking would involve interference in the domestic economic and political affairs of states. Ultimately agreement was reached on Article 55(a) of the Charter, which simply states that the United Nations shall promote ‘higher standards of living, full employment, and conditions of economic and social progress and development’ but does not call for specific follow-up at the international level.

U.S. opposition in this context did not signify the rejection of ESR *per se*. Indeed, in 1941 President Roosevelt had nominated ‘freedom from want’ as one of the four freedoms that should characterize the future world order. In his 1944 State of the Union address, he called for a second Bill of Rights.¹²⁸

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second bill of rights, under which a new basis of security and prosperity can be established for all — regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries, or shops, or farms, or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

¹²⁷ See generally R. Russell and J. Muther, *A History of the United Nations Charter: The Role of the United States 1940–1945* (1958), at 786.

¹²⁸ Eleventh Annual Message to Congress (11 January 1944), in F. L. Israel (ed.), *The State of the Union Messages of the President 1790–1966* (Vol. 3, 1966) at 2881.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

This approach was subsequently reflected in a draft international Bill of Rights, completed in 1944, by a Committee appointed by the American Law Institute. In addition to listing the rights contained in the U.S. Bill of Rights (the first ten amendments to the Constitution), the Institute's proposal advocated international recognition of a range of rights and acceptance of the correlative duties in relation to education, work, reasonable conditions of work, adequate food and housing, and social security.¹²⁹ In relation to each of the proposed rights, a Comment by the Committee drew attention to the fact that it had already been recognized in the 'current or recent constitutions' of many countries; e.g., 40 countries in the case of the right to education; nine for the right to work; 11 for the right to adequate housing; 27 for the right to social security.

Although these proposals of the Committee were never formally endorsed by the American Law Institute, they were submitted to the United Nations and were to prove highly influential in the preparation of the first draft of the Universal Declaration in 1947. In the drafting of Articles 22–28 of the UDHR, strong support for the inclusion of ESCR came from the United States (a delegation led by Eleanor Roosevelt), Egypt, several Latin American countries (particularly Chile) and from the (Communist) countries of Eastern Europe. The United Kingdom opposed their inclusion,¹³⁰ as did South Africa, which objected first that 'a condition of existence does not constitute a fundamental human right merely because it is eminently desirable for the fullest realization of all human potentialities' and second that if the proposed economic rights were to be taken seriously it would be 'necessary to resort to more or less totalitarian control of the economic life of the country'.¹³¹

After the adoption of the Universal Declaration in 1948, the next step was to translate the rights it recognized in Articles 22–28 into binding treaty obligations. This took until 1966 as a result of Cold War tensions, developing U.S. domestic opposition to the principle of international human rights treaties, and the scope and complexity of the proposed obligations. By 1955, the main lines of what was to become the ICESCR were agreed.

Between 1949 and 1951 the Commission on Human Rights worked on a single draft covenant dealing with both categories of rights. But in 1951 the General Assembly, under pressure from the Western-dominated Commission, agreed to draft two separate covenants. A contemporaneous UN account (UN Doc. A/2929 (1955)) captures the main ESCR-related dilemmas and controversies during the drafting process:

6 ... [T]he goal was for the two covenants] to contain 'as many similar provisions as possible' and to be approved and opened for signature simultaneously, in order to emphasize the unity of purpose.

...

8. Those who were in favour of drafting a single covenant maintained that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without [ESCR], [CPR] might be purely nominal in character; without [CPR], [ESCR] could not be long ensured

...

9. Those in favour of drafting two separate covenants argued that [CPR] were enforceable, or justiciable, or of an 'absolute' character, while [ESCR] were not or might not be; that the former were immediately applicable, while the latter

¹²⁹ See Statement of Essential Human Rights, UN Doc. A/148 (1947), Arts. 11–15.

¹³⁰ See B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014); and J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999) Chs. 5–6.

¹³¹ UN Doc. E/CN.4/82/Add.4 (1948), at 11, 13.

were to be progressively implemented; and that, generally speaking, the former were rights of the individual ‘against’ the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of [CPR] and that of [ESCR], and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.

10. The question of drafting one or two covenants was intimately related to the question of implementation. If no measures of implementation were to be formulated, it would make little difference whether one or two covenants were to be drafted. Generally speaking, [CPR] were thought to be ‘legal’ rights and could best be implemented by the creation of a good offices committee, while [ESCR] were thought to be ‘programme’ rights and could best be implemented by the establishment of a system of periodic reports. Since the rights could be divided into two broad categories, which should be subject to different procedures of implementation, it would be both logical and convenient to formulate two separate covenants.

11. However, it was argued that not in all countries and territories were all [CPR] ‘legal’ rights, nor all [ESCR] ‘programme’ rights. A [CPR] might well be a ‘programme’ right under one régime, an [ESCR] a ‘legal’ right under another. A covenant could be drafted in such a manner as would enable States, upon ratification or accession, to announce, each in so far as it was concerned, which civil, political, economic, social and cultural rights were ‘legal’ rights, and which ‘programme’ rights, and by which procedures the rights would be implemented.

The ICESCR was adopted by the General Assembly in Res. 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. It is divided into five ‘Parts’. Part I (like Part I of the ICCPR) recognizes the right of peoples to self-determination; Part II defines the general nature of states parties’ obligations; Part III enumerates the specific substantive rights; Part IV deals with international implementation; and Part V contains typical final provisions of a human rights treaty. In terms of substantive rights, the right to property, although recognized in the Universal Declaration, was not included, primarily because of the inability of governments to agree on a formulation governing public takings and the compensation therefor.

ESR are not to be found only in the ICESCR. To the contrary, they figure in most of the other major treaties, albeit in different forms. While it is essential to read the full text of the Covenant, the following excerpts from Parts II and III provide a flavour of some of the key issues. Later materials explore the meaning of Article 2.

EXCERPTS FROM THE ICESCR

...

PART II

Article 2

1. 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 recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value ...;
 - (ii) A decent living for themselves and their families ...;
- (b) Safe and healthy working conditions;
- ...
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

...

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food
- ...;

...

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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:

- (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.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education ... shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

...

1. Differentiating the Rights

The two Covenants use different terminology in relation to each right. Thus where the ICCPR contains terms such as ‘everyone has the right to ...’ or ‘no one shall be ...’, the ICESCR usually employs the formula ‘States Parties recognize the right of everyone to ...’. There are major differences in terms of the general obligations clause. Article 2(1) provides that these are subject to the availability of resources (‘to the maximum of its available resources’), and that the obligation is one of progressive realization (‘with a view to achieving progressively’).

This language has been subject to conflicting critiques. On the one hand, it is sometimes suggested that the nature of the obligation under the ICESCR is so onerous that virtually no government would be able to comply. Developing countries, in particular, are seen to confront an impossible challenge. On the other hand, it is argued that the relative open-endedness of the concept of progressive realization, particularly in light of the qualification about availability of resources, renders the obligation devoid of meaningful content. Governments can present themselves as defenders of ESR without international imposition of any precise constraints on their policies and behaviour. A related criticism is that the Covenant imposes only ‘programmatic’ obligations upon governments — that is, obligations to be fulfilled incrementally through the ongoing execution of a programme. It therefore becomes difficult if not impossible to determine when those obligations ought to, or have been, met.

Another problematic distinction is that between the different categories of ESCR. Which are economic, which are social, and which are cultural? The ICESCR does not make explicit any distinction in this regard. Commentators differ as to their characterization of each of the declared rights,¹³² or ignore the distinction. The original drafting rationale was an essentially bureaucratic one: the rights of concern to the ILO (Arts. 6–9) were assumed to be ‘economic’, those relevant to UN agencies such as the Food and Agriculture Organization and the World Health Organization (Arts. 10–12) were treated as ‘social’, and those that fell within the sphere of interest of UNESCO (Arts. 13–15) were designated as ‘cultural’. In practice, however, most such distinctions are difficult to maintain. Education, for example, can arguably be classified as belonging to all of the relevant categories — economic, social and cultural, not to mention civil and political.

¹³² E.g., H. Steiner, ‘Social Rights and Economic Development: Converging Discourses?’, 4 *Buffalo Hum. Rts. L. Rev.* (1998) 25.

2. Implementation: the ESCR Committee

The greatest challenge is to identify effective approaches to implementation — i.e., to the means by which ESCR can be given effect and governments can be held accountable to fulfil their obligations. The Covenant says only that governments must use ‘all appropriate means’ to work towards the stated ends. Such means may be universally valid or relevant or may be quite specific to a particular culture or legal system. The Covenant gives no further pointers, beyond noting that ‘appropriate means’ includes ‘particularly the adoption of legislative measures’. It is clear, however, that neither legislation nor effective remedies of a judicial nature, which are both central to the domestic implementation framework contained in the ICCPR (Art. 2), will play the same roles or *per se* be sufficient in relation to the ICESCR.

In terms of international procedures designed to promote accountability, the UN Human Rights Council has several relevant mechanisms. One is the Universal Periodic Review process (Ch. 8B, below), and another relates to the scrutiny provided by commissions of inquiry and other reporting mechanisms (Ch. 8C, below). Neither of these has so far been very focused or effective in relation to ESR. The most significant contribution has been made by the group of Special Procedures appointed by the Council (Ch. 8B, below). This now includes Special Rapporteurs and independent experts focused specifically on the rights to culture, education, environment, food, health, and housing, as well as on a range of thematic issues such as disability, discrimination, and poverty. Examples of country reporting on ESR are provided below (Sec. F, below).

The principal UN body concerned specifically with ESCR is the Committee on Economic, Social and Cultural Rights (the ‘ESCR Committee’). The creation of the Committee was not foreseen in the text of the Covenant. It first met in 1987, having been established by a 1985 resolution of the Economic and Social Council after earlier monitoring arrangements had failed. The Committee has 18 independent expert members, elected for four-year terms on the basis of equitable geographic representation. In most respects it functions along the same lines as the ICCPR Committee, the work of which is analysed in detail in Chapter 9, below, and the CEDAW Committee discussed in Chapter 3, above. For that reason, little detail as to procedures is provided in the present context.¹³³ Its task is to supervise compliance by states parties with their obligations under the ICESCR. It does this on the basis of regular reports they submit in accordance with its ‘reporting guidelines’. An initial report by each state party is due within two years, and subsequent reports which respond to a list of country-specific issues drawn up by the Committee are required at roughly five to eight year intervals. The examination of a state’s report by the Committee culminates in the adoption of the Committee’s ‘concluding observations’, following the same sort of approach as we saw earlier in relation to the CEDAW Committee (Ch. 3C, above).

In addition to its reporting function, the 2008 Optional Protocol established a complaints procedure.¹³⁴ It entered into force on 5 May 2013 and, as of 2025, has 31 States Parties.¹³⁵ By the beginning of 2025, the Committee had registered 359 communications, resulting in the adoption of 21 Views (18 of which found violations); 27 declared inadmissible; 123 discontinued or withdrawn; and 188 pending consideration (UN Doc. E/2025/22, para. 90). Most complaints have involved housing rights.¹³⁶ An example follows:

¹³³ See P. Alston, ‘The Committee on Economic, Social and Cultural Rights’, in F. Mégret and P. Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2nd ed., 2021) 439.

¹³⁴ See M. Langford, B. Porter, R. Brown and J. Rossi (eds.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016).

¹³⁵ S. Liebenberg, ‘Reasonableness Review’, in M. Langford and K. Young (eds.), *The Oxford Handbook of Economic and Social Rights* (2022) 000; and *ibid.*, ‘Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol’, 42 *Hum. Rts. Q.* (2020) 48.

¹³⁶ Nils-Hendrik Grohmann, ‘Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR’, 22 *Hum. Rts. L. Rev.* (2022).

HAMID SAYDAWI AND MASIR FARAH V. ITALY,
COMMUNICATIONS NO. 226/2021 AND NO. 227/2021, VIEWS OF 13 MARCH 2024

[The applicants had lived in two houses with their families since 2000 and 2005 respectively. They had renovated the houses and registered the houses as their place of residence and the State party ‘condoned’ their actions. In 2008, the houses were acquired by the Italian State railway company, which initiated eviction proceedings in 2012, leading to a firm eviction order in March 2021.]

...

7.5 The authors do not have the financial means to find adequate alternative housing on the private market. They requested social housing in 2021, and the authorities have been aware of their need for alternative housing since 2011. The only alternative offered by the State party consisted of temporary emergency shelter, which would have led to a separation of each family, through a separation of the men from the women.

7.6 The authors claim that evicting them and their families without alternative and adequate accommodation would amount to a violation of their right to adequate housing under article 11 (1) of the Covenant.

...

D. Conclusion and recommendations

11.1 On the basis of all the information provided and in the particular circumstances of the present cases, the Committee considers that the eviction of the authors and their families without an adequate proportionality test by the judicial authorities, in the absence of a consideration of the disproportionate impact that the eviction might have on the authors and their families and of the best interests of the child, and without respecting the procedural guarantees of adequate and genuine consultation, would constitute a violation of the authors’ right to adequate housing.

11.2 The Committee ... makes the following recommendations to the State party.

Recommendations in respect of the authors

12. The State party is under an obligation to provide the authors with an effective remedy, in particular by: (a) reassessing, if they are not currently in adequate housing, their state of necessity and their place on the waiting list ...; (b) providing the authors with financial compensation ...; and (c) reimbursing the authors for [their] legal costs

General recommendations

13. ... [T]he State party has an obligation:

(a) To ensure that its normative framework allows persons in respect of whom an eviction order is issued and who might consequently be at risk of destitution or of violation of their Covenant rights ... to challenge the decision before a judicial or other impartial and independent authority with the power to order the cessation of the violation and to provide an effective remedy so that such authorities can examine the proportionality of the measure in the light of the criteria for limiting the rights enshrined in the Covenant under the terms of article 4;

(b) To take the necessary measures to ensure that evictions affecting persons who do not have the means of obtaining alternative housing are carried out only within the framework of proceedings involving genuine and effective consultation with the persons concerned, in which all available alternative housing (whether belonging to such persons or made available by the relevant State agencies) is assessed and only after the State has taken all essential steps, to the maximum of its available resources, to ensure that evicted persons have alternative housing, especially in cases involving families, older persons, children and/or other persons in vulnerable situations. If the group to be evicted includes children, the proceedings must guarantee their right to be heard;

(c) To take the necessary measures to solve the problems caused by the failure of the courts and social services to coordinate their efforts, which can result in an evicted person's being left without adequate accommodation;

(d) To develop and implement, to the maximum of its available resources, a comprehensive plan to guarantee the right to adequate housing for low-income persons, in keeping with general comment No. 4 (1991). This plan should provide for the necessary resources, indicators, time frames and evaluation criteria to guarantee these individuals' right to housing in a reasonable, timely and measurable manner.

...

* * *

The Optional Protocol also includes provision for an inquiry procedure, similar to that of CEDAW discussed in Ch. 3 above. Only a handful of States Parties have accepted the Committee's role in that regard and no inquiries have yet been undertaken. The Committee holds a 'day of general discussion' at most of its sessions to enable experts from civil society, academia, international agencies and elsewhere to discuss key issues relating to ESCR.

Finally, the Committee has also been active in producing General Comments,¹³⁷ a term that describes a function very similar to that performed by the CEDAW Committee's General Recommendations. The Committee's General Comment on the right to water illustrates the strengths as well as some of the problems inherent in this process. Recall that the ICESCR makes no reference to water, let alone a right thereto.

ESCR COMMITTEE, GENERAL COMMENT NO. 15: THE RIGHT TO WATER (2002)

1. ... The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights

2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

3. [Covenant Article 11(1)] specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival

...

...

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water

¹³⁷ Between 1989 and 2023 the ESCR Committee adopted 21 General Comments. They are: No. 1: Reporting by States parties (1989); No. 2: International technical assistance (1990); No. 3: The nature of States parties' obligations (1990); No. 4: Right to adequate housing (1991); No. 5: Persons with disabilities (1994); No. 6: ESCR of older persons (1995); No. 7: Forced evictions (1997); No. 8: Economic sanctions and ESCR (1997); No. 9: Domestic application of the Covenant (1998); No. 10: National human rights institutions and ESCR (1998); No. 11: Plans of action for primary education (1999); No. 12: Right to adequate food (1999); No. 13: Right to education (1999); No. 14: Right to health (2000); No. 15: Right to water (2002); No. 16: Equal right of men and women to ESCR (2005); No. 17: Authorial rights under Art. 15(1)(c); No. 18: Right to work (2005); No. 19: The right to social security (2008); No. 20: Non-discrimination in ESCR (2009); No. 21: Right of everyone to take part in cultural life (2009); No. 22: Right to sexual and reproductive health (2016); No. 23: Right to just and favourable conditions of work (2016); No. 24: State obligations in the context of business activities (2017); No. 25: Science and ESCR (2020); and No. 26: Land and ESCR (2022).

supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

11. The elements of the right to water must be *adequate* for human dignity, life and health... . The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

Availability. The water supply for each person must be sufficient and continuous for personal and domestic uses ...;

Quality. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

Accessibility. Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party

...

International obligations

30. [ICESCR Articles 2(1), 11(1) and 23] require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.

31. To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.

32. States parties should refrain at all times from imposing embargoes or similar measures, ...

33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries

34. Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required

35. ... States parties should take steps to ensure that [any international agreements to which they are parties] do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

...

3. Responses to General Comment No. 15

Some governments expressed strong reservations.¹³⁸ Canada, for example, argued that while governments owe a responsibility to their own people to provide access to water and sanitation, this did not translate into a human right. But other governments and many NGOs enthusiastically embraced the right and in 2008 the Human Rights Council appointed an ‘Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation’. The Expert, Catarina de Albuquerque, subsequently presented a series of reports that helped to persuade states of the importance and validity of the right and in 2010 the UN General Assembly (in Res. 64/292) recognized ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights’.

The resolution was adopted with 122 votes in favour, 0 against and 41 abstentions. Among the abstainers were many Western governments, including the United States and the United Kingdom. The latter argued that ‘there was no sufficient legal basis for declaring or recognizing water or sanitation as freestanding human rights, nor was there evidence that they existed in customary law.’ Despite this reluctance on the part of 41 states, several months later the Council adopted a resolution, without a vote (i.e., with no formal objections) recalling the Assembly’s resolution and affirming ‘that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity’ (HRC Res. 15/9 (2010)). Six months later the Council ‘upgraded’ the title of the Independent Expert to that of Special Rapporteur on the human right to safe drinking water and sanitation. The transformation of the right – from unmentioned in the ICESCR and strongly opposed by key governments, to uncontested recognition and the appointment of a Special Rapporteur to move it forward – was thus complete.

It still remained to clarify whether a single right encompasses both water and sanitation or whether these are two separate rights. The latter understanding was confirmed by the UN General Assembly in 2015 (Res. 70/169):

... the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living; ...

According to the former Special Rapporteur, Léo Heller, in *The Human Rights to Water and Sanitation* [HRtWS] (2022) 2, there are 2 billion people worldwide without access to an adequate water supply, 1.4 billion of whom live in rural areas. 4.2 billion people lacked access to safely managed sanitation services, of which 494 million were still practicing open defecation. 584 million children did not have a basic water service at school, with 31 percent of schools worldwide lacking these services, and 698 million children were without basic sanitation services at school, accounting for 37 percent of schools worldwide.

Somewhat surprisingly, the response of UN agencies to these developments has been unenthusiastic, in Heller’s view (at 370):

UN-Water itself generally does not emphasize the theme or HRtWS, even when its focus is on water and sanitation services. Its annual World Water Development Reports, which have an important impact in the area, are often focused on technological issues or on topics with little proximity to more social or human rights concerns.

¹³⁸ See generally, M. Satterthwaite, ‘Assessing the Rights to Water and Sanitation: Between Institutionalization and Radicalization’, 52 *Geo. J. Int’l L.* (2021) 315; M. Davis, ‘Freedom from Thirst: A Right to Basic Household Water’, 42 *Cardozo L. Rev.* (2021) 879; and N. Reiners, ‘States as Bystanders of Legal Change: Alternative Paths for the Human Rights to Water and Sanitation in International Law’, 37 *Leiden J. Int’l L.* (2024) 22.

The reluctance of these agencies might be partly explained by the United States' continuing *de facto* opposition. On 15 November 2021, it explained its position on the relevant General Assembly resolution in these terms:

... While we respect the importance of promoting access to sanitation and water and that efforts to do so can involve distinctive approaches, we understand this resolution's references to human rights to water and sanitation to refer to the right derived from [ESCR] contained in the [ICESCR]. The United States is not a party to the ICESCR, and the rights contained therein are not justiciable in U.S. courts. ...

We disagree with any assertion that the right to safe drinking water and sanitation is inextricably related to or otherwise essential to enjoyment of other human rights, such as the right to life [under the ICCPR]. To the extent that access to safe drinking water and sanitation is derived from the right to an adequate standard of living, it is addressed under the ICESCR, which imposes a different standard of implementation than that contained in the ICCPR. We do not believe that a State's duty to protect the right to life by law would extend to addressing general conditions in society or nature that may eventually threaten life or prevent individuals from enjoying an adequate standard of living.¹³⁹

This reticence in turn can perhaps be understood as a result of ongoing debates within the United States. A well-known case, in which four UN Special Rapporteurs became involved,¹⁴⁰ was the contamination of drinking water in Flint, Michigan by as much as 100 times the legal level of lead. In response to lawsuits:

... the state of Michigan and city of Flint [argued] that clean water is not a constitutional right. This would mean they would not be liable for the lead-poisoned water, when they decided in 2014 to draw the city's water supply from the Flint River without having the water properly treated. It would also mean they are not liable for the impact the dangerously tainted water had on people in Flint, including the 9,000 children known to have been exposed to it.¹⁴¹

In Lowndes County, Alabama, a majority of residents live without properly functioning, legal, basic sanitation infrastructure, and must instead rely on a series of ditches or crudely constructed piping systems to guide human waste away from their residences. Both Flint and Lowndes County are home to a large percentage of low-income Black residents. Following a widely publicized visit by a UN Special Rapporteur,¹⁴² and strong local activism,¹⁴³ the U.S. Justice Department investigated whether the Alabama authorities were engaging in race discrimination in violation of the Civil Rights Act. In May 2023, an 'interim resolution' was announced that would suspend the investigation on the condition that clearly specified remedial measures were taken by the Alabama authorities. Many other such cases where access to water and sanitation were impacted by racial discrimination have been documented in the United States and in other wealthy countries.¹⁴⁴

By contrast, courts in India have long acknowledged a right to sanitation facilities. Already in 1980, the Indian Supreme Court, in *Municipal Council, Ratlam vs Shri Vardhichand & Ors* 1980 AIR 1622, had lamented that:

¹³⁹ United States Mission to the United Nations, Explanation of Position for the Human Rights to Safe Drinking Water and Sanitation Resolution (15 November 2021).

¹⁴⁰ 'Flint: "Not just about water, but human rights"', OHCHR Press Release (3 May 2016).

¹⁴¹ A. Klasing, 'Water Is a Human Right – in Flint, in Michigan, and the US', *Human Rights Watch Dispatch* (11 July 2018); and N. Gaber, 'Mobilizing Health Metrics for the Human Right to Water in Flint and Detroit, Michigan', 21 *Health and Hum. Rts.* (2019) 179.

¹⁴² UN Doc. A/HRC/38/33/Add.1 (2018) para. 69; and PBS Newshour, 'The story of American poverty, as told by one Alabama county', PBS (7 July 2018).

¹⁴³ J. Carrera and C. Flowers, 'Sanitation Inequity and the Cumulative Effects of Racism in Colorblind Public Health Policies', 77 *Am. J. Econ. & Sociol.* (2018) 941.

¹⁴⁴ J. Brown et al., 'The Effects of Racism, Social Exclusion, and Discrimination on Achieving Universal Safe Water and Sanitation in High-Income Countries', 11 *The Lancet Global Health* (2023) e606.

... the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies.

The Court ordered that:

2. The Municipal Council shall, within six months from to-day, construct a sufficient number of public latrines for use by men and women separately, provide water supply and scavenging service morning and evening so as to ensure sanitation.

...

4. The municipality will not merely construct the drains but also fill up cesspools and other pits of filth and use its sanitary staff to keep the place free from accumulations of filth. After all, what it lays out on prophylactic sanitation is a gain on its hospital budget.

...

... [T]he court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice.

In *Milun Saryajani v. Pune Municipal Commissioner, C.A. (Bom.)* (2015), the Bombay High Court relied on Article 21 (the right to life) and Article 47 (State's duty to improve public health) of the Indian Constitution, along with references to the ICESCR, in a case which focused specifically on the absence of toilet facilities for 'women walking on the streets'. The Court noted that there were 180 urinals for 1.7 million women and that 'not a single farthing/penny' of the budget for new construction had been spent. It focused specifically on the gendered implications of these failures:

42. ... the consequence of not going to the toilet and controlling the bladder results in urinary tract infection, kidney stone, interstitial cystitis and swelling of the bladder.

44. ... women have the right to have safe and clean toilets at all convenient places, which in a way impacts their right to live with human dignity. One of the paramount duty of the State and the Corporations is to improve public health by providing toilets for women at all convenient places.

...

ORDER

[50.] (i) All Municipal Corporations shall formulate a comprehensive scheme for construction of toilets/urinals/ restrooms/ privies for women walking on the streets. The Corporations shall constitute a Committee [within four weeks, to oversee the entire process.]

(ii) ... The Committee shall formulate a comprehensive scheme from the identification of the spot to construction of such toilets which shall include the management and maintenance of the toilets. ...

* * *

Inspired by such precedents, along with the almost total absence of public restrooms in the United States, one commentator has called for U.S. state courts to recognize a right to public toilets as part of their constitutional public health obligations.¹⁴⁵ But while courts have a potentially important role, Margaret Satterthwaite, in ‘The Rights to Water and Sanitation’, in Malcolm Langford and Katharine Young (eds.), *The Oxford Handbook on Economic and Social Rights* (2023) 000, draws attention to an indispensable ingredient in most such struggles:

A technocratic approach to the right to water can make some changes possible by giving policymakers tools to analyze needed government actions, regulatory imperatives and failures, and the limits of commodification and financialization. However, the kinds of thoroughgoing changes required in the face of extreme inequality, global pandemics, and climate change require creative, contextually relevant, and dogged political action connected to broader social movements for global justice. ...

QUESTIONS

1. Is the ESCR Committee skating over important terminological issues when it claims that we tolerate ‘breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage’?

2. Consider the following issues in relation to the excerpts from the ICESCR: does the right to work amount to a guarantee of employment? Is Article 7 on working conditions utopian or relevant only to an advanced industrial economy? Is the much-derided ‘right to holidays with pay’ defensible?¹⁴⁶ How could the right to social security be meaningful in a poor developing country? Why is the right to health not formulated in terms of a right of access to health care? Is the vision of the right to education in Article 13 outdated?

3. Craven has argued that a ‘desire to conserve the status quo may involve occasionally reading an instrument such as the Covenant in a ‘teleological’ or ‘evolutive’ manner, just as a desire to transform or change social relations may involve reading it ‘literally’.¹⁴⁷ What interpretive strategy does the Committee use to justify its conclusion that there is a right to water, and how persuasive is it?

4. Mechlem has criticized the ESCR Committee for claiming, in its General Comment No. 12 on the Right to Food, that international organizations such as the FAO and the World Bank have ‘international obligations’ under the Covenant. She notes that there is no mention of any such obligations in the text and that these organizations cannot become parties to the treaty:

“Disconnected from any methodological basis, its conclusions seem to have been reached at random. Because statements rather than arguments are offered, it is also difficult to reconstruct the train of thought of the CESCR... .

The CESCR pays a price for its endorsement of forward-looking human rights thinking. Because this endorsement cannot be based on a legally sound interpretation of the ICESCR, it undermines the credibility and legitimacy of its overall interpretation output.¹⁴⁸”

¹⁴⁵ R. Weinmeyer, ‘Lavatories of Democracy: Recognizing a Right to Public Toilets through International Human Rights and State Constitutional Law’, ²⁶ *U. Pa. J. Const. L.* (forthcoming, 2024).

¹⁴⁶ The United States is the only advanced economy that does not guarantee paid holidays for workers. A. Maye, *No Vacation Nation, Revised* (2019).

¹⁴⁷ M. Craven, ‘Some Thoughts on the Emergent Right to Water’, in E. Riedel and P. Rothen (eds.), *The Human Right to Water* (2006) 37, at 39.

¹⁴⁸ K. Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’, 42 *Vand. J. Transnat’l. L.* (2009) 905.

Is this a valid criticism? If so, what are the implications for the Committee's approach to the right to water? If not, what are the limits to the Committee's 'creativity' in proclaiming new norms and obligations?

5. Should there be a 'right to pee', as Indian NGOs have long advocated? How do you assess the United States' position that 'the right to safe drinking water and sanitation is [not] inextricably related to or otherwise essential to enjoyment of other human rights'?

B. COMPETING PERSPECTIVES ON ESR

In the following materials we examine some of the philosophical, religious, economic and legal challenges that are frequently posed by the critics of ESR, both at the national and international levels. The materials tend to emphasize the U.S. debate, partly because the United States still tends to be the key player on these issues in international fora and partly because U.S.-style economic liberalism has been widely adopted elsewhere.

But before reviewing the various critiques it is important to note that there are many settings in which ESR are widely accepted in both theory and practice. The right to education, at least at primary school level, is almost universally accepted and has achieved extensive constitutional recognition. When people are forcibly evicted from their homes and have nowhere else to live, most legal systems recognize some dimensions of their right to shelter or housing. The deliberate denial of access to food — whether in relation to detainees, displaced persons, disfavoured ethnic or racial groups, or in the context of an embargo — is widely acknowledged to violate basic human rights norms. When states fail to establish and enforce basic minimal health and safety protections for workers the international community considers a violation of labour rights to have occurred. But despite such examples, there remain many challenges to these rights, as the following readings indicate.

1. Ambivalence towards ESR

Despite almost universal rhetorical commitment by governments to the doctrine that ESR and CPR are of equal importance, many governments and human rights NGOs continue to be ambivalent towards ESR. Thus, for example, in terms of formal commitments:

- While all 46 member states of the Council of Europe are parties to the European Convention on Human Rights and thus to its complaints procedure (indeed its acceptance is a prerequisite to membership), only one-third of them (16) have accepted the collective complaints system under the European Social Charter (which is the Convention's counterpart in the field of ESR).
- The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, of 1988 (the 'Protocol of San Salvador'), has only been ratified by 18 countries, compared with the 25 parties to the Convention itself.
- While the Optional Protocol to the ICCPR providing for the submission of complaints has been ratified by 116 States, the equivalent for the ICESCR has only 31 States Parties.

The only open hostility to this group of rights has come from the United States, whose attitude has varied considerably from one administration to another.¹⁴⁹ Eleanor Roosevelt, who represented the Truman Administration, was a strong proponent of ESR. The United States, under President Johnson,

¹⁴⁹ P. Alston, 'Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States', in William F. Shulz (ed.), *The Future of Human Rights: US Policy for a New Era* (2008) 120.

voted in the General Assembly in 1966 to adopt both Covenants. Although neither the Nixon nor Ford Administrations were opposed to these rights, neither actively promoted them. The Carter Administration adopted a different approach, epitomized by Secretary of State Cyrus Vance's 'Law Day Speech' at the University of Georgia in which he defined human rights as including:

First, ... the right to be free from governmental violation of the integrity of the person Second, ... the right to the fulfilment of such vital needs as food, shelter, health care and education Third, ... the right to enjoy civil and political liberties ¹⁵⁰

In 1978, President Carter signed the Covenant and sent it to the Senate for its advice and consent with a view to ratification. At the time, however, no action was taken by the Senate, even in Committee. The Reagan and George H. W. Bush Administrations reversed official policy and opposed the concept of ESR on the grounds that, while:

the urgency and moral seriousness of the need to eliminate starvation and poverty from the world are unquestionable ... the idea of economic and social rights is easily abused by repressive governments which claim that they promote human rights even though they deny their citizens the basic ... civil and political rights.¹⁵¹

In 1993, the Clinton Administration committed to move towards ratification of the Covenant, but did not do so and continued to oppose the inclusion of all references to rights such as the right to adequate housing and the right to adequate food in international diplomatic settings. The Administration of George W. Bush remained unsympathetic but became open to formal acknowledgement of ESR while insisting that they were very different in nature. Thus it characterized the right to food as 'a goal or aspiration to be realized progressively' that translates into 'the opportunity to secure food; [and] not a guaranteed entitlement'.¹⁵²

The Obama Administration announced a 'major policy shift' in 2011, rejecting the concerns of previous administrations that: (1) recognition of ESCR would obligate the United States to provide increased foreign assistance; (2) such rights might become justiciable; (3) states' rights and prerogatives would be threatened; and (4) recognition would play into the hands of those who use ESR to justify neglect of CPR. It announced that it would 'work constructively with like-minded delegations to adopt fair and well-reasoned resolutions at the UN' on ESCR that 'are consistent with our own laws and policies'.¹⁵³ In practice, little changed. And both the Trump and Biden administrations have systematically followed the traditional policy approach of downgrading ESCR at every opportunity. The State Department's annual *Country Reports on Human Rights Practices* still do not address ESR, although they do include a range of labour rights, the definition of which 'is informed by internationally recognized labor rights and standards', but in fact tracks U.S. domestic law much more closely.¹⁵⁴

One striking anomaly in the U.S. position should be noted. Alone among ESR, the right to education is addressed, albeit in different ways, in the constitutions of many of the 50 component states. In 1954, in the landmark case of *Brown v. Board of Education* (347 U.S. 483), a unanimous Supreme Court recognized 'education [as] perhaps the most important function of state and local governments' and declared it to be 'a right which must be made available to all on equal terms'. But, almost two decades later, in *San Antonio Independent School District v. Rodriguez* (411 U.S. 1 (1973)) the Court took a very different approach. While much of the 5–4 majority decision was concerned with the finer points of U.S. equal protection law, the Court also considered whether education was a constitutionally protected fundamental right. It insisted that such a right could not be derived from arguments about the 'relative societal significance of education' but only from the text of the Constitution. And it found

¹⁵⁰ 76 Dept. of State Bulletin (1977) 505.

¹⁵¹ Introduction, U.S. Dept. of State, *Country Reports on Human Rights Practices* for 1992, 5.

¹⁵² See www.fao.org/DOCREP/MEETING/005/Y7106E/y7106e03.htm.

¹⁵³ M. Posner, 'The Four Freedoms Turn 70: Ensuring Economic, Political, and National Security in the 21st Century', U.S. Dept. of State, 24 March 2011.

¹⁵⁴ <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/> (2023) Appendix B.

that, despite dramatic differences in the funding provided for education from one district to another, there was no ‘absolute denial of educational opportunities to any’ children. It also expressed concerns that a finding of a right to education might logically lead to findings relating to issues such as denials of ‘decent food and shelter’. The silver lining of the Supreme Court’s abdication has been that it helped provoke extensive litigation in state courts, resulting in some surprisingly strong affirmations of the right to education.¹⁵⁵

But the United States and China, as discussed above, are not alone in their ambivalence. Although formal support for ESCR has been near universal, in practice no group of states has consistently followed up its rhetorical support at the international level with practical and sustained programmes of implementation. West European social democracies would seem best placed to promote the importance of these rights. But, while being consistently supportive of initiatives, they have been generally cautious, in part because the rights are often not accorded full constitutional or other recognition as rights *per se in their own domestic orders*, and in part because of domestic political constituencies calling for reductions in the scope of the European welfare state.¹⁵⁶

Australia, for example, has no bill of rights but a number of major inquiries have been held to consider whether one should be adopted and a key question has always concerned the possible but much contested inclusion of ESCR. In 2024 a federal Parliamentary Committee recommended the adoption of a Human Rights Act, drafted so as to:

[capture] the immediately realisable aspects of economic, social and cultural rights, including obligations to ensure people enjoy rights without discrimination; satisfy certain minimum aspects of these rights; and not take backwards steps (or ‘retrogressive measures’) with respect to these rights; ...¹⁵⁷

Developing countries continue to be the most vocal proponents of these rights, but they have made few concrete proposals beyond calling for more attention to be accorded to them. Cuba, for example, was so reluctant to treat these rights as individually enforceable that it initially resisted the appointment of any special rapporteurs to investigate ESCR.¹⁵⁸

Finally, some of the most prominent international NGOs have also been ambivalent towards ESR. Until 1993 Human Rights Watch (HRW)¹⁵⁹ definitively eschewed ESCR, and Amnesty International effectively did so until 2001. Since then both organizations have sought to develop a coherent strategy in relation to these rights, albeit with rather limited success. At the same time, a number of more specialized groups such as Physicians for Human Rights, ESCR-Net, the Center for Economic and Social Rights and the National Economic and Social Rights Initiative, along with the International Commission of Jurists, have made important contributions to enhanced understanding of these rights.¹⁶⁰ The justification put forward by Kenneth Roth, Executive Director of HRW from 1993 to 2022, was that the ‘methodologies’ they have developed for CPR are difficult to apply in relation to ESR:

**KENNETH ROTH, DEFENDING ECONOMIC, SOCIAL AND CULTURAL RIGHTS:
PRACTICAL ISSUES FACED BY AN INTERNATIONAL HUMAN RIGHTS ORGANIZATION
26 HUM. RTS. Q. (2004) 63¹⁶¹**

¹⁵⁵ M. Kaufman, *Badges and Incidents: A Transdisciplinary History of the Right to Education in America* (2019).

¹⁵⁶ C. O’Cinneide, ‘The Present Limits and Future Potential of European Social Constitutionalism’, in K. Young (ed.), *The Future of Economic and Social Rights* (2019) 324.

¹⁵⁷ Parliamentary Joint Committee on Human Rights, *Inquiry into Australia’s Human Rights Framework* (May 2024) p. xxi and Ch. 6.

¹⁵⁸ UN Doc. E/CN.4/1998/25, para. 16.

¹⁵⁹ See generally P. Alston, *Human Rights Watch Inc.* (2025).

¹⁶⁰ See especially various interpretive guides adopted by civil society groups, such as (1) the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), 9 *Hum. Rts. Q.* 122 (1987); (2) the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), 20 *Hum. Rts. Q.* (1998) 691; (3) the Montréal Principles on Women’s Economic, Social and Cultural Rights (2002), 26 *Hum. Rts. Q.* (2004) 760; (4) the Maastricht Principles on Extraterritorial Obligations of States in the Area of [ESCR] (2013); and (5) the Maastricht Principles on The Human Rights of Future Generations (2023).

¹⁶¹ For a more recent defence of this position, see K. Roth, *Righting Wrongs: Three Decades on the Front Lines Battling Abusive Governments* (2025).

...

In my view, the most productive way for international human rights organizations, like Human Rights Watch, to address ESC rights is by building on the power of our methodology. The essence of that methodology ... is not the ability to mobilize people in the streets, to engage in litigation, to press for broad national plans, or to provide technical assistance. Rather, the core of our methodology is our ability to investigate, expose, and shame. We are at our most effective when we can hold governmental (or, in some cases, nongovernmental) conduct up to a disapproving public

... [T]o shame a government effectively — to maximize the power of international human rights organizations like Human Rights Watch — clarity is needed around three issues: violation, violator, and remedy. We must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists. If any of these three elements is missing, our capacity to shame is greatly diminished

...

Broadly speaking, [these elements are] clearest when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC rights violation. These three dimensions are less clear when the ESC shortcoming is largely a problem of distributive justice. If all an international human rights organization can do is argue that more money be spent to uphold an ESC right — that a fixed economic pie be divided differently — our voice is relatively weak. We can argue that money should be diverted from less acute needs to the fulfillment of more pressing ESC rights, but little reason exists for a government to give our voice greater weight than domestic voices. On the other hand, if we can show that the government (or other relevant actor) is contributing to the ESC shortfall through arbitrary or discriminatory conduct, we are in a relatively powerful position to shame: we can show a violation (the rights shortfall), the violator (the government or other actor through its arbitrary or discriminatory conduct), and the remedy (reversing that conduct).

...

To conclude, let me offer a hypothesis about the conduct of international human rights organizations working on ESC rights. It has been clear for many years that the movement would like to do more in the ESC realm. Yet despite repeated professions of interest, its work in this area remains limited. Part of the reason, of course, is expertise; the movement must staff itself somewhat differently to document shortfalls in such matters as health or housing than to record instances of torture or political imprisonment. But much of the reason, I suspect, is a sense of futility. International human rights activists see how little impact they have in taking on matters of pure distributive justice so they have a hard time justifying devoting scarce institutional resources for such limited ends

QUESTIONS

1. Given the reticence of many states, how would you explain the fact that ESR continue to occupy an important place within the international regime? What factors might lead any given government to be strongly supportive of the concept and practice of such rights? Why would the U.S. Government be so keen to address labour rights in its annual reports?
2. If China has done so well in recent years in lifting vast numbers out of poverty, is there any reason to worry about the fact that it has few significant accountability mechanisms in place in relation to ESR?
3. Lee Kuan Yew, the former Prime Minister of Singapore, adopted an ESR policy which has been described in the following terms:

 “[It is government policy] not to provide direct funds to individuals in its ‘welfare’ programs. Instead, much is spent on education, public housing, health care and infrastructure build-up as human capital investments to enable the individual and the nation as a whole to become economically competitive in a capitalist world For those who fall through the economic net ... public assistance is marginal and difficult to obtain The government’s position is

that ‘helping the needy’ is a moral responsibility of the community itself and not just of the state. So construed, the recipients of the moral largesse of the community are to consider themselves privileged and bear the appropriate sense of gratitude.”

Does such an approach give priority to ESR or does it instead put economic growth ahead of both sets of rights? If Singapore were to decide to become a party to the ICESCR, would it need to change such policies?

4. Are ESR matters of ‘pure distributive justice’, and if so, does this make them any less human rights than civil and political rights?

2. Historical Perspectives

The phrase ‘not enough’ was famously used by Anthony Crosland in his book *The Future of Socialism* (1956) to which Samuel Moyn refers in his own book entitled *Not Enough*. But while Crosland was arguing that equality of opportunity was ‘not enough’, Moyn’s critique is that ESR are insufficient because they fall short of undefined goals such as ‘full-fledged distributive justice’, ‘material equality’, and ‘distributive equality’.

Mila Versteeg, in ‘Can Rights Combat Economic Inequality?’, 133 *Harv. L. Rev.* (2020) 2017 provides an overview of Moyn’s thesis:¹⁶²

... As Moyn puts it, human rights have been “unambitious in theory and ineffectual in practice in the face of market fundamentalism’s success”. While human rights “have occupied the global imagination,” they have “contributed little of note, merely nipping at the heels of the neoliberal giant”. Even worse, the human rights movement has been tainted by association with unconstrained capitalism because the movement gained prominence while laissez-faire policies were gaining favor globally. Moyn believes that ... “even perfectly realized human rights ... are compatible with ... radical inequality”.

Moyn acknowledges that some advocacy efforts have addressed social rights, such as the rights to healthcare, to social security, and to education. But these efforts are not enough either, as they have focused only on *sufficiency*: a minimum of resources for the poorest of the poor, rather than comparable resources for all. For Moyn, there exists a crucial distinction between the former, that is, “sufficiency,” and the latter, what he calls “material equality” (also “distributive equality”, “economic justice”, or just “equality”). Sufficiency captures “how far an individual is from having nothing and how well she is doing in relation to some minimum of provision of the good things in life”. In contrast, material equality “concerns how far individuals are from one another in the portion of those good things they get”. A commitment to material equality therefore effectively requires limiting inequality in any given country and a “commitment to a universal middle class”. Moyn believes that promoting sufficiency is not enough to achieve equality: even if we realize higher levels of sufficiency for more people, the rich can still become richer.

... Moyn concludes that human rights law is actually the wrong vehicle for promoting material equality. One reason is that human rights law — with its individualistic premise of constraining the state from committing human rights abuses against discrete persons — is simply a bad fit for the task of effecting

¹⁶² For an update by Moyn himself, see Samuel Moyn, ‘Sufficiency, Equality, and Human Rights’, in Malcolm Langford and Katharine G. Young (eds.), *The Oxford Handbook of Economic and Social Rights* (2023) 000.

material equality. “[W]hen inequality has been limited,” he says, “it was never on the sort of individualistic and often antistatist basis that human rights share with their market fundamentalist *Doppelgänger*”. Another, related reason is that human rights law’s toolkit — litigation and “naming and shaming” violators — is ill-equipped to promote economic justice. According to Moyn, “When it comes to mobilizing support for economic fairness, the chief tool[] of the human rights movement — playing informational politics to stigmatize the repressions of states ... — [is] simply not fit for use”. ...

... Moyn’s primary objective is to force redistribution and cap inequality. To accomplish that, he argues, we need not only to provide a basic minimum of subsistence but also to set an income ceiling, lift up the middle classes, prevent the dismantling of existing social welfare states, and build new ones.... The end goal is a strong social welfare state, preferably extended to the global level. ...

SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018)

...
The distinction between sufficiency and equality allows us to see how profoundly the age of human rights ... has mainly been a golden age for the rich. The meaning of human rights has slowly transformed as egalitarian aspiration has fallen. ... The French Revolution’s dream of a welfare state offering sufficient provision as well as egalitarian citizenship returned—at least in some places—when the Great Depression and World War II ushered in new kinds of national communities. In that era, human rights partook of the ideal of distributive equality within nations. In our day, human rights have instead become associated (along with the excesses of terrible leaders and the horrors of heartrending atrocity) with global sufficiency alone. ... To a startling extent, human rights have become prisoners of the contemporary age of inequality. ...

...
... The human rights revolution of our time is bound up with a global concern for the “wretched of the earth,” but not in the egalitarian sense that the socialist and postcolonial promoters of that phrase originally meant.

Instead of global justice, market fundamentalism triumphed starting in the 1970s

The companionship between human rights and market fundamentalism was not inevitable. ... The attempt to mobilize economic and social rights has remained unimpressive since the end of the Cold War [H]uman rights lost their original connection with a larger egalitarian aspiration, focusing on sufficient provision instead.

...
There is no reason for human rights ideals to continue the accommodating relationship they have had with market fundamentalism and unequal outcomes. Human rights may well serve to indirectly indict the consequences of inequality when it threatens the minimum standards of liberty, security, and provision that human rights protect. This does not mean, however, that either human rights norms or the kinds of movements we have learned to associate with those norms—engaging in an informational politics of “naming and shaming,” operating in the professional mode, and prizing judges as ideal enforcers of basic norms—are up to the challenge of supplementing sufficiency with equality in theory or practice. ...

...

**PHILIP ALSTON, THE PAST AND FUTURE OF SOCIAL RIGHTS
STEVEN L. B. JENSEN AND CHARLES WALTON (EDS.), SOCIAL RIGHTS AND THE POLITICS
OF OBLIGATION IN HISTORY (2022) 308**

Equality and non-discrimination were always among the key tenets of international human rights law. The issues were high on the UN's agenda in the early years after the adoption of the Universal Declaration of Human Rights (UDHR), but the focus was primarily on racial equality and equality between men and women. The structural dimensions underpinning these forms of discrimination were very much present at the outset but, as Steven L. B. Jensen has shown, key Western governments carried out a very successful effort to marginalise and all but erase them from both the human rights and the development agendas in the 1940s and 1950s, in part because they raised unpleasant and unwanted questions about the impact and aftermath of colonialism. Inequality issues subsequently made their way back on to the international human rights agenda in different forms [especially through the 1973 Ganji Report on social rights, which focused heavily on inequality at the national level and the New International Economic Order demands in the mid-1970s]. Again, these efforts were assiduously, and ultimately effectively, blocked by Western nations, but it would be a misrepresentation to suggest that the corpus of human rights law was inherently incapable of saying anything about material inequality. ...

...

Inequality is so central to Moyn's thesis [in his book *Not Enough*] that the terms 'equality' or 'inequality' appear an astonishing 525 times in his book. The principal themes that he develops can be distilled down for present purposes to the following:

- (a) Human rights have 'nothing to say about material inequality' because they neglect the need for a 'ceiling on inequality'.
- (b) Social rights as understood in the post-war era reflected a commitment to egalitarian citizenship that was later lost.
- (c) The UDHR was originally a 'template' or 'charter' for 'national welfare states'.
- (d) Social rights norms became, at best, concerned only with ensuring a subsistence minimum.

...

16.3.1 Material Inequality

Moyn's first theme concerns the silence of human rights about material inequality. The key issues here are definitional. They relate to 'human rights', 'inequality' and 'ceilings'. He uses the terms 'human rights', 'human rights law' and 'human rights movement' almost interchangeably, but, in fact, there are important distinctions that need to be drawn. In terms of the last, he relies on what comes close to a caricature of the approach taken by human rights advocates based on a limited understanding of the work of Amnesty International and Human Rights Watch, but he neither goes into any detail on the work of either of those groups nor acknowledges that the human rights movement encompasses a far more heterogeneous set of actors with very different agendas, normative priorities, constituencies and methods of work.

Despite the book's preoccupation with 'equality', Moyn avoids any systematic definition Instead, his analysis glides seamlessly across phrases like 'material equality', 'distributive equality', 'absolute equality of material outcomes' and 'distributional equality'.

The third definitional issue relates to his critique of human rights (whether norms or organisations) for paying no heed to the need for a 'ceiling' on inequality. The term 'ceiling' ... is never defined, beyond a reference to 'a ceiling on wealth and a constraint on material hierarchy'. For example, he laments that neo-liberals have obliterated 'whatever ceiling on inequality national welfare states had imposed', but this begs the question ... as to whether welfare states ever actually imposed such ceilings.

... [F]or all of the emphasis on egalitarianism, he suggests at one stage that what is required is merely a ‘modicum of equality in the distribution of the good things in life’, and that it is not necessary to seek ‘absolute equality of material outcomes’. At the other end of the spectrum is his suggestion that socialism is in fact the way to achieve material equality. He calls for it to be elevated ‘to the global project it has rarely been but must become’. But socialism too is never defined.

...

16.3.2 Egalitarian Citizenship

A second main theme of Not Enough is that social rights, as they were understood in the post-war era, reflected a commitment to egalitarian citizenship that was later abandoned. It is not clear where this commitment was to be found. Moyn asserts that, in this founding period, ‘human rights partook of the ideal of distributive equality within nations’. This is then contrasted with the sorry state of play today in which ‘the spirit of human rights ... has shifted from nationally framed egalitarian citizenship to a globally scaled subsistence minimum’. And he asks whether there is ‘any way for human rights to return to their original relationship with distributive equality’. But ... [he] presents the slimmest of evidence for the existence of any such ideal. ...

...

16.3.3 The UDHR as a Welfare State Charter

A central pillar of Moyn’s contrast between the late 1940s and today is the way in which he consistently characterises the ‘welfare state’ of the earlier era. Again, no definition is offered, despite the fact that scholars of the welfare state are united in the view that the term is notoriously difficult to pin down and has a variety of connotations. In fact, the term ‘welfare state’ was used only very occasionally before 1950, even in the UK, with which it is, in retrospect, most commonly associated. Moreover, in that context its content and its relationship to a more robust and demanding redistributive state were a matter of deep political contention, even among those on the left of the political spectrum who supported the various elements that would come to make up the welfare state. But this occurred well after the adoption of the UDHR. Nevertheless, the ‘welfare state’ takes centre stage in Moyn’s retelling:

When the United Nations canonized economic and social rights in the Universal Declaration of Human Rights of 1948, it consecrated the democratic welfare state that had emerged victorious from World War II. It thereby did more than simply enshrine the ideal of distributive sufficiency that the declaration explicitly defined in its series of basic entitlements; it also reflected the ambitious political enterprise of distributive equality.

Unless he is extrapolating entirely from wartime developments in the United States and the United Kingdom, neither of which could accurately be characterised as seeking to achieve distributive equality, it may be that he has in mind the origins of the Swedish welfare state, but these were hardly significant in the UDHR context. Or perhaps it is the Soviet model of the socialist state, but that too would seem to be a very different proposition. It is thus unclear what he means when he laments the demise of the ‘ceiling on inequality national welfare states had imposed’. One might surmise that he is thinking of the strongly progressive personal income tax system that was in place in countries like the United States and the United Kingdom, partly as a result of the need to raise vast amounts of money to fight the war, and which remained an important part of the scene until the late 1970s, but there is no discussion in the book of these issues.

So when Moyn ruefully recalls the UDHR as a ‘charter or template for national welfare states’, it is not clear which states at that time constituted the models that others were supposed to follow. Which states embodied in the late 1940s what Moyn saw as the Declaration’s ‘ambitious political enterprise of distributive equality’, and which states expressed such a vision as a central part of the Declaration? It certainly would not have been the Latin American states, although they were the strongest and most numerous proponents of the inclusion of social rights in the Declaration. It might have been the

United States, although by 1948 it was moving away from the New Deal model. It is unlikely to have been the Union of Soviet Socialist Republics (USSR).

...

16.3.4 Social Rights as Minimum Subsistence Norms

Another central theme in *Not Enough* is that existing social rights provisions aspire only to promote ‘sufficient provision’ or ‘a globally scaled subsistence minimum’. Because of this minimalism, ‘human rights do not necessarily call for a modicum of distributive equality’. Behind this conclusion is the assumption that it would be possible to achieve a universal minimum level of living without involving any form of redistribution, a proposition that would be very difficult to show empirically.

In explaining the significance of his analysis, Moyn notes that ‘social rights haven’t provided us with the right language and tools to oppose rising inequality’. There is nothing in those rights that ‘allow[s] us to mount a direct attack on inequality’. In this formulation, he is addressing the shortcomings of the rights themselves, not of the movements that have ignored or promoted them. The normative language, he says, is simply not up to it. But there is no analysis at all of the most expansive and capacious social rights such as the ‘right to an adequate standard of living’ and ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. [And there is only one reference to the voluminous body of work of the UN Committee on ESCR.]

* * *

Another response to Moyn’s thesis comes from Nehal Bhuta, in ‘Recovering Social Rights’, in *ibid* (ed.), *Human Rights in Transition* (2024) 1:

This chapter responds to a fundamental challenge made against social rights: that they are an inadequate legal and political language to address widening income and wealth inequality. ...

I argue that these claims reflect a great deal of truth about the present of social rights, but do not accurately characterize their past. ... I recover a different register of social rights ... which infused the ... drafting of the [UDHR]. [Specific rights claimed in this register include the right to work, the right to subsistence, and the right to the product of one’s labour.] I call these “natural social rights” or “collective natural rights,” and trace their lineages through English Radical thought, French Physiocratic thought, Jacobin and Neo-Jacobin thinking, to early twentieth century state theories and constitutional social rights. The essential insight gained from recovering these repertoires of social rights is the surprising extent to which social rights ideas laid the conceptual foundations for the social state. Rather than understanding social rights as nothing more than the weak offspring of a social welfare state brought into being by social conflict, we can see them as a historically-powerful political-ethical discourse that helped *articulate and motivate* the concept of the state as a public power that must *organize* the economy in order to ensure a “society of equals.”¹⁶³ At the heart of nineteenth century ideas of social right was the demand for the creation of equal social citizens and the construction of social democracy, through the creation of a social democratic state. Recovering these ideas helps us better understand the ways that social rights *could be* a germane response to the challenge of inequality in the present.

¹⁶³ See the rich history of the concept of political and economic equality recounted in P. Rosanvallon, *The Society of Equals* (2013, trans. Goldhammer).

3. Philosophical Perspectives

Much of the literature on ESR tends to overlook the philosophical dimensions of the issue. But, in practice, those aspects are rarely far below the surface in debates about ESR. It is thus necessary to have at least a general sense of philosophical arguments for and against ESR. In the readings that follow, Neier and Kelley reflect the influence of Hayek in arguing that ESR should not properly be viewed as ‘rights’,¹⁶⁴ while Griffin and Nickel outline different but related justifications for such rights. Sen responds to two major critiques of ESR.

FRIEDRICH HAYEK, JUSTICE AND INDIVIDUAL RIGHTS LAW, LEGISLATION AND LIBERTY (1982) APPENDIX TO CHAPTER NINE

...

... [N]ew positive ‘social and economic’ human rights ... demand as their counterpart a decision that somebody (a person or organization) should have the duty of providing what the others are to have. It is, of course, meaningless to describe them as claims on ‘society’ because ‘society’ cannot think, act, value, or ‘treat’ anybody in a particular way. If such claims are to be met, the spontaneous order which we call society must be replaced by a deliberately directed organization: the cosmos of the market would have to be replaced by a taxis [i.e. an order] whose members would have to do what they are instructed to do. They could not be allowed to use their knowledge for their own purposes but would have to carry out the plan which their rulers have designed to meet the needs to be satisfied. From this it follows that the old civil rights and the new social and economic rights cannot be achieved at the same time but are in fact incompatible; the new rights could not be enforced by law without at the same time destroying that liberal order at which the old civil rights aim.

...

It is evident that all these ‘rights’ are based on the interpretation of society as a deliberately made organization by which everybody is employed. They could not be made universal within a system of rules of just conduct based on the conception of individual responsibility, and so require that the whole of society be converted into a single organization, that is, made totalitarian in the fullest sense of the word. ... [R]ules of just conduct ... can never take the form of ‘everybody must have so and so.’ In a free society what the individual will get must always depend in some measure on particular circumstances which nobody can foresee and nobody has the power to determine. Rules of just conduct can ... can bring about only opportunities for the acquiring of such claims.

...

... If we wish everybody to be well off, we shall get closest to our goal, not by commanding by law that this should be achieved, or giving everybody a legal claim to what we think he ought to have, but by providing inducements for all to do as much as they can that will benefit others. To speak of rights where what are in question are merely aspirations which only a voluntary system can fulfil, not only misdirects attention from what are the effective determinants of the wealth which we wish for all, but also debases the word ‘right’, the strict meaning of which it is very important to preserve if we are to maintain a free society.

ARYEH NEIER, SOCIAL AND ECONOMIC RIGHTS: A CRITIQUE¹⁶⁵ 13 HUM. RTS. BRIEF (2006) 1

... I favor a fairer distribution of the world’s resources; [but] through the political process. For the most part, ... it cannot take place through the assertion of rights Rights only have meaning if it is possible to enforce them. But there has to be some mechanism for that enforcement, and adjudication seems to be the mechanism that we have chosen. ...

... [A]lthough there certainly will be economic ramifications of efforts to enforce [civil and political rights such as access to counsel for accused persons, and decent prisons], they do not involve a broad

¹⁶⁴ For a careful analysis, see R. Plant, *The Neo-liberal State* (2010).

¹⁶⁵ Neier was one of the founders of Human Rights Watch and the architect of its approach to ESR.

redistribution of society's resources or its economic burdens. Therefore, I would distinguish the incidental costs of protecting civil and political rights from the much more substantial costs of economic redistribution.

Furthermore, there will always be, in unfair economic distribution, elements of invidious discrimination, discrimination on grounds of race or gender, or denials of due process. In these circumstances, I believe it is appropriate to invoke rights. For example, if a town provides roads and sewage collection, or water and electricity, to people of one race and not to those of another But I think of these matters in terms of race discrimination, which involves a denial of civil and political rights, and not economic redistribution. Finally, I want to make it clear that certain constitutions incorporate some things that could be called economic and social rights with a certain degree of legislative specificity. For example, a constitution may provide that every child shall be entitled to a free primary school or a free secondary school education. When a constitution provides that level of legislative specificity, I think it is certainly appropriate to use the judicial mechanism to enforce one's rights accordingly.

Social/economic rights and the democratic process

The concern I have with [ESR] is when there are broad assertions ... of a right to shelter or housing, a right to education, a right to social security, a right to a job, and a right to health care. There, I think, we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.

In my view, the purpose of the democratic process is essentially to deal with two questions: public safety and the development and allocation of a society's resources Economic and security matters ought to be questions of public debate. To withdraw either of them from the democratic process is to carve the heart out of that process.

Everybody has an opinion on what should be done to protect the public's safety, and ... as to what is appropriate in the allocation of a society's resources and its economic burdens These issues ought to be debated by everyone in the democratic process, with the legislature representing the public and with the public influencing the legislature in turn. To suggest otherwise undermines the very concept of democracy by stripping from it an essential part of its role.

Indeed, whenever you get to these broad assertions of shelter or housing or other economic resources, the question becomes: What shelter, employment, security, or level of education and health care is the person entitled to? It is only possible to deal with this question through the process of negotiation and compromise [A] court is not the place where it is possible to engage in [the necessary] sort of negotiation and compromise That is the heart of the political process

Consider the question of health care If you are allocating the resources of a society, how do you deal with the person who says they need [a] kidney transplant or [a] bypass or ... anti-retroviral drugs to save their life when the cost of these procedures may be equivalent to providing primary health care for a thousand children? Do you say the greater good for the greater number, a utilitarian principle, and exclude the person whose life is at stake if they do not get the health care that they require? I do not believe that is the kind of thing a court should do

Consider next the question of education. What if a constitution talks about a right to an education but is silent as to the type of education people should be entitled to? A society may say that it needs a certain elite — scientists, engineers, and brain surgeons — as well as people who are going to be able to work effectively in factories and service jobs. Does someone have a right to say they are entitled to an elite education ...? Can you deal with these questions through the adjudicatory process? Again, I do not believe it is possible.

Finally, consider the question of jobs. Suppose that a decision is made through the legislative process that we have to spend a certain amount on building roads because we want peasants to be able to take

their goods to market for sale. Suppose further that we have to build a port to export those goods Can the judicial process deal with the question of the short-term need for jobs and social security as opposed to that of long-term socio-economic growth? Again, can you deal with a society's decision to spend some of its resources on these matters rather than provide jobs at a certain level for every single person? ...

Civil and political rights

... I am a believer in very strong civil and political rights: the right to free speech, the right to assemble, the right not to be tortured, etc. Those rights have to mean exactly the same thing every place in the world. With social and economic "rights," however, it is inevitable that they are going to be applied differently in different places. That is, if you are talking about one country with extensive resources and one that is very poor, there is not going to be the same right to shelter or to health care

But suppose that one takes that same idea — that different stages of development mean different things for each country — and applies it to the concept of civil and political rights. Suppose China or Zimbabwe says it is not a developed country and therefore cannot provide the same civil and political rights as a developed country

Another way in which the idea of social and economic rights is dangerous is that you can only address economic and social distribution through compromise, but compromise should not enter into the adjudication of civil and political rights. I do not want a society to say that it cannot afford to give individuals the right to speak or publish freely, or the right not to be tortured

...

DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE (1998) 15

... America remains unique in the role that rights play in the national culture. ... [W]hile government is necessary to secure ... freedom, it is also the greatest danger to it. Thus, the concept of rights served two functions in the political theory of the Enlightenment: to legitimate government and to control it

... [T]he concept of welfare rights, a concept that reflects a more expansive view of the role of government than anything envisioned by the classical liberals of the Enlightenment. 'For Jefferson, ... the poor had no right to be free from want', observes legal scholar Louis Henkin. 'The framers saw the purposes of government as being to police and safeguard, not to feed and clothe and house' They differ in what is being claimed as a right, in the obligations that they impose, and in the way they are implemented.

...

Welfare rights differ from the classical rights to life, liberty, and property in the nature of the claim that they embody

... The classical rights guarantee freedom from interference by others — and may thus be referred to as liberty rights — whereas welfare rights guarantee freedom to have various things that are regarded as necessities. What that means, in essence, is that the classical liberty rights are concerned with processes, whereas welfare rights are concerned with outcomes.

Liberty rights set conditions on the way in which individuals interact. Those rights say that we cannot harm, coerce, or steal from each other as we go about our business in life, but they do not guarantee that we will succeed in our business

...

... [L]iberty rights impose on other people only the negative obligation not to interfere, not to restrain one forcibly from acting as he chooses

But welfare rights impose positive obligations on others A welfare right is by nature a right to a positive outcome, not contingent on the success of one's own efforts. It must therefore impose on others the obligation to ensure that outcome.

On whom does the obligation fall [to provide what welfare rights require]? ... One person's liberty rights impose on every other human being the obligation to respect them. I am obliged not to murder or steal from other individuals, even those I have never encountered and with whom I have no relationship. But am I obliged to respect their welfare rights? ... The obligation to supply those goods does not fall upon me as a particular individual; it falls upon all of us indifferently, as members of society Insofar as welfare rights are implemented through government programs, for example, the obligation is distributed among all taxpayers.

...
To implement the liberty rights of individuals, government must protect them against incursions by other individuals The laws involved are relatively simple; they essentially prohibit specific types of actions. The government apparatus required is relatively small, the 'night-watchman state' of classical liberalism. The only significant expense involved is that of the military, to protect against foreign aggression.

The implementation of welfare rights requires a much more activist form of government. The welfare state typically involves large-scale transfer programs ... through which wealth is transferred from taxpayers to those on whom the state confers entitlements to various goods.

...
... [T]he administration of the transfer programs is enormously complex by contrast with the relatively simple prohibitions involved in protecting the rights to life, liberty, and property. The welfare state involves government in running large-scale business enterprises: pension plans, health insurance, and so on. A complex set of regulations ... and a large bureaucracy [are] required to enforce those regulations

**JAMES GRIFFIN, THE PRESIDENTIAL ADDRESS:
DISCREPANCIES BETWEEN THE BEST PHILOSOPHICAL ACCOUNT OF HUMAN RIGHTS AND
THE INTERNATIONAL LAW OF HUMAN RIGHTS
101 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (2001) 1**

...
According to my account, there are two grounds for human rights Personhood initially generates the rights; practicalities give them, where needed, a sufficiently determinate shape.

The way to understand personhood more fully is to distinguish the various strands of agency The first stage of agency is our taking our own decisions for ourselves, not being dominated or controlled by someone else (autonomy). To be more than empty tokens, our decisions must be informed; we must have basic education, access to information and to other people's views. And then, having formed a conception of a good life, we must be able to pursue it. So we need enough in the way of material provisions to support ourselves. And if we have all that, then we need others not to stop us (liberty). Whenever the word 'basic' appears here, it means the base needed not just to keep body and soul together but to live as an agent.

From this ... we should be able to derive all human rights. We have a right to autonomy. In private life, this means ... those in authority ... must not make us, or keep us, submissive to their wills We have a right to life and to some form of security of person. We have a right not to be tortured We have rights to education, free expression, peaceful assembly. And we have various rights to basic material provision; these so-called welfare rights are much challenged, but for all my inclination to keep the class of human rights tight, it seems to me impossible to exclude them. So there must be a large range of rights to certain necessary conditions of agency.

Then, we must be free from interference in the pursuit of our major ends [T]here must be a large range of liberty rights, because liberty is the other essential component of agency.

This, of course, is the merest start of a list. There are many more human rights

...

Twentieth century lists: economic, social, and cultural rights. ... [S]ome writers are deeply sceptical about the whole class of welfare rights What seems to me undeniable is that there is a human right to the minimum resources needed to live as an agent. That is more than the resources needed simply to keep body and soul together, but it is a good deal less than the lavish provision that many of the international documents have in mind. So I think that there are acceptable claims to (human) welfare rights in the major international documents. But, on my account, there is also a vast number of unacceptable and debatable claims, many more than in the case of civil and political rights.

(a) *Unacceptable Cases:* Some of the claims to welfare rights are hardly credible. Article 7c of the *Additional Protocol to the American Convention* asserts that there is a right of every worker to promotion or upward mobility in his employment. But some perfectly good jobs have no career structure

...

... The *Universal Declaration* of 1948 proclaims ... a right to work Yet on my account, there is no right to work. There is certainly a right to the resources needed to live as an agent, but those resources do not have to come from work. If in an advanced technological society there were not enough work for everyone, and those without it were adequately provided for, then, on the face of it, no one's human rights would be violated

...

[Then in the ICESCR, there is] a right to 'the highest attainable standard of physical and mental health'. On my account, there is no such right. [This] is not even a reasonable social aim. Societies *could* mount crash programmes ... in the case of illnesses for which cures are attainable, but they often do not. They regard themselves as free to decide when they have spent enough on health, even if they are still short of the highest attainable standards, and may devote their inevitably limited resources to [other social goals]

...

JAMES W. NICKEL, POVERTY AND RIGHTS 55 THE PHILOSOPHICAL Q. (2005) 385

Human rights are not ideals of the good life for humans; rather they are concerned with ensuring the conditions, negative and positive, of a minimally good life

Some philosophers have followed this line of thought to the conclusion that the main economic and social right is 'subsistence'. Henry Shue, John Rawls and Brian Orend¹⁶⁶ make subsistence the centrepiece of their concern for economic and social rights. Shue defines subsistence as 'unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventative health care' Rawls includes 'subsistence' on his very short list of human rights, treating it along with security as part of the right to life. He interprets 'subsistence' as including 'minimum economic security' or 'having general all-purpose economic means'.

The idea of subsistence alone offers too minimal a conception of economic and social rights. It neglects education, gives an extremely minimal account of health services, and generally gives too little attention to people's ability to be active participants and contributors. It covers the requirements of having a life, but neglects the conditions of being able to lead one's life.

If Shue, Rawls and Orend err by making economic and social rights too minimal, international human rights documents make them excessively grandiose

... I advocate a conception [that] suggests that economic and social rights focus on survival, health and education. It requires governments to govern in such a way that the following questions can be answered affirmatively:

¹⁶⁶ Eds.: see H. Shue, *Basic Rights* (2nd edn., 1996); B. Orend, *Human Rights: Concept and Context* (2002); and J. Rawls, *The Law of Peoples* (1999).

1. Subsistence: Do conditions allow all people to secure safe air, food and water as well as environmentally appropriate shelter and clothing if they engage in work and self-help in so far as they can, practise mutual aid through organizations such as families, neighbourhoods and churches, and procure help from available government assistance programmes? Do people enjoy access to productive opportunities that allow them to contribute to the well-being of themselves, their families and their communities?
2. Health: Do environmental conditions, public health measures and available health services give people excellent chances of surviving childhood and childbirth, achieving physical and mental competence and living a normal lifespan?
3. Education: Do available educational resources give people a good chance of learning the skills necessary for survival, health, functioning, citizenship and productivity?

...

II. The Justification of Economic and Social Rights

It is sometimes alleged that economic and social rights do not have the importance that civil and political rights have. If the objection is ... that economic and social rights do not protect fundamental interests or are too burdensome to be justifiable, very plausible rebuttals are available.

...

[Contrary to Griffin's argument], autonomy by itself does not seem likely to be able to generate economic and social rights, due process rights, or rights to non-discrimination and equality before the law. To compensate, Griffin accordingly relies heavily on 'practicalities' in allowing these rights. The result is to make the justification of rights other than liberties appear shaky and derivative. This could have been avoided by introducing some other fundamental values or norms, particularly a requirement of fair treatment when very important interests are at stake A fairness norm would be no more controversial than autonomy as a starting-point for human rights, and it would allow due process rights to be as central and non-derivative as liberty rights.

[Nickel then proposes] a framework that suggests that people have secure, but abstract, moral claims on others in four areas: a secure claim to have a life; a secure claim to lead one's life; a secure claim against severely cruel or degrading treatment; and a secure claim against severely unfair treatment.

All four principles protect aspects of human dignity

The UDHR speaks of the 'inherent dignity ... of all members of the human family', and declares that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience.' The four grounds of human rights that I have proposed provide an interpretation of these ideas. We respect a person's dignity when we protect his life and agency and when we prevent others from imposing treatment that is severely degrading or unfair.

...

**AMARTYA SEN, THE IDEA OF JUSTICE
(2009) 379**

The Plausibility of Economic and Social Rights

...

Two of the most powerful rejections [of ESR by theorists and philosophers] have come from Maurice Cranston and Onora O'Neill

There are ... two specific lines of reproach, which I shall call the 'institutionalization critique' and the 'feasibility critique'. The institutionalization critique, which is aimed particularly at economic and social rights, relates to the belief that real rights must involve an exact correspondence with precisely formulated correlate duties. Such a correspondence, it is argued, would exist only when a right is institutionalized. Onora O'Neill has presented the following criticism with clarity and force:

Unfortunately much writing and rhetoric on rights heedlessly proclaims universal rights to goods or services, and in particular 'welfare rights', as well as to [ESCR], without showing what connects each presumed right-holder to some specified obligation-bearer(s), which leaves the content of these supposed rights wholly obscure Some advocates of universal economic, social and cultural rights go no further than to emphasize that they can be institutionalized, which is true. But the point of difference is that they must be institutionalized: if they are not there is no right.

In responding to this criticism, we have to invoke the understanding ... that obligations can be both perfect and imperfect. Even the classical 'first-generation' rights, like freedom from assault, can be seen as imposing imperfect obligations on others ...¹⁶⁷

Indeed, the supportive activities of social organizations are often aimed precisely at institutional change, and the activities are plausibly seen as part of imperfect obligations that individuals and groups have in a society where basic human rights are violated To deny the ethical status of these claims would be to ignore the reasoning that fires these constructive activities, including working for institutional changes

The 'feasibility critique' ... proceeds from the argument that even with the best of efforts, it may not be feasible to realize many of the alleged economic and social rights for all Maurice Cranston puts the argument thus:

The traditional political and civil rights are not difficult to institute. For the most part, they require governments, and other people generally, to leave a man alone The problems posed by claims to economic and social rights, however, are of another order altogether. How can the governments of those parts of Asia, Africa, and South America, where industrialization has hardly begun, be reasonably called upon to provide social security and holidays with pay for millions of people who inhabit those places and multiply so swiftly?

Is this apparently plausible critique persuasive? I would argue that it is based on a confounding of the content of what an ethically acknowledged right must demand [H]uman rights advocates want the recognized human rights to be maximally realized. The viability of this approach does not crumble merely because further social changes may be needed at any point of time to make more and more of these acknowledged rights fully realizable and actually realized.

Indeed, if feasibility were a necessary condition for people to have any rights, then not just social and economic rights, but all rights — even the right to liberty — would be nonsensical, given the infeasibility of ensuring the life and liberty of all against transgression Non-realization does not, in itself, make a claimed right a non-right. Rather, it motivates further social action. The exclusion of all

¹⁶⁷ For more detail on 'imperfect' obligations, see *ibid.*, 373–74.

economic and social rights from the inner sanctum of human rights, keeping the space reserved only for liberty and other first-generation rights, attempts to draw a line in the sand that is hard to sustain.

...

QUESTIONS

1. The position outlined by Neier seems to track existing United States domestic policy approaches closely. Does this make it more or less convincing from a human rights perspective? Does he effectively exclude the recognition of all ESR?
2. Based on the preceding readings, how would you identify the salient distinctions between civil and political and ESR? How useful is it to think in terms of rights versus needs, negative versus positive, individual versus collective, determinate versus open textured, law versus policy?
3. Does Griffin's theory of agency provide a satisfactory basis for a theory of ESR? What about Nickel's reliance upon subsistence and human dignity?

C. THE RELATIONSHIP BETWEEN THE TWO SETS OF RIGHTS

The interdependence of the two categories of rights has always been part of UN doctrine. The UDHR of 1948 included both categories without any sense of separateness or priority. The Preamble to the ICESCR, in terms mirroring those used in the ICCPR, states that 'in accordance with the Universal Declaration ..., the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [ESCR], as well as his [CPR]'. The 1993 Vienna World Conference expressed the relationship by saying that all rights are 'indivisible and interdependent and interrelated'.

The interdependence principle, apart from its use as a political compromise between advocates of one or two covenants, reflects the fact that the two sets of rights can neither logically nor practically be separated in watertight compartments. Similarly, a given right might fit equally well within either covenant, depending on the purpose for which it is declared. Some illustrations follow:

- (1) The right to form trade unions is contained in the ICESCR, while the right to freedom of association is recognized in the ICCPR.
- (2) The ICESCR recognizes various 'liberties' and 'freedoms' in relation to scientific research and creative activity.
- (3) While the right to education and the parental liberty to choose a child's school are dealt with in the ICESCR (Art. 13), the liberty of parents to choose their child's religious and moral education is recognized in the ICCPR (Art. 18).
- (4) The prohibition of discrimination in relation to the provision of, and access to, educational facilities and opportunities can be derived from both Article 2 of the ICESCR and Article 26 of the ICCPR.
- (5) Even the European Convention on Human Rights, which is generally considered to cover only CPR issues, states (in Art. 2 of Protocol 1) that 'no person shall be denied the right to education'.

While the claim of ‘indivisibility’ is not easy to prove empirically,¹⁶⁸ demonstrating ‘interdependence’ is more straightforward. The following report highlights some of the links between the denial of ESR and of CPR.

**PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND
HUMAN RIGHTS ON HIS MISSION TO THE UNITED STATES OF AMERICA
UN DOC. A/HRC/38/33/ADD.1 (2018)**

...

7. [The International Monetary Fund’s assessment of the United States economy in 2017 was that] it “is delivering better living standards for only the few”, and that “household incomes are stagnating for a large share of the population, job opportunities are deteriorating, prospects for upward mobility are waning, and economic gains are increasingly accruing to those that are already wealthy”.

...

19. In a democracy, the task of government should be to facilitate political participation by ensuring that all citizens can vote and that their votes will count equally. However, in the United States there is overt disenfranchisement of more than 6 million felons and ex-felons, which predominantly affects Black citizens since they are the ones whose conduct is often specifically targeted for criminalization. In addition, nine states currently condition the restoration of the right to vote after prison on the payment of outstanding fines and fees. A typical outcome is that seen in Alabama, where a majority of all ex-felons cannot vote.

20. Then there is covert disenfranchisement, which includes the dramatic gerrymandering of electoral districts to privilege particular groups of voters, the imposition of artificial and unnecessary voter identification requirements, the blatant manipulation of polling station locations, the relocation of Departments of Motor Vehicles’ offices to make it more difficult for certain groups to obtain identification, and the general ramping up of obstacles to voting, especially for those without resources. The net result is that people living in poverty, minorities and other disfavoured groups are being systematically deprived of their right to vote.

21. It is thus unsurprising that the United States has one of the lowest turnout rates in elections among developed countries ...

...

33. Calls for welfare reform take place against a constant drumbeat of allegations of widespread fraud in the system. Government officials warned the Special Rapporteur that individuals are constantly coming up with new schemes to live high on the welfare hog, and that individual states are gaming the welfare system to cheat the federal Government. The contrast with tax reform is instructive. In the tax context, immense faith is placed in the goodwill and altruism of the corporate beneficiaries, while with welfare reform the opposite assumptions apply. The reality, of course, is that there are good and bad corporate actors and there are good and bad welfare claimants. But while funding for the Internal Revenue Service to audit wealthy taxpayers has been reduced, efforts to identify welfare fraud are being greatly intensified. Revelations of widespread tax avoidance by companies and high-wealth individuals draw no rebuke, only acquiescence and the maintenance of the loopholes and other arrangements designed to facilitate such arrangements. But revelations of food stamps being used for purposes other than staying alive draw howls of outrage from government officials and their media supporters.

...

44. In many cities, homeless persons are effectively criminalized for the situation in which they find themselves. Sleeping rough, sitting in public places, panhandling, public urination and myriad other offences have been devised to attack the “blight” of homelessness. The criminalization of homeless individuals in cities that provide almost zero public toilets seems particularly callous. ...

¹⁶⁸ See J. Nickel, ‘Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights’, 30 *Hum. Rts. Q.* (2008) 984.

45. Ever more demanding and intrusive regulations lead to infraction notices for the homeless, which rapidly turn into misdemeanours, leading to warrants, incarceration, unpayable fines and the stigma of a criminal conviction that in turn virtually prevents subsequent employment and access to most housing. Yet the authorities in cities such as Los Angeles and San Francisco often encourage this vicious circle. ... Homelessness on this scale ... reflects political choices to see the solution as law enforcement rather than adequate and accessible low-cost housing, medical treatment, psychological counselling and job training. ...

...

47. In many cities and counties, the criminal justice system is effectively a system for keeping the poor in poverty while generating revenue to fund not only the justice system but many other programmes. The use of the legal system to raise revenue, not to promote justice, as was documented so powerfully in a 2015 report on Ferguson, Missouri by the Department of Justice, is pervasive around the country.

48. So-called fines and fees are piled up so that low level infractions become immensely burdensome, a process that affects only the poorest members of society, who pay the vast majority of such penalties. Driving licences are also commonly suspended for a wide range of non-driving related offences, such as a failure to pay fines. This is a perfect way to ensure that the poor, living in communities that have steadfastly refused to invest in serious public transport systems, are unable to earn a living that might have helped to pay the outstanding debt. Two paths are open: penury, or driving illegally, thus risking even more serious and counterproductive criminalization.

...

52. Solutions to major social challenges in the United States are increasingly seen to lie with privatization, especially in the criminal justice system. Bail bond corporations, which exist in only one other country in the world, precisely because they distort justice, encourage excessive and often unnecessary levels of bail, and lobby for the maintenance of a system that by definition penalizes the middle class and the poor.

53. In some states, minor offences are routinely punished by placing the offender on probation, overseen by a for-profit corporation, entirely at the expense of the usually poor offender. Those who cannot pay are subject to additional fees, supervision and testing. Similarly, in 26 states judges issue arrest warrants for alleged debtors at the request of private debt collectors, thus violating the law and human rights standards. The practice affects primarily the poor by subjecting them to court appearances, arrest warrants that appear on background checks, and jail time, which interfere with their wages, their jobs, their ability to find housing and more.

54. The United States remains a chronically segregated society. Blacks are 2.5 times more likely than Whites to be living in poverty, their infant mortality rate is 2.3 times that of Whites, their unemployment rate is more than double that for Whites, they typically earn only 82.5 cents for every dollar earned by a White counterpart, their household earnings are on average well under two thirds of those of their White equivalents, and their incarceration rates are 6.4 times higher than those of Whites. These shameful statistics can only be explained by long-standing structural discrimination on the basis of race, reflecting the enduring legacy of slavery.

55. Ironically, politicians and mainstream media portrayals distort this situation in order to suggest that poverty in America is overwhelmingly Black, thereby triggering a range of racist responses and encouraging Whites to see poverty as a question of race. Too often the loaded and inaccurate message that parts of the media want to convey is “lazy Blacks sponge off hard-working Whites”.

...

57. ... The United States has the highest maternal mortality ratio among wealthy countries, and black women are three to four times more likely to die than White women. In one city, the rate for Blacks was 12 times higher than that for Whites.

...

66. In terms of welfare, the main responses [to the opioid crisis] have been punitive. States increasingly seek to impose drug tests on recipients of welfare benefits, with programmes that lead to expulsion from the programme for repeat offenders. Others have introduced severe punishments for pregnant women who abuse drugs. Medical professionals recognize that such policies are counterproductive,

highly intrusive and misplaced. The urge to punish rather than assist the poor often also has racial undertones, as in the contrast between the huge sentences handed down to those using drugs such as crack cocaine (predominantly Black) and those using opioids (overwhelmingly White).

D. 'AVAILABLE RESOURCES'

As already noted, one of the major distinctions between ESR and CPR is that obligations in relation to the former are limited to steps that can be taken within 'available resources'. No equivalent limitation is mentioned in the ICCPR, leading many experts to suggest that the realization of CPR is therefore not resource contingent. As a result, it is often argued that while wealthy industrialized countries may be able to afford policies designed to protect ESR, most developing countries cannot. For example, Maurice Cranston has written that: '[f]or a government to provide social security ... it has to have access to great capital wealth The government of India, for example, simply cannot command the resources that would guarantee' each Indian an adequate standard of living.¹⁶⁹ A closely related issue concerns trade-offs. It is argued that more money spent on health inevitably means less for education, or water, or food etc. For many critics it follows that, in the absence of large-scale international aid or of rapid domestic economic growth (or both), the government's hands are tied and little can be expected of it in response to its obligations under the Covenant. Pressures to reduce the size of the public sector, to privatize various functions previously performed by governments, and to stimulate growth by reducing taxes, all render governments less able to accept responsibility for ESR.

Before focusing only on ESR, it is useful to reflect further on the resource dimensions of CPR. In principle, the issue does not arise because the relevant obligation — to respect and ensure — is not made subject to any qualifications as to resources. But in reality, resources are always relevant in at least some respects. As noted earlier, Roth argues that ESR 'shortcomings [are] largely a problem of distributive justice', unless there is arbitrary or discriminatory government conduct. He cites a government's failure to provide universal primary education as a classic case, because 'there is not enough money to go around, so governments cannot provide education to all children.' But he also notes (at 65) that:

... similar tradeoffs of scarce resources can arise in the realm of [CPR]. Building prisons or creating a judicial system can be expensive. However, my experience has been that international human rights organizations implicitly recognize these tradeoffs by avoiding recommendations that are costly. For example, Human Rights Watch in its work on prison conditions routinely avoids recommending large infrastructure investments. Instead, we focus on improvements in the treatment of prisoners that would involve relatively inexpensive policy changes.

But what Roth terms 'distributive justice' problems also arise in relation to CPR. Consider the question of how much funding to put into a judicial system, or a police service, or how elaborate and accessible arrangements for voting will be. Each of these can be funded more or less generously, and the decision will generally be made in light of the available resources, rather than being determined solely in light of an evaluation of the ideal level of supply. Moreover, treating 'distributive justice' issues as off-limits for human rights analysis effectively locks in the status quo and makes it impossible for deep-rooted issues of economic and social injustice to be addressed within the human rights framework.¹⁷⁰

¹⁶⁹ 'Human Rights: Real and Supposed', in D. Raphael (ed.), *Political Theory and the Rights of Man* (1967) 43, at 51.

¹⁷⁰ See generally, E. Pribytkova, 'Are There Global Obligations to Assist in the Realization of Socio-Economic Rights?', 54, *N.Y.U. J. Int'l L. & Pol.* (2022) 379.

The Response of the UN Committee on ESCR

The debates over available resources and progressive realization have been central to much of the work of the Committee on ESCR. In 1990, it adopted a broad-ranging General Comment that laid the groundwork for its overall approach. This General Comment No. 3 has subsequently been invoked by many courts around the world. In 1999, the Committee elaborated upon the steps that should be taken by a state in a situation in which available resources are clearly inadequate to enable implementation of the right to primary education. And in 2007 the Committee, in response to calls that it should reassure governments and others that it would adopt a measured approach to the question of available resources if a complaints procedure were to be adopted in the form of an Optional Protocol, laid out the factors that it would take into account. Excerpts from these three statements, and another on social security, follow.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 3: THE NATURE OF STATES PARTIES OBLIGATIONS, 1990

1. Article 2 ... describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result[W]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, ... is the ‘undertaking to guarantee’ that relevant rights ‘will be exercised without discrimination ...’.

2. The other is the undertaking in article 2(1) ‘to take steps’, which in itself, is not qualified or limited by other considerations [W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be ‘all appropriate means, including particularly the adoption of legislative measures’. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. ...

4. ... [H]owever, the adoption of legislative measures ... is by no means exhaustive of the obligations of States parties. Rather, the phrase ‘by all appropriate means’ must be given its full and natural meaning [T]he ultimate determination as to whether all appropriate measures have been taken remains for the Committee to make.

...

7. Other measures which may also be considered ‘appropriate’ ... include, but are not limited to, administrative, financial, educational and social measures.

...

9. ... The concept of progressive realization constitutes a recognition of the fact that full realization of all [ESCR] will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the [ICCPR] which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être* of the Covenant which is to establish clear

obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified

10. ... [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. ... [T]he obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints

12. Similarly, the Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

...

**COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 11:
PLANS OF ACTION FOR PRIMARY EDUCATION,
1999**

1. Article 14 of the [ICESCR] requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all

...

6. *Compulsory*. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State is entitled to treat as optional the decision as to whether the child should have access to primary education

7. *Free of charge*. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-base basis

8. *Adoption of a detailed plan*. The State party is required to adopt a plan of action within two years

9. *Obligations*. A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way,

there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources. By the same token, and for the same reason, the references to ‘international assistance and cooperation’ in articles 2.1 and 23 of the Covenant are of particular relevance in this situation. Where a State party is clearly lacking in the financial resources and/or expertise required to ‘work out and adopt’ a detailed plan, the international community has a clear obligation to assist.

10. Progressive implementation Unlike the provision in article 2.1, however, article 14 specifies that the target date must be ‘within a reasonable number of years’ and moreover, that the time-frame must ‘be fixed in the plan’. In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan

**COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AN EVALUATION OF THE
OBLIGATION TO TAKE STEPS TO THE ‘MAXIMUM OF AVAILABLE RESOURCES’ UNDER AN
OPTIONAL PROTOCOL TO THE COVENANT:
STATEMENT UN DOC. E/C.12/2007/1 (2007)**

...

8. In considering a communication concerning an alleged failure of a State party to take steps to the maximum of available resources, the Committee will examine the measures that the State party has effectively taken, legislative or otherwise. In assessing whether they are “adequate” or “reasonable”, the Committee may take into account, inter alia, the following considerations:

- (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
- (b) Whether the State party exercised its discretion in a non-discriminatory and nonarbitrary manner;
- (c) Whether the State party’s decision (not) to allocate available resources was in accordance with international human rights standards;
- (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
- (e) The time frame in which the steps were taken;
- (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were nondiscriminatory, and whether they prioritized grave situations or situations of risk.

9. The Committee notes that in case of failure to take any steps or of the adoption of retrogressive steps, the burden of proof rests with the State party to show that such a course of action was based on the most careful consideration and can be justified by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources.

10. Should a State party use “resource constraints” as an explanation for any retrogressive steps taken, the Committee would consider such information on a country-by-country basis in the light of objective criteria such as:

- (a) The country’s level of development;
- (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
- (c) The country’s current economic situation, in particular whether the country was undergoing a period of economic recession;

- (d) The existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
- (e) Whether the State party had sought to identify low-cost options; and
- (f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.

...

**COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 19:
THE RIGHT TO SOCIAL SECURITY
(ART. 9), 2008**

[While this statement is directed specifically at possible cuts in social security benefits, the Committee also applies the same approach in relation to other ESR under the Covenant.]

...

42. There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.¹⁷¹

QUESTIONS

1. Could it reasonably be argued that virtually every country could afford to provide universal primary education and access to primary health care if it wished to do so?
2. Do the ESCR Committee's General Comments reflect a workable balance that resolves the objections of ESR critics to the effect that such rights are unaffordable if taken seriously and almost meaningless if the emphasis is placed on resources which will never be sufficiently 'available'? How workable are the criteria that the Committee proposes to apply in examining a complaint alleging that available resources have not been used to achieve respect for a given right?

¹⁷¹ For the Committee's approach to social security under the Optional Protocol, see Communication No. 1/2013 *López Rodríguez v. Spain*, Communication No. 1/2013 (November 2013).

E. CONSTITUTIONS, COURTS AND OTHER REMEDIES

Since the 1990s, ESR have assumed major constitutional significance in many countries through: (1) explicit constitutional recognition; (2) judicial interpretation of CPR to encompass at least some ESR; and (3) judicial willingness to treat previously non-justiciable ESR provisions as being justiciable.

A survey by Evan Rosevear, Ran Hirschl and Courtney Jung, in ‘Justiciable and Aspirational Economic and Social Rights in National Constitutions’, in Katharine Young (ed.), *The Future of Economic and Social Rights* (2019) 37, concluded that:

... Nearly all new democracies, and several established ones, have included some form of ESRs in their constitutions Almost all constitutions also include a generic protection of ‘the right to life’ or ‘human dignity’, either in lieu of, or in addition to, a set of concrete ESRs. More than three-quarters of the world’s constitutions now contain at least one formally justiciable ESR, only 17 do not incorporate at least one justiciable or aspirational ESR, and the majority of constitutions include nine or more. Indeed, such rights are now so commonly enshrined that they may reasonably be seen as a defining characteristic of third wave constitutions.

...

Only four constitutions – those of Kyrgyzstan, Myanmar, Sierra Leone and Thailand – had fewer ESRs in 2016 than they did in 2000, while 51 constitutions had more.

...

The rights ... [to] education, health, child protection and social security ... were the most commonly enshrined rights in 2000 All four ... are now present in at least two-thirds of all national constitutions. These rights are also much more likely to be justiciable in 2016 than they were in 2000.

Rights to a healthy environment and environmental protection have also increased disproportionately since 2000 [and] ... are now present in more than two-thirds of national constitutions. ...

...

... Whereas a right to housing is now present in 42 percent of constitutions, a right to land is present in only 14 percent. ...

...

... Civil law constitutions have been significantly more likely to entrench ESRs than common law constitutions, and recent changes confirm the distinction. ...

Despite these impressive statistics, the authors acknowledge that ‘there are multiple paths and trajectories to the realization (or neglect) of ESRs, of which constitutionalization is only one aspect.’ This is borne out by the fact that while an increasingly rich ESR case law has emerged, it has come mainly from just a handful of jurisdictions such as Brazil, Colombia, India, Kenya and South Africa.

The accountability of governments and other entities, as well as the availability of a remedy in cases of a violation, are indispensable elements of international human rights law. Under Article 8 of the UDHR, ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’ The Declaration recognizes ESR and there is nothing to indicate that this provision was intended to apply only to CPR. There is, however, nothing in the ICESCR that is equivalent to the requirement in the ICCPR that states parties

‘develop the possibilities of judicial remedy’ (Art. 2(3)(b)). This lacuna seems to have encouraged many governments and commentators to assume that traditional legal remedies such as court actions are either inappropriate or at best impracticable for the vindication of ESR.

This section looks at ESR in constitutions and considers the types of remedies considered by courts. A key issue is justiciability (i.e., the ability of courts to provide a remedy for aggrieved individuals claiming a violation of those rights) which many observers continue to see as the essential hallmark of a ‘real’ human right. First, we consider the extent to which states are required by international law to provide constitutional recognition of ESR or specific types of remedies in relation to them.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 9: DOMESTIC APPLICATION OF THE COVENANT, 1998

A. The duty to give effect to the Covenant in the domestic legal order

1. ... The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring governments to do so ‘by all appropriate means’, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

2. But this flexibility co-exists with the obligation upon each State Party to use *all* the means at its disposal to give effect to the rights recognised in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the norms themselves must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

...

C. ... Legal or judicial remedies?

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate Any such administrative remedies should be accessible, affordable, timely, and effective [But] whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Justiciability

10. In relation to [CPR], it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to [ESCR]. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus in General Comment No. 3 it cited, by way of example: articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3).¹⁷² It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have

¹⁷² These refer respectively to: equal rights of men and women (Art. 3), equal pay for equal work (Art. 7(a)(i)), the right to form and join trade unions and the right to strike (Art. 8), the right of children to special protection (Art. 10(3)), the right to free, compulsory, primary education (Art. 13(2)(a)), the liberty to choose a non-public school (Art. 13(3)), the liberty to establish schools (Art. 13(4)), and the freedom for scientific research and creative activity (Art. 15(3)).

important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

ESR Litigation in Specific Constitutional Settings

When reading these cases from different jurisdictions, keep in mind the following questions:

- (a) are ESR formulated in a manner that is sufficiently precise to enable judges to apply them in concrete cases?;
- (b) to the extent that such cases will involve decisions about public spending priorities, should such decisions remain the exclusive domain of the executive and legislature?;
- (c) are judges well suited in terms of their expertise, social and political background and the facilities available to them to make such decisions?; and
- (d) are there creative approaches to remedies that courts could, and should, develop in relation to ESR?

1. India: Public Interest Litigation

In the Indian Constitution of 1950 the concept of ‘directive principles of state policy’, first used in the 1937 Irish Constitution, was used in contra-distinction to that of ‘fundamental rights’. They were considered to be distinct from, and usually inferior in status to, rights that appear in the constitution without the qualification ‘directive’. They appear in different forms in diverse constitutions worldwide,¹⁷³ although the Indian approach is the most significant. The Constitution contains a chapter dealing with ‘fundamental rights’ which consists largely of civil and political rights enforceable in the courts, and another chapter dealing with ‘directive principles of state policy’. Some illustrations from the Constitution follow.

Part III. Fundamental Rights

...

Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

...

Part IV. Directive Principles of State Policy

...

Article 37. The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 39. The State shall, in particular, direct its policy towards securing:

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

¹⁷³ See generally T. Khaitan, ‘Constitutional Directives: Morally-Committed Political Constitutionalism’, 82 *Modern L. Rev.* (2019) 603.

- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

...

Article 41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

...

Article 47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties

Over the years the Indian courts have redefined the relationship between fundamental rights and directive principles by integrating the two categories and making the latter potentially enforceable. This has largely been done in the context of so-called ‘Public Interest Litigation’ (PIL). PIL was pioneered by the Supreme Court, partly to regain popular legitimacy in the wake of its initial failure to reign in the emergency declared by Indira Gandhi in 1975, which involved severe repression of civil liberties:

... the court relaxed the rules of standing and pleading before the court. Thus, any public-spirited individual or entity could bring a case ... for the enforcement of a fundamental right. In addition, the court dispensed with the procedural formalities required to bring a petition, and converted all sorts of instruments (including letters written to the judges, postcards addressed to the court, and newspaper articles highlighting rights violations) to writ petitions. The court also expanded its own powers to develop a range of remedies that at times involved taking control over the activities of other agencies.¹⁷⁴

The following materials provide a sampling of some landmark PIL cases.

OLGA TELLIS V. BOMBAY MUNICIPAL CORPORATION
SUPREME COURT OF INDIA, AIR 1986 SC 18 (10 JULY 1985)

CHANDRACHUD CJ (FOR THE COURT):

1. These Writ Petitions portray the plight of lakhs [hundreds of thousands] of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city Those who have made pavements their homes exist in the midst of filth and squalor, which has to

¹⁷⁴ N. Jain, ‘The Democratizing Force of International Law: Human Rights Adjudication by the Indian Supreme Court’, in A. Roberts et al. (eds.), *Comparative International Law* (2018) 319.

be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company

It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Art. 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood

...

32. ... For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Art. 21 is wide and far-reaching That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities

33. Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. [Reference is made to Arts. 41 and 37, noted above] ... The Principles contained in Arts. 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life

...

35 ... It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Commonsense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants.

...

37. Two conclusions emerge from this discussion: one, that the right to life which is conferred by Art. 21 includes the right to livelihood and two, that it is established that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. By Art. 21, such deprivation has to be according to procedure established by law

...

57. To summarise, ... pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate [sites] at Malavani or at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for the resettlement: slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites or accommodation will be provided to them In order to minimise the hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season

Later Indian Cases

In subsequent cases the Court expanded its interpretation of Article 21 in relation to a wide range of social sectors, including health. In *Rakesh Chandra Narayan v. State of Bihar* (1989 AIR 348) a PIL complaint alleged abusive conditions at a mental hospital in Bihar. At the Court's request, a Chief Judicial Magistrate, visited and reported that only nine out of 16 medical officers had been appointed, that there was an acute water shortage, none of the toilets functioned, there was no additional light or

ventilation provided, there were 300 beds for 1,580 patients, that meals were wholly inadequate and medicines were in very short supply. In response the Court requested the Bihar authorities to put forth a 'definite scheme for improving the working of the Institution'. The Health Secretary of Bihar subsequently filed a report that the Court found to be entirely inadequate. It then ordered that a series of specific measures be taken. Eighteen months later it observed that the responses of the authorities 'have not given us the satisfaction of the touch of appropriate sincerity in action' and that they had been 'half-hearted'. It concluded that it could not, 'with any sense of confidence ... leave the management to the Health Department of the State of Bihar'. While recognizing the difficulty involved in managing a hospital located 1,000 kilometres away, the Court nonetheless appointed a Committee of Management 'with full powers to look after all aspects of the institution', prescribed its exact composition, scheduled its meetings and kept the case open.

In *Consumer Education & Research Centre v. Union of India* ((1995) 3 SCC 42) the Court examined a PIL petition complaining of the hazards faced by workers in asbestos-related industries. The petition cited International Labour Organization standards and detailed the medical consequences of the exposure. The Court took the opportunity to expand its definition of the right to life and to make a detailed remedial order:

26. The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker [sic] would lead life of misery

27. Therefore, we hold that right to health, medical aid to protect the health and vigour to a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person.

...

33. The writ petition is, therefore, allowed. All the industries are directed (1) To maintain and keep maintaining the health record of every worker up to a minimum period of 40 years ...; (2) The Membrane Filter test, to detect asbestos fibre should be adopted by all the factories ...; (3) All the factories ... are directed to compulsorily insure health coverage to every worker; (4) The Union and the State Governments are directed to review the standards of permissible exposure ... in tune with ... international standards ...; (6) [all the relevant workers shall be medically examined and, if found to be suffering from an occupational health hazards, shall be compensated 100,000 rupees.]

In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* ((1996) 4 SCC 37) the petitioner fell off a train and suffered serious head injuries. He was taken by ambulance to a succession of hospitals and turned away, either because the hospital did not have the necessary facilities, or because no free beds were available. He ended up at an expensive private hospital. The Court found a violation of Article 21:

The Constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state the primary duty of the Government is to secure the welfare of the people [which includes providing] adequate medical facilities ... by running hospitals and health centres Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment [violates] Article 21

The Court ordered measures specific to the applicant, but also remedial measures designed to ensure that in future ‘proper medical facilities are available for dealing with emergency cases’. They included ordering additional emergency facilities at Primary Health Centres, the upgrading of local hospitals, improved ambulance facilities and preparation to ensure that medical personnel ‘are geared to deal with a larger number of patients needing emergency treatment on account of higher risk of accidents on certain occasions and in certain seasons.’ In considering the financial implications of these orders, it stated:

It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view. It is necessary that a time-bound plan for providing these services should be chalked out ... and steps should be taken to implement the same

Three areas in which the Court’s activism bore important constitutional and legislative fruit are education, food and the environment. In 1992-93 the Court derived the right to education from the right to life and recognized a fundamental right to free education for children up to 14 years old.¹⁷⁵ This in turn led to an amendment to the Constitution (the 86th), recognizing such a right for children between six and 14 years. Some commentators have stressed the importance of these developments,¹⁷⁶ while others have noted that ‘educational indicators remain dismal’.¹⁷⁷

Similar ambivalence can be found in the literature relating to the use of PIL in relation to environmental issues. Arpitha Kodiveri, in ‘Biodiversity Litigation in India: A Typology of Cases and Varieties of Environmentalism’ in Guillaume Futhazar et al. (eds.), *Biodiversity Litigation* (2022) 177 acknowledges that PIL ‘reshaped the nature of environmental jurisprudence in India and infused it with many international legal principles, such as the polluter pays principle, public trust doctrine, and international biodiversity law. These cases also changed the legal landscape on which future environmental laws were made.’ But some of the cases came at the expense of those living in poverty, whose rights were ‘placed on the backburner and ... replaced by bourgeois environmentalism and exclusionary conservation’ orders.

Perhaps the most consequential PIL case was *People’s Union for Civil Liberties v. Union of India & Ors.* ((2004) 12 SCC 108) which started with a PIL Writ Petition (No. 196 of 2001) invoking Articles 21 and 47 of the Constitution. It followed deaths from starvation in Rajasthan state, even though the government held ample grain supplies at the time. The Court issued a series of orders over many years, deriving a right to food from the right to life, and obtaining regular factual updates from Commissioners it appointed for this purpose. It ordered the activation of the Famine Code for three months; a doubling of the grain allocation under the food for work scheme; required ration shops to stay open and provide the grain to families below the poverty line at the set price; and the implementation of a mid-day meal scheme in schools.¹⁷⁸

The 2013 National Food Security Act reflected the extent to which the People’s Union for Civil Liberties (PUCL) litigation had affected mainstream political discourse, although the Act assiduously avoided any specific reference to ‘the right to food’. Its stated aim is ‘to provide for food and

¹⁷⁵ Mohini Jain v. State of Karnataka (1992) AIR 1858 and J P Unnikrishnan v. State of Andhra Pradesh, 1993 SCC (1) 645.

¹⁷⁶ F. Matthey-Prakash, *The Right to Education in India: The Importance of Enforceability of a Fundamental Right* (2019)

¹⁷⁷ A. Sengupta et al., ‘Legislating Human Rights: Experience of the Right to Education Act in India’, in K. Young (ed.), *The Future of Economic and Social Rights* (2019) 158.

¹⁷⁸ L. Birchfield and J. Corsi, ‘Between Starvation and Globalization: Realizing the Right to Food in India’, 31 *Mich. J. Int’l L.* (2010) 691.

nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity'. Although the Act's impact has been mixed,¹⁷⁹ the ramifications of the PUCL litigation continue.

DIPIKA JAGATRAM SAHANI V. UNION OF INDIA AND OTHERS
SUPREME COURT OF INDIA (13 JANUARY 2021)

ASHOK BHUSHAN, J.

1. This writ petition has been filed as a Public Interest Litigation under Article 32 of the Constitution of India questioning the closure of the Anganwadi Centres across the country. ... [These] Centres [provide] supplementary nutrition to pregnant women, lactating mothers, adolescent girls and children up to the age of 6 years [as well as growth monitoring and counseling, pre-school education, immunization and referral services.] ... [The petitioners sought, inter alia]:

a) [A] writ of mandamus directing the Union of India and all States and Union Territories to forthwith reopen all the Anganwadi Centres in the country and provide Anganwadi services as before the lockdown and in accordance with Sections 4 to 7 of the National Food Security Act, 2013.

...

2. ... Article 47 of the Constitution ... provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. The Government of India with the above objective launched a welfare scheme, namely, Integrated Child Development Services Scheme in the year 1975. ... This Court in [the 2001 PUCL case], had issued various directions for protection of right to food of the poor and the underprivileged sections including children and women. ...

3. The Parliament enacted the National Food Security Act, 2013

...

7. After spread of ... COVID-19, Anganwadi Centres were closed throughout the country in March, 2020. The distribution of special nutrition and other benefits to be provided for beneficiaries being essential services were permitted to be conducted by Anganwadi staff by resorting to Take Home Ration.

...

14. Shri Colin Gonsalves, ... counsel ... for the petitioner contends that ... after lockdown came to an end [and] due to non-opening of Anganwadi in various States beneficiaries, children pregnant women and lactating mothers are suffering. The pandemic has caused severe strain on the employment and means of livelihood of a large sections of the society especially marginal sections, who require immediate extension of all benefits as envisaged in the Scheme. ... [D]ue to non-providing of hot cooked meals to children up to the age of six years and children who are affected of malnutrition .. are suffering which needs immediate attention and remedial action.

...

18. ... Government has a constitutional obligation to preserve human life. Good health of its citizens is its primary duty. International covenants also aim at highest attainable standards of physical and mental health. This is in interest of social justice. Inadequate supply of nutritious food to the citizens, more particularly to the children and the women shall affect their health. Therefore, the same shall be in violation of their fundamental right to health/right to live with dignity guaranteed under Article 21 of the Constitution of India.

19. The Centre as well as States are statutorily obliged to implement statutory obligation as imposed under Sections 4,5 and 6 of the Act, 2013. ...

...

¹⁷⁹ G. Dandurand, 'The Techno-politics of Human Rights: The Case of the National Food Security Act in India', 144 *Geoforum* (2023) 103819.

24. ... [S]everal States have taken decision to open Anganwadi Centres. ...

...

26. On the other hand, there are few States who have taken decision not to reopen Anganwadi Centres.

...

...

33. It is the obligation of the State to ensure that pregnant women, lactating mothers and children in the age of 3 to 6 years and children who suffer from malnutrition are provided their dues. ... All States/Union Territories should evolve an appropriate mechanism for supervision so that dues are received by beneficiaries for whom schemes are in place. It is for the State to secure health to its citizens as its primary duty. ...

34. ... We are of the view that unless there are any specific reasons for not opening of Anganwadi Centres, all Anganwadi Centres beyond the containment zones should be made functional by all the States/Union Territories at an early date. All States may review the situation and take positive decisions on or before 31.01.2021

RESPONSES TO INDIA'S PIL

Even *The Economist* magazine, long critical of ESR, was hesitant in 2010 to dismiss entirely the Indian Supreme Court's foray into social rights.¹⁸⁰ It drew attention to the risk of overburdening the state in areas where it has already failed, pointing out that '[o]ver 80% of health-care spending in India is in the private sector, ... yet any "right-to-health" legislation is likely to focus on non-functioning public clinics.' It conceded, however, that 'India's appetite for rights is the expression of a young democracy's hopes' which led them to conclude that 'India's crusading judges sometimes take on too much, but they have often held the government to account—and Indians like them for it.' It added, 'where it encourages the introduction of concrete reforms, rights talk means something'.

But much of the recent literature has been somewhat critical of the Court's approach. For example, Tarunabh Khaitan, in 'The Supreme Court as a Constitutional Watchdog' (2019) at 721 *Seminar* (2019) 22, at 23, suggests that India's is 'arguably the world's most powerful apex court' with 'power to seriously impact the lives of a billion-plus Indians'. He acknowledges that through PIL 'it has made decisions of far-reaching import in the areas of housing, environment, food security, corruption, transparency, sexual harassment, urban pollution, forest rights, and economic policy.' But he is critical of the way in which the Court has done this:

The SCI's approach to legal reasoning and interpretation ... is astonishingly undisciplined. Relevant, even binding, precedent is far too often simply ignored. Relevant legislative or even constitutional provisions are sometimes not even discussed in the judgement. ...

[A recent] study shows that a vast majority of the SCI's judgments neither cite previous cases, nor are they cited by later cases. All too frequently, the actual prayers of the litigants are ignored, and the court gives orders that no party before it prayed for – sometimes against persons who weren't even heard by the court.

...

... [P]oorly reasoned decisions create multiple, mutually contradictory, precedents. ... [B]y making judicial outcomes extremely unpredictable [the Court] incentivizes parties to try their luck and litigate rather than settle out of court. ... It is inevitable that the system will, sooner or later, implode.

Pritam Baruah, in 'Human Dignity in Indian Constitutional Adjudication', in J. Chia-Shin Hsu (ed.), *Human Dignity in Asia: Dialogue between Law and Culture* (2022) 21 argues that relying upon the concept

¹⁸⁰ 'The Rights Approach: India's Rights-based Activism is Bound to Yield Less than it Promises', *The Economist* (18 March 2010).

of dignity ‘was almost axiomatic for any discussion on the right to life’ by the Court. Relatedly, ‘every violation of liberty, equality, or dignity perhaps involves all three’ in its analyses. To justify its ‘uninhibited’ reliance on the concept, the Court cites ‘a wide range of academic literature on dignity that has emerged in law and philosophy’. Baruah warns that this approach has failed to clarify how the Court understands or applies ‘dignity’, and may encourage judges to rely overmuch on extra-legal concepts, such as moral and political values, in their decision-making. He attributes the problem to the Court’s heavy workload, the convenient indeterminacy of the relevant concepts, and the judges’ lack of philosophical training.

Finally, Neha Jain, above, is especially critical of the Court’s invocation of international law:

The court has taken up the causes of the oppressed and the voiceless, but always with an eye to its own political aspirations and authority. Thus, its decisions “seek to provide a workable *modus vivendi* rather than to articulate high values.”

The court has cultivated an image of itself as an organ for establishing government accountability while embracing political accommodation. It has carefully avoided upsetting any major political players, and concentrated on political issues that are unlikely to directly threaten their interests.

...

... [T]he court’s innovative invocations of international law for myriad purposes—gap filling, interpretation, enlargement of the content of rights, chastisement of the other organs of government, supervision and monitoring of executive and legislative functions—may be inspired by distinctively domestic, and not entirely benevolent, aims. ...

... [The court] has expended little effort in explaining its judicial philosophy or the logic behind controversial uses of international law. Moreover, its pronouncements on the nature and derivation of customary international norms and on the effect of reservations to treaties betray a worrying incomprehension of international legal sources. ...

QUESTIONS

1. Does the Supreme Court’s expansion of the scope of Article 21 and its transformation of the legal status of the directive principles go too far? In what respects? Against which criteria would you assess the success of the ‘right to food’ case law?
2. In defending the Court’s approach, Gauri argues that critiques based on separation of powers arguments tend to assume that only one model is appropriate rather than recognizing ‘that courts may play a variety of roles in different settings.’¹⁸¹ And Landau concludes that in a society such as India, ‘more aggressive, unconventional enforcement strategies — especially the judicious use of structural injunctions — can more effectively target social rights interventions towards the poor’ than ‘weak-form’ or dialogue-based approaches to judicial review.¹⁸² What do you think makes India special in this regard, and does this mean that its experience is unhelpful for determining how other societies should approach ESR?
3. What approach has the Indian Court taken in determining the ‘available resources’? Does *The Economist*’s estimate that over 80 percent of health care spending in India occurs in the

¹⁸¹ V. Gauri, ‘Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving’, 1 *Indian J. L. & Econ.* (2010) 71.

¹⁸² D. Landau, ‘The Reality of Social Rights Enforcement’, 53 *Harr. Int’l. L. J.* (2012) 402, at 404.

private sector suggest that the Court is effectively imposing ever-more burdens on a sector that is already failing?

4. In 2012, the Indian Supreme Court held that there is a right to sleep.¹⁸³ It did so in a case in which over 1,000 police had forcibly evicted a group of more than 20,000 persons involved in what the police had deemed to be an unlawful assembly, protesting against government corruption. The police chose to act after midnight when all of the protesters had gone to sleep for the night. On what basis and under what circumstances do you think a right to sleep might reasonably be grounded in human rights law?

5. Are the critiques of PIL necessarily also a critique of the Court's social rights activism?

2. South Africa and Kenya

When South Africa's post-apartheid constitution was being debated, consideration was given to following the directive principles approach in relation to ESR. This was rejected, however, and full constitutional recognition was accorded to them. In the decades since, the South African jurisprudence has had a major impact on discussions of ESR globally, with many commentators arguing that the *Grootboom* and *TAC* cases in particular show the way forward for an effective and manageable approach to making these rights justiciable.¹⁸⁴

Kenya followed a similar road. When the country was under considerable pressure from highly divisive ethnic conflicts, it turned to the adoption of a 'transformative constitution', as the South African model has long been described. While the Kenyan Supreme Court was relatively slow to engage on ESCR issues, recent judgments have been important.

The materials below focus on some of the key cases from South Africa and an important Kenyan case on housing rights. They focus especially on questions relating to 'progressive realization, the 'availability of resources' and the most appropriate remedies in such cases.

Section 1

The Republic of South Africa is one sovereign democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
...

Section 7

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.
...

Section 10

Everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁸³ *In Re: Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary, Union of India & Ors*, Judgment of 23 February 2012.

¹⁸⁴ Two other notable ESR cases are *Khosa v. Minister for Social Development* 2004 (6) BCLR 569 (social security for non-citizens) and *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR 1268 (housing rights).

Section 11

Everyone has the right to life.

...

Section 26

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 27

(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Section 28

(1) Every child has the right:

...

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

...

Section 39

(1) When interpreting the Bill of Rights, a court, tribunal or forum:

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

...

SOOBRAMONEY V. MINISTER OF HEALTH (KWAZULU-NATAL)
CONSTITUTIONAL COURT OF SOUTH AFRICA, CASE CCT 32/97 (27 NOVEMBER 1997)

CHASKALSON P.:

[1] The appellant, a 41 year old unemployed man, is a diabetic who suffers from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke during 1996. In 1996 his kidneys also failed. Sadly his condition is irreversible and he is now in the final stages of chronic renal failure. His life could be prolonged by means of regular renal dialysis. He has sought such treatment from the renal unit of the Addington state hospital in Durban. The hospital can, however, only provide dialysis treatment to a limited number of patients. The renal unit has 20 dialysis machines available to it, and some of these machines are in poor condition Because of the limited facilities that are available for kidney dialysis the hospital has been unable to provide the appellant with the treatment he has requested.

[2] ... Additional dialysis machines and more trained nursing staff are required to enable it to do this, but the hospital budget does not make provision for such expenditure. The hospital would like to have its budget increased but it has been told by the provincial health department that funds are not available for this purpose.

[3] Because of the shortage of resources the hospital follows a set policy in regard to the use of the dialysis resources. Only patients who suffer from acute renal failure, which can be treated and remedied by renal dialysis are given automatic access to renal dialysis at the hospital. Those patients who, like the appellant, suffer from chronic renal failure which is irreversible are not admitted automatically to the renal programme. A set of guidelines has been drawn up and adopted to determine which applicants who have chronic renal failure will be given dialysis treatment

[The opinion noted that the appellant did not qualify under the guidelines. He alleged that he could not afford treatment at private hospitals, and he sought a judicial order directing Addington Hospital to provide the necessary treatment. His application was dismissed, and he then applied for leave to appeal to the Constitutional Court. His claim was based on sections 27(3) and 11 of the 1996 Constitution. The Court stressed the great disparities in wealth in South Africa, and the deplorable conditions and poverty in which millions of people lived, including lack of access to adequate health facilities.]

...

[11] What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.

[14] Counsel for the appellant argued that section 27(3) should be construed consistently with the right to life entrenched in section 11 of the Constitution and that everyone requiring life-saving treatment who is unable to pay for such treatment herself or himself is entitled to have the treatment provided at a state hospital without charge.

[15] This Court has ... not yet been called upon to decide upon the parameters of the right to life or its relevance to the positive obligations imposed on the state under various provisions of the bill of rights. In India the Supreme Court has developed a jurisprudence around the right to life so as to impose positive obligations on the state in respect of the basic needs of its inhabitants Unlike the Indian Constitution ours deals specifically in the bill of rights with certain positive obligations imposed on the state, and where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith.

...

[17] The purposive approach [to constitutional interpretation] will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision 'a narrower or specific meaning' should be given to it.

[18] In developing his argument on the right to life counsel for the appellant relied upon ... *Paschim Banga Khet Mazdoor Samity and others v. State of West Bengal and another* ... [See above. The Court drew a strong distinction between the two cases. It concluded that the circumstances in that case made it] precisely the sort of case which would fall within section 27(3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilize his condition. The treatment was available but denied.

[19] In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to 'everyone' within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for [non-life threatening medical needs]. In my view much clearer language than that used in section 27(3) would be required to justify such a conclusion.

[20] Section 27(3) itself is couched in negative terms — it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.

[21] The applicant suffers from chronic renal failure. To be kept alive by dialysis he would require such treatment two to three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable. In my view section 27(3) does not apply to these facts.

[22] The appellant's demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of sections 27(1) and (2) and not section 27(3). These sections entitle everyone to have access to health care services provided by the state 'within its available resources'.

...

[24] At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public There are many more patients suffering from chronic renal failure than there are dialysis machines to treat such patients. This is a nation-wide problem and resources are stretched in all renal clinics throughout the land. Guidelines have therefore been established [and] ... were applied in the present case.

[25] ... It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally

...

[28] ... It is estimated that the cost to the state of treating one chronically ill patient by means of renal dialysis provided twice a week at a state hospital is approximately R60,000 per annum. If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment ... the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet.

[29] The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about [health care] funding These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

[30] ... The dilemma confronting health authorities faced with such cases was described by Sir Thomas Bingham MR in *R v. Cambridge Health Authority, ex parte B*:¹⁸⁵

... health authorities of all kinds are constantly pressed to make ends meet
Difficult and agonising judgments have to be made as to how a limited budget is
best allocated to the maximum advantage of the maximum number of patients.
That is not a judgment which the court can make.

[31] One cannot but have sympathy for the appellant and his family ... [b]ut the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security

The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

[37] ... The appeal ... is dismissed.

***GOVERNMENT OF SOUTH AFRICA V. GROOTBOOM*¹⁸⁶**
CONSTITUTIONAL COURT OF SOUTH AFRICA, CASE CCT 11/00 (4 OCTOBER 2000)

[Irene Grootboom and most other respondents (390 adults and 510 children) lived in a squatter settlement called Wallacedene. Their living conditions were 'lamentable': very low income population, overcrowded shacks (95 percent of which lacked electricity), no water or sewage or refuse removal services, the area partly waterlogged and dangerously close to a main thoroughfare. Many inhabitants who had applied for subsidized low-cost housing from the municipality had been on the waiting list for up to seven years.

Facing the prospect of indefinitely long and intolerable conditions, respondents began to move out of Wallacedene in September 1998, putting up shacks on vacant privately owned land (named 'New Rust') that was earmarked for eventual low-cost housing. Court proceedings brought by the owner resulted in an order of May 1999 instructing the sheriff to evict respondents and dismantle their shacks. The magistrate also ordered the parties and municipality to identify alternative land for permanent or temporary occupation by the New Rust residents. No mediation occurred, and respondents were evicted, their houses bulldozed and possessions destroyed. They then took shelter on the Wallacedene sports fields under such temporary structures as were feasible, at the time when winter rains began.

The High Court ordered the appellants to provide the respondents who were children and their parents with shelter. Its judgment stated that 'tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.' The appellants, representing all spheres of government responsible for housing (central government, province of the Western Cape and municipality), brought the present appeal to challenge that order.]

JUSTICE YACOUB [FOR THE COURT]:

¹⁸⁵ [1995] 2 All ER 129 (CA) at 137d–f.

¹⁸⁶ On *Grootboom* as a canonical case, see K. Young, 'The Canons of Social and Economic Rights', in S. Choudhry et al. (eds.), *Global Canons in an Age of Uncertainty: Debating Foundational Texts of Constitutional Democracy and Human Rights* (2024) Ch. 21.

[6] The cause of the acute housing shortage lies in apartheid.

[The High Court concluded that the respondents' challenge under section 26 failed, because the appellant had taken 'reasonable legislative measures and other measures within its available resources to achieve the progressive realisation of the right to have access to adequate housing.' The Constitutional Court interpreted section 26 to impose certain obligations in this case. The following excerpts from Justice Yacoob's opinion concern only section 26.]

...

[20] ... Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case

...

ii) The relevant international law and its impact

[26] During argument, considerable weight was attached to the value of international law in interpreting section 26

[The Court turned to a discussion of the ICESCR and the work of the UN Committee on ESCR. The opinion emphasized Art. 11 (the right of everyone to an adequate standard of living ..., including adequate food, clothing and housing) and Art. 2 (States parties will take appropriate steps to ensure the realization of this right ... to the maximum of available resources etc.). The opinion drew particular attention to para. 10 of General Comment No. 3 (Sec. A, above) in relation to a minimum core obligation.]

[31] ... Each right has a "minimum essential level" that must be satisfied by the states parties Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.

[32] It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right

[33] ... [T]he real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable

iii) Analysis of section 26

...

[34] ... Subsections (1) and (2) are related and must be read together Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. ...

[35] ... A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society

[36] ... For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

[37] The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads

...

Reasonable legislative and other measures

[39] What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

...

[41] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable

[42] ... Mere legislation is not enough

...

[43] Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right

...

[46] ... Section 26 does not expect more of the state than is achievable within its available resources The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

...

[52] ... [T]here is no express provision [in the national housing programme] to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the [Housing] Act.

...

[66] ... The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.

...

[68] Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately

[69] In conclusion ... the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier

...

H. Evaluation of the conduct of the appellants towards the respondents

...

[88] ... The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt

...

[92] This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.

I. Summary and conclusion

...

[94] I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[95] ... [S]ection 26 does oblige the state to devise and implement a coherent, coordinated programme designed to meet its section 26 obligations. The programme that has been adopted ... fell short of the obligations imposed

...

TREATMENT ACTION CAMPAIGN V. MINISTER OF HEALTH **CONSTITUTIONAL COURT OF SOUTH AFRICA, CASE CCT 8/02 (5 JULY 2002)**

[The Treatment Action Campaign (TAC) was the lead applicant among various other civil society groups working on HIV/AIDS. The respondents were the national Minister of Health and the various provincial authorities. The Court noted that the applicants' affidavits addressed the issues raised 'from a variety of specialised perspectives, ranging from paediatrics, pharmacology and epidemiology to public health administration, economics and statistics'.]

The Issues

[In their affidavit, the Applicants made various points, including: the catastrophic nature of the HIV/AIDS epidemic; mother-to-child HIV transmission had infected 70,000 children every year since 1998; Nevirapine significantly reduces the risk and 'is safe, of acceptable quality, and therapeutically efficacious'; the manufacturers have offered it free of charge to the South African government for five years; and while it is widely used in the private sector, the government has limited its availability to a few pilot sites, which number two per province. There follows a summary of the applicants' case.]

22.11 There is no rational or lawful basis for allowing doctors in the private sector to exercise their professional judgment in deciding when to prescribe Nevirapine, but effectively prohibiting doctors in the public sector from doing so.

22.12 ... [T]he government has failed over an extended period to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV.

...

22.14 This conduct of the government is irrational, in breach of the Bill of Rights, and contrary to the values and principles prescribed for public administration in section 195 of the Constitution. Furthermore, government conduct is in breach of its international obligations”

...

[23] In their argument counsel for the government raised issues pertaining to the separation of powers. This may be relevant in two respects — (i) in the deference that courts should show to decisions taken by the executive concerning the formulation of its policies; and (ii) in the order to be made where a court finds that the executive has failed to comply with its constitutional obligations

Enforcement of socio-economic rights

...

Minimum core

[26] [T]he first and second amici ... contended that section 27(1) of the Constitution establishes an individual right vested in everyone. This right, so the contention went, has a minimum core to which every person in need is entitled. The concept of “minimum core” was developed by the United Nations Committee on [ESCR in its General Comment No. 3]

...

[34] Although Yacoob J [in *Grootboom*] indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).

[35] A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis

...

[37] ... [T]he courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse

[38] Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts [D]eterminations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

[39] We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). ...

...

The applicants’ contentions

[44] It is the applicants’ case that the measures adopted by government ... were deficient in two material respects: first, because they prohibited the administration of nevirapine at public hospitals and clinics

outside the research and training sites; and second, because they failed to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV.

...

The policy confining nevirapine to the research and training sites

...

[51–55. In substance, four reasons were advanced in the affidavits for confining the administration of nevirapine to the research and training sites. (1) Where the comprehensive package was unavailable, the benefits of nevirapine would be counteracted by the transmission of HIV from mother to infant through breast-feeding. But delivery of that package is costly and problematic in some contexts. (2) The administration of nevirapine to the mother and her child might lead to the development of resistance to the efficacy of nevirapine and related antiretrovirals in later years. (3) In safety terms, the hazards of using nevirapine are unknown. (4) It is unclear if the public health system has the capacity to provide the package.]

...

[56] We deal with each of these issues in turn.

Efficacy

[57] ... It is clear from the evidence that the provision of nevirapine will save the lives of a significant number of infants even if it is administered without the full package

[58] ... [T]he wealth of scientific material produced by both sides makes plain that sero-conversion of HIV takes place in some, but not all, cases and that nevirapine thus remains to some extent efficacious in combating mother-to-child transmission even if the mother breastfeeds her baby.

Resistance

[59] ... The prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time in the future is well worth running.

Safety

[60] The evidence shows that safety is no more than a hypothetical issue That is why [nevirapine's] use is recommended without qualification for this purpose by the World Health Organization

Considerations relevant to reasonableness

[67] The policy of confining nevirapine to research and training sites ... fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.

[68] ... A programme for the realisation of socio-economic rights must “be balanced and flexible and make appropriate provision for attention to ... crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.” [*Grootboom*]

...

Children's rights

[77] While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that “[t]his does not mean ... that the State incurs no obligation in relation to children who are being cared for by their parents or families.”

[78] The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential Their rights are “most in peril” as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.

[79] The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They

and their children are in the main dependent upon the state to make health care services available to them.

...

The powers of the courts

[96] Counsel for the government contended that even if this Court should find that government policies fall short of what the Constitution requires, the only competent order ... that a court can make is to issue a declaration of rights to that effect. That leaves government free to pay heed to the declaration made and to adapt its policies in so far as this may be necessary to bring them into conformity with the court's judgment. This, so the argument went, is what the doctrine of separation of powers demands.

[97] In developing this argument counsel contended that under the separation of powers the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.

[98] This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy ...

[99] The primary duty of courts is to the Constitution and the law The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. ...

...

[102] ... Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal

...

[106] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case

...

[112] [After reviewing cases from the United States, India, Germany, Canada and the United Kingdom, the Court concludes] that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. ...

...

Orders

[135] ... 3. Government is ordered without delay to:

a) Remove the restrictions that prevent nevirapine from being made available ...

.

b) Permit and facilitate the use of nevirapine ...

...

d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine

...

MAZIBUKO V. CITY OF JOHANNESBURG
CONSTITUTIONAL COURT OF SOUTH AFRICA, CASE CCT 39/09 [2009] ZACC 28 (8 OCTOBER 2009)

[Section 27 of the South African Constitution provides that ‘everyone has the right to have access to ... sufficient food and water ...’. The new government adopted a highly innovative example of a rights-based water policy. The Water Services Act (1997) recognized everyone’s ‘right of access to basic water supply and basic sanitation’ and required every water services institution to ‘take reasonable measures to realise these rights’. It defined a ‘basic water supply’ as ‘the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.’ It authorized the Minister to prescribe ‘compulsory national standards’. Regulation 3 (2001) provides that the minimum standard for basic water supply services is:

- (b) ... a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month
- (i) at a minimum flow rate of not less than 10 litres per minute;
- (ii) within 200 metres of a household; and
- (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

In 1994, 12 million people did not have adequate access to water. By the end of 2006 the figure was down to 8 million, of whom 3.3 million had no access at all.

The applicants lived in Phiri, in Soweto, a township set up in the apartheid era. It was next to Johannesburg, a city with 3.2 million people living in about a million households, half of which are very poor and almost one-fifth of which are located in informal settlements. Almost 20 percent of households had no access to basic sanitary services and 10 percent had no access to a tap providing clean water within 200 metres of their home.

The respondents were the City of Johannesburg, Johannesburg Water (Pty) Ltd, and the national Minister for Water Affairs and Forestry. Since the water company was wholly owned by the City, no issue arose concerning the responsibilities of private actors.

The pipes to Soweto were badly corroded and extensive leakage occurred. Sowetan households consumed an average of 67 kilolitres per month, but were charged a flat rate based on a deemed consumption of 20 kilolitres. But less than 10 percent of households actually paid their bills and the water company derived 1 percent of its revenue from the one-quarter to one-third of its total water sales that went to Soweto. Seventy-five percent of water pumped into Soweto was thus not accounted for.

The company introduced Operation *Gcin’amanzi* (to save water), initiated in Phiri. It abandoned the flat rate system of deemed consumption and introduced three service levels: (1) a tap within 200 metres of each dwelling; (2) a tap in the yard of a household with a water flow of only 6 kilolitres per month;

and (3) a metered connection. Phiri residents had to choose between (2) and (3) with the latter involving a pre-paid meter.

In 2008 the High Court rejected the pre-paid meters as being unauthorized by the City's by-laws, procedurally unfair and racially discriminatory. It also held the free water allowance to be inadequate and ordered the provision of 50 litres per person per day. In 2009 the Supreme Court of Appeal gave the City two years to amend its by-laws and set the free water allocation at 42 litres.]

O'REGAN J. [FOR THE COURT]:

...

The role of courts in determining the content of social and economic rights ...

...

[50] [Reading] section 27(1)(b) [together] with section 27(2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.

...

[56] The applicants' argument [is] that the Court should adopt a quantified standard determining the content of the right not merely its minimum content. The argument must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2*.

[57] Those reasons are essentially twofold. [First, the Constitution] requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim "sufficient water" from the state immediately.

...

[59] ... Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.

[60] Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.

[61] Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

[62] ... [T]his case illustrates that the obligation in relation to the right of access to sufficient water will vary depending upon circumstance. As emerges from research by the World Health Organisation in 2003 ... the expert evidence on the record provides numerous different answers to the question of what constitutes "sufficient water". Courts are ill-placed to make these assessments for both institutional and democratic reasons.

...

[66] The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights

[67] Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional

standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.

[68] These considerations were overlooked by the High Court and the Supreme Court of Appeal which ... found it appropriate to quantify the content of the right, ... they erred in this approach and the applicants' argument that the Court should set 50 litres per person per day as the content of the section 27(1)(b) right must fail.

The relevance of regulation 3(b) of the National Water Standards Regulations

[69] ... [The] minimum standard for basic water supply [contained in Regulation 3(b)] is the basis of the policy adopted by the City and Johannesburg Water. ...

[70] National government should set the targets it wishes to achieve in respect of social and economic rights clearly The minimum standard set by the Minister informs citizens of what government is seeking to achieve. In so doing, it enables citizens to monitor government's performance and to hold it accountable politically if the standard is not achieved. This also empowers citizens to hold government accountable through legal challenge if the standard set is unreasonable.

[71] A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy. This case provides an excellent example of government doing just that If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought

...

[76] [I]t will in most circumstances be difficult for an applicant who does not challenge the minimum standard set by the legislature or the executive for the achievement of social and economic rights to establish that a policy based on that prescribed standard is unreasonable

The reasonableness of the City's Free Basic Water policy

...

Rich and Poor

[83] The first question is whether it is unreasonable for the City to provide the 6 kilolitres of free water to rich and poor alike First, [the City] asserts that the rising block tariff structure means that wealthier consumers, who tend to use more water, are charged more for their heavier water usage. The effect of this is that the original 6 kilolitres that is provided free is counterweighed by the extent to which heavy water users cross-subsidise the free allocation. Secondly, the City points to the difficulty of establishing a method to target those households who are deserving of free water. ... In my view, these reasons are persuasive and rebut the charge of unreasonableness on this ground.

Per household versus per person allowance

[84] Secondly, the applicants argue that the policy is unreasonable because it is formulated as 6 kilolitres per household (or accountholder) rather than as a per person allowance. Again the City presents cogent evidence that it is difficult to establish how many people are living on one stand at any given time; and that it is therefore unable to base the policy on a per person allocation. This evidence seems indisputable. ... The applicants' argument on this basis too must fail.

Policy based on a misconception

[85] The third argument, which the Supreme Court of Appeal upheld, is that the policy is unreasonable because the City considered that it was not under an obligation to provide a specified amount of free

basic water. What is clear from the discussion above is that the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right. This the City accepts The applicants' argument on this score must also fail.

Insufficient for large households

[86] The fourth argument is that the 6 kilolitres per month per household is not sufficient in that it does not provide 50 litres per person per day across the board. There is a welter of evidence on the record indicating that household sizes in Johannesburg vary markedly

[87] The picture is further complicated, however, by the fact that there is often more than one household relying on one water connection. This is especially so in townships There are many water connections where there is only one resident, but there are some with as many as 20.

[88] Where the household size is average, that is 3.2 people, the free basic water allowance will provide approximately 60 litres per person per day The difficulty is that many households are larger than the average Yet, to raise the free basic water allowance for all so that it would be sufficient to cover those stands with many residents would be expensive and inequitable, for it would disproportionately benefit stands with fewer residents.

[89] Establishing a fixed amount per stand will inevitably result in unevenness because those stands with more inhabitants will have less water per person than those stands with fewer people. This is an unavoidable result of establishing a universal allocation. Yet it seems clear on the City's evidence that to establish a universal per person allowance would administratively be extremely burdensome and costly, if possible at all. The free basic water allowance established is generous in relation to the average household size in Johannesburg. Indeed, in relation to 80% of households (with four occupants or fewer), the allowance is adequate even on the applicants' case. In the light of this evidence, coupled with the fact that the amount provided by the City was based on the prescribed national standard for basic water supply, it cannot be said that the amount established by the City was unreasonable.

...

Indigent registration policy

[98] The applicants also challenge the reasonableness of the City's indigent registration policy on two main grounds: the first is that it is demeaning for citizens to have to register as indigents; and the second is that because only approximately one-fifth of the households who are eligible to register are registered, the policy is unreasonable because it is under-inclusive.

...

[101] Although a means-tested policy requires citizens to apply for benefits and so disclose that they are poor, to hold a means-tested policy to be constitutionally impermissible would deprive government of a key methodology for ensuring that government services target those most in need. Indeed, nearly all social security benefits afforded by the national government are based on means-testing Means-testing may not be a perfect methodology [but] it seeks to ensure that those most in need benefit from government services. In their affidavits, the applicants proposed no third way as an alternative

[102] ... The dilemma is not readily solved [I]t cannot be said that the policy as formulated ... was unreasonable. The applicants' argument in this regard must fail.

...

Litigating social and economic rights

[159] The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is "sufficient water" within the meaning of section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is unreasonable. The applicants submitted during argument that if this were to be the result, litigation in respect of the positive obligations imposed by social and economic rights would be futile. It is necessary to consider this submission.

[160] The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government

...

***CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY V. BLUE MOONLIGHT
PROPERTIES 39 (PTY) LTD AND ANOTHER***

CONSTITUTIONAL COURT OF SOUTH AFRICA, CASE CCT 37/11 [2011] ZACC 33 (1 DECEMBER 2011)

VAN DER WESTHUIZEN J (FOR THE COURT):

Introduction

[1] This matter concerns the fate of 86 people (Occupiers), who are poor and unlawfully occupy a property ... in the City of Johannesburg (property). The property comprises old and dilapidated commercial premises with office space, a factory building and garages. The case deals with the rights of the owner of the property, Blue Moonlight Properties 39 (Pty) Ltd (Blue Moonlight) and with the obligation of the City of Johannesburg Metropolitan Municipality (City) to provide housing for the Occupiers if they are evicted. ...

[2] Seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved. The quest for a roof over one's head often lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy. ... An estimated 423,249 households in Johannesburg alone are, for example, without adequate housing. ...

[3] The practical questions to be answered in this case are whether the Occupiers must be evicted to allow the owner to fully exercise its rights regarding its property and, if so, whether their eviction must be linked to an order that the City provide them with accommodation. ...

...

Resources

...

[71] The Supreme Court of Appeal rejected the City's submission that it lacked resources. It observed that the City spoke "in the vaguest terms" about the affordability of meeting demands for housing. It noted that the record showed that the City had been operating in a financial surplus for the past year. Furthermore, the City did not state that it was unable to reallocate funds or to meet the temporary housing needs of the Occupiers. Finally, it observed that the Occupiers sought only temporary housing, whereas the City's affidavits mainly set out its inability to meet the Occupiers' permanent housing needs. This, coupled with the fact that the City had three years of prior knowledge of the Occupiers' circumstances, led the Court to find that to a great extent the City had itself to blame for its unpreparedness to deal with the Occupiers' plight.

...

Constitutional validity of the differentiation in the City's policy on emergency housing

[76] It is now necessary to determine the constitutional validity of the differentiation in the City's housing policy. That policy distinguishes between those relocated by the City itself and those evicted by private landowners. ...

...

[87] The present challenge deals with section 9(1) [equality before the law] and section 26(2) of the Constitution. The concepts of rationality and reasonableness are thus central. A policy which is irrational could hardly be reasonable. ...

[88] In the area of the right of access to adequate housing ... the question is essentially one of *reasonableness*. The availability of resources is an important factor

[89] A policy that, for example, differentiates between general housing needs and emergency situations might well be understandable. The question is whether it is reasonable to differentiate within the category of emergencies between people relocated by the City and those evicted by private landowners and inflexibly to include the first but exclude the second group.

[90] In *Grootboom* this Court held that a reasonable housing programme cannot disregard those who are most in need. ...

[91] The City argues that the needs of those who live on properties it has designated as "bad buildings" are greater than those rendered homeless through eviction by a private landowner. ...

[92] By drawing a rigid line between persons relocated by the City and those evicted by private landowners, the City excludes from the assessment, whether emergency accommodation should be made available, the individual situations of the persons at risk and the reason for the eviction. Affected individuals may include children, elderly people, people with disability or women-headed households, for whom the need for housing is particularly great or for whom homelessness would result in particularly disastrous consequences. ... [I]t cannot necessarily be assumed that the City evicts or relocates mainly for reasons of safety whilst private property owners do so only for commercial reasons. Once an emergency of looming homelessness is created, it in any event matters little to the evicted who the evictor is. The policy does not meaningfully and reasonably allow for the needs of those affected to be taken into account.

[93] The City rightly argues that "queue jumping" must not be permitted. ... [But] queue jumping is not in issue in this case. The Occupiers do not claim permanent housing, ahead of anyone else in a queue. ... What they ask is not to be excluded from the City's provision of temporary housing ... simply because they are being evicted by a private landowner and not by the City.

...

[95] ... I find that whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy makes is not. ...

...

Just and equitable remedy

...

[99] A remedy must be formulated. The order of the Supreme Court of Appeal requires the Occupiers to vacate the premises on a specific date. It also declares the City's policy unconstitutional. It orders the City to provide "temporary emergency accommodation" to the Occupiers. ...

[100] ... The date of eviction must be linked to a date on which the City has to provide accommodation. Requiring the City to provide accommodation 14 days before the date of eviction will allow the Occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation. Although Blue Moonlight cannot be expected to be burdened with providing accommodation to the Occupiers indefinitely, a degree of patience should be reasonably expected of it and the City must be given a reasonable time to comply. ...

...

GENERAL COMMENTS ON THE RIGHT TO HOUSING

Before considering two important cases from the Kenyan Supreme Court in relation to the right to housing, note should be taken of two General Comments by the Committee on ESCR. The first, General Comment No. 4, on the right to adequate housing (1991) provides:

7. ... [T]he right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. ...

8. Thus the concept of adequacy is particularly significant While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, [certain aspects must be taken into account, including:]

...

(b) *Availability of services, materials, facilities and infrastructure.* An adequate house must contain certain facilities essential for health, security, comfort and nutrition [including] safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities ... ;

...

(d) *Habitability.* [This includes] adequate space and protecting [inhabitants] from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. [P]hysical safety ... must be guaranteed as well. ...;

(e) *Accessibility.* ...;

(f) *Location.* Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. ...

...

The second, General Comment No. 7 (1997) addresses forced evictions, defined as:

3. ... the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. ...

...

9. ... [L]egislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Moreover, ... States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. ...

...

15. ... [P]rocedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

...

* * *

The *Mitu-Bell* case below engages specifically with the second of these General Comments and the issue of remedies known as ‘structural interdicts’. Inspired by U.S. cases like *Brown v. Board of Education*, these orders have frequently been used by the South African Constitutional Court. Their purpose is to eliminate:

systemic violations existing especially in institutional or organisational settings. Rather than compensate for past wrongs, [a structural interdict] seeks to adjust future behaviour, and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. Its most prominent feature is the creation of a complex ongoing regime of performance ... [This] is facilitated by the court’s retention of jurisdiction, and sometimes by the court’s active participation in the implementation of the decree.¹⁸⁷

MITU-BELL WELFARE SOCIETY V. THE KENYA AIRPORTS AUTHORITY ET AL.
SUPREME COURT OF KENYA, [2021] KESC 34, KLR (11 JANUARY 2021)

[The 15,325 residents of Mitumba Village, near Wilson airport in Nairobi, petitioned the High Court on 21 September 2011 in response to a notice published in the newspapers on 15 September giving them seven days to vacate the land on which they lived. Despite a restraining order issued on 22 September, the respondents demolished the village on 19 November 2011. In September 2013 the High Court concluded that the appellants’ constitutional rights had been violated and ordered a ‘structural interdict’ which required the government and the appellants to engage in a dialogue, based on documentation provided by the former and with the participation of other interested parties and experts. However, on 1 July 2016, the Court of Appeal overturned most of the High Court judge’s findings, leading to a further appeal to the Supreme Court. That Court identified the following issues for consideration:]

[115] ... 1. What is the place of Structural Interdicts (if any) as forms of relief in human rights litigation under the Constitution?

2. What is the effect of Article 2 (5) and 2 (6) of the Constitution regarding the applicability of international law in general and international human rights in particular?

3. To what extent are Guidelines by UN bodies relevant ...?

4. Under what circumstances may a Right to Housing accrue ...?

...

(i) Structural Interdicts

...

[117] ...Article 23 (1) of the Constitution provides that:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications [for] redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”

Article 23 (3) of the Constitution provides that:

¹⁸⁷ C. Mbazira, ‘From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa’, 24 *S. Af. J. Hum. Rts.* (2008) 1, at 4.

“In any proceedings brought under Article 22, a Court may grant appropriate relief, including:

- (a) a declaration of rights
- (b) an injunction
- (c) a conservatory order
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation
- (f) an order of judicial review

....

[121] We [consider] ... that Article 23 (3) ... empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. ...

[122] ... [W]e hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the Courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order. Most importantly, the Court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. ...

(ii) Applicability of International Law under Articles 2(5) and 2(6) of the Constitution

...

[132] ... Article 2(5) and (6) of the Constitution, recognizes international law (both customary and treaty law) as a source of law in Kenya. By the same token, a Court of law is at liberty, to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision

[133] ... [T]he expression “shall form part of the law of Kenya” ... does not transform Kenya from a dualist to a monist state [G]iven the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are Non-Self Executing, which means that, they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action.

(iii) The Role of UN Guidelines in the Interpretation and Clarification of the Bill of Rights

...

[141] ... [W]e must ... determine whether the UN Guidelines, [General] Comment No. 7 can be regarded as general rules of international law within the context of Article 2(5) of the Constitution. ... [S]uch resolutions, declarations, and comments do not ordinarily amount to norms of international law. At best they constitute what is called in international jurisprudence, Soft Law. However, it is also accepted that certain UN General Assembly Declarations and Resolutions can ripen into a norm or norms of customary international law, depending on their nature and history leading to their adoption.

...

[142] The UN Guidelines, General Comment No. 7 do not in our view qualify as general rules of international law, which have a binding effect on members of the international community. However, the Guidelines are intended to breathe life into the Right to Dignity and the Right to Housing under the ICCPR and the ICESCR respectively. They therefore constitute soft law in the language of international jurisprudence. In the instant case, while the trial Judge cannot be faulted for having referred to the Guidelines per se, being soft law, as opposed to general rules of international law, the learned Judge ought not to have elevated them to the status of Article 2 (5) of the Constitution.

... [T]he Guidelines actually do fill the existing lacuna as to how the Government ought to carry out evictions.

[143] ... [T]he UN Guidelines ... are tools or aids directed to states parties to help the latter in implementing the treaty or better fulfilment of their obligations there-under. Each state party is free to make use of the Guidelines, to the extent that is practicable under its legal system. The guidelines are not “binding” upon the states parties, nor are they part of the law of Kenya in the language and meaning of Article 2 (6) of the Constitution, unless they have ripened into a norm of customary international law

(iv) The Reality of the Right to Housing under Article 43 (1) of the Constitution

[144] ... The appellants herein, were uprooted from their habitation by the Government, on grounds that their settlements lay on the flight path to Wilson Airport, thus posing danger to the security of the public and air travelers. By this action, the appellants were deprived of their right to shelter (read “housing”) for however informal, however decrepit, these settlements had been home to their existence, their aspirations, and their very humanity. The appellants case is that the State, through its duty-bearing organs, had an obligation to respect and protect their right to housing under Article 21 (1) of the Constitution.

[145] The respondents ... argue that the appellants, had no recognizable title to the land from which they had been justifiably evicted, on security grounds. It is their case that a right to housing, cannot accrue from an illegal occupation of land by the claimants. ...

[146] The crucial question ... is when does the right to accessible and adequate housing accrue? In the language of Article 21, the right to housing, being an economic and social right, can only be realized progressively. In determining the import of the expression “progressive realization” in the *Matter of the Principle of Gender Representation in the National Assembly and Senate* ..., the Supreme Court opined:

“... [T]he expression “progressive realization” is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal—a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.”

[147] ... Article 20 (5) provides that:

“In applying any right under Article 43, if the State Claims that it does not have the resources to implement the right, a Court, tribunal or other authority shall be guided by the following principles—

(a) It is the responsibility of the State to show that the resources are not available

(b) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals and

(c) The Court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely, on the basis that it would have reached a different conclusion.

...

[149] ... [T]he question as to when the right to housing accrues ... is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with each successive government erecting the defence of “lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is predicated upon one’s ability to “own” land. In other words, unless one has “title” to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.

[150] This scenario has inevitably led to the emergence of the so called “informal settlements”, an expression that describes a habitation by the “landless”. In their struggle to survive, many Kenyans do occupy empty spaces and erect shelters thereupon, from within which, they eke their daily living. Some of these settlements sprout upon private land, while others grow on public land. It is these “settlers” together with their families who face the permanent threat of eviction either by the private owners or State agencies. The private owners will raise ‘the sword of title’, while the State agencies will raise ‘the shield of public interest’. So where does this leave the right to housing guaranteed by Article 43 of the Constitution?

[151] While we ... [agree that] an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants, we don’t think the same can be said of an “illegal occupation” of public land. To the contrary, we are of the considered opinion, that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all? ... The 2010 Constitution has radically transformed land tenure in this country by declaring that all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals. It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in public land.

[152] The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under Article 60 (1) (a) of the Constitution. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the Court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that, the eviction may be entirely justifiable in the public interest. But, under Article 23 (3) of the Constitution, the Court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (UN Guidelines), the provision of alternative land for settlement, etc.

[153] The right to housing in its base form (shelter) need not be predicated upon “title to land”. Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of “informal settlement”. Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The Courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of “the wretched of the earth”.

...

[156] ... [Orders made by lower courts] ought not to have involved non- state actors, who were not parties to the suit. ... [However,] the eviction ... was carried out in contravention of a court order. ... Actions by state organs, carried out in flagrant disregard of court orders, do undermine our constitutional order, more so, if they result in the violation of citizens’ rights. If a trial Court is so moved, there is no reason why it cannot grant relief to the aggrieved.

...

WILLIAM MUSEMBI V. THE MOI EDUCATIONAL CENTRE CO. LTD.
SUPREME COURT OF KENYA (16 JULY 2021)

The petitioners (336 adults and 90 children) stated that they had resided in two informal settlements in Nairobi since 1968, on what was then public land. Their villages were officially supplied with electricity and water. In 2013, 300 armed people, accompanied by police, invaded the villages without any advance notice. They destroyed all of the property and evicted the residents. The main question before the Supreme Court was whether the right to housing applied between two private parties and whether the State had respected its ‘negative obligation not to abuse or violate’ the relevant rights.

...

[56] ... [T]he eviction of the Petitioners was violent and did not accord with the expected constitutional obligation of the State

[57] In *Satrose Ayuma*, the High Court laid out certain principles that an evicting party must comply with. The Court, in doing so, applied international principles of law

[58] The principles include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. [General Comment No.7.] ...

[59] [As to whether the eviction violated the Petitioners’ rights:] Even the ordinary man in the street, confronted with the facts..., would answer the question in the affirmative. ...

...

[64] ... [I]t is manifestly evident in the present context that the mandate to ensure the realization and protection of social and economic rights does not extend to the 1st Respondent, a private entity. Even though the 1st Respondent has a negative obligation to ensure that it does not violate the rights of the Petitioners, it is not under any obligation to ensure that those rights are realized, either progressively or immediately. ...

THE RELATIONSHIP BETWEEN HOUSING AND PROPERTY RIGHTS

The ESCR Committee has received many communications on the right to housing, especially from Spain. For example, in *El Goumari and Tidli v. Spain*, Communication No. 85/2018 (2021) the domestic court failed to take account of the consequences of eviction for a family as part of a proportionality determination. The Committee found a violation of the right to adequate housing. Consider the following reflections on some of the case law emerging at the domestic and international levels.

(i) Gautam Bhatia, ‘The Kenyan Supreme Court on Land, Evictions, and Horizontal Rights’, *Notes from a Foreign Field* (16 July 2021), responding to *Musembi*:

[A] distinction must be drawn between the obligation to provide alternative accommodation, and the obligation not to evict until alternative accommodation is available. The former is indeed a positive obligation and ... not binding on private parties. The latter, however, is a classic non-interference obligation, as it is just another pre-condition for when you can evict (like notice, participation, a court order etc.). ... It is thus not far-fetched to argue that it must follow from this judgment that if a private party proposes to evict people from private land, then it is for the State to take on the positive obligation of securing alternative accommodation before that eviction can take place

(ii) Stuart Wilson, ‘Making Space for Social Change: Pro-Poor Property Rights Litigation in Post-Apartheid South Africa’, in Jason Brickhill (ed.), *Public Interest Litigation in South Africa* (2018) 159, at 182:

Property law is one of the most important sources from which spaces of social action are constructed and reshaped. It sets the terms on which people may access and exploit material goods. Through reforms to property law, South Africa has embarked on a fundamental re-imagining of those terms. Unlawful occupiers of land have gained temporary, limited and circumscribed rights to remain where they have no common law entitlement to be. Tenants can insist that their landlords act fairly, even where their leases specify otherwise; and can hold out against a landlord who wants to repossess his property by arguing that the landlord has acted unfairly. Debtors who have failed to repay their debts can stave off debt recovery, restructure their obligations, and even prevent some forms of execution altogether, even though they have borrowed money that they have not given back.

These important amendments to South African property law are reshaping social and economic relationships across a wide range of geographical and social contexts. They are driving social change. But the change that is being wrought is subtle, complex, contingent and takes time to reveal itself. ...

...

[T]he principle that evictions should not lead to homelessness may drive, and has often driven, widespread community-based legal resistance to eviction. If every community under threat of homelessness by eviction responded in this way, there can be little doubt that property relations in South Africa would be transformed overnight. Not every community responds to a threat of eviction in this way. However, to detect and begin to describe a relationship between law and social change, it is enough that some communities do respond in this way, and that the law creates, expands or helps protect the space in which this is possible.

...

(iii) Mandisa Shandu and Michael Clark, 'Towards a Values-Based Approach to Property Relations in South Africa', 11 *Const. Ct. Rev.* 2021 (2022) 39:

Abstract: In recent decades, there has been growing dissatisfaction with the dominant theories of property law systems, founded on notions of exclusion and individualism, these systems have increasingly become associated with an unsustainable and inequitable distribution of resources. This inequitable distribution has largely been attributed to these property law systems that offer wholly disproportionate protection to the rights and interests of property owners while providing little to no recognition or protection for wider social, environmental and humanitarian concerns. These constructions of property overemphasise a single set of values – values that are largely economic, exclusionary and exploitative. Through an analysis of public land, particularly municipal land, we advocate for a rethinking of current property law relations to prioritise a more varied set of values, including social, ecological, emotional and humanist values, with the ultimate aim of realising a more social conception of property law. This is urgently required in the South African context, where access to land, tenure security and housing was historically dictated by colonialism and apartheid, and which remains influenced by deep-seated inequality. ...

Conclusion: Towards a Values-Based Approach

...

... [T]he narrow focus of viewing municipal land as a capital asset ... limits the possibilities for municipal land to serve a societal function, such as affordable housing, and ... this has the effect of maintaining an unequal status quo. The demands by housing activists for golf-courses on well-located parcels of public land to be redistributed is illustrative of the need to interrogate the systems and decision-making processes that protect and reproduce spatial inequality through, among other things, the economic value paradigm. An appropriate rationalisation would entail establishing a comprehensive set of principles to guide the use of public land so that decision makers are required to objectively consider broader values (that are informed and shaped by history and the current reality of unequal access to land), and to justify their decisions about a municipality's immovable property portfolio against these principles.

...

(iv) Consider this approach to legislative recognition of the right to housing in Portugal's Housing Basic Law, of 3 September 2019:

...

Article 2: Scope

1 Everyone has the right to housing, for themselves and their family, regardless of ancestry or ethnic origin, sex, language, territory of origin, nationality, religion, creed, political or ideological beliefs, education, economic situation, gender, sexual orientation, age, disability or health status.

Article 3: General principles

1 The State is the guarantor of the right to housing.

2 ... [T]he State shall programme and implement a housing policy

...

4 The promotion and protection of housing are pursued through public policies, as well as through private, cooperative and social initiatives subordinated to general interest.

5 Public housing policies obey the following principles:

- a) Universality of the right to an appropriate housing unit to all individuals and their families;
- b) Equal opportunities ..., with positive discrimination measures when necessary;
- c) Social, economic and environmental sustainability ...;
- d) Administrative decentralization, subsidiarity and cooperation ...;
- e) Transparency of public procedures;
- f) Citizen participation and support of initiatives by local communities and populations.

...

Article 5: Effective use of housing

1 Any housing unit that is, unjustified and continuously, during the period defined by law, without effective housing use, for reasons imputable to the owner, is considered vacant.

2 Owners of vacant housing units are subject to the sanctions provided by law

3 Second homes, emigrant housing and the housing units of displaced persons for occupational or health reasons are not considered vacant.

...

Article 6: ...

The right to housing implies access to essential public services, as defined by specific legislation and to a suitable network of transport and social facilities

...

Article 9: Housing conditions

1 A housing unit is considered of adequate size for its residents if the area, the number of rooms and the water supply, sanitation and energy solutions are sufficient and do not cause situations of insalubrity, overcrowding or promiscuity-risk.

...

Article 11: Right to choose the place of residency

1 The State respects and promotes the citizens' right to choose the place of residency, according to their needs, means and preferences, without prejudice of urban planning restrictions.

2 In case of resettlement by public entities, the consultation of those involved is mandatory and, whenever possible, the permanence of persons and families to be resettled shall be promoted in the vicinity of the place where they previously resided.

3 In case of resettlement by private entities, determined by legal requirement, the consultation of those involved is mandatory and, whenever possible, the permanence of tenants or assignees of dwellings shall be promoted in the vicinity of the place where they previously resided.

4 In the allocation of adequate housing in public resettlement processes in neighbourhoods and adjoining areas, pre-existing neighbourhood and community ties shall be taken into consideration.

Article 12: Right to an address

1 The State promotes and guarantees to all citizens, namely homeless persons, the right to a postal address, inherent to the exercise of citizenship rights, including the mail delivery service.

2 Local authorities ensure toponymic identification of all dwellings in their area, including recent urban areas, urban settlements of illegal origin, precarious housing sites, dispersed housing or isolated dwellings.

...

Article 13: Eviction protection and accompaniment

...

4 The State, autonomous regions and local authorities cannot promote the administrative eviction of vulnerable individuals or families without prior guarantee of resettlement solutions, as defined by law, without prejudice to the following paragraph.

...

3. ESR in the Inter-American Convention

The Inter-American Court of Human Rights (see Chapter 11 B, below) was initially reluctant to address ESCR, but that has changed very significantly in recent years.¹⁸⁸ The following case addresses two important, but often neglected, dimensions of ESCR: the right to cultural identity, and freedom from discrimination on the basis of economic status.

¹⁸⁸ See generally R. Gargarella, 'Economic and Social Rights in Latin America: A Long and Unfinished March', in M. Langford and K. Young (eds.), *The Oxford Handbook of Economic and Social Rights* (2023) 000.

THE MAYA KAQCHIKEL INDIGENOUS PEOPLES OF SUMPANGO ET AL. V. GUATEMALA
INTER-AMERICAN COURT OF HUMAN RIGHTS, SER. C, NO. 440 (6 OCTOBER 2021)

...

62. The instant case concerns the alleged existence of legal obstacles that prevent Guatemala's indigenous peoples ... from having access to radio frequencies. The case also concerns the alleged absence of affirmative actions by the State aimed at ensuring such access, and an alleged policy of criminalization of community radio stations operated without a license in Guatemala, which has resulted in the criminal prosecution of members of indigenous communities and raids on their community radio stations.

...

c) The right of indigenous peoples to participate in cultural life ...

119. The Court has reiterated its authority to determine violations of Article 26 of the American Convention

[*Note:* ESCR are dealt with in Chapter III of the Convention, and Article 26 is headed 'Progressive Development':

The States Parties undertake to adopt measures ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the [OAS Charter].]

...

125. This Court has pointed out that cultural identity is a "basic human right, and one of a collective nature in indigenous communities, which must be respected in a multicultural, pluralist and democratic society." The Court understands that the right to cultural identity "protects the freedom of individuals, including when they are acting together or as a community, to identify with one or several societies, communities or social groups, to follow a way of life connected to the culture to which they belong and to take part in its development. Thus, this right protects the distinctive features that characterize a social group without denying the historical, dynamic and evolving nature of culture."

...

128. The Court has also referred to the instrumental nature of certain rights, such as freedom of expression, to realize other rights such as the right to take part in cultural life. From this perspective, indigenous people's access to their own community radio stations, as vehicles of freedom of expression, is an indispensable element to promote the identity, language, culture, self-representation and the collective and human rights of indigenous peoples. ...

...

130. ... [In terms of] obligations of an immediate nature ..., States must ensure that this right is exercised without discrimination, and adopt effective measures for its full realization. ... [In terms of] obligations of a progressive nature ..., progressive realization means that States Parties have the specific and constant obligation to move as expeditiously and efficiently as possible toward the full realization of this right, subject to available resources, by legislation or other appropriate means. Likewise, the obligation of non-retrogression is imposed with respect to the realization of the rights achieved. Consequently, the obligations to respect and guarantee rights established in the Convention, as well as the adoption of provisions of domestic law (Articles 1(1) and 2), are essential to achieve their effectiveness.

... d) *Alleged violations of the right ... to equality before the law* ...

132. The Court has reiterated that States must refrain from carrying out actions that in any way are aimed, directly or indirectly, at creating situations of discrimination de jure or de facto. ...

133. In this regard, while the general obligation under Article 1(1) refers to the State's obligation to respect and ensure the rights contained in the American Convention "without any discrimination," Article 24 protects the "right to equal protection of the law." ... [T]aking into account the situation of poverty that affects a large part of the indigenous population in Guatemala, the Court will examine the alleged violation of Article 24 of the Convention in relation to the category of "economic status." In this sense, the Court has already established that poverty is a category protected under the Convention, since "poverty may well be understood to fall within the category of "economic status" to which the said article expressly refers, or in relation to other categories of protection such as "social origin" or "any other social condition," in view of its multidimensional nature."

...

135. ... Article 24 of the Convention also establishes an obligation to ensure material equality. ... [It] has two dimensions. The first is a formal dimension that establishes equality before the law; the second is a material or substantial dimension that requires the adoption of affirmative measures in favor of groups that have historically been discriminated against or marginalized due to the factors mentioned in Article 1(1) of the American Convention. Thus, the Court considers that the right to equality before the law also entails the obligation to adopt measures to ensure that the equality is real and effective; in other words "to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. To this end, States must actively combat situations of exclusion and marginalization."

...

154. ... [T]he Court finds that the operation of community radio stations by indigenous peoples is an essential vehicle for their cultural survival. ... [The] broadcasting regulations in Guatemala ... in practice [prevent] indigenous peoples ... from exercising their right to participate in cultural life through their community radio stations."

[The Court required Guatemala to adapt its domestic regulations accordingly, to establish a simple procedure for obtaining licenses, and to reserve part of the radio spectrum for indigenous community radio stations.]

4. Assessing ESR Litigation

For all that it has achieved, litigation to uphold ESR has also been the subject of important critiques. Consider the following:

David Landau and Rosalind Dixon, 'Constitutional Non-Transformation?', in Katharine Young (ed.), *The Future of Economic and Social Rights* (2019) 110:

... [A]cross a number of different systems, judicial enforcement of social rights is often targeted at middle-class groups, rather than the poor

One set of explanations focuses on notions of judicial capacity, and the degree to which courts may lack the institutional tools or mechanisms to achieve the kind of broad social and economic transformation necessary for social rights to benefit the poor. ... [But] with the right degree of creativity, and potentially also supportive legal and political culture – courts may be able to overcome at least some of these institutional limitations. ...

A second explanation focuses on the idea of legal and judicial 'capture,' or the degree to which courts are ultimately co-opted by the middle class as a tool for furthering their own interests and objectives. ... [I]n many cases what may appear to be capture in fact can be better understood as a form of pro-majoritarian judicial review by courts, which seek to promote the effectiveness of majority understandings of, or commitments to, social rights – in the face of either international pressures to adopt a more limited role in the protection of

social rights, or blockages in domestic legislative and administrative processes that undermine the responsiveness of the state to democratic majority demands for social protection and economic redistribution.

Third, ... a pro-middle-class social rights jurisprudence may in some circumstances be complementary with a more pro-poor, transformative social rights agenda: it may create the political support for such an agenda necessary to ensure adequate resources for its realization, and also support for the court, when faced with the inevitable pushback from an executive faced with budgetary pressures. ...

Farrah Ahmed and Tarunabh Khaitan, 'Constitutional Avoidance in Social Rights Adjudication', 35 *Oxford J. Leg. Stud.* (2015) 607:

In his important book *Judging Social Rights* [2012], Jeff King offers an account of how judges should adjudicate social rights claims. ...

... [He] defends the constitutionalisation and consequent judicialisation of social rights, provided that judges adjudicate these rights in an incremental fashion. ... [He] endorses an incrementalist agenda which demands constitutional avoidance, particularisation, cautious expansion and analogical reasoning, vague rather than specific legal standards, focus on procedural rights, non-intrusive remedies and ready revisitation of precedents in social rights cases. Incrementalism, King argues, preserves a valuable, if limited, role for courts in social rights litigation, while respecting his four principles of judicial restraint: democratic legitimacy, polycentricity, expertise and flexibility.

...

... King mainly understands constitutional avoidance as a rule of last resort ...:

Where a claim may succeed on constitutional or non-constitutional grounds (which typically means choosing statutory interpretation or administrative law instead of constitutional remedies), the court should, under circumstances of serious uncertainty, prefer the non-constitutional remedy.

... King uses 'constitutional avoidance' interchangeably with a preference for administrative over constitutional grounds for judicial decisions. In other contexts, the law of torts is likely to be a more plausible alternative to constitutional law. ... [He says]:

One of the better ways to give effect to an avoidance canon is to give rights-friendly readings to statutes and soft law policies in the welfare state. And a way of extending common law protections is to use a heightened standard of judicial review when constitutional rights are 'engaged', a process that will allow the domestic court to issue a remedy in the case at hand while leaving the question of whether the constitutional rights are 'violated' open for another day.

... Ordinary statutes, common law doctrines and soft law policies should therefore be interpreted or developed in a 'rights-friendly' manner. King mainly recommends the rights-sensitive development of administrative law grounds of review including illegality, procedural impropriety, rationality (including heightened rationality) and legitimate expectations to protect social rights. King also calls for a more intense standard of judicial review when a constitutional right is 'engaged', and favours a more robust judicial approach to the enforcement of social rights through non-constitutional means, rather than the (often more deferential) enforcement through constitutional means. ...

...

... [W]e examined the potential for constitutional avoidance in landmark Indian Supreme Court cases on social rights. Of the 19 cases we examined, the claimant was successful in obtaining some remedy in 18 cases. In 15 out of these ..., at least some of the remedies granted (whether substantive access to shelter, education, medical care, or procedural safeguards protecting such access) could have been granted without invoking constitutional guarantees. There was always a statute, a policy, administrative law, common law or (in a few cases) private law provision upon which some of these remedies could have rested. ...

...

... For instance, the orders in *Olga Tellis* ... did not require an appeal to constitutional rights. Rather, a robust administrative law review to protect legitimate expectations and procedural fairness was all that was required to justify the Court's orders....

...

Kent Roach, 'Remedies and Accountability for Economic and Social Rights', in Malcolm Langford and Katharine Young (eds.), *The Oxford Handbook of Economic and Social Rights* (2023) 000:

The challenges of devising effective remedies for ESRs are considerable. Those who ask for remedies that courts may find unmanageable, illegitimate, or too expensive risk having courts reject the merits of the ESRs claim. This danger of remedial deterrence is also complicated by the rise of populism, which means that even competent governments may not always respond promptly and in good faith to judicial rulings. The mix of remedies will change with the context. Populist resistance may make dialogic remedies less successful in the future. Environmental, migration, and public health crises may result in an increased emphasis on interim remedies designed to prevent irreparable harm. Case-specific remedies designed for specific individuals may be a means to convince reluctant courts not to abandon their remedial role and to become more comfortable with finding ESRs violations. Damage remedies may fail fully to restore victims or to prevent the reoccurrence of violations, but they may provide some tangible relief to those who have been denied ESRs rights. Damages may also provide much needed resources to finance continued mobilization and in the case of Indigenous peoples continued efforts to maximize self-determination. The award of both interim remedies and damages may also demonstrate some remedial success and promote greater awareness in civil society and governments about the dramatic harms and costs of not recognizing ESRs. Those who seek better compliance with ESRs in the future should be open to the possibility that some defeats in court could lead to political victories. Even when they win in court, it may still be necessary to continue civil society and political awareness and engagement. They may be able to use some of the instruments of populism—such as social media, consumer boycotts of corporations, and mobilization of protests—to turn a spotlight on violations of ESRs that, alas, may become even more widespread in the future.

Kira Tait and Whitney Taylor, 'The Possibility of Rights Claims-Making in Court: Looking Back on Twenty-Five Years of Social Rights Constitutionalism in South Africa', 48 *Law Soc. Inq.* (2023) 1023:

... Our findings reveal skepticism [among ordinary South Africans] about the feasibility and efficacy of [turning to the law for social rights]. ... [S]kepticism ... [stems from] the disconnect in how citizens expect the state and its institutions to work and the way they experience them working. ... [C]itizens' expectations of the post-apartheid state have failed to materialize. People are told they have

rights, but having rights has not resulted in their anticipated outcome, whether that is being able to voice a complaint or gain access to basic services. People are told they can get help from courts, but the legal system works in ways that make accessing justice difficult. Against this backdrop, ordinary South Africans have developed doubts about the benefits of rights and the law as meaningful institutions, at times rendering it impossible for them to turn to the courts for redress. These doubts create significant challenges for state accountability, institutional development, and citizenship in postapartheid South Africa's project of democratic state building.

QUESTIONS

1. Compare the approaches taken by the Court in *Soobramoney*, *Grootboom* and *TAC*. Is the approach consistent or does the Court shift the goalposts significantly from one case to the next?

2. 'In the *TAC* case, the Court rolls out all the classic statements of deference to the legislature before it engages in an aggressive demolition of the government's policy choices and replaces them with its own.' Comment.

3. 'In administrative law there is generally a detailed legislative standard to apply or interpret, whereas in constitutional law the provisions are, almost by definition, open-ended. By applying a reasonableness test that is shaped by administrative law notions in interpreting constitutional provisions the Court avoids the sort of deep inquiry that is essential if ESR are to be given substantive, as opposed to merely procedural, content.' Comment.

4. Consider this assessment by Jackie Dugard, one of Mazibuko's lawyers:

"... human rights litigation might not be able to immediately dismantle structural racism especially when concretised as residential segregation and rationalised within a neoliberal cost-recovery paradigm.

But this narrow view of the value of human rights as determined by whether a case wins or loses in court, misses two critical points. First, many 'losing' cases result in direct gains for the litigants and other similarly situated people. ... [D]espite losing in court, *Mazibuko* resulted in the City of Johannesburg responding politically to the grievances raised in the case by providing increased access to free basic water and halting the rollout of PPMs in poor Black residential areas.

Second ... arguably the real power of rights lies 'beyond the courtroom' in the realm of the 'politics of rights'. It is here where ... rights act to expose the dynamics of domination and question the existing order by providing a counter-veiling narrative to the dominant ones. ... [H]uman rights-based mobilisation beyond the courtroom is a form of resistance capable of influencing discourse and shifting power relations – both likely precursors to social change.

...

...

... [H]uman rights litigation is not unique in its inability thus far to have dismantled structural inequality. The global neoliberal order has proven stubbornly resistant to egalitarian socio-economic change by whatever means. ...¹⁸⁹"

Do you agree with Dugard's assessment?

¹⁸⁹ J. Dugard, 'Racial Segregation, Water Disconnection and Human Rights Litigation: An Examination of the Use of Law to Challenge Structural Racism in Detroit and Johannesburg', in D. Lupin (ed.), *A Research Agenda for Human Rights and the Environment* (2023) 81.

F. ESR: BEYOND CONSTITUTIONS AND LITIGATION

It is increasingly accepted that more attention needs to be given to approaches to the implementation of ESR that do not rely largely on litigation and courts. Various commentators cited above emphasize the importance of social movements and community activism, but that approach still leaves open the question of what approaches should be pursued in legal and institutional terms. Amartya Sen has counselled against an unduly legalistic approach:

Human rights are best viewed as pronouncements in social ethics, sustainable by open public reasoning. They may or may not be reflected in a legal framework through, say, specific “human rights legislation,” but there are also other ways of implementing human rights (including public recognition, agitation, and monitoring). The viability and universality of human rights are dependent on their ability to survive open critical scrutiny in public reasoning. The corresponding obligations are both perfect and imperfect in character. Where imperfect, they ground a firm duty to reasonably consider undertaking actions which can defend or promote the relevant freedom, both in process and opportunity terms. Such obligations place implicit and explicit pressure on all who are in a plausible position to prevent the violation of economic and social rights.¹⁹⁰

One starting point is to ask why the language of rights needs to be used at all, as long as the focus is on education, health, housing and so on. This is rarely a question asked in relation to CPR but it often arises in relation to ESR, with organizations such as the World Bank suggesting that they pursue ESR-compatible outcomes without needing to characterize them as such.¹⁹¹ This is one response to the question of whether it really matters if ESR are treated as human rights:

... [The reality is that] the use of rights terminology is avoided so assiduously by governments and others precisely because it does matter very much and makes a big difference. How so? First, the use of the human rights framework ensures that in the midst of programmes designed to ensure collective well-being, the rights of the individual and not just the overall goals of the programme and the interests of the collectivity are taken into account. Second, in contrast to generic social justice language which has no defined content or agreed meaning, human rights discourse directs policymakers and others back to the internationally agreed formulations of [ESR] and the jurisprudence that has painstakingly evolved. Third, treating [ESR] as human rights rather than long-term goals introduces an element of immediate salience which might otherwise not be present. Fourth, and perhaps most importantly, the language of rights recognizes and insists on the dignity and agency of all individuals (regardless of race, gender, social status, age, disability or any other distinguishing factor) and it is intentionally empowering. Whether in the home, village, school or workplace, or in the political marketplace of ideas, it makes a difference if one is calling for the realization of collectively agreed and internationally recognized and defined rights to housing or education, rather than merely making a general request or demand. Moreover, as noted earlier, the legal conception of human rights presupposes and demands accountability, whereas characterizing [ESR] in terms of desirable goals or development challenges leaves them hostage to a great many other considerations.¹⁹²

The same analysis suggests that a human rights approach to ESR would focus especially on the dimensions of recognition, institutionalization, and accountability. Constitutional recognition is all too

¹⁹⁰ A. Sen, ‘Obligations and Economic and Social Rights’, in Malcolm Langford and Katharine Young (eds.), *The Oxford Handbook of Economic and Social Rights* (2023) 000.

¹⁹¹ J. Wolfensohn, ‘Some Reflections on Human Rights and Development’, in P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 19.

¹⁹² P. Alston, Report of the Special Rapporteur on extreme poverty and human rights (UN Doc. A/HRC/32/31 (2016)), para. 8.

rarely accompanied by specific recognition of say the ‘*right to education*’ in the relevant legislative and administrative arrangements:

A. Legal recognition

27. ... [I]t is difficult to understand how the obligations to “recognize” the rights, and to “guarantee” non-discrimination, could possibly be achieved in the absence of targeted legislative or equivalent measures. ... [T]he general principle is that States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by, *inter alia*, incorporating norms of international human rights law into their domestic law, or otherwise implementing them in their domestic legal system. The key element here is the recognition of the norm itself, not merely the adoption of measures that are pertinent to the subject-matter of the norm.

B. Obligation to establish institutions

28. Human rights are often expressed with great brevity and little or no elaboration as to their content or corresponding obligations. The relevant treaties simply recognize that there is a right to life, a right to social security or a right to recognition as a person before the law. But the assumption underpinning this approach is that institutions will be created and will help to develop the normative content of the relevant right, promote its implementation and facilitate its realization. In Spanish, the term *institucionalidad* is sometimes used to denote the institutional arrangements that are needed to underpin the rule of law and human rights. Where no institutions are designated to take the lead in implementing a particular human right, the likelihood is that little will be done to treat it as a human right *per se*. This is especially the case in relation to [ESR].

C. Obligation to promote accountability

29. The principle of accountability provides the overarching rationale for the establishment of an international human rights regime. It operates at two levels. One involves State accountability to the international community The other involves ensuring that governments are accountable to their citizens and other rights holders. The right to a remedy is recognized in the [UDHR] and [in general] international human rights law [as well as in General Comment No. 9 of the Committee on ESCR].

Accountability

As noted above, one of the most effective mechanisms for monitoring states’ compliance with their ESR obligations, apart from the Committee on ESCR, has been the Special Procedures system, described in detail in Chapter 8 below. In addition to preparing reports once or twice a year on specific themes, and sending communications (allegation letters) to governments, these independent experts also undertake country visits, at the invitation of the relevant government. In relation to ESR, the most broadly focused of the Special Procedures mandates is the Special Rapporteur on extreme poverty and human rights. The following are two examples of such reports:

SPAIN (A/HRC/44/40/ADD.2 (2020))

10. The Special Rapporteur visited areas that many Spaniards would not recognize as a part of their country. A shanty town with far worse conditions than a refugee camp, without running water, electricity or sanitation, where migrant workers have lived for years Closed-off neighbourhoods of concentrated poverty, where families are raising children with a dearth of State services, health clinics, employment centres, security, paved roads or legal electricity. A segregated school in a poor neighbourhood with a 100 per cent Roma student body and a 75 per cent rate of early leaving.

11. The single word heard most over the two-week visit was “abandoned.” People felt abandoned in a rural town without public transportation to visit the doctor and no money to pay for private transport. Abandoned in a stigmatized low-income suburb that the police avoid. Abandoned to unscrupulous landlords, unconscionable rent raises or unmaintained public housing and abandoned to an arbitrary bureaucratic system that denies vital support without explanation. The common thread was an absence of government support to ensure that people do not needlessly experience the worst effects of poverty, a situation many face because of phenomena largely beyond their control, such as job loss, structural discrimination or illness.

12. People feel abandoned for good reason. The benefits of the economic recovery have largely flowed to corporations and the wealthy, while many of the public services and protections that were severely curtailed after 2008 have not been restored. Income growth has been primarily captured by those at the top ...

13. In comparison, people in poverty have been largely failed by policymakers. ... [ESR] are rarely taken seriously, even if they are frequently invoked rhetorically. People face skyrocketing housing costs, privatization of apartment blocks and aggressive evictions, yet low cost social housing is almost non-existent, despite widespread agreement on the necessity for it. The system for providing social assistance is broken. ... [W]ealthy families [benefit] more from cash transfers than poor families. The system is fragmented, impossible to navigate and is not reaching the poor people who need it most. ...

**UNITED KINGDOM
(A/HRC/41/39/ADD.1 (2019))**

3. ... [O]ne fifth of its population (14 million people) live in poverty. Four million of those are more than 50 per cent below the poverty line and 1.5 million experienced destitution in 2017, unable to afford basic essentials. Following drastic changes in government economic policy beginning in 2010, the two preceding decades of progress in tackling child and pensioner poverty have begun to unravel and poverty is again on the rise. ...

4. But statistics alone cannot capture the full picture of poverty in the United Kingdom, much of it the direct result of government policies ... There has been a shocking increase in the number of food banks and major increases in homelessness and rough sleeping; a growing number of homeless families – 24,000 between April and June of 2018 – have been dispatched to live in accommodation far from their schools, jobs and community networks; life expectancy is falling for certain groups; and the legal aid system has been decimated, thus shutting out large numbers of low-income persons from the once-proud justice system. Government reforms have often denied benefits to people with severe disabilities and pushed them into unsuitable work, single mothers struggling to cope in very difficult circumstances have been left far worse off, care for those with mental illnesses has deteriorated dramatically, and teachers’ real salaries have been slashed. The number of emergency admissions to hospitals of homeless people (“of no fixed abode”) increased sevenfold between 2008–2009 and 2017–2018.

5. In the past, the worst casualties of these “reforms” would have received at least minimal protection from the broader social safety net. But austerity policies have deliberately gutted local authorities and thereby effectively eliminated many social services, reduced policing services to skeletal proportions, closed libraries in record numbers, shrunk community and youth centres, and sold off public spaces and buildings including parks and recreation centres. It is hardly surprising that civil society has reported unheard-of levels of loneliness and isolation, prompting the Government to appoint a Minister for Suicide Prevention. The bottom line is that much of the glue that has held British society together since the Second World War has been deliberately removed and replaced with a harsh and uncaring ethos.

...

11. ... [T]he driving force has not been economic but rather a commitment to achieving radical social re-engineering – a dramatic restructuring of the relationship between people and the State. Successive

Governments have brought revolutionary change in both the system for delivering minimum levels of fairness and social justice to the British people, and especially in the values underpinning it. ...

12. Far-reaching changes to the role of Government in supporting people in distress are almost always “sold” as part of an unavoidable fiscal “austerity” programme needed to save the country from bankruptcy. In fact, the ... many billions extracted from the benefits system since 2010 have been offset by additional resources required, by local government, by doctors and hospital accident and emergency centres, and even by the ever-shrinking, overworked and underfunded police force to fund the increasing need for emergency services.

13. The Government has made no secret of its determination to change the value system to focus more on individual responsibility, to place major limits on government support and to pursue a single-minded focus on getting people into employment. Many aspects of this programme are legitimate matters for political contestation, but it is the mentality informing many of the reforms that has brought the most misery and wrought the most harm to the fabric of British society. British compassion has been replaced by a punitive, mean-spirited and often callous approach apparently designed to impose a rigid order on the lives of those least capable of coping, and elevate the goal of enforcing blind compliance over a genuine concern to improve the well-being of those at the lowest economic levels of British society. ...

Reactions to the Special Rapporteur’s United Kingdom Report

Following the rapporteur’s visit, demands on UK food banks more than doubled over the next five years (Trussell Trust, *Hunger in the UK* (2023)). The Trust found that ‘14% of all UK adults (or their households) [had] experienced food insecurity in the 12 months to mid-2022, equating to an estimated 11.3 million people. ... [M]ore than two thirds of those experiencing food insecurity have not received food aid.’

Responses to the UN report varied, perhaps predictably, and it was the subject of more than 4,000 separate media stories.¹⁹³ The Prime Minister responded in Parliament to the report on several occasions. The Chancellor (Finance Minister) told the BBC: ‘I reject the idea that there are vast numbers of people facing dire poverty in this country. I don’t accept the UN rapporteur’s report at all. I think that’s a nonsense.’ The Leader of the Opposition called the findings a ‘wake-up call about the rising levels of poverty and destitution that exist in Britain today,’ and the report was debated in both Houses of Parliament. The editors of *The Guardian* (Editorial, 18 November 2018) stated that the Special Rapporteur’s:

position and plain speaking have exposed this country before the world’s gaze. His scathing analysis is a call not only to conscience but to Britain’s self-respect. ... It is unpardonable that the costs of austerity have fallen so disproportionately upon the poor, women, ethnic minorities, children, single parents, and people with disabilities

...

... It is a national embarrassment that we needed a UN poverty envoy to spell out what is so evident. It will be a greater one if we refuse to pay heed.

The Times Editorial on the report (25 May 2019) stated that:

... This tendentious and frivolous document says more about the weaknesses of the UN’s system of monitoring human rights than it does about [the situation in Britain].

¹⁹³ See P. Alston, B. Khawaja, and R. Riddell, ‘Much ado about poverty: the role of a UN Special Rapporteur’, 27 *J. Por. and Soc. Just.* (2019) 423; M. Adler, ‘The Alston Report on extreme poverty and human rights in the UK: a review’, 28 *J. Por. and Soc. Just.* (2020) 265; and F. Hill, *There Is Nothing for You Here: Finding Opportunity in the 21st Century* (2021) 158-160.

Real violations of human rights are a pressing issue in many parts of the world. ... Unfortunately, partisan attacks on democratic governments, and on democratic societies generally, are what the UN's purported mechanisms of scrutiny all too often produce.

The failings of Mr Alston's report are legion. As he spent only 11 days in Britain conducting his research on welfare policy since 2010, perhaps he should be commended for managing to write a document that extends as far as 21 pages.

...

It is legitimate to debate the mix of private and public sector, or the right level for the public debt or deficit relative to GDP, but these issues have no bearing on Mr Alston's brief. Amber Rudd, the work and pensions secretary, has indicated that she will lodge a complaint with the UN about the report. She should do so, not to defend the reputation of the government but to force the UN to confront the politicised inadequacies of its reporting.

The Archbishop of Canterbury (*The Guardian*, 2 December 2018) said, 'I think it's really important for the government to respond carefully to that [report], not to dismiss it.' And Human Rights Watch subsequently produced its first ever report focused specifically on the right to food: *Nothing Left in the Cupboards: Austerity, Welfare Cuts and the Right to Food in the UK* (May 2019).

The reports on Spain and the United Kingdom include a focus on broader economic policies such as austerity, privatization, and inequality, which have a major impact on the availability of resources for ESR.

QUESTIONS

1. Does it really make a difference if social justice policies are formulated in terms of rights discourse?
2. What are the principal constituencies for country reports on ESR prepared by Special Rapporteurs?

G. THE POLITICAL ECONOMY OF HUMAN RIGHTS

Although this chapter focuses on ESR, the issues raised in the following materials are of crucial importance for all human rights. In recent years, there has been a much more concerted focus in the human rights field on the root causes of violations and the underlying structures that help to maintain various forms of injustice.¹⁹⁴ These approaches reflect many different conceptual and theoretical streams of thought. One is the concept of 'structural violence', introduced by Johan Galtung, in 'Violence, Peace, and Peace Research, 6 *J. Peace Res.* (1969) 167. Galtung viewed social justice as a form of 'positive peace', or the absence of structural violence. He observed that 'law and order' approaches often emphasize personal or bodily violence and neglect the deeper economic and social structures that actually constrain the opportunities for individuals to perhaps an even greater extent.

Iris Marion Young, in *Responsibility for Justice* (2011), criticized the pre-occupation of philosophers like John Rawls with just 'a small subset of [society's] institutions' at the expense of focusing on those 'social-structural processes' that produce so much injustice. For Young (at 52):

¹⁹⁴ See, e.g., V. Mantouvalou, *Structural Injustice Workers' Rights* (2023); D. Birchall, 'Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in an Era of Marketisation', 71 *ICLQ* (2022) 227; Z. Manfredi, 'Radicalizing Human Rights', *The Boston Review*, (21 June 2022); M. McKeown, 'Structural Injustice', 16 *Phil. Compass* (2021) 1; M. Powers and R. Faden, *Structural Injustice: Power, Advantage, and Human Rights* (2019); and A. Nuti, *Injustice and the Reproduction of History* (2019).

Structural injustice ... exists when the social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them. Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the repressive policies of a state. Structural injustice occurs as the consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.

In some respects, this approach is the opposite of that pursued by organizations like Human Rights Watch. As its Executive Director from 1993 to 2022 explained (in Sec. B, above), ‘naming and shaming’ requires the identification of a ‘violatee’ responsible for the problem. In the case of structural violence, this might well be difficult or impossible, because the culprit could be society, the tax system, social mores, or even the market. But human rights obligations fall principally upon governments, and their obligations are not only to refrain from violations themselves or to punish known violators, but also to take whatever measures are needed to facilitate and, as far as possible ensure, conditions in which the populace is able to enjoy the full range of their rights.

The readings below touch, all too briefly, on some of the principal structural impediments to the realization of ESR. In the years ahead, proponents of human rights will need to devote far greater attention to these issues than has been the case to date.

1. Austerity¹⁹⁵

The International Monetary Fund and other financial actors have replaced the terms ‘austerity’ or ‘structural adjustment’ with the more technical and obscure notion of ‘fiscal consolidation’. Wolfgang Streeck, in ‘A New Regime’, in D. King and P. Le Galès (eds.), *Reconfiguring European States in Crisis* (2017) 139 explains that this establishes public austerity as a fundamental principle, to be achieved in part:

by a redefinition of the responsibilities of government and the purposes of public policy, in the direction of a smaller state and an expanded market, less public and more private provision, privatization of state activities and assets, and a substitution of individual effort for collective solidarity. Ultimately, the construction of a consolidation state implies a far-reaching rationalization, or ‘economization’, of politics and society. In the process states become less like sovereigns and more like firms: instead of overriding markets, they have to be responsive to them. Whereas the politics of democratic capitalism was to protect society from the ‘vagaries of the market’ (Polanyi), the politics of the consolidation state protects financial markets from what are for them the vagaries of democratic politics.

[Streeck identifies four ‘lasting political-economic consequences’ of fiscal consolidation:]

1. Budget balancing, if achieved by spending cuts rather than tax increases, and even more so if accompanied by tax cuts, comes at the expense of discretionary as distinguished from mandatory spending. As public budgets approach balance, a growing share of government expenditure goes to cover comparatively rigid, legally fixed expenditures, such as wages for public sector workers, public pensions, and, of course, debt service. As the final element is untouchable in a consolidation state, it is public investment, both in the physical infrastructure and in education,

¹⁹⁵ See generally, A. Nolan and J. P. Bohoslavsky (eds.), *Human Rights and Economic Policy Reform* (2023); G. MacNaughton and D. Frey, *Economic and Social Rights in a Neoliberal World* (2019); and D. Kinley, *Necessary Evil: How to Fix Finance by Saving Human Rights* (2018).

families, active labour market policy, and the like ... that must give. Over the longer term, this will also produce pressures on 'entitlements' like social security, making them more politically vulnerable and less mandatory in effect. ...

2. Budget balancing allows no new debt Public investment will therefore have to be financed out of what will very likely be shrinking current revenue. Regaining and retaining the confidence of financial markets may therefore require governments to cut public investment, even if real interest rates on government debt approach zero. Resulting deficiencies in physical and social infrastructures have to be attended to by private investors assuming what had previously been public responsibilities. One outcome is likely to be a growing number of public-private partnerships (PPPs) of various sorts, with returns on private investment insured by the state, and governments or individual citizens paying user fees to private firms. ... [S]tates and citizens will be paying more under such arrangements than they would have paid had the investment remained in public hands. ...
3. Cutting discretionary expenditure inevitably involves cuts in social services such as education and especially in universal services benefiting all citizens. As the range and quality of state-provided services deteriorate, the middle class will look for complementary or alternative private provision, and governments will be urged to allow private firms to compete with public authorities. In the process, the better-to-do will get habituated to more customized private provision, which will make them demand (further) tax cuts so they can pay for them—tax cuts that will drive further spending cuts. As the welfare state loses growing segments of its middle-class constituency, public programmes will turn into programmes for the poor which ... will make them poor programmes.
4. Privatization of investment in physical and social infrastructures gives rise to a growing private industry operating in what used to be the public sector. While typically subject to regulation, private providers are likely soon to become powerful players in the political arena, where they will ally with the upwardly mobile middle class and its liberal-conservative political parties. The evolving connections of the new firms with the government—often taking the form of a revolving-door exchange of personnel—and their campaign contributions will further cement the shift from a redistributive towards a neoliberal state that abandons providing for social equity and social cohesion to civil society and the market.

Another study documented the extent to which policies demanding austerity were especially prominent in the aftermath of COVID-19:

A decade of fiscal consolidation increased poverty and inequality, especially for women, undermined progress on human rights and sparked social conflict. During 2010-20, prior to the COVID-19 pandemic, millions were pushed into poverty by the jobs crisis and by regressive austerity policies. Women were particularly affected by job losses and cuts in social protection and public services, while austerity was imposed with the implicit assumption that women would act as the shock absorbers by providing (unpaid) care at home. A vast array of social protection benefits, such as child allowances, disability benefits,

gender equality programs, childcare services, services to victims of violence or housing support were rationalized as cost-saving measures ...¹⁹⁶

One documented effect of austerity policies was:

Slower improvements, or deteriorations, in life expectancy and mortality trends were seen in the majority of countries, with the worst trends in England & Wales, Estonia, Iceland, Scotland, Slovenia, and the USA, with generally worse trends for females than males.¹⁹⁷

International human rights bodies have tentatively begun to address the human rights implications of austerity measures,¹⁹⁸ although the courts will often defer to the legislature in such matters. One such example is the UK Government's 'two-child policy' which eliminated benefits otherwise payable to families for any third or subsequent child born after 6 April 2017. The policy was designed to save money and to incentivise parents with more than two children to move into work, or work more hours to make up the difference. But a 2023 report found 'no evidence that capping child benefits increases employment. Labour market activity among larger families seem to be particularly [unresponsive] to reductions in benefits income, likely due to parents' commitment to unpaid care, the scale of caregiving responsibilities and barriers to paid work.'¹⁹⁹

R (ON THE APPLICATION OF SC, CB AND 8 CHILDREN) V. SECRETARY OF STATE FOR WORK AND PENSIONS AND ORS
[2021] UKSC 26

LORD REED: (with whom Lord Hodge, Lady Black, Lord Lloyd-Jones, Lord Kitchin, Lord Sales and Lord Stephens agree)

...
[The Supreme Court considered whether the policy constituted indirect discrimination against women, in contravention of the European Convention on Human Rights.]

193. ... [W]omen constitute 90% of single parents bringing up children, as well as 50% of parents jointly bringing up children. ... Since women are disproportionately represented among parents bringing up children, it is inevitable that they will be disproportionately affected by legislation ... making changes to child-related benefits paid to parents.

...
195. ... There is no suggestion that that is itself the result of discrimination on the ground of sex.

196. The differential impact on women is not, therefore, a special feature of this measure. It is inherent in any general measure which limits expenditure on child- related benefits. ...

197. Once it is understood that the legitimate aims of the measure could not be achieved without a disproportionate impact on women, ... the only remaining question ... in relation to proportionality, is whether the inevitable impact on women outweighed the importance of achieving the aims pursued. Parliament decided that the importance of the objectives pursued by the measure justified its enactment, notwithstanding its greater impact on women. I see no basis on which this court could properly take a different view.

¹⁹⁶ Isabel Ortiz and Matthew Cummins, *End Austerity: A Global Report on Budget Cuts and Harmful Social Reforms in 2022-25* (2022) 6.

¹⁹⁷ G. McCartney et al., 'Is austerity a cause of slower improvements in mortality in high-income countries? A panel analysis', *313 Soc. Sci. & Med.* (2022) 115397.

¹⁹⁸ P. Alston, 'The Impact of Austerity on the Protection of Human Rights', in K. Lenaerts et al (eds.), *An Ever Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (2019) 261.

¹⁹⁹ M. Reader et al., *Making Work Pay? The Labour Market Effects of Capping Child Benefits in Larger Families* (2023).

Discrimination against children living in households containing more than two children

198. There remains the argument that the legislation discriminates against children living in households containing more than two children, by comparison with children living in households containing one or two children

199. Parliament's aims in enacting the legislation ... [were] first, to promote the economic well-being of the country by reducing excessive public expenditure on welfare benefits, with spending on child tax credit being a particular concern; and secondly, to address what was regarded as an unfair and unreasonable aspect of the child tax credit system, namely that recipients were guaranteed a rise in income for every additional child they might choose to have, without limit. ... [T]he decision ... ensured that the measure would not affect families of average or below-average size.

200. ... [T]he objective of protecting the economic well-being of the country is undoubtedly a legitimate aim for the purposes of the Convention. ...

201. ... Since the legislation is a general measure of social and economic strategy, involving an assessment of priorities in the context of the allocation of limited state resources, it follows that Parliament's assessment that the difference in treatment is justified should be treated by the courts with the greatest respect. ...

...

204. ... How far the welfare system should go to protect families against the vicissitudes of life is a matter on which opinions in our society differ greatly, and of which Parliament is the best judge. ...

205. It is also argued that the legislation is not in the best interests of children living with persons whose entitlement to child tax credit is affected by the limitation. ... But Parliament was told that reducing spending on welfare benefits would allow the Government to protect other expenditure of benefit to children: on education, childcare and health. Furthermore, the difficult question is not so much what would be in the best interests of children, but the extent to which it is fair, economically desirable and socially acceptable to impose the cost of supporting children, whose parents lack the means to do so themselves, on other members of society. Parliament must have considered that the impact of the limitation upon the interests of the children who would be affected by it was outweighed by the reasons for introducing it.

206. The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.

[The appeal against the policy was dismissed.]

2. Privatization

Governments worldwide have increasingly sold public assets to private entities and integrated the private sector into the delivery of public services, including healthcare, education, housing, and water.²⁰⁰ As argued by Julien Mercille and Enda Murphy, in 'What is Privatization? A Political Economy Framework', 49 *Environ. Plan A* (2017) 1040 privatization "restructures economies in fateful

²⁰⁰ See A. Dorfman and A. Harel (eds), *The Cambridge Handbook of Privatization* (2021); C. Cordelli, *The Privatized State* (2020); and P. Alston, Report of the Special Rapporteur on extreme poverty and human rights on privatization, UN Doc. A/73/396 (2018).

directions: ownership of public assets and goods and services provision are transferred away from collective control and into the hands of private interests. This implies not only a reduction of democratic input and accountability in economic practices and institutions but a widening of inequality.”²⁰¹

Various Special Rapporteurs have documented the ESR impacts of privatization, as has the ESCR Committee. General Comment No. 24 on ICESCR obligations in the context of business activities outlines the Committee’s approach:

2. Obligation to protect

...

21. ... Privatization is not per se prohibited by the Covenant, even in areas ... where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called “public service obligations”: ...

22. The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic [ESCR] may become less affordable [when] provided by the private sector, or that quality may be sacrificed for the sake of increasing profits....States thus retain at all times the obligation to regulate private actors to ensure that ... services they provide are accessible to all, are adequate, are regularly assessed ... and are adapted to [the public’s] needs

The African Commission on Human and Peoples’ Rights, in General Comment 7 (2022) on State obligations with regard to social services, also addressed the issue.

B. General human rights standards applicable to social service provision

(11) This trend towards commercialization [of public services] undermines the object and purpose of the African Charter, which views social services not as commercial products, but as essential preconditions for the enjoyment of human rights.

...

(15) ... States must impose public service obligations to ensure that social services, at minimum, are:

- (a) available to all individuals on an equal basis and without discrimination;
- (b) accessible, even in times of emergency;
- (c) acceptable to the users;
- (d) of the highest attainable quality;
- (e) effectively regulated;
- (f) and subject to democratic public accountability.

C. The State obligation to ensure the provision of public social services

(31) ... Although States have reasonable discretion when designing their systems for social service provision, there should always be a quality public option. This

²⁰¹ See J. Mercille and E. Murphy, “What is privatization? A political economy framework”, 49 *Environment and Planning A: Economy and Space* (2017) 1040.

system should be adequately funded, democratically controlled, and non-commercial in nature.

Domestic courts have also considered the permissibility of privatization. The High Court of Israel, for instance, held that a law establishing a privately operated prison was unconstitutional, reasoning:

When the state transfers power to manage a prison, with the invasive powers that go with it, to a private profit-making corporation, it violates the human dignity of the inmates of that prison, since the public purposes that give imprisonment legitimacy are undermined and the inmates becomes a means for the private corporation to make profits.²⁰²

3. Inequality

One of the most troubling phenomena today is the rapid acceleration in inequality. Reports by the World Inequality Lab and Oxfam describe the trajectory. Thomas Piketty looks at the justifications often proffered to defend such vast differences.

Abhijit Banerjee and Esther Duflo, in ‘Foreword’ to the *World Inequality Report 2022* (at 3), observe that:

In every large region of the world with the exception of Europe, the share of the bottom 50% in total earnings is less than 15% (less than ten in Latin America, Sub-Saharan Africa and MENA region) while the share of the richest 10% is over 40% and in many of the regions, closer to 60%. ... [E]ven more striking is what is happening to wealth. The share of the bottom 50% of the world in total global wealth is 2% ..., while the share of the top 10% is 76%. Since wealth is a major source of future economic gains, and increasingly, of power and influence, this presages further increases in inequality. Indeed, at the heart of this explosion is the extreme concentration of the economic power in the hands of a very small minority of the super-rich. The wealth of the top 10% globally ... is actually growing slower than the world average, but the top 1% is growing much faster: between 1995 and 2021, the top 1% captured 38% of the global increment in wealth, while the bottom 50% captured a frightening 2%. The share of wealth owned by the global top 0.1% rose from 7% to 11% over that period

In one of its annual reports on inequality, (*Survival of the Richest: How We Must Tax the Super-Rich Now to Fight Inequality* (2023)), Oxfam notes that the world is living through an unprecedented moment of multiple crises involving widespread hunger and energy poverty, climate breakdown, COVID-19, and increasing poverty:

... At the same time, these multiple crises all have winners. The very richest have become dramatically richer and corporate profits have hit record highs, driving an explosion of inequality.

- Since 2020, the richest 1% have captured almost two-thirds of all new wealth – nearly twice as much money as the bottom 99% of the world’s population.

...

²⁰² Academic Center of Law and Business v. Minister of Finance, HCJ 2605/05 (19 November 2009).

- Food and energy companies more than doubled their profits in 2022, paying out \$257bn to wealthy shareholders, while over 800 million people went to bed hungry.
- Only 4 cents in every dollar of tax revenue comes from wealth taxes, and half the world's billionaires live in countries with no inheritance tax on money they give to their children.
- A tax of up to 5% on the world's multi-millionaires and billionaires could raise \$1.7 trillion a year, enough to lift 2 billion people out of poverty, and fund a global plan to end hunger.

Thomas Piketty, in *Capital and Ideology* (2020) 1, argues that:

Every human society must justify its inequalities: unless reasons for them are found, the whole political and social edifice stands in danger of collapse. Every epoch therefore develops a range of contradictory discourses and ideologies for the purpose of legitimizing the inequality that already exists or that people believe should exist. ...

In today's societies, these justificatory narratives comprise themes of property, entrepreneurship, and meritocracy: modern inequality is said to be just because it is the result of a freely chosen process in which everyone enjoys equal access to the market and to property and automatically benefits from the wealth accumulated by the wealthiest individuals, who are also the most enterprising, deserving, and useful. ...

...

... Nearly everywhere a gaping chasm divides the official meritocratic discourse from the reality of access to education and wealth for society's least favored classes. The discourse of meritocracy and entrepreneurship often seems to serve primarily as a way for the winners in today's economy to justify any level of inequality whatsoever while peremptorily blaming the losers for lacking talent, virtue, and diligence. ...

...

From this historical analysis one important conclusion emerges: what made economic development and human progress possible was the struggle for equality and education and not the sanctification of property, stability, or inequality. The hyper-inegalitarian narrative that took hold after 1980 was in part a product of history, most notably the failure of communism. But it was also the fruit of ignorance and of disciplinary division in the academy. The excesses of identity politics and fatalist resignation that plague us today are in large part consequences of that narrative's success. By turning to history from a multidisciplinary perspective, we can construct a more balanced narrative and sketch the outlines of a new participatory socialism for the twenty-first century. By this I mean a new universalistic egalitarian narrative, a new ideology of equality, social ownership, education, and knowledge and power sharing. ...²⁰³

...

²⁰³ On meritocracy and taxation, see M. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (2020).

4. Fiscal Policy Responses

Schumpeter famously observed that ‘nothing shows so clearly the character of a society and of a civilization as does the fiscal policy that its political sector adopts’.²⁰⁴ And Murphy and Nagel have noted that while ‘[n]othing could be more mundane than taxes, ... they provide a perfect setting for constant moral argument and possible moral progress.’²⁰⁵ For them, taxation has two primary functions:

- (1) It determines how much of a society’s resources will come under the control of government, for expenditure in accordance with some collective decision procedure, and how much will be left to the discretionary control of private individuals, as their personal property ... (2) It plays a central role in determining how the social product is shared out among different individuals, both in the form of private property and in the form of publicly provided benefits.²⁰⁶

As Streeck indicated above, mainstream neoliberal policy prescriptions are almost entirely predicated upon reducing taxes to the greatest extent possible. The result is that in many countries, including the United States and the United Kingdom, vibrant debates about the need for radical fiscal reforms proceed with little if any mention of higher tax rates. Yet tax is central to the ability of any government to protect and promote human rights.²⁰⁷

Consider the following overview:

**ALEX COBHAM, FARIYA MOHIUDDIN AND LIZ NELSON,
GLOBAL TAX JUSTICE AND HUMAN RIGHTS
GILLIAN MACNAUGHTON AND DIANE FREY (EDS.),
HUMAN RIGHTS AND ECONOMIC INEQUALITIES (2021) 168**

I. Introduction

... Estimates of the global revenue losses due to international tax avoidance (and tax evasion) are in the region of \$700 billion each year, with lower-income countries bearing disproportionate costs. The ramifications for human rights obligations are both local and international. In equal measure, domestic tax policy and practice, and international approaches and cooperation can be instrumental in supporting national governments to maximize available resources. The prospect that states with available resources will choose to use these to meet their human rights obligations – put simply, through redistribution of income, or by providing a program of publicly funded services – also depends, in a more complex but equally fundamental way, on the role of tax and the social and fiscal policies governments choose to adopt. Tax provides a key point in the relationship between people and their States, and nurtures the accountability of States, which in turn results in long-term improvements in governance and the effectiveness of political representation. In short, tax contributes to the necessary resources to support governments in developing national poverty mitigation strategies and in establishing social protections, public services and infrastructure. ...

...

²⁰⁴ J. Schumpeter, *History of Economic Analysis* (1954), at 769.

²⁰⁵ L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice* (2002), at 188.

²⁰⁶ *ibid.*, at 76.

²⁰⁷ P. Alston and N. Reisch (eds.), *Tax, Inequality, and Human Rights* (2019).

II. Human Rights and the Four Rs of Tax

... State bodies are, indeed, key duty bearers and are required to act to ensure the fulfilment of human rights. Government, as agent of the State, therefore must develop economic policies, including a fiscal environment, to realize these rights. Tax plays a pivotal role in doing this. It provides the means to raise revenue and effect the redistribution of income and wealth and thereby address economic inequalities. ...

This section explores ... the “four Rs” of tax – revenue, redistribution, repricing and representation ...

A. Revenue

Financial resources enable governments to meet their human rights obligations. Taxes can be both regressive and progressive, but even individually regressive taxes, such as a consumption tax, can play an important role in raising revenue for progressive expenditure. The critical assessment is that of the overall incidence of the tax system and of the associated public expenditure, including benefits and credits, in order to reflect the whole distributional change. Tax justice makes the emphatic case that tax revenue is central to raising required resources for the realization of human rights.

...

B. Redistribution

... Within a tax justice normative framework, redistribution should target unearned income (that which is generated from capital gains, dividends, stocks and shares, and other financial assets such as real estate and land) and inherited wealth. These measures both broaden a country’s tax base and reflect the progressive principle of taxing based on the ability to pay. ...

...

Overall, the potential for progressive redistribution of wealth and income provides a powerful counterpoint to the emergence of fiscal austerity policies where national debt has been compounded by conflict in many countries throughout the world; or where an ideological response has driven regressive cuts to both expenditure and tax, as in the UK and Spain. ...

C. Repricing

There are often social costs to private behavior, and these may not be fully reflected in market prices. For example, ... a failure to tax carbon emissions can lead to societies bearing the costs of companies’ production decisions. Behaviors that are associated with social or public harms or benefits can be addressed using tax as a tool to reprice market goods and services where the private and social costs or returns diverge. In other words, a progressive tax regime can intercede on behalf of public interest.

...

...

D. Representation

While often overlooked, the channel linking taxation and political representation is critical in ensuring that States are able financially to meet their obligations, including through funding public services and curtailing economic and social inequalities, and that there is sufficiently strong and broad public accountability so that inequalities of influence too can be overcome (to ensure, for example, that economic elites do not prevent effective, progressive taxation).

...

... A state operating an effective taxation system upon which it relies for most of its relatively high public expenditure is likely, over time, to become or remain responsive to its people – raising tax morale and compliance, and further supporting the quality of representation and effectiveness of spending. ... [A] State with persistently low tax-funding of its expenditures is likely to see lower levels

of public spending, and deteriorating quality of governance and political representation – ultimately undermining its own legitimacy to tax.

...

The Impact of Tax Avoidance and Evasion on ESR

Each State Party to the ICESCR is required to use ‘the maximum of its available resources’ to meet its obligations. We have seen that the stumbling block in some of the discussions about these rights is the claim that states simply do not have the necessary resources. Yet the relevant resources can only result from appropriate fiscal policies, including the rates of taxation; how tax liabilities are structured and on whom or what they are imposed; and how much effort will be made to collect taxes due and to close loopholes or other arrangements that enable certain groups to avoid taxation. Tax ‘evasion’ involves a violation of the law, whereas tax ‘avoidance’ is legal. But the latter might rely on laws that are patently unfair and even designed to let certain groups off the hook.

Tax policies raise complex and multi-dimensional issues, but they cannot be avoided if the idea of State responsibilities for the realization of ESR are to be taken seriously. While most of the materials in this section focus on the situation in developed countries, it is important to note that the same dynamics often apply in relation to countries in the Global South. Other relevant factors in the Global South tax context include states’ inability to tax multinational corporations on their operations, widespread corruption, and failures to prevent tax evasion or to address tax avoidance. The following materials are no more than snapshots of existing arrangements designed to provide a basis for discussions.

Vanessa Ogle provides historical background to the unevenness of global tax policies in ‘Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s-1970s’, 122 *Am. Hist. Rev.* 122 (2017) 1431:

... Tax codes as they applied to Europeans and other non-natives in colonies were extremely varied, laced with exemptions, and often simply hard to enforce. Tax rates were much lower in colonies

... [W]hen Europeans retreated from the colonial world abroad in the 1950s and 1960s, some returnees sought to prolong the favorable tax arrangements that had come with empire. In comparison, the high tax rates now intended to finance the welfare state at home seemed excessive. But the former colonies were no longer set up to securely serve in their former capacity as tax shelters. ... “[R]eturnees from empire,” British merchant banks soon discovered, could be a lucrative source of tax haven business. Malta and Jersey began offering tailored solutions to such clientele. Similarly, to French observers at the time, it was clear that Monaco’s fortunes as a burgeoning tax haven from the late 1950s on had to do with French returnees, especially from Indochina, Algeria, Tangier, and Morocco. Decolonization and the end of empires created something of a money panic and a clientele eager to move assets out of the colonial world to havens that would shelter them from [taxation]. ...

Such demand for more and better tax havens had to be met by both governments and an army of avoidance assistants. Between 1945 and 1970, some of the most important new or improved tax havens and offshore markets were set up, and older ones expanded, with government involvement from London and Washington, D.C. Even where governments were not directly involved, they at least tolerated these developments. ...

Money laundering is one factor which can erode a country’s tax base, as described by Jack Blum, Charles Davidson, and Ben Judah in ‘Offshore, National Security and Britain’s Role’, 11 *Tax Justice Focus* (2020), at 2:

Some estimates put the share of the UK's GDP derived from money laundering as high as 15%. London is both one of the critical nodes of the world financial system and a gateway to the offshore world: with countless financial and legal service providers ready to shuttle their clients' wealth to secrecy jurisdictions under British sovereignty like the British Virgin Islands or the Cayman Islands which have become hubs of illegal activity. All this has helped London become a favoured location for oligarchs, whose needs and wants have become a staple of the professional services sector.

Even where no illegal activity is involved, 'tax shifting', as identified by Katarzyna Anna Bilicka, in 'Comparing UK Tax Returns of Foreign Multinationals to Matched Domestic Firms', 109 *Am. Econ. Rev.* (2019) 2921, remains a problem:

... [F]oreign multinational subsidiaries shift a large proportion of their taxable profits out of the United Kingdom. Specifically, the baseline propensity score estimates suggest that foreign multinational subsidiaries underreport their taxable profits by about 50 percent relative to domestic standalones. ...

...

... [P]otential revenue gains from equalizing the tax payments of foreign multinational subsidiaries and domestic standalones would vary from £3 billion at the beginning of the sample to £25 billion in 2014. Relative to the total UK corporate tax revenue, which was £30 billion in 2000 and £40 billion in 2014, this would imply that a full elimination of the differences in the reported taxable profits between domestic standalones and foreign multinational subsidiaries would lead to revenue gains of 10 percent in 2000 and 62 percent in 2014, absent behavioral changes.

Since 2015, banks and other financial intermediaries have been required to report on foreign financial assets and accounts under the U.S. Foreign Account Tax Compliance Act. On the basis of this data, Niels Johannesen et al., in 'The Offshore World According to FATCA: New Evidence on the Foreign Wealth of U.S. Households', (*NBER Working Paper* 31055, 9 March 2023) at 3, conclude that:

... [A]round 1.5 million U.S. taxpayers held foreign financial accounts with aggregate assets of around \$4 trillion in tax year 2018. By comparison, the total financial assets of U.S. households totaled roughly \$80 trillion according to official financial accounts. Around half of the assets in foreign accounts, just below \$2 trillion, were held in jurisdictions usually considered tax havens, such as Switzerland, Luxembourg and the Cayman Islands. Just 14% of accounts are located in tax havens compared to nearly half the total wealth, which reflects that accounts in havens were on average larger.

Tax havens are central to many of the challenges in this area. The Tax Justice Network has ranked countries in its *Corporate Tax Haven Index - 2021 Results* on the basis of their complicity 'in helping multinational corporations underpay corporate income tax'. Beside each country in the list below is its 'Haven Score' which measures the scope for corporate tax abuse allowed by its tax and financial systems, and its 'Share', reflecting the percentage of the world's corporate tax abuse for which TJN calculates it is responsible:

1. British Virgin Islands (100; 6.4%); 2. Cayman Islands (100; 6.0%); 3. Bermuda (100; 5.7%); 4. Netherlands (80; 5.5%); 5. Switzerland (89; 5.1%); 6. Luxembourg (74; 4.1%); 7. Hong Kong (78; 4.1%); 8. Jersey (100; 3.9%); 9. Singapore (85; 3.9%); 10. United Arab Emirates (98; 3.8%); 11. Ireland (77; 3.3%); 12. Bahamas (100; 3.3%); 13. United Kingdom (69; 3.1%); ... 18. France (67; 2.1%); 19. China (63; 2.0%); ... 25. USA (47; 1.2%).

The same network, in its *State of Tax Justice 2022* report, estimates that:

... [A]t least 1 of every 4 tax dollars lost to multinational corporations using tax havens can be prevented by publishing government-collected transparency data that has been held from the public since at least 2016 ... [d]ue to the OECD's failure to publish aggregated country by country reporting data

A path breaking study by Annette Alstadsæter, Niels Johannesen, and Gabriel Zucman, 'Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality', 162 *J. Pub. Econ.* (2018) 89, estimated total offshore wealth kept in tax havens to be about 10 percent of world GDP, or \$5.6 trillion in 2007. Almost half was in Switzerland. They also estimated the ratio of offshore wealth to GDP by country. It ranged from a very small amount in Scandinavia, to as much as 60 percent in Russia, the Gulf states, and Latin America. About 80 percent of those funds belonged to the top 0.1 percent of households.

Finally, Thomas Tørsløv et al., 'The Missing Profits of Nations', 90 *Rev. Econ. Stud.* (2023) 1499 underscores the impact of profit-shifting by multinational corporations on average tax rates:

One of the most striking development [sic] in global tax policy since the 1980s has been the decline in corporate income tax rates. Between 1985 and 2018, the global average statutory corporate tax rate fell by about half, from 49% to 24%. One reason for this decline is international tax competition. By cutting their tax rates, countries can attract profits and capital from abroad.

...

36% of multinational profits—defined as profits made by multinationals outside of the country where their parent is located—were shifted to tax havens globally in 2015. We establish that US multinationals shift comparatively more profits: in 2015, US firms shifted more than half of their multinational profits, as opposed to about a quarter for other multinationals.

Even when multinational corporations are taxed by the states in which they are headquartered, they can often take advantage of 'business-friendly' policies to shrink their taxable income. These policies include allowable deductions of many kinds, some inserted in tax codes precisely to benefit particular categories of taxpayers. In the United States, for example, hedge fund managers have various options for ensuring that they pay perhaps 40 percent less than otherwise applicable tax rates. Major technology companies have historically paid very low tax rates: Amazon, for example, according to Just Taxes Blog (7 February 2022):

... reported a record \$35 billion in U.S. pretax income for fiscal year 2021 [With a federal tax bill of \$2.1 billion, its] effective federal income tax rate of 6 percent means it avoided about \$5.2 billion of federal income tax in 2021. If Amazon had paid the statutory 21 percent tax rate ... without any tax breaks, that would have meant a tax bill of more than \$7.3 billion.

The Role of International Law

The picture that emerges from the preceding materials is that there are many ways in which fiscal policies could be reformed that would result in a much higher tax yield for governments, thereby providing additional resources that could, in principle, be spent to enhance the realization of ESR.²⁰⁸ The final remaining issue is what role international law plays and could play in this regard.

Lorena Bachmaier Winter and Donato Vozza, in 'Corruption, Tax Evasion, and the Distortion of Justice: Global Challenges and International Responses', 85 *Law & Contemp. Prob.* (2022) 75, contrast the extensive work that has been done to reign in some forms of corruption with the longstanding reticence to tackle tax fraud:

²⁰⁸ See EU Tax Observatory, *Global Tax Evasion Report* 2024.

Despite the common harms that countries face from corruption and from fraudulent tax practices, a notable gap exists in international legal responses to these two related but distinct global crimes. Although characterized by weaknesses or ineffectiveness, anti-corruption strategies are governed and advanced through a multilevel approach. Indeed, international conventions provide a common legal framework on anticorruption for state parties. In contrast, there is no international legal instrument to counter serious tax evasion and tax avoidance behaviors from a criminal law perspective, apart from some pieces of legislation adopted within the European Union. Given that national responses to tax evasion are marked by differences that enable tax dodging and hinder international cooperation, the absence of binding international legal responses to tax crime can precipitate serious distortions of justice and warrants further attention.

Arthur Cockfield, in ‘Secrets of the Panama Papers: How Tax Havens Exacerbate Income Inequality’, 13 *Colum. J. Tax L.* (2021) 45, considers possible policy reforms that might inhibit tax haven abuses. One is to create ‘a cross-border withholding tax on global investments [which] could assist tax authorities in enforcing their tax laws’. A second is to establish a ‘global financial registry’ which would make it easier for governments to identify the ultimate (or beneficial) human owners of cross-border investments, which are often very carefully hidden. Governments would thus be better able to determine ‘if their resident firms had paid tax on worldwide income’. A third option is for governments to eliminate ‘onshore’ laws that offer tax-haven-like benefits via domestic law. These are common in many countries, including the United States.

Cockfield also suggests some more technical fixes, including:

the need for whistleblower protections for any individual who provides information leading to tax and financial crime prosecutions; the need to embed lawyers within tax authority audit teams to ensure proper evidence is provided to prosecutors; the need for prosecutorial incentives to pursue significant penalties against “white collar” criminals who have often attracted lenient sentences; better information sharing among government agencies when each agency sees only one part of the overall criminal financial scheme; and bureaucratic incentives to retain police, tax officials, and prosecutors in the long run, so they can gain a necessary understanding of the complexities.

Many of these proposals necessarily implicate financial privacy. For instance, a greater sharing of information among government agencies may violate existing prohibitions against such sharing ... under the view they unduly inhibit privacy interests. These privacy interests in turn must necessarily be protected within a free and democratic society for reasons that include the need to protect freedom of expression and freedom to engage in political dissent. Moreover, in an age of big data, government use of opaque algorithms to scrutinize taxpayers, and increasing data collection, taxpayer privacy rights arguably need stronger protection.

Nevertheless, ... from a distributional justice perspective, the granting of strong privacy protections to corporations or offshore bank accounts protects the interests of wealthy individuals and criminals at the expense of ordinary citizens who cannot take advantage of the benefits offered by the offshore world. In other words, the current system of strong financial privacy protection harms the public interest and contributes to income inequality.

A long-running debate concerns whether international tax reforms are best negotiated within the universal framework of the United Nations or in the ‘rich countries’ club’, the Organisation for Economic Co-operation and Development (OECD). Tove Maria Ryding, in ‘Proposal for a United Nations Convention on Tax’, *Eurodad* (March 2022), argues that many developing countries have been

unable to participate in that forum and that there has been a serious lack of transparency. Progress has been very slow, although in 2021 there was agreement in principal on a global minimum tax of 15 percent applicable to multinational enterprise groups with a global turnover of at least €750 million. In 2025, the Trump administration rejected the OECD agreement.

Finally, following UN General Assembly Res. 77/244 (2022), negotiations began in 2025 for a UN Convention on International Tax Cooperation. The goal is to complete drafting of the treaty and two protocols, one on cross-border services in the digitalised economy and another on prevention and resolution of tax disputes, by the end of 2027. The Trump administration rejected the process but all other UN Member States remain engaged in the negotiation.

QUESTIONS

1. Why is it important to consider the political economy of rights in general and ESR in particular, and what are the main risks of such a focus?
2. Compare the ESCR Committee's approach to privatization with the approaches of the African Commission and the High Court of Israel. Are 'public service obligations' sufficient to mitigate the risks posed by privatization?
3. How should human rights and tax justice respond to strong resistance by conservatives to more effective tax policies? Consider the situation in the United States, for example. In December 2018, *ProPublica* reported that people claiming the earned income credit in their U.S. tax returns, most of whom earn under \$20,000 a year, were more likely to be audited by the Internal Revenue Service than those earning \$400,000. This is consistent with a zero-tolerance approach to possible welfare fraud, and a much more lenient approach to tax fraud by high earners. Between 2010 and 2018, research by the Center on Budget and Policy Priorities²⁰⁹ showed that IRS enforcement funding, adjusted for inflation, was cut by 24 percent, although the number of tax returns grew by 9 percent; operations staff were reduced by 31 percent; there were 51 percent fewer audits of corporations with more than \$1 billion in assets; and the audit rate for filers earning over \$1 million decreased by 61 percent. In April 2021, the IRS Commissioner told Congress that the 'tax gap', or the difference between taxes owed and taxes paid, averaged \$441 billion per year, mostly as a result of evasion by the wealthy and large corporations. By June 2025 the Trump administration had reduced the workforce of the Internal Revenue Service by 24%, with significant additional losses anticipated. The nonpartisan Yale Budget Lab estimated that a 50% cut could lead to a \$350 billion revenue drop in the next decade. The number of auditors was reduced by 31%, thus significantly reducing the risk of audit for high-income earners.

²⁰⁹ <https://www.cbpp.org/research/federal-tax/depletion-of-irs-enforcement-is-undermining-the-tax-code>.

Chapter 5. National Security, Terrorism and International Humanitarian Law

The relationship between national security and human rights is a long and troubled one. This chapter explores the subject through the prism of twenty-first century counter-terrorism law and practice. International organizations and courts have developed considerable experience over many decades in dealing with situations involving terrorism, armed conflict, and states of emergency. A rich body of legal rules and principles has developed in response to the interests and strategic goals of the various actors.

The materials raise important considerations about the distribution of interpretative and regulatory authority in times of public emergency. They also demonstrate the sweeping changes brought by the counterterrorism regime implemented after the terrorist attacks of 11 September 2001. Recurring questions include whether the proper balance is being struck between security and rights, and which rules and which institutions are best equipped to strike that balance. Some have argued that the challenge is not to achieve a balance but to manage co-dependency.

The attacks on 11 September 2001 constituted a turning point in the relationships between international law, global institutions and terrorism. It was one of the deadliest days in American history, totaling more deaths — nearly 3,000 — than the attack on Pearl Harbor and rivalling, if not exceeding, the number of Americans killed on D-Day. Nineteen members of Al Qaeda hijacked four commercial jets, two of which crashed into the 110-story twin towers of the World Trade Center, one into the Pentagon and one in a field in Pennsylvania. Almost two hours passed between the first collision and the collapse of the second World Trade Center tower, with the loss of life and panic televised around the world as the events unfolded. The near simultaneous attacks exposed major vulnerabilities in the security system of the world's superpower. Al Qaeda cells had resided within US territory. They had converted commercial transportation into catastrophic weapons. Their members' willingness to embrace suicide represented a unique strategic threat, one less susceptible to traditional modes of deterrence. With the demonstrated willingness of Al Qaeda to massacre thousands of people, intelligence agencies in the United States and elsewhere began considering with special intensity the prospect of a terrorist organization acquiring and employing weapons of mass destruction.

International institutions responded in a swift and extraordinary manner. In a resolution passed on 12 September, the UN Security Council determined that the attacks constituted a 'threat to international peace and security' and recognized the 'inherent right of individual or collective self-defence in accordance with the Charter' (Res. 1368). Accordingly, the resolution implicitly recognized that the acts of 11 September constituted an 'armed attack' under Article 51 of the UN Charter. Although the United States and other countries had experienced and responded to terrorist attacks with force in the past, the Council had never before issued such a finding. Also unprecedented, both the North Atlantic Treaty Organization and the Organization of American States formally considered 11 September an 'armed attack' and invoked the collective self-defence provisions of their respective treaties.

9/11 represented a turning point in the strategic approach of the United States to terrorism. After invading Afghanistan in 2001, the United States spent \$2.313 trillion on the war through 2022.²¹⁰ This was one part of the Bush Administration's 'Global War on Terrorism' which posited that the United States was in a global 'armed conflict', of unlimited potential scope and duration, with Al Qaeda and its affiliates. This strategic posture entailed the adoption of a 'war model' in dealing with terrorism in contrast with an exclusively 'criminal law model'. A war model employs the instruments of warfare such as armed interventions, armed forces and military violence. A criminal law model employs the instruments of law enforcement, policing and prosecutions.

Choosing to adopt a war model may have a greater effect on political discourse and psychological frames than on rights and obligations under international human rights law. As will be discussed below,

²¹⁰ Watson Institute, Brown University, *Cost of War* (2022), cited by President Biden in August 2021.

international human rights law adjusts state obligations regardless of whether a public emergency is designated a war or another type of threat to public order and national security. The nature of the threat — its gravity and probability — is the critical variable. That said, domestic legal questions, such as constitutional presidential powers, may turn on the classification of a situation as a war or something else. We also consider the implications of the fact that the existence of an armed conflict triggers the application of international humanitarian law (IHL), which is also known as the law of armed conflict (LOAC).

A. TERRORISM: DEFINITIONS AND INSTITUTIONAL RESPONSES

At the international level, states have shown limited willingness to find a generally, if not universally, acceptable definition of terrorism. Two separate elements have contributed to this reluctance. The first is encapsulated in the adage that ‘one person’s terrorist is another person’s freedom fighter’. While competent lawyers should be capable of classifying specific acts as illicit under any circumstance and without regard to the motivation of fighting forces, at different points in history various states have employed legal craft to create exceptions for their favoured political groups or ideological struggles. The second is that the absence of an agreed definition leaves states to craft their own approaches and to adapt counter-terrorism laws to serve more subjective purposes.

In the second half of the twentieth century, and in the absence of a strong political consensus, states interested in outlawing terrorism through international treaties had to make do with codifying the definition and prohibition of specific acts — such as hostage taking and seizure of civilian aircraft. The UN began this piecemeal approach with the adoption of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. Eight conventions of a similar character were adopted in the 1970s and 1980s, and two more before 1999. As early as 1996, India proposed a draft international convention on the suppression of terrorism. Considerable progress was made by 2002, but since then continuing negotiations in a Working Group of the Sixth Committee of the General Assembly have yielded little.

During this period, efforts at reaching a general definition of terrorism and a categorical outlawing of the practice were stymied by divergent political interests. Some argued that any definition and accompanying regulatory regime ought to recognize the legitimacy of armed struggle by national liberation groups, such as the Palestine Liberation Organization and the African National Congress, and groups resisting colonial domination. In contrast, others argued that no definition of terrorism would be acceptable if it implied that attacks on civilians could be excused in the case of armed resistance or insurgencies waged for particular purposes. Another political impasse involved the regulation of ‘state terrorism’. That is, some proposed definitions of terrorism faced stiff opposition because they focused on actions by non-state actors and failed to address violence that governments employed against civilians. Finally, a nagging legal question was whether crimes against humanity — a widespread or systematic attack against a civilian population — already covered significant acts of terrorism.

Steps towards defining terrorism include the International Convention for the Suppression of the Financing of Terrorism, agreed to by the UN General Assembly in December 1999. It contains the first general definition of terrorism in an international treaty:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

By mid-2001, only four states had ratified the Convention – far short of the 22 required for the treaty to enter into force. In the days following the attacks on 11 September, the Security Council called on

states to join the Convention ‘as soon as possible’. Within five years, 155 states had done so, and by 2025 there were 190 parties.

Another significant step towards achieving a universal definition was spurred by the Security Council. In August 2004, the government of Russia introduced Resolution 1566 on terrorism. The previous month, Russia had experienced one of the worst hostage crises in its history. A Chechnyan armed group seized a Russian school in the town of Beslan, and the standoff ended in the deaths of over 300 civilians, most of them children. The resolution was intended, in part, to expand the work of a Security Council committee beyond its existing focus on Al Qaeda and the Taliban. The Council broke new ground with a unanimously adopted resolution that effectively provided a general definition of terrorism:

The Security Council ... acting under Chapter VII ... [r]ecalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature

These developments, however, did not resolve the legal ambiguities and political controversy surrounding a definition. Upon ratifying the Terrorism Financing Convention, three states (Egypt, Jordan and Syria) submitted a reservation to the definition of terrorism. Jordan’s reservation, for example, stated that its government ‘does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people’s right to self-determination as terrorist acts within the context of paragraph 1(b) of Article 2 of the Convention.’ Two dozen states formally objected to the reservation. Most of them contended that the reservation was incompatible with the object and purpose of the treaty. None of the objections were made by an Islamic or African country. Similar cleavages emerged with respect to Security Council Resolution 1566.

In 2006, Martin Scheinin, the first Special Rapporteur on counter-terrorism proposed that:

‘Terrorist offences’ should be confined to instances where the following three conditions cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Similarly, any criminalization of conduct in support of terrorist offences should be restricted to conduct in support of offences having all these characteristics (UN Doc E/CN.4/2006/98, para. 72).

It has been argued that a ‘one-size fits all’ approach is unworkable and should be replaced by ‘a multi-definitional approach to the concept of terrorism in legal terms, with the definition used being determined by the powers exercisable in respect of it. This would work as a sliding scale: the more intrusive, repressive and oppressive the powers the narrower the definition.’²¹¹ Another scholar has proposed distinguishing two different classes of ‘especially violent’ criminal activities. The first is core terrorism, involving ‘actions which undermine civilians’ essential rights (... such as life, physical integrity, freedom, and dignity)’, which has an organizational dimension, and an intent to spread terror among the population. The second is subversion and relates to widely but not universally condemned

²¹¹ A. Greene, ‘Defining Terrorism: One Size Fits All?’, 66 *Int. Comp. Law Q.* (2017) 411.

acts which are pursued for political ends.²¹² For its part, the UN continues to address terrorism per se, but has also added other phenomena such as ‘racially and ethnically motivated violent extremism’.²¹³

But most commentators have been strongly critical of the absence of an agreed definition, including the current Special Rapporteur, Ben Saul.

**BEN SAUL, THE LEGAL BLACK HOLE IN UNITED NATIONS COUNTERTERRORISM
INTERNATIONAL PEACE INSTITUTE, GLOBAL OBSERVATORY, 2 JUNE 2021²¹⁴**

It is remarkable that two decades of extensive global counterterrorism law and cooperation have proceeded from a normative black hole: the absence of a common definition of terrorism. Security Council Resolution 1373 and successive resolutions have deliberately omitted any definition, despite requiring states to take far-reaching legislative and executive action.

... [T]he Council’s approach was tactically brilliant. ... [Any precise definition] would have been unlikely to reflect or attract an international consensus, triggering serious compliance problems in national implementation.

... Legal definition was instead devolved to states in national implementation. ... [They] were generally content to retain their sovereign discretion to identify and legislate for themselves the meaning of terrorism.

Much valuable and principled counterterrorism law and cooperation has occurred based on the Council’s suite of resolutions, despite the lack of a definition. The failure to define terrorism continues, however, to seriously impede the effectiveness of counterterrorism, its consistency with human rights law and international humanitarian law, and the legitimacy and legality of the Council’s exercise of its international security powers under the United Nations Charter.

...
[F]rom a practical standpoint, the inevitable divergence between national definitions impairs inter-state cooperation to “bring to justice” terrorists

... In the absence of an agreed international definition, one state is not required to criminalize the same “terrorist” conduct as another state by asserting extraterritorial quasi-“universal” jurisdiction over it. Instead, different domestic counterterrorism laws sail by like ships passing in the night. The legal differences are also fertile ground for political tensions

... [D]ivergent national definitions equally impair cooperation across the spectrum [in matters such as] the duty on states to themselves refrain from supporting terrorism and to counter terrorist financing, prevent terrorism and support for it, prevent the movement of terrorists, address abuse of refugee status, and prevent and suppress the travel of “foreign terrorist fighters.” ...

... [I]t is difficult for [states] to know whether there is any minimum or core “soft” concept of terrorism This matters ... [because they] are subject to continuing international monitoring by the Counter-Terrorism Committee Executive Directorate (CTED) and the Financial Action Task Force (FATF) whose listing of high-risk jurisdictions can bring economic costs. ...

Stung by human rights criticisms, the Council belatedly offered a non-binding definition of terrorism in Resolution 1566. That definition has been welcomed on human rights grounds because it is so narrow. ...

²¹² M. Di Filippo, ‘The definition(s) of Terrorism in International Law’, in R. Kolb, G. Gaggioli and P. Kilibarda (eds.), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (2022) 2, at 15.

²¹³ For a UN overview of its activities, see UN Doc. A/77/718 (2023).

²¹⁴ See also B. Saul, *Defining Terrorism in International Law* (2008).

The advantages of that definition include that it links terrorism to the existing convention offenses, which are widely agreed upon The addition of the personal violence and specific intent elements in Resolution 1566 also reduces the overbreadth of some convention offenses Many of the conventions also capture not only “public” (that is, political, religious, or ideological) violence but also “private” violence, which may be more like ordinary crime than terrorism.

The obvious defect in this definition is that it would exclude many acts commonly regarded as “terrorism.” In part this is because the resolution covers only harm to people, not other targets of terrorism such as property, resources, infrastructure or utilities, communications, financial systems, the environment, or endangerment of public health and safety in general.

More pressingly, it is too narrow because it confines terrorism to the scope of the existing convention offenses. ... Many are also limited to transnational not domestic terrorism, yet the Council also requires action on the latter.

These limitations are precisely why many states have enacted more general definitions of terrorism

... Resolution 1566 has not appreciably influenced national practice, and there is little evidence that the Council or CTED has sought to influence states to restrain or amend their definitions according to it. CTED’s Technical Guidance (2020) to states encourages enactment of the counterterrorism convention offenses, and acknowledges simply that other definitions of terrorism should comply with human rights law. However, the opaque nature of CTED assessments—most of the time, they are not publicly released—makes it difficult to know what precisely CTED expects of national definitions in practice.

Conclusion ...

... How can the Council – credibly, and with a straight face – designate all “terrorism” as a threat to international peace and security, and require legal measures to be taken against it, without explaining what it is? How is all domestic (as opposed to transnational) terrorism a threat to international security, when its effects by definition are contained entirely within a single state? It may be acceptable to identify a general category of threat, but it can hardly be a valid exercise of Charter power if that threat comprises a black hole. The Council may be an expert in politics and security, but law requires certainty and precision – or it is not law at all, just politics and arbitrariness disguised as law.

The Role of the UN Security Council

The United States mobilized the Security Council immediately after 9/11 and the Council has since been instrumental in promoting a global counter-terrorism agenda which has received enthusiastic backing from countries such as China, India, Russia, and Saudi Arabia. Council action has pursued two main tracks. The first is a ‘legislative’ one, which has combined measures binding upon states, pursuant to Chapter VII of the UN Charter, with a highly productive practice of supplementing those measures through soft law processes.

The second track has involved the adoption of an expansive counter-terrorism sanctions regime.²¹⁵ This has also given rise to the so-called global Magnitsky sanctions considered in Chapter 12 below. Gavin Sullivan provides an in-depth analysis of the terrorism sanctions system in *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (2020). He characterizes the processes by which the UN produces lists of sanctioned individuals as ‘a “structure making site” for identifying, calculating and stabilising “global terrorism” as a novel field of intervention by the Security Council, whilst avoiding the critical problem of having to actually define in law what terrorism is.’ The

²¹⁵ See Chapter 12, below; A. Lang, ‘Alternatives to Adjudication in International Law: A Case Study of the Ombudsperson to the ISIL and Al-Qaida Sanctions Regime of the UN Security Council’, 117 Am. J. Int’l L. (2023); and D. Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (2016).

procedure ‘transforms complex, diffuse and localised threats into a simplified, optically consistent and commensurable set of individual list entries that can be readily manipulated by the Council and implemented with worldwide effect.’

The following Security Council documents provide an overview of the principal policies that states have been urged or required to adopt.

SECURITY COUNCIL RESOLUTION 2462 (2019)

...

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

2. *Emphasizes* its decision in resolution 1373 that all Member States shall criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; and its decision in resolution 2178 [2014] that all Member States shall establish serious criminal offenses regarding the travel, recruitment, and financing of foreign terrorist fighters;

...

4. *Strongly urges* all States to implement the comprehensive international standards embodied in the revised FATF Recommendations on Combating Money Laundering, and the Financing of Terrorism and Proliferation and its interpretive notes;

5. *Decides* that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the wilful provision or collection of funds [etc.]

6. *Demands* that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law;

...

13. *Calls on* States to invest resources in the implementation of sanctions regimes pursuant to resolutions ...;

14. *Urges* all States to assess specifically their terrorist financing risk and to identify economic sectors most vulnerable to terrorist financing, including but not limited to non-financial services, such as, inter alia, the construction, commodities and pharmaceutical sectors, in line with FATF standards and *welcomes* guidance issued by the United Nations, including the “UNODC Guidance manual for Member States on terrorist financing risk assessments” and the FATF in that regard;

...

18. *Encourages* Member States to build the capacity of their financial oversight and regulatory systems in order to deny terrorists the space to exploit, raise and move funds, including by ensuring an effective implementation of reporting and disclosure requirements by the private sector as well as by taking into account the dedicated country assessments of relevant entities such as the Counter-Terrorism Committee Executive Directorate (CTED) and the FATF and its Global Network;

...

22. *Encourages* competent national authorities, in particular financial intelligence units and intelligence services, to continue to establish effective partnerships with the private sector ...;

23. *Recognizes* the vital role played by non-profit organizations in national economies and social systems, *calls on* Member States to periodically conduct a risk assessment of its non-profit sector or update existing ones to determine the organizations vulnerable to terrorist financing and to inform the implementation of a risk based approach, *encourages* Member States to work cooperatively with the non-profit sector in order to prevent abuse of such organizations including front organizations by and for terrorists, while recalling that States must respect human rights and fundamental freedoms and *recalls* the relevant recommendations and existing guidance documents of the FATF in that regard, in particular its recommendation 8;

...

35. *Requests* CTED, in accordance with resolution 2395, to strengthen its assessment process relating to countering the financing of terrorism, including through targeted and focused follow-up visits as complements to its comprehensive assessments ...;

...

37. *Requests* CTED and the Analytical Support and Sanctions Monitoring Team to prepare, ahead of the joint special meeting, a report on actions taken by Member States to disrupt terrorist financing and in this regard, and *invites* Member States to submit to them in writing, by the end of 2019, information on actions taken to disrupt terrorist financing;

...

**STATEMENT BY THE PRESIDENT OF THE SECURITY COUNCIL
UN DOC. S/PRST/2022/7, 15 DECEMBER 2022**

[Note: Presidential Statements are regularly adopted by the Security Council. Although they are not binding, because they are not adopted under Chapter VII of the Charter, they are heavily negotiated and reflect a strong degree of consensus.]

The Security Council reaffirms that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever and by whomsoever committed, and remains determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level.

The Security Council condemns in the strongest terms terrorism in all its forms and manifestations, and all terrorist acts, including those on the basis of xenophobia, racism and other forms of intolerance, or in the name of religion or belief, and further reaffirms that terrorism should not be associated with any religion, nationality, civilization, or group.

The Security Council strongly condemns attacks by terrorist groups or individuals on civilians, critical infrastructure and soft targets, including transnational and cross-border attacks, and demands the immediate cessation of such attacks, and calls on all Member States to summon the requisite political will to denounce all acts of terrorism.

The Security Council expresses its deep concerns as terrorist groups continue to make efforts to destabilize governments.

...

The Security Council underlines that acts of terrorism can seriously impair the enjoyment of human rights and threaten the social and economic development of all States and undermine global stability and prosperity and emphasizes that the threat of terrorism is continuing, affecting an increasing number of Member States across most regions, which may exacerbate conflicts in affected regions, and contributes to undermining affected States, specifically their security, stability, governance, social and economic development.

The Security Council further reaffirms that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular, the UN Charter, international human rights law, international refugee law and international humanitarian law,

underscores that effective counterterrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing

The Security Council underscores the importance of a whole of government and whole of society approaches, recognizes the importance of cooperation with all relevant stakeholders, such as civil society, including community-based civil society, grassroots organizations, the private sector, academia, think tanks, media, youth, women, and cultural, educational, and religious leaders in increasing awareness about the threats of terrorism and violent extremism conducive to terrorism and effectively tackling them, and in this regard urges Member States to continue efforts to ensure the full, equal and meaningful participation and leadership of women and inclusion of youth in all counterterrorism and violent extremism conducive to terrorism approaches and strategies.

The Security Council notes with concern that terrorist groups craft distorted narratives that are based on the misinterpretation and misrepresentation of religion to justify violence, and that terrorist groups further seek to use names or religion or religious symbols, in order to manipulate followers and for propaganda or recruitment purposes.

The Security Council, in this regard, recognizes the importance of conducting outreach to entities with expertise and experience in crafting counter-narratives and promoting tolerance and coexistence, including religious actors, to counter terrorist propaganda and narratives.

...

The Security Council calls upon all Member States to implement the comprehensive international standards of the Financial Action Task Force (FATF) on Combating Money Laundering and the Financing of Terrorism and Proliferation

The Security Council reiterates the obligation of Member States to prevent the movement of terrorists or terrorist groups by, inter alia, effective border controls, and, in this context, urges Member States to exchange information expeditiously, improve cooperation among competent authorities to prevent the movement of terrorists and terrorist groups to and from their territories, the supply of weapons for terrorists and financing that would support terrorists and terrorist groups, and underlines that safe havens provided to terrorists continue to be a significant concern and urges Member States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in order to find, deny safe haven to, and bring to justice, extradite or prosecute, in accordance with applicable international law, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.

The Security Council reaffirms its resolution 2664 (2022) and urges Member States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.

...

The Security Council underlines the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter Terrorism Strategy and recognizes that a comprehensive approach to defeating terrorism requires national, regional, subregional and multilateral action.

The Security Council notes with concern the increased use of the Internet, and other information and communications technologies, including social media, virtual assets and new financial instruments for terrorist purposes, and the increasing global misuse of unmanned aerial systems (UAS) by terrorists

...

...

The Security Council expresses deep concern that the threat of terrorism, in all its forms and manifestations, has increased and become more diffuse, in various regions of the world, aided by the use of new and emerging technologies for terrorist purposes, while recognizing that innovations in technology may also offer significant opportunities to use technology to counter terrorism and in this

regard welcomes the adoption of Delhi Declaration on Countering the Use of New and Emerging Technologies for Terrorist Purposes by the Counter Terrorism Committee (CTC), and calls on CTC to consider developing, with the support of CTED, within a reasonable period, a set of non-binding guiding principles, as provided in the Declaration.

The Security Council recognizes the need for adequate funding for programs, technical assistance, and capacity building provided by the entities the UN Counterterrorism Global Compact, including the Office of Counter Terrorism (UNOCT) for counter terrorism to effectively support counterterrorism efforts of Member-States, especially developing ones, and encourages Member States to contribute voluntary funding in this regard.

**FIONNUALA NÍ AOLÁIN, ‘SOFT LAW’, INFORMAL LAWMAKING AND ‘NEW INSTITUTIONS’ IN
THE GLOBAL COUNTER-TERRORISM ARCHITECTURE
32 EUR. J. INT’L L. (2021) 919**

...
2 *The Sources, Status and Process of Making Soft Law*

...
The concept of ‘soft’ law is viewed by some legal scholars as controversial. ... First is the instinct that the very expression ‘soft’ law may appear to be an oxymoron The second relates to long-standing disputes over agreed definitions of the term ..., most particularly that ‘soft’ can relate to the comparison between written versus unwritten norms, [to] the status of the norm or ... to [its] normative content The most uncontroversial definition of soft law is that it constitutes those international norms, principles and procedures that are outside the formal sources of international law enumerated in Article 38 of the [ICJ] Statute and that lack the requisite degree of normative content to create enforceable rights and obligations but are still able to produce certain legal effects. ...

‘Soft’ law comes in multiple forms. It can include General Assembly resolutions, declarations, guidelines, technical manuals, opinions from quasi-judicial bodies [It] is produced and driven by states through a variety of mechanisms including in bilateral, multilateral and institutional settings. Increasingly, non-state actors produce, shape, contribute to and drive the enforcement and recognition of ‘soft’ law. ...

Recognition and validation for the legal effects of ‘soft’ law has been increasing over many decades ... [although the] ICJ’s approach has been restrained

... [In the regional human rights courts] soft-law standards have played an important role in expounding and augmenting the applicable treaty standards. Soft law ... functions as a ‘gap-filler’ in the absence of treaty agreement or customary international law consolidation. Soft law gives guidance to states and other stakeholders in the absence of specifically formulated norms, providing useful and necessary legal frames to state action and cooperation. A key aspect of soft law is the interaction between hard and soft-law standards to shape the substance of obligations. In particular, a number of soft-law norms develop and augment binding standards and authoritatively interpret them. ... [Soft law’s advantages] include access by a variety of stakeholders, informality in process as well as in negotiation, innovative modalities of engagement and analysis and a variety of pathways to produce legal norms in new and challenging global contexts.

3 *From General to Specific: Soft Law’s Deepening Role in Counter-terrorism*

A key feature of the post-9/11 legal landscape has been the proliferation of multi-level terrorism-related regulation. This is enabled by an augmented UN internal architecture, complimented by the creation of external specialized entities responding to perceived counter-terrorism regulatory gaps and by augmented capacity at regional and national levels. A noticeable element of that legal terrain is a shift from a primary focus on treaty agreements to other forms of law-making and norm enforcement by states. ...

After 9/11, ... Security Council resolutions have developed a distinct and problematic 'legislative' character engaging in regulatory action across a range of substantive areas including sanctions, foreign fighters, regulation of travel between states, organized crime, biometrics, data collection and data sharing. Normative developments were fast-tracked ..., leading towards multilateral institutionalization, specifically the creation and reinvigoration of subsidiary organs, including ... special Committees (e.g. the Counter Terrorism Committee, CTC) and the procedurally circumscribed Office of the Ombudsperson which constitute unprecedented institutional innovations. The creation of the UN Counter-Terrorism Committee Executive Directorate (CTED) and the CTC provided new fora and entities (an inter-institutional machinery) whose production of a variety of 'soft' instruments, including standards, compendiums, sanction instructions, technical information and guidance, proceeded apace. These norms range from formal legal and capacity-building engagements, to highly informal advice, and lots in between. Central to the normative landscape has been counter-terrorism soft law.

... [There are] some unique features to counter-terrorism soft-law production. These include, first, the scale of norm proliferation It is bolstered by the normative outputs of a plethora of new counter-terrorism entities at global and regional levels, including, but not limited to, the Global Counter-Terrorism Forum (GCTF) and the Financial Action Task Force (FATF). ...

Second, the nomenclature of 'soft' law appears to understate the extent to which many of these normative guidelines, declarations, 'good practices' and technical rules function as distinctly hard in counter-terrorism practice. ... [D]elegations [take] extreme care in the negotiation of provisions, exactly as if they were negotiating treaty provisions. ...

Third, ... the institutional landscape for counter-terrorism is quite unique. As a primarily coercive regulator of behaviour, counter-terrorism soft law has a repressive quality distinct from other soft-law arenas. Thus, ... states have reporting requirements to the UN Counter-Terrorism Committee, which de facto operates to leverage a portion of these norms into domestic law and oversee their practical implementation. The CTED functions as the supervision entity with an array of capacities including country visits, technical assistance in the form of 'deep dives' on national practice and assessments to enable its oversight role. Many counter-terrorism soft-law norms come with capacity building, technical expertise and support on a scale not found in other legal domains, precisely because there is a powerful UN architecture to aid their direct implementation.

...

... Terrorism resolutions are quickly followed by a rush to produce guidance, technical advice, manuals, principles and addendums for states by OCT, the Global Compact, CTED and the GCTF. ... [O]ne observes cross-fertilization, cross-referencing, message duplication and recurrent invocations of the same rules, formulated in processes that are non-transparent and non-accessible to all states, in order to present as regular conduct practices that would previously have been considered an overt challenge to state sovereignty. In almost all of these arenas, human rights are visibly side-lined

...

* * *

An illustration of the impact of these international initiatives is provided by the case of Australia. Keiran Hardy and George Williams observe in 'Two Decades of Australian Counterterrorism Laws', 46 *Melb. U. L. Rev.* (2022) 34, that Australia adopted 92 counter-terrorism laws, amounting to 5,559 pages of legislation, between 2001 and 2021. Between 2002 and 2007 alone, the conservative government enacted 48 laws, averaging more than one every seven weeks:

These include laws providing for broad preparatory offences, enhanced surveillance powers, preventative detention, warrantless access to metadata, enforceable decryption, citizenship stripping, continuing detention and many more. ... The laws have often been pushed through Parliament on tight timelines, with little time for scrutiny and debate. Once ... on the statute books, they are very rarely amended or removed. The story of these laws is one of state power continually expanding, and rarely, if ever, contracting.

In the second decade, the main catalyst for new laws was the threat from IS and foreign fighters. However, legal responses to that threat went much further. Intelligence disclosure offences signalled a crackdown on whistleblowers, a trend confirmed by police raids on journalists and media outlets, and multiple investigations into government insiders and their lawyers. The metadata and encryption laws have a much wider scope again in affecting every Australian who uses a smartphone or the internet. Extensive lawmaking has continued since in response to threats of espionage, foreign interference, and right-wing extremism, and shows no sign of abating. ...

The number and scope of Australia's counterterrorism laws has been heavily influenced by the politics of being 'tough on terrorism'. Even where laws have clear and recognised problems, the pressure for bipartisanship means that they can pass through Parliament with minimal scrutiny. ...

Without enforceable protection for human rights [Australia lacks a federal Bill of Rights], there is little that courts can do to limit the scope or impact of these laws. ...

Selected Issues

The Security Council has adopted dozens of lengthy, detailed, and highly demanding resolutions and statements on counter-terrorism since 2001. The two preceding texts serve to identify many of the principal areas of action. The texts warrant careful reading and analysis. In order to assist that process, we outline below some of the human rights concerns that have been highlighted, including by successive UN Special Rapporteurs on human rights and counter-terrorism (Martin Scheinin (2005-11), Ben Emmerson (2011-17), Fionnuala Ní Aoláin (2017-23), and Ben Saul (2023-)).

(a) The role of human rights

In the early years after 9/11, proponents struggled to ensure that reference was made to human rights in the resolutions, strategies, and policies adopted. But in recent years, there is almost always a clear statement affirming the importance of human rights. However, commentators have suggested that these are often tokenistic, lacking in detail, and without follow up.

Consider this assessment by Kim Lane Scheppele and Arianna Vidaschi, in *9/11 and the Rise of Global Anti-Terrorism Law: How the UN Security Council Rules the World* (2021) 245:

The Security Council has required states to monitor terrorist finances and to halt transfers of money to and from named parties as soon as they appear on Security Council terrorism watch lists. But it never guaranteed basic due process protections for those who appeared on these lists. The Security Council has required states to act affirmatively to prevent terrorist plots from hatching on their territory and therefore to increase the surveillance of and ability to gather information from domestic populations. But it never provided any protection for the right to data privacy. The Security Council has required states to share information with other states, encouraging the security services of states around the world to work with each other, regardless of whether these security services had reputations for working under the rule of law or its opposite. But it never set minimum human rights standards for security services. And the Security Council has required states to monitor the system of transnational travel, refugee claims, and asylum applications to make sure that terrorists are not moving around under cover of human rights protections. But it has never acknowledged that important rights are at stake – rights of travel, association, and asylum, to say nothing of general personal liberty. The concentration on the

effective tracking and interception of terrorists has taken priority over any obligation to observe basic rights.

A similar perspective is provided by Fionnuala Ní Aoláin, in ‘Human Rights Advocacy and the Institutionalization of U.S. “Counterterrorism” Policies Since 9/11’, *Just Security*, 9 September 2021:

[The result of post 9/11 counterterrorism policies] has been the stifling of human rights, the choking of civil society, and the weakening of the rule of law on every continent. It is not by accident that counterterrorism regulation has expanded and deepened across the globe in the past 20 years, with tranches of national legalization efforts which are broad, imprecise, and highly opaque on what precisely constitutes terrorism. In this vein, defending women’s rights has been defined as terrorism, arguing for the protection of the environment is terrorism, pro-democracy movements are terrorists, humanitarian protection supports terrorists, and civil society actors are engaged in terrorism when they call their governments to account.

(b) Incitement

The Preamble to Security Council Res. 1624 (2005) condemns ‘the incitement of terrorist acts’ and repudiates ‘attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts’. Helen Duffy and Larissa van den Herik, in ‘Terrorism and the Security Council’, in Robin Geiß and Nils Melzer (eds.), *The Oxford Handbook on the International Law of Global Security* (2021) 193 observe that this resolution ‘has triggered a plethora of regional standards, national laws, and prosecutorial practices directed against myriad forms of expression deemed to constitute direct or “indirect” incitement.’ They note, for example, that the EU Directive on Combating Terrorism (2017/541) covers ‘anyone who “makes available” in any way (re-posting, lending, distributing) a message or images which might prove “dangerous”’:

Under the shadow of [Security Council mandates], some States have incorporated new forms of ‘indirect incitement’ into hastily passed legislation, while others have subjected pre-existing laws to expansive interpretations. The result is a broad spectrum of offences, and prosecutions, based on diverse forms of ‘dangerous’ expression, such as encouragement, glorification, justification, apology, possession, dissemination or making available prohibited information or materials, or professing to be a member of or associated with prohibited organisations.

(c) Crafting counter-narratives

Because terrorist groups are seen to popularize distorted narratives ‘based on misinterpretation and misrepresentation of religion’, the Council regularly calls upon states to generate ‘counter-narratives’. Consider the assessment (UN Doc. A/HRC/43/46 (2020)) by Special Rapporteur Ní Aoláin:

... [D]espite recent research indicating that it remains an unproven assumption that messages, myths, promises, objectives, glamour and other enticements propagated through violent extremism can be replaced with, or dismantled by, an alternative set of communications, many national and international measures to prevent and counter violent extremism are focused on counter-narratives. ... [T]here is no robust data showing that that approach works, absent a meaningful commitment to and the delivery of transformed material conditions on the ground. Without that, counter-narratives are little more than exaggerations and are perceptively recognized as such by their target communities. ... [The UN’s approach] may be counterproductive, given that it can both appear as a defence of the status quo and contribute to a loss of trust in civil society and in government, in particular where opacity with regard to the genuine nature of the countering voices is tolerated. ... [The resulting focus on] content regulation ... is directly translated in multiple national contexts into broad, indiscriminate and overreaching limitations on freedom of expression.

(d) The role of religion

While the Security Council insisted in 2022 that ‘terrorism should not be associated with any religion’, Special Rapporteur Ní Aoláin (UN Doc. A/HRC/43/46 (2020)) provides a different perspective:

... [Many counter-terrorism] programmes and policies have discriminately targeted certain groups and communities, particularly based on religious grounds The widespread references [to groups such as] ISIL, Al-Qaida and Boko Haram ... have gone a long way towards colouring the debate In certain countries, the agenda ... is focused exclusively on violent Islamist extremism, obscuring other forms of extremism and leading to stigmatization and polarization. [This] ... focus ... belittles the severity of the danger posed by other groups. ...

...

... [C]omplex factors [contribute to and dovetail] with what is viewed as religious violence, including the loss of trust in public institutions caused by endemic corruption and cronyism, policies of exclusion, as well as impunity, trivialization and legal impunity. [The Special Rapporteur] affirms the broader analysis concerning the known factors conducive to terrorism and extremism and encourages States to use the resources they have to address deficits in governance, the rule of law and corruption

(e) Gender

The gendered dimensions of terrorism and counter-terrorism have long been recognized. In many cases, however, the approach suggested has called for more attention to be given to women as potential leaders and executors of terrorism, or as victims of terrorism in need of protection.²¹⁶ Special Rapporteur Scheinin pushed back against such narratives in a 2009 report (UN Doc. A/64/211) that examined the complex relationships between gender equality and countering terrorism. He emphasized that ‘gender is not synonymous with women, but rather it encompasses the social constructions that underlie how women’s and men’s roles, functions and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood.’²¹⁷ His report drew strong resistance from some states.

Aleksandra Dier and Gretchen Baldwin, in *Masculinities and Violent Extremism* (2022) vii argue that gender mainstreaming efforts have failed to critically examine the structural gendered and racialized hierarchies, inequalities, and assumptions implicit in much counterterrorism analysis:

Violent extremist and terrorist groups across the ideological spectrum exploit masculinities in their efforts to recruit and retain members. For example, many so-called “Islamist” violent extremists use a sense of victimization by the state, expectations around masculine roles, pushback against changing gender roles, and idealization of warrior masculinities to drive recruitment, retention, and broader strategic decisions. This may involve constructing masculinities based on violence and the subjugation of women or the protection of the Islamic community from outside “villains.”

... Extreme right-wing discourse has traditionally focused on the gendering of spaces and hierarchical boundaries based on assumptions about masculinity and femininity. Right-wing extremists have also increasingly promoted hypermasculine violence as a way to defend against perceived outside threats, including immigrants and the feminist, lesbian, gay, bisexual, transgender, and queer (LGBTQ+), and racial justice movements. Some right-wing extremists even position themselves as “enlightened” on women’s rights compared to their

²¹⁶ For example, M. Suttan, *The Rising Importance of Women in Terrorism and the Need to Reform Counterterrorism Strategy* (2009).

²¹⁷ See M. Satterthwaite and J. Huckerby (eds.), *Gender, National Security, and Counter-Terrorism: Human Rights Perspectives* (2013).

view of Islam while simultaneously relegating women to traditional, conservative gender roles. ...

...

... [C]ounterterrorism actors often view Muslim masculinity as violent, misogynistic, and homophobic, in contrast with a benevolent, tolerant, and protective Western masculinity. Such narratives affect their decision making, impacting policy priorities, approaches, and resource allocation. This can lead counterterrorism actors to prioritize highly securitized and militarized policies that further radicalize communities and undermine human rights. The masculinities produced by state actors can also feed into and mutually reinforce those produced by violent extremists.

(f) ‘Whole-of-society’

The Council regularly calls for the adoption of ‘whole of society’ approaches to counter-terrorism. Compare the response of Special Rapporteur Ní Aoláin (UN Doc. A/HRC/43/46 (2020)):

Many practices ... involve targeting particular people, communities and groups, giving rise to ... profiling, ... compounding structural discrimination and exclusion, [and] surveillance and harassment. ... [Of particular concern is] the so-called “whole of society” approach, in which responsibilities to detect “signs of radicalization” fall upon various actors in society, including teachers, social workers, medical staff and other health-care professionals, prison staff, neighbours and family members, community leaders and members of faith-based groups. ... [T]he securitization of care professions ... [impinges] on the unique ethical obligations of professionals in those fields to those they serve. [It creates] an environment in which the threat of violent extremism is ubiquitous and pervasive [T]hose measures break the fragile trust that individuals and communities place in those professionals Such policies lead to overselection and overreporting, largely on prohibited discriminatory grounds, having an impact on the rights to freedom of religion and expression and privacy. Furthermore, the lack of transparency about the use of the information generated and its often underregulated sharing across government entities lends credence to a perception that preventing and countering violent extremism is yet another tool of a State intelligence entity’s counter-terrorism efforts, rather than a genuine effort at building resistance to the threat of violent extremism.

(g) Non-profit organizations (‘NPOs’)

Counter-terrorism policies now focus heavily on the need to ensure that NPOs are not used as, in the Security Council’s words, ‘front organizations by and for terrorists’. The lead role on this has been taken by the Financial Action Task Force (FATF), a stand-alone group of 37 states, whose extensive influence is magnified by the Council’s consistent invocation of its work. The FATF states that its ‘recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard’. It defines an NPO as: ‘a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works”’ (FATF, Terrorist Financing Risk Assessment Guidance (2019) 43). But many governments have used the pretext of seeking to implement such standards to crack down on their opponents within civil society. The Venice Commission (Opinion No. 1028/2021 of 18 June 2021), in reviewing Turkish legislation designed to implement FATF standards, noted that ‘the obligatory auditing of [122,000] NGOs raises serious doubts about the authorities stated [counter-terrorism] objective Under the pretext of conducting a “risk assessment”, the measures introduced are overly far-reaching and will have a chilling effect on any NGO’

(h) New technologies²¹⁸

The Council's 2022 Presidential Statement, promoted during India's Council presidency, 'welcomes the adoption of [sic] Delhi Declaration on Countering the Use of New and Emerging Technologies for Terrorist Purposes ... and calls on CTC [the Counter Terrorism Committee] to consider developing ... a set of non-binding guiding principles, as provided in the Declaration'. Paragraph 32 of the Delhi Declaration envisages that such principles would assist states 'to counter the threat posed by the use of new and emerging technologies for terrorist purposes, including by compiling good practices on the opportunities offered by the same set of technologies to counter the threat, consistent with international human rights and international humanitarian law'.

Consider this report on the Delhi meeting provided by Tomaso Falchetta and Anna Oosterlinck, in 'UN Counterterrorism and Technology: What Role for Human Rights in Security?', *Just Security*, 23 November 2022:

... The focus of the debate in most of the panels was on the real and perceived threats of abuses of ICT by terrorists; human rights got short shrift, as did even legitimate questions about the credibility of evidence cited for the alleged terrorist abuses.

...

... [The topic of] abuse of ICT and emerging technologies by terrorists ... could be interpreted to cover a vast range of measures — anything from content moderation to social media monitoring, from limiting the use of encryption to resorting to hacking for surveillance — all in the name of countering terrorism. It essentially encourages governments to introduce counterterrorism measures with a view to addressing abuses of ICT that will likely end up undermining human rights, particularly the right to privacy and the right to freedom of expression.

... Privacy International expressed its concerns at the expansion of new technologies employed for the surveillance of public spaces, whether online or offline, in the name of countering terrorism. It noted that social media monitoring is often justified as a form of content moderation for counterterrorism purposes, but that it is also abused to surveil peaceful assemblies and profile people's social conduct. Privacy International also noted how attempts by governments to access encrypted communications to identify potential terrorist threats risk introducing vulnerabilities into the systems; the result could be indiscriminate surveillance of digital communications, compromising the privacy and security of potentially all users of digital communication services.

[Another NGO,] ARTICLE 19 ... [noted that]: 1) security without rights is meaningless ...; and 2) international human rights law dictates that the same rights apply online as offline. States can only restrict free speech on the basis of national security if the principles of legality, legitimacy, proportionality, and necessity have all been met. ...

Unsurprisingly, given that the text was negotiated by the 15 CTC member States behind closed doors and well ahead of the meeting in India, the Delhi Declaration does not seek to address these or other concerns raised by civil society organizations and human rights experts.

(i) Border controls

In its 2022 Presidential Statement, the 'Security Council reiterates the obligation of Member States to prevent the movement of terrorists or terrorist groups by, inter alia, effective border controls'. But

²¹⁸ For a comprehensive overview by the Special Rapporteur, see UN Doc. A/HRC/52/39 (2023).

there are now many accounts of the discriminatory and deeply problematic ways in which counter-terrorism-driven border controls are being used.²¹⁹ E. Tendayi Achiume, UN Special Rapporteur on racism, has documented (UN Doc. A/75/590 (2020)) how:

Governments and United Nations agencies are developing and using emerging digital technologies in ways that are uniquely experimental, dangerous and discriminatory in the border and immigration enforcement context. By so doing, they are subjecting refugees, migrants, stateless persons and others to human rights violations, and extracting large quantities of data from them on exploitative terms that strip these groups of fundamental human agency and dignity.

... [D]igital technologies are being deployed to advance the xenophobic and racially discriminatory ideologies that have become so prevalent, in part due to widespread perceptions of refugees and migrants as per se threats to national security. In other cases, discrimination and exclusion occur in the absence of explicit animus, but as a result of the pursuit of bureaucratic and humanitarian efficiency without the necessary human rights safeguards. ... [V]ast economic profits associated with border securitization and digitization are a significant part of the problem.²²⁰

And Niku Jafarnia, in ‘The United Nations Security Council’s Counterterrorism Resolutions and the Resulting Violations of the Refugee Convention and Broader International Law’, 35 *Harv. Hum. Rts J* (2022) 255, describes the impact on the law relating to refugees:

... [The Security Council’s] counterterrorism resolutions contravene the Refugee Convention [and other human rights protections]. The Refugee Convention [already has] built-in exceptions ... [that] work to strike a balance between states needing to protect themselves and the need to grant protection to those fleeing persecution. ...

...

... Beyond the possible violations of international law that the UNSC resolutions have prompted, the practical impacts of the resolutions cannot be ignored. First and foremost, the resolutions have resulted in EU counterterrorism policies that have barred large swaths of legitimate refugees from the Middle East from pursuing asylum in Europe. Because of the resolutions’ over-expansive definitions of terrorism, entire groups of individuals may be deemed terrorists, and therefore will be barred from protection that they should be given by law. Under the material support provisions and the lack of exception made for humanitarian assistance, the resolutions also have impacts on the ability of NGOs to provide vulnerable communities and areas with humanitarian aid. ...²²¹

Finally, consider the US Supreme Court’s review of what was widely termed President Trump’s ‘Muslim ban’. In *Trump v. Hawaii* (138 S. Ct. 2392 (2018)) several states challenged a Presidential Proclamation (No. 9645 of September 24, 2017) that restricted entry into the United States of nationals of eight states (Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen) whose systems for managing and sharing information about their nationals was deemed inadequate. The list was said to have been the result of in-depth scrutiny by the Department of Homeland Security. The underlying

²¹⁹ See P. Molnar, *Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up* (2020); European Commission and Deloitte, *Opportunities and Challenges for the Use of Artificial Intelligence in Border Control, Migration and Security* (2020); and A. Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (2020).

²²⁰ See generally E. T. Achiume, ‘Racial Borders’, 110 *Georgetown L. J.* (2022) 445.

²²¹ See also S. Graber, ‘Teaching Terrorists: How United States Counterterrorism Law Violates International Humanitarian Law’, 48 *Yale J. Int’l L.* (2023) 153.

Congressional legislation authorizes the President to suspend the entry of any aliens whose entry he deems ‘would be detrimental to the interests of the United States.’

Chief Justice Roberts wrote the opinion for the 5-4 majority:

... [P]laintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. ...

...

... [P]laintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. ... [While running for office], the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States” Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” ...

... [As President, he] retweeted links to three anti-Muslim propaganda videos. ...

... [T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

... The Proclamation ... is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. ...

... Any rule of constitutional law that would inhibit the flexibility of the President to respond to changing world conditions should be adopted only with the greatest caution, and our inquiry into matters of entry and national security is highly constrained. ...

It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

... The text says nothing about religion. ...

[The Court concluded that] the Government has set forth a sufficient national security justification to survive rational basis review.

Justice Sotomayor, joined by Justice Ginsburg, dissented.

... The Court’s decision today fails to safeguard that fundamental principle [of religious liberty]. It leaves undisturbed a policy first advertised openly and

unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. ...

...

... [T]he Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. ... But even under rational-basis review, the Proclamation must fall. [It] is “‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’” that the policy is “‘inexplicable by anything but animus.’”

QUESTIONS

1. “[T]errorist” is a word that cleanses nuance: It suggests that there are good and bad people, and the bad ones are irredeemable enough to warrant a fixed label.²²² If you agree with this observation, what might the consequences be in terms of applicable legal regimes?

2. Does the ‘scourge of terrorism’ constitute such a grave threat to international peace and security that the upending of many previously accepted norms is justified?

3. Although the Special Rapporteur on counter-terrorism, and various UN treaty bodies have regularly been highly critical of the policies pursued by states and by the UN in this area, their comments are often dismissed on the grounds that they are merely opinions and are not binding. Compare this assessment by José Alvarez:

*A panoply of UN experts and assorted others — from human rights treaty bodies to the special rapporteur on torture — now routinely make ever more specific legal pronouncements — about such things as the propriety or consequences of “invalid” treaty reservations, specific interrogation techniques, or states’ reliance on diplomatic assurances when engaging in the foreign rendition of suspects. While our Executive contests many of these pronouncements, even the 100 plus lawyers of the U.S. State Department are no match for the sheer quantity and variety of this institutionalized output, which, as amplified by the voice of organizations like Human Rights Watch, may achieve a legitimacy greater than the views of any single nation, including our own.*²²³

4. In the view of Special Rapporteur Ní Aoláin, ‘[t]he conditions that give rise to sustained violence in many societies ... include climate change, grinding inequality, unresolved questions of self-determination, meaningful political participation and adequate representation in fragile, complex and disputed sovereignties. None of these issues have been adequately addressed by a counter-terrorism framework, whether sequentially or intersectionally’ (A/77/345 (2022) para. 30). Discuss.

5. The use of soft law is proliferating in many areas of international law. Emily Crawford, in *Non-Binding Norms in International Humanitarian Law* (2021) 254, argues that because of the importance attached to soft law norms, they need to possess a degree of legitimacy, which in turn requires ‘that there is some accountability, transparency, and a lack of bias’. She adds that this ‘may mean more transparency during the drafting process (such as more systematic

²²² O. El Akkad, Review of V. V. Ganeshanathan, *Brotherless Night* (2022), *New York Times*, 1 Jan. 2023.

²²³ J. E. Alvarez, ‘The Internationalization of U.S. Law’, 47 *Colum. J. Transnat’l L.* (2009) 537.

engagement with civil society and States); more assiduous attempts to ensure broad geographical representation among participants; more extensive State consultations before and during the drafting process; more open communication regarding participants and drafting procedures; and perhaps even ongoing efforts to revise and update documents in light of State and non-State practice.’ Are such ‘remedies’ likely to work in the counter-terrorism field? If not, what does this say about the legitimacy of the relevant processes?

6. Security concerns have led governments to justify the widespread use of new technologies using biometric data and artificial intelligence. Are UN counter-terrorism mechanisms the best placed to take the lead on regulating these uses?

B. THE LEGAL FRAMEWORK

In response to terrorism or other threats to ‘the life of the nation’, such as armed conflict, natural disasters, or climate change-driven upheavals, governments have several options in terms of the legal framework under which they will shape their response. The first is to respond on the basis of standard constitutional and administrative law powers, including use of police powers and the criminal law. This also includes the right to impose limitations upon the enjoyment of certain rights, in line with international human rights law. The second is to declare a state of emergency (sometimes formulated as a state of exception, or state of siege) and, in effect, to suspend the enjoyment of certain rights, through derogation from the relevant obligations. The third is to treat the situation as one involving an armed conflict, whether internal or international, and thus make use of IHL.

1. Emergencies and Derogation

International law permits states to limit or suspend part of their legal obligations, and thus restrict some rights, under certain circumstances. To that end, the legal recourse available to states includes limitation clauses (discussed in the context of civil and political rights in Chapter 3, and economic, social and cultural rights in Chapter 4) and derogations systems codified in various treaties or available through norms of customary international law.

Limitation and derogation clauses in treaties have a similar function in the sense that both provide legal avenues for states to avoid obligations that would ordinarily constrain their actions. They are also similar in that neither permits states to ignore their human rights obligations altogether. However, one significant difference between the two is that derogations were designed to be applicable only in the exceptional case of a grave threat to the survival and security of a nation. The implication is that derogations were intended to be invoked as temporary measures. In contrast, limitation clauses apply across the spectrum, from everyday public order maintenance and policing strategies, to national security and large-scale military actions.

Limitation clauses are commonplace in human rights instruments. The Universal Declaration of Human Rights (UDHR), as discussed in Chapter 3, contains a general limitation clause in Article 29. The general limitation clause in Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) permits state parties to subject the rights contained in the Covenant ‘only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare.’ The International Covenant on Civil and Political Rights (ICCPR), by contrast, does not contain a general limitation clause. Instead, limitation clauses are included in various rights provisions such as those pertaining to freedom of association (Art. 22), freedom of movement (Art. 12), expulsion of foreign nationals (Art. 13) and access of the press and public to criminal trials (Art. 14). Several provisions in the ICCPR, such as those prohibiting torture (Art. 7) and slavery (Art. 8), are subject to no limitation.

Article 4 of the ICCPR codifies the rules for states to derogate from obligations during a state of emergency. Specific conditions are attached to a state's exercise of this option. For example, governmental measures must generally be prescribed and determined by law, shown to be necessary and designed to protect particular public interests. These conditions are designed to strike a balance between security and human rights, but they also do more than just balance. Some of the rules, for example, preclude any relaxation of obligations with respect to core rights. The prohibition on genocide is a prime example. The categorical prohibition on genocidal acts is subject to no qualification. In addition to balancing competing interests, the rules are also designed to ensure that governments do not restrict rights that have no rational or reasoned connection to meeting national concerns during a time of emergency.²²⁴

The following readings examine the derogation system in contrast with the protections (and limitations) that ordinarily apply.

**JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS:
THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY
(1994)**

Approaching [the law on derogations] chronologically, the first legally significant standard is Article 3 common to the four Geneva Conventions of 1949, also known as “Common Article 3.” Applicable during periods of internal armed conflict, a frequent setting for the invocation of emergency powers in the past several decades, Common Article 3 prescribes a set of minimal protections that must be afforded even under these dire circumstances. The guarantees of Common Article 3 are further elaborated in Articles 4 to 6 of Protocol II [to the Geneva Conventions, adopted in 1977], particularly with respect to non-derogable fair trial standards. Indeed, the entire body of international humanitarian law, both customary and codified, is highly relevant to protection of human rights during states of emergency, especially in defining non-derogable rights. International humanitarian law by nature is designed to apply in full force during the subset of emergencies involving armed conflict, so in a sense it is all emergency law. And because situations of armed conflict tend to be among the direst of emergencies, protections available then should logically be available in any other emergency context.

Two crucial sets of treaty standards were also drafted at approximately the same time as Common Article 3. Article 15 of the European Convention was drafted primarily during early 1950 with the benefit of almost three years of discussion by drafters of the Covenant on Civil and Political Rights within the United Nations. The derogation article of the European Convention served as a focal point for the debate between two alternate approaches to treaty drafting, which might be called “general enumeration” and “precise definition.” The proponents of general enumeration favored drafting a document with positive definitions of rights and no exceptions or restrictions other than a single general limitations clause, similar to Article 29 of the Universal Declaration. The proponents of precise definition, on the other hand, wanted not only specific limitations clauses in many provisions defining particular rights but also a derogation article for emergencies, arguing that these clauses would actually prevent abusive suspension or denial of rights. During the final stages of the drafting process, the attraction of entrenching a list of non-derogable rights swayed a majority to favor inclusion of the derogation article.

... Article 4 [of the ICCPR] became the focus of the division of opinion between the general-enumeration and precise-definition camps Another key division, leading to an awkward compromise, developed on the question whether the clause on non-derogable rights should include only those rights most important and central to human dignity and most at risk during typical emergencies, or should be expanded to include all rights that no reasonable government would need to limit substantially in any conceivable emergency.

²²⁴ See generally C. Douzinas, *States of Exception: Human Rights, Biopolitics, Utopia* (2023); G. Agamben, *State of Exception* (2007); and D. Dyzenhaus, ‘States of Emergency’, in M. Rosenfeld, and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 442.

The drafters of the American Convention on Human Rights, who began work in earnest in the 1960s, had the benefit of earlier-drafted human rights treaties as a model and began with an apparent consensus on the precise-definition approach The special interest developed within the OAS on protecting human rights during states of emergency may help explain the rather different form the derogation article takes in the American Convention

A brief comparison of the three derogation articles in the human rights treaties to the relevant portions of the major humanitarian law instruments reveals some interesting similarities and differences, as well as “lacunae,” that have attracted ongoing efforts to formulate additional, more complete standards. ...

Along with the threshold of severity, the principle of proportionality is the most important and yet most elusive of the substantive limits imposed on the privilege of derogation... . The principle of proportionality embodied in the derogation clauses has its roots in the principle of necessity, which also forms one of the key pillars of international humanitarian law. The existence of competent active, and informed organs of supervision, both at the national as well as at the international level, is vital if the proportionality principle is to have meaning in practice. ... [B]oth logistical (access to information and ability to act promptly) and attitudinal (deference to national authorities, e.g., by extension of a “margin of appreciation”) factors affect the functioning of the various treaty implementation organs.

The Covenant and the American Convention include clauses specifying that derogation measures may not be imposed in a manner that discriminates on the grounds of race, color, sex, language, religion, or social origin

Article 15 of the European Convention is silent on the issue of discrimination in the application of emergency measures Nevertheless, arbitrary discrimination against disfavored groups of various types would be difficult to justify as being “strictly required.” Thus, there may be no substantive difference between the silence of the European Convention and the explicit non-discrimination clauses of the other two treaties, if only arbitrary distinctions are outlawed by the latter.

Draft non-discrimination provisos to the Covenant’s derogation article were proposed by the United States (in 1948) and by France (in 1949), but adding the element of non-discrimination was not easily accomplished. The Commission on Human Rights voted in May 1950 on the basis of an oral amendment during debate to add Article 20, the non-discrimination article to the list of non-derogable rights in Article 4. Objections were immediately raised that disparate treatment of enemy aliens would be necessary during wartime, and the decision was reversed the following day. A way around this impasse was found in 1952 when a non-discrimination clause not including the classification of national origin was added to the draft derogation article.

The idea that only arbitrary discrimination is outlawed by Article 4(1) is underlined by the deliberate inclusion of the word “solely” in its text.²²⁵ Even without this term, however, the reference to discrimination in Article 4 conveys the implication that only arbitrary and unjustifiable distinctions in the application of emergency measures would be outlawed. Thus, where an identifiable racial or religious group poses a distinct security threat not posed by other members of the community, presumably, emergency measures could be deliberately targeted against the group, despite the non-discrimination clause.

The absence of the word “solely” from the non-discrimination clause in Article 27(1) of the American Convention on Human Rights apparently has no intended significance. ...

The three treaties diverge dramatically with respect to defining absolute rights never subject to suspension. The process of defining non-derogable rights has been a markedly progressive one, with each later drafted instrument expanding the core of non-derogable rights. The European Convention

²²⁵ A separate vote was taken on the UK proposal to frame the clause in terms of discrimination ‘solely’ on one of the forbidden grounds. Support of the inclusion of ‘solely’ was premised on the notion that wartime measures aimed at a particular nationality, for example, might predominantly affect persons of a particular race without being race-based.

begins with just four, sparsely defined: the right to life, excepting deaths resulting from lawful acts of war (Article 2); the ban on torture or inhuman or degrading treatment or punishment (Article 3); the prohibition on slavery or servitude (Article 4(1)); and the prohibition on retroactive criminal penalties (Article 7).

**HUMAN RIGHTS COMMITTEE, STATES OF EMERGENCY,
GENERAL COMMENT 29 (ON ARTICLE 4)
(24 JULY 2001)**

1. ... The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant

2. ... Before a state moves to invoke Article 4, two fundamental conditions must be met: the situation must amount to a public emergency that threatens the life of the nation, and the state party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with Article 4. ...

3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation... . If States parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. ...

4. ... [The requirement that derogation measures are limited to the extent strictly required by the exigencies of the situation] relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party

5. The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in Article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited 'to the extent strictly required by the exigencies of the situation'. This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (Article 12) or freedom of assembly (Article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

...

7. ... Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in Article 4, paragraph 2, to

Article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in Article 18, paragraph 3... .

8. According to Article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though Article 26 or the other Covenant provisions related to nondiscrimination (Articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in Article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.

...

10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. ...

...

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, Article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of Article 4 of the Covenant.²²⁶

13. In those provisions of the Covenant that are not listed in Article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under Article 4. Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person ... a norm of general international law not subject to derogation

(b) The prohibitions against taking of hostages, abductions or unacknowledged detention ... justified by their status as norms of general international law.

(c) ... [T]he rights of persons belonging to minorities includes elements that must be respected in all circumstances

(d) ... [D]eportation or forcible transfer of population without grounds permitted under international law

(e) No declaration ... may be invoked as justification for a State party to engage itself, contrary to Article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in Article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must

²²⁶ [T]he category of crimes against humanity as defined in [the Rome Statute] covers . . . violations of some provisions of the Covenant that have not been mentioned in the said provision of the Covenant. For example, certain grave violations of Article 27 may at the same time constitute genocide under Article 6 [genocide] of the Rome Statute, and Article 7 [crimes against humanity], in turn, covers practices that are related to, besides Articles 6, 7 and 8 of the [ICCPR], also Articles 9, 12, 26 and 27.

comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in Article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as Article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of Articles 14 and 15.

16. Safeguards related to derogation, as embodied in Article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

...

Other Responses to Emergencies

If the ICCPR contained no derogation clause, could states parties lawfully suspend particular treaty obligations in the event of a public emergency? Two areas of international law are relevant to answering this question: rules governing the suspension of treaties and rules governing circumstances precluding wrongfulness. As to the former, the Vienna Convention on the Law of Treaties sets forth default rules for treaty interpretation. Article 62 provides that a state can suspend its treaty obligations due to a 'fundamental change in circumstances'. The suspension may apply to the treaty as a whole or to a single clause or provision. See Vienna Convention, Article 44. In the drafting process, states can elect to modify the default rules with respect to a specific treaty. For example, treaty drafters could narrow (or expand) the scope of conditions that permit a state to suspend its obligations. Likewise, treaty drafters could condition the ability to suspend a treaty obligation on the satisfaction of procedural criteria.

Second, the Articles on Responsibility of States for International Wrongful Acts drafted by the International Law Commission describe rules for 'circumstances precluding wrongfulness'. The draft articles of state responsibility define conditions under which a state may justify its failure to perform an international legal obligation. In the preceding analysis of derogation clauses, Joan Fitzpatrick alludes to one such justification: necessity. According to the articles of state responsibility, '[n]ecessity may not be invoked by a State as a ground for precluding the wrongfulness of an act unless the act [i]s the only way for the State to safeguard an essential interest against a grave and imminent peril.'

Another justification that may be relevant is *force majeure*. This principle excuses a state from legal responsibility if 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, mak[es] it materially impossible in the circumstances to perform the obligation', according to the draft articles. The practice of the International Labour Organization, for example, suggests that states can derogate from ILO conventions in the event of an armed conflict by invoking *force majeure* — whether or not the convention contains an explicit suspension clause.

In addition to the substantive scope of the right to derogate, consider the specific procedures a state is supposed to follow in derogating from its treaty obligations. Article 4 contains two procedural elements: official proclamation of a public emergency and notification to other states parties. In *Silva v. Uruguay*, Communication No. 34/1978 (1981), the Human Rights Committee observed that while 'the sovereign right of a State party to declare a state of emergency is not questioned ... by merely

invoking the existence of exceptional circumstances [a State] cannot evade' its Covenant obligations. 'If the ... Government does not furnish the required justification ... [the] Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant.'

Many governments have been criticized for their use and abuse of states of emergency. Most recently the Trump administration has frequently invoked the need for emergency measures. Executive Order 14157 of January 20, 2025 is entitled 'Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists'. Its purpose is to create 'a process by which certain international cartels (the Cartels) and other organizations will be designated as Foreign Terrorist Organizations':

[Section 1 (a) ... The Cartels have engaged in a campaign of violence and terror throughout the Western Hemisphere that has not only destabilized countries with significant importance for our national interests but also flooded the United States with deadly drugs, violent criminals, and vicious gangs.

The Cartels functionally control, through a campaign of assassination, terror, rape, and brute force nearly all illegal traffic across the southern border of the United States. In certain portions of Mexico, they function as quasi-governmental entities, controlling nearly all aspects of society. The Cartels' activities threaten the safety of the American people, the security of the United States, and the stability of the international order in the Western Hemisphere. Their activities, proximity to, and incursions into the physical territory of the United States pose an unacceptable national security risk to the United States.

...

(c) The Cartels and other transnational organizations, such as [Tren de Aragua and La Mara Salvatrucha], operate both within and outside the United States. They present an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. I hereby declare a national emergency, under IEEPA [the International Emergency Economic Powers Act], to deal with those threats.

Section 2

...

It is the policy of the United States to ensure the total elimination of these organizations' presence in the United States and their ability to threaten the territory, safety, and security of the United States. ...

In March 2025, before deporting detainees to El Salvador, President Trump invoked the Alien Enemies Act of 1798, which grants the president the power to deport citizens of nations engaged in war, invasion or 'predatory incursion,' arguing that Tren de Aragua, was invading the United States. He has also used the 'rhetoric of a nation under siege, promising amid stepped-up ICE raids and violent protests in California to "take all such action necessary to liberate Los Angeles from the Migrant Invasion."²²⁷ And trade tariffs imposed in April were justified in part on the grounds that 'foreign trade and economic practices have created a national emergency.'

While questions relating to the justification of states of emergency have been before the European Court of Human Rights since its inception, cases from Turkey have been especially prominent in recent years, particularly in response to the failed *coup d'état* in 2016. Commentators have been critical of the actual functioning of the derogations system under the European Convention,²²⁸ and the following materials illustrate some of the challenges involved.

²²⁷ A. Liptak, 'Trump Declares Dubious Emergencies to Amass Power, Scholars Say,' *New York Times*, 10 June 2025.

²²⁸ S. Wallace, 'Derogations from the European Convention on Human Rights: The Case for Reform', 20 *Hum. Rts. L. Rev.* (2020) 769.

**VENICE COMMISSION, OPINION ON EMERGENCY DECREE LAWS NOS. 667-676
ADOPTED FOLLOWING THE FAILED COUP OF 15 JULY 2016 (10 DECEMBER 2016)**

[The Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the Venice Commission's opinion on the overall compatibility of the implementation of the state of emergency in Turkey with Council of Europe standards.]

II. Factual background

6. On 15 July 2016 a group of officers within the Turkish armed forces tried to seize power in the country and overthrow President Erdoğan. The conspirators bombed the Parliament, attacked other public buildings, blocked roads and bridges in major towns, and seized a TV station. ... Hundreds of civilians were injured or killed. However, the Turkish armed forces and the population resisted, and the coup failed. The conspirators within the Army, police and other armed forces were disarmed and arrested.

7. The Venice Commission strongly and resolutely condemns ... the ruthlessness of conspirators, and expresses solidarity with the Turkish society

8. On 20 July 2016 the Government declared a state of emergency for three months. Following the approval of that declaration by Parliament, the Government started to legislate through emergency decree laws. The first was Decree Law no. 667, which entered into force on 23 July 2016.

[Note: The state of emergency was subsequently renewed seven times for a total of 24 months until it was lifted in July 2018. In all, 37 emergency decrees were issued.]

9. ... During the state of emergency, over 100.000 civil servants, military officers, judges, teachers and academics have been dismissed from their jobs. Tens of thousands have been arrested and prosecuted. Private institutions allegedly linked to the conspiracy have been closed down and their property confiscated.

10. According to Turkish official sources, there is strong evidence that the conspiracy has been organised by the supporters of Mr Fethullah Gülen, an Islamic cleric living in the US. In the Turkish official documents the Gülenist network is denoted as “FETÖ/PDY” (“Fethullah Terror Organization/Parallel State Structures”).

11. Originally, the Gülenist network consisted of a large number of educational institutions, charity foundations, business entities, etc. According to the Government, in addition to being largely present in the public education, business sphere and in the third sector, the Gülenists also started secretly penetrating into State institutions.

12. According to the Turkish authorities, in December 2013 the Gülenists tried to destabilize the AKP Government by accusing some of its members of corruption. Now this incident is considered by the Government as a first coup attempt by the Gülenists. Following the events of December 2013 the Government started closing down some key entities of the Gülenist network (such as the Asya bank and the Zaman newspaper).

13. In addition, a large number of civil servants, military officers and judges suspected of Gülenist sympathies were subjected to disciplinary investigations, or transferred to other places of service. However, these measures were of a limited effect, allegedly because of hidden obstruction from the Gülenists who by then had already infiltrated various State institutions.

...

16. ... [T]he Venice Commission takes into account certain factual allegations made by the Turkish authorities, for the purpose of building its legal analysis. The first allegation is that the failed coup was prepared and implemented by a coordinated group composed at least partly of supporters of Mr Gülen within the army and other State institutions. The Turkish authorities called the Gülenist network a “terrorist organisation”; the Organisation of Islamic Cooperation is of the same opinion. There are

different definitions of “terrorism”. Regardless of the propriety of these characterisations, those who were directly involved in the planning and implementation of the coup definitely formed a criminal organisation.

17. The second factual allegation is that, even before the coup, a number of members of the Gülenist network were involved in certain illegal acts, which arguably qualify as crimes under the Turkish Criminal Code. ... However, this does not mean that everybody who has ever had contacts with the organisations or projects associated with Mr Gülen may be automatically considered as aiding and abetting the commission of those crimes.

...

103. The criteria used to assess the links of the individuals to the Gülenist network have not been made public, at least not officially. The Venice Commission rapporteurs were informed that dismissals are ordered on the basis of an evaluation of a combination of various criteria, such as, for example, making monetary contributions to the Asya bank and other companies of the “parallel state”, being a manager or member of a trade union or association linked to Mr Gülen, using the messenger application ByLock and other similar encrypted messaging programmes. In addition, the dismissals may be based on police or secret service reports about relevant individuals, analysis of social media contacts, donations, web-sites visited, and even on the fact of residence in student dormitories belonging to the “parallel state” structures or sending children to the schools associated with Mr Gülen. Information received from colleagues from work or neighbours and even continuous subscription to Gülenist periodicals are also mentioned amongst those many criteria which are used to put names on the “dismissals lists”.

...

119. Disciplinary liability, or any other similar measure, should be foreseeable; a public servant should understand that he/she is doing something incompatible with his/her status, in order to be disciplined for it. Hence, it is important to establish a moment in time at which a reasonable and well-informed person ... must have understood that their continued connections with the Gülenist network were clearly unacceptable.

...

IV. Conclusions

...

225. There is no doubt that the Turkish authorities were confronted with a dangerous armed conspiracy, and that they had good reasons to declare a state of emergency and give extraordinary powers to the Government. ... Nevertheless, the state of emergency regime should remain within the limits set by the Constitution and domestic and international obligations of the State.

226. The provisions of the Turkish Constitution on the declaration of a state of emergency appear to be in line with common European standards in this area. However, the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law.

227. The main concerns of the Venice Commission related to the current constitutional situation in Turkey may be summarised as follows:

- Following the declaration of a state of emergency, for over two months, the Government was de facto permitted to legislate alone, without any control by Parliament or the Constitutional Court;
- The Government took permanent measures, which went beyond a temporary state of emergency. Civil servants were dismissed, not merely suspended, organisations and bodies were dissolved and their property confiscated instead of being put under temporary State control. In addition, the Government made a number of structural changes to the legislation, which should normally be done through the ordinary legislative process outside of the emergency period;

- The Government implemented its emergency powers through ad hominem legislation. In particular, tens of thousands of public servants were dismissed on the basis of the lists appended to the emergency decree laws. Such collective dismissals were not individualised, i.e. they did not refer to verifiable evidence related to each individual and described in the decisions;
- Basic rights of administrative due process of the public servants dismissed by the decree laws or on their basis have not been respected;
- Collective dismissals were ordered because of the alleged connections of public servants to the Gülenist network or other organisations considered “terrorist”, but this concept was loosely defined and did not require a meaningful connection with such organisations ...;
- ...
- In the area of criminal procedures, extension of the time-limit for pre-trial detention without judicial control up to 30 days is highly problematic
- The Government has removed crucial safeguards that protect detainees from abuses, which increases the likelihood of ill-treatment;

...

228. The Venice Commission is particularly concerned by the apparent absence of access to justice for those public servants who have been dismissed directly by the decree laws, and those legal entities which have been liquidated by the decree laws. ...

...

**PIŞKIN V. TURKEY,
EUROPEAN COURT OF HUMAN RIGHTS, SECOND SECTION,
APPLICATION NO. 33399/18 (15 DECEMBER 2020)**

[Based on Emergency Legislative Decree No. 667, the applicant was dismissed from his job as an expert at the Ankara Development Agency, a ‘public law entity’. He claimed that no valid reason had been given and that appropriate procedures had not been followed. He categorically denied any kind of link with the FETÖ/PDY and said he too considered it to be a ‘terrorist organisation’. The Labour Court dismissed his claim on the grounds that his determination was lawfully carried out under Decree No. 667. On appeal, the Ankara Regional Court and the Constitutional Court also dismissed the application.]

33. The relevant parts of Emergency Legislative Decree No. 667, which came into force on 23 July 2016, read as follows:

Article 4

(1) Persons considered as belonging, affiliated or linked to terrorist organisations or structures, formations or groups which the National Security Council has determined are involved in activities prejudicial to the national security of the State:

...

(g) personnel employed in all kinds of posts, positions and status (including workers) in institutions affiliated or related to a ministry, are dismissed from the civil service upon the proposal of the head of unit, with the approval of the director of the recruitment department.

...

(2) Persons dismissed in accordance with the first paragraph cannot be employed in the civil service again

...

[Under the heading of ‘relevant international materials, the Court took very detailed note of the Venice Commission’s Opinion (p. 000 above), and of the UN Human Rights Committee’s General Comment No. 29.]

...

55. On 21 July 2016 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

... On 15 July 2016, a large-scale coup attempt was staged in the Republic of Turkey to overthrow the democratically-elected government and the constitutional order. This despicable attempt was foiled by the Turkish state and people acting in unity and solidarity. The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the [ECHR]. The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. ...

...

[Article 6]

131. ... [In relation to fair trial rights under Article 6 of the Convention, the] issue before the Court is whether the applicant benefited from a genuine assessment of his submissions during the proceedings before the domestic courts. ...

...

133. [T]he Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”

134. Moreover, Article 6 of the Convention obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument put forward by the plaintiff.

...

...

140. The Court observes that ... the applicant had access to a tribunal which had full jurisdiction to hear and determine the case ..., [and the first instance] court decided to supplement the case file, heard witnesses called by the applicant and held a public hearing. Furthermore, the applicant had not been prevented from accessing any decisive piece of evidence provided to the domestic courts by the employer. In the light of the foregoing, the Court is prepared to accept that the judicial process sufficiently satisfies the requirements of adversarial proceedings and equality of arms without prejudice to its subsequent examination of the applicant’s allegations concerning the effectiveness of judicial review.

...

147. ... [A]t no stage in the proceedings before the different trial benches did the domestic courts consider the question whether the termination of the applicant’s employment contract for presumed links with an illegal structure had been justified by his conduct or any other relevant evidence or information. ... [I]t does not transpire from the impugned decisions that the arguments put forward by the applicant had ever really been heard, that is to say had been duly examined by the trial courts.

148. As regards the Constitutional Court, ... by giving a summary inadmissibility decision, the latter failed to conduct any analysis of the legal and factual issues in question.

149. ... [T]he conclusions set out in the judicial decisions given ... do not demonstrate that the domestic courts conducted an in-depth, thorough examination of the applicant’s arguments, that they based their reasoning on the evidence presented by the applicant and that they validly reasoned their dismissal of the latter’s challenges. ...

...

150. [In conclusion], whereas the domestic courts theoretically held full jurisdiction to determine the dispute between the applicant and the administrative authorities, they deprived themselves of jurisdiction to examine all questions of fact and law relevant to the dispute before them, as required by Article 6 § 1.

151. The Court concludes therefore that the applicant was not actually heard by the domestic courts.

...

...

153. ... [E]ven in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 ... if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer

immunities from civil liability on large groups or categories of persons ... There has accordingly been a violation of Article 6 § 1 of the Convention.

[Article 8]

154. The applicant ... stated that because of his dismissal he was now labelled a “terrorist” and “traitor”. ... [T]he Court will examine the present case under Article 8 ...:

1. Everyone has the right to respect for his private ... life ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

...

207. ... [T]he Court notes ... the general character of the wording of ... Decree No. 667, with terms such as “belonging to” and “affiliated or linked with” an illegal structure. ... [T]he Government did not cite any criteria concerning the definition of [these] concepts Moreover, the Court takes note of the Venice Commission’s considerations on the foreseeability of the criteria used to assess a person’s links with an illegal structure.

Nevertheless, the Court takes the view that ... the *actus reus* of such offences should be worded in general language. Otherwise, the statute may not deal with the issue comprehensively and will require constant review and updating

...

209. ... Having regard to the particular circumstances of the state of emergency and to the fact that the domestic courts had full jurisdiction to review the measures adopted ..., the Court is prepared to proceed on the assumption that the impugned interference was prescribed by law.

...

222. ... [T]he Court can accept, in keeping with its findings under Article 6, that the simplified procedure established under Legislative Decree No. 667 enabling civil servants and other civil-service employees to be dismissed might be considered as having been justified in the light of the very specific circumstances of the situation ..., given that the measures taken during the state of emergency had been subject to judicial review. Consequently, it considers that no further assessment is required of the procedure

223. As regards the ... thoroughness of the judicial review of the impugned measure, the Court reiterates the principle that any individual subject to a measure for reasons of national security must have safeguards against arbitrary action.

224. The Court is prepared to accept that membership of structures organised along military lines or establishing a rigid, irreducible form of solidarity among their members, or else pursuing an ideology contrary to the rules of democracy, a fundamental element of “European public order”, could raise an issue vis-à-vis national security and prevention of disorder where the members of such bodies are called upon to discharge public duties.

...

227. ... [E]ven where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence. If it were impossible to contest effectively a national security concern relied on by the authorities, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

228. ... [T]he domestic courts failed to determine the real reasons why the applicant’s employment contract had been terminated Consequently, the judicial review of the impugned measure in the present case was inadequate.

229. ... [T]he impugned measure cannot be said to have been strictly required by the special circumstances of the state of emergency. There has accordingly been a violation of Article 8 of the Convention.

...

CONCURRING OPINION OF JUDGE KOSKELO

1. ... I am in full agreement with the judgment in terms of the outcome, ... however, I have reservations concerning the reasoning

Article 6

...

4. In my view, ... the ... requirements [of] full jurisdiction, adversarial procedure and equality of arms ... were only satisfied in a purely formal sense, as a matter of abstract theory. This is hardly consonant with ... upholding rights that are real and not only illusory [The majority] stated that the applicant was not prevented from having access to the case file regarding evidence submitted [but] ... the file lacked anything that could have served to elucidate the specific facts or the evidence relied on to justify the dismissal, and thus to help the applicant discern what exactly he should challenge and how.

5. ... [The Court should] dispense with the statements set out in paragraph 140. In the specific circumstances, they are more or less void of substance. The crux of matter is the actual weakness of the judicial review that took place.

Article 8

...

7. [T]he Court has consistently held that for domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters relating to fundamental rights, it would be contrary to the rule of law ... for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. ...

...

10. ... [T]he relevant provision of ... Decree No. 667 is worded very vaguely It is difficult to see how such a legal basis for measures that entailed dramatic and, in principle, permanent consequences for the individuals concerned could be considered consonant with the standards developed in the Court's case-law.

11. ... [T]he Venice Commission ... also expressed concerns regarding the formulation of the relevant provisions, and recommended that they should be amended so that a dismissal could only be ordered on the basis of a combination of factual elements which clearly indicated that the public servant had acted in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order.

...

13. [A]s regards the judicial review and the relevant requirements of independence, one should not lose sight of the fact that all the members of the judiciary were themselves subject to the threat of dismissal under the same emergency measures. In sum, the quality of the legal framework, including the relevant safeguards, appears highly problematic from the point of view of the established Convention standards.

...

COVID-19

Around 90 percent of constitutions contain explicit provisions for dealing with states of emergency and, between 1985 and 2014, at least 137 countries made such a declaration at least once.²²⁹ Some

²²⁹ C. Bjørnskov and S. Voigt, 'The Architecture of Emergency Constitutions', 16 *Int'l J. Con. L.* (2018) 101.

states are said to have ‘routinized’ states of emergency.²³⁰ While counter-terrorism has been a key driver in this area, the COVID-19 pandemic, starting in early 2020, led to a flood of emergency measures, although many fewer formal derogations.²³¹ The following materials provide contrasting perspectives on the impact of these developments.

As noted by Tom Ginsburg and Mila Versteeg, in ‘The Bound Executive: Emergency Powers During the Pandemic’, 19 *Int’l J. Con. L.* (2021) 1498, COVID-related measures included ‘nationwide stay-at-home orders, military-enforced curfews, suspended religious services, cellphone monitoring, the suspension of schools and other government services, restricted travel, and the censoring of news.’ Some have been controversial, others have not:

... [T]he pandemic response has produced massive debates about the role of government power during times of crisis It is conventional wisdom that emergencies require massive delegation of power to the executive, which is the only branch of government with the information, decisiveness, and speed to respond to crises. Therefore, the executive cannot be effectively constrained by the other branches of government, and may even need to operate outside the law entirely. Checks and balances that ordinarily constrain constitutional governance thus cease to exist during times of crisis. While this view, associated most prominently with Carl Schmitt, has numerous critics, it remains popular, with high-profile proponents such as Eric Posner and Adrian Vermeule, who [have articulated] a theory of an “unbound executive” [They] characterize crisis governance as “Schmittian” and “post-Madisonian,” because they believe that the Madisonian scheme of checks and balances, wherein different branches and levels of government have the incentives to keep each other in check, fails to operate under such circumstances. ...

[The authors present] data from an original global survey ... [of] the legal basis for the early pandemic response as well as the extent to which there has been judicial oversight, legislative involvement, and whether the executive’s pandemic response has encountered pushback from subnational units. ...

[The] key finding is that, in many countries, checks and balances have remained robustly in place Perhaps most surprising is that, in over half of the democracies we surveyed, courts have played a visible role in monitoring the executive. ... Of course, the fact that courts attempt to monitor executive power does not mean that they actually succeed. Court orders can be defied, and implementation might be lacking, especially when courts dictate complex policy responses. ...

... [I]n roughly two-thirds of countries in our survey, legislatures have been directly involved in the pandemic response, either because they had to declare or extend a state of emergency or because they passed new legislation. The vast majority of legislatures that passed new legislation have also attempted to provide safeguards against abuse by making these new laws specific to the current crisis and temporary in nature. ...

Finally, in a number of countries, ... subnational authorities have been more aggressive than national governments, demanding greater restrictions for their particular localities; and in some places, they have pushed back against national leaders who have been perceived as over-reaching. ...

²³⁰ S. Hennette Vauchez, ‘Taming the Exception: Lessons from the Routinization of States of Emergency in France’, 20 *Int’l J. Con. L.* (2022) 1793.

²³¹ R. R. Rubins and G. Barzilai, ‘Only Sovereignty: Global Emergencies between Domestic and International Law’, 55 *Cornell Int’l L. J.* (2022) 139; and R. G. Teshome, ‘Derogations to Human Rights During a Global Pandemic: Unpacking Normative and Practical Challenges’, 37 *Am. U. Int’l L. Rev.* (2022) 307.

A different picture emerges, however, when the focus is specifically on the human rights impact of COVID-related measures, as illustrated by this UN report based on civil society information (UN Doc. A/HRC/51/13 (2022)):

7. Between 1 January 2020 and 13 April 2022, the Secretary-General received at least 111 official depositary notifications from 24 Member States instituting states of emergency and derogations, pursuant to [the ICCPR], including extensions or introductions of new restrictions specifically related to COVID-19.

8. More than 175 countries reportedly adopted legal or other forms of pandemic response measures that limited civic freedoms, including freedom of assembly, association and expression. ... COVID-19 restrictions affected a wide range of civil society actors, changing how they were able to reach the communities they serve, to engage with State and other counterparts and to influence policymaking. In many countries, measures were based on outdated emergency laws, decrees and regulations or on repurposed security-related legislation, and were enacted for prolonged periods or without termination dates. Civil society responses ... also indicated that, overwhelmingly, emergency measures were adopted without any consultations with communities. Efforts to involve civil society in reviewing the measures' effectiveness were also scarce.

18. During the pandemic, the United Nations human rights mechanisms repeatedly raised concerns ... in relation to unequal access to COVID-19 vaccines, medicines, health technologies and diagnostics

19. In many countries COVID-19 measures also granted increased powers to the executive branch, weakening other branches of Government and the critical oversight functions they provide, for example, by suspending judicial proceedings and thus undermining civil society's ability to bring lawsuits to challenge COVID-inspired laws and practices that infringed rights. Many Governments also defined "essential workers" narrowly, excluding lawyers, for example, and thereby effectively preventing them from providing their clients essential legal services and from accessing courts and justice, including in the context of COVID-19 curfews.

The UN report indicates that, by April 2022, only 24 of 193 UN Member States registered COVID-19-related derogations. For the Council of Europe, ten of 46 States had done so by 2023. And these numbers alone tell only part of the story. Laurence Helfer, in 'Rethinking Derogations from Human Rights Treaties', 115 *Am. J. Int'l L.* (2021) 20 calls attention to the weaknesses in the derogations system, as illustrated by the COVID-19 experience:

The emergency measures engendered by the COVID-19 pandemic differ in several respects [from those taken in earlier decades, which focused especially on political unrest and terrorism]. For one, ... the number of derogating states ... is far lower than the more than one hundred countries that have imposed pandemic-related restrictions on individual rights.

A second difference concerns the number and diversity of rights affected. Most COVID-19 derogations unsurprisingly focus on freedom of movement, assembly, and association. But states have also restricted the rights to liberty, to respect for private and family life, to a fair trial, to the protection of property, to freedom of expression, and to education. Some COVID-19 controls have also infringed nonderogable rights—including the right to life, the prohibition of torture and cruel, inhuman or degrading treatment, and forced labor—and implicated a state's positive human rights obligations, including those relating to economic and social guarantees.

A third difference concerns governments that have invoked the pandemic as an excuse to repress dissent. Many of these violations relate to public health—such as arbitrary arrests and extrajudicial killings during lockdowns or censorship of information about COVID-related infections or deaths. Others range much further afield, perhaps the most infamous being Hungarian emergency laws that give the executive virtually unfettered power to rule by decree.

...

In sum, the use of derogations in response to COVID-19 is only one facet of a much broader set of restrictions and violations of human rights during the pandemic. For a mechanism designed to constrain the suspension of individual liberties during emergencies through international disclosure and oversight, the derogations regime appears to be having only a modest impact.

Fionnuala Ni Aoláin, in 'Exceptionality: A Typology of Covid-19 Emergency Powers', 26 *UCLA J. Int'l L. & Foreign Aff.* (2022) 49, reinforces that picture and expresses particular concern about the accompanying 'trend toward normalizing the exceptional and avoiding the constraints of exceptionality and oversight that follow from treaty derogation.' Consider, for example, the following legislation, adopted with minimal debate less than two weeks after the first two cases of COVID-19 were discovered in Ghana.²³²

GHANA, IMPOSITION OF RESTRICTIONS ACT, 2020 (21 MARCH 2020)

1. The object of this Act is to provide for powers to impose restrictions on persons, to give effect to [the emergency provisions] ... of the Constitution in the event or imminence of an emergency, disaster or similar circumstance to ensure public safety, public health and protection.

Imposition of restrictions

2. (1) The President may, acting in accordance with the advice of relevant person or body, by Executive Instrument, impose restrictions specified [in the Constitution.]

(2) An Instrument made under subsection (1) should include provisions in respect of

- (a) the specific restriction to be imposed;
- (b) the duration of the restriction;
- (c) the person to whom the restriction applies;
- (d) the geographic area to which the prescription applies;
- (e) the facts and circumstances for the provisions in paragraphs (a) to (d), and
- (f) any other matter incidental to the attainment of the object of this Act.

3. (1) The President may impose a restriction under subsection 1 of section 2 where the restriction

- (a) is reasonably required in the interest of defence, public safety, public health or the running of essential services;
- (b) is reasonably required on the movement or residence within Ghana of any person or persons generally, or any class of persons;
- (c) is required to restrict the freedom of entry into Ghana, or movement in Ghana, of a person who is not a citizen of Ghana; or

²³² For an analysis, see B. Nkrumah, 'The (Il)legality of Ghana's Covid-19 Emergency Response: A Commentary', in E. Durojaye and D. Powell (eds.), *Constitutional Resilience and the COVID-19 Pandemic* (2022) 311; and A. Fellmeth, 'Human Rights Derogations in National Emergencies: Lessons from Africa', 28 *Sw. J. Int'l L.* (2023) 640.

(d) is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community.

(2) The imposition of the restriction under subsection (1) shall be reasonably justified in accordance with the spirit of the Constitution.

4. (1) A restriction impose [sic] under subsection (1) of section 2 shall be for a period of not more than three months.

...

6. A person who fails to comply with a restriction imposed under the Executive Instrument issued under subsection (1) of section 2 commits an offence and is liable on summary conviction to a fine ... or to a term of imprisonment of not less than four years and not more than ten years or to both.

7. In this Act, unless the context otherwise requires,

“disaster” includes an occurrence [sic] by which there is serious disruption of general safety endangering the life and health of many people or large material interests which require co-ordinated action by services of different disciplines and flood, earthquake, drought, rainstorm, war, civil strife or industrial accident; and

“essential services” include

- (a) water supply services;
- (b) electricity supply services;
- (c) health and hospital services;
- (d) waste management services;
- (e) air traffic and civil aviation control services;
- (f) meteorological services;
- (g) fire services;
- (h) air transport services;
- (i) supply and distribution of fuels;
- (j) telecommunications services; and
- (k) public and private commercial transport services.

QUESTIONS

1. All *jus cogens* norms are non-derogable under Article 4, but not all non-derogable rights under Article 4 are *jus cogens* norms. In other words, there is a residual category in Article 4: ICCPR provisions that do not reflect *jus cogens* norms but nevertheless may not be suspended due to a public emergency. What are the general features of such provisions? What is the logic behind their receiving this extraordinary protection if they do not implicate peremptory norms?

2. In General Comment 29, the Committee provides an expanded list of non-derogable rights beyond those explicitly enumerated in Article 4(2). Did the Committee go too far or not far enough? What would you exclude or include?

3. In 2017, Turkey held a constitutional referendum which, in the view of one observer, put in place a system ‘organized around sweeping new presidential powers including many powers equivalent to those under the state of emergency on a permanent basis’. The new system ‘perpetuated the executive aggrandizement and dismantled the key checks and balances that

form an integral part of any functioning democracy'.²³³ Does Judge Koskela's gloss on the European Court's decision in *Piskin v. Turkey* suggest that the court has adopted an overly permissive response to Turkey's state of emergency, in which over 100,000 persons were dismissed from their jobs?

4. What do you see as the key shortcomings in Ghana's Restrictions Act?

5. On three days in late March 2022, 87 people were murdered by criminal gangs in El Salvador. The government of President Nayib Bukele immediately imposed a 30-day 'state of exception', subsequently renewed 39 times as of June 2025. Bukele has restricted freedom of assembly and the right to a legal defence in court, and authorized the rounding up of alleged gang members. Over 100,000 people, or 1.7% of the population, are now imprisoned and 350 are alleged to have died in overcrowded, unhygienic and dangerous conditions. El Salvador has the world's highest incarceration rate. The Justice Minister said the suspected gang members would never return to the streets. In January 2023, the Defense Minister announced a 56.8 percent decrease in homicides between 2021 and 2022, which he attributed to the crackdown. In 2025, President Bukele's approval ratings were 85%. In 2025 President Trump transferred hundreds of detainees from US prisons to the El Salvador system. How would you evaluate this situation in terms of the ICCPR, to which El Salvador is a party?

2. International Humanitarian Law and its Relationship to Human Rights

International law protects the rights of individuals during wartime. A potential difficulty in securing such protection, however, is determining how two areas of international law — the law of armed conflict (also called 'international humanitarian law') and human rights law — interrelate. Also, which institutions should have the power to interpret and apply these bodies of law? For example, should human rights institutions have the authority and competence to interpret IHL? For the moment we focus on the content of IHL and the first set of concerns, namely, the relationship between the two legal regimes. Once we better understand those issues, we can consider questions about the appropriate role of various institutions in interpreting the law.

The Structure and Content of IHL²³⁴

IHL is certainly a specialized body of law. It regulates, often in exacting detail, the methods of conducting hostilities and the treatment of victims of warfare. At the outset, it is important to understand three parameters that define the scope of the regime's application. First, the regime applies only in situations of armed conflict and military occupation. Second, an important distinction involves the classification of a conflict as either international (i.e., between two or more states) or non-international (e.g., between a state and a non-state group; or between two non-state groups). In general, a broader and more demanding set of IHL rules applies to international armed conflict, and only a subset of those obligations applies to non-international armed conflict. A primary reason for that normative hierarchy is that the legal authority of the state is generally at its zenith in dealing with matters within its sovereign territory; and state authority is more constrained when acting abroad in direct confrontation with the sovereign interests of another state. Third, the obligations of IHL are meant to apply equally to all parties involved in a conflict. That is, the rights and responsibilities of actors do not change according to the purported justness of one side's cause. The rules are neither more stringent for a state that aggressively invades another state, nor more relaxed for a state acting

²³³ See E. Turkut, 'The Turkish Post-Coup Emergency and European Responses: Shortcomings in the European System Revisited', *Eur. Yb. Hum. Rts* (2022) 445.

²³⁴ See generally M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd ed., 2024); and A. Clapham, *War* (2021).

in self-defence against an aggressor. In other words, the rules that apply to conduct during an armed conflict (*jus in bello*) are separate from the rules that apply to the initial reasons for going to war (*jus ad bellum*).

IHL is governed by overarching principles and a set of specific rules. The former includes three general principles. First is the principle of necessity: an obligation to use only the amount of force needed to obtain a military objective. Second is the principle of distinction: an obligation to attack only legitimate military targets and never deliberately attack civilians or civilian objects. Third is the principle of proportionality: an obligation to ensure an acceptable relationship between the legitimate destructive effect and undesirable collateral effects of a military attack. The principle of proportionality may, alternatively, be formulated as an obligation to ensure any incidental loss or injury to civilian life is not excessive in relation to the military objective of an attack.

IHL is often divided into two domains, though these boundaries have merged in more recent years. One domain concerns legal obligations related to the methods and means of warfare in the conduct of military operations. This domain has historically been called ‘Hague Law’ — due to the city in which the principal treaties on this subject were initially adopted. Its rules are codified, for example, in The Hague Conventions concluded in 1899 and 1907. And, customary international law currently plays a significant role in defining its content, as an International Court of Justice advisory opinion on the use of nuclear weapons demonstrates. Examples of Hague Law include prohibitions on specific weapons, on the infliction of superfluous injury and unnecessary suffering, on assassination and on perfidious conduct. Contemporary issues in this domain include the use of cluster bombs, the use of remote controlled drones, the tactics of cyber attacks and cyber warfare more generally, and the definition of acts of terrorism in the context of an armed conflict.

In contrast with Hague Law, the second domain of IHL concerns the treatment of civilians and combatants who have laid down their arms and are subject to the effective authority of an opposing party to the conflict. This domain has historically been called ‘Geneva Law’ due as well to the treaty conferences that initially codified this area of law. The principal instruments are the four Geneva Conventions of 1949. The conventions were drafted in the aftermath of the Second World War, during the same period in which war crimes trials were taking place on the European continent and in East Asia. Collectively, the 1949 Conventions provide rules for the wounded, sick and shipwrecked (the First and Second Geneva Conventions), prisoners of war (the Third Geneva Convention) and civilians (the Fourth Geneva Convention). Contemporary controversies involving the application of Geneva Law include the definition of persons who are lawfully subject to detention and the composition of military trials in non-international armed conflict.

Most of the rules in the 1949 Conventions apply to international armed conflicts — war between two or more states. However, Article 3 common to all four Conventions, which has been called a ‘convention in miniature’, contains rules that apply to non-international conflicts such as civil wars. Common Article 3 imposes direct legal obligations on all parties to a conflict — including non-state actors. These obligations include the most basic rights of individuals such as freedom from torture, murder, mutilation and cruel treatment; the right to a fair trial, and the general right ‘in all circumstances [to] be treated humanely’. The International Court of Justice famously referred to the rules in Common Article 3 as ‘a minimum yardstick’ for all armed conflicts because they reflect ‘elementary considerations of humanity’.

In the midst of the Cold War, states reconvened in Geneva to negotiate two additional protocols to the 1949 Conventions. Finalized in 1977, the two Protocols involve a convergence of Hague Law and Geneva Law. That is, each Protocol contains rules pertaining to the two domains in a relatively undifferentiated organizational structure. Additional Protocol I elaborates the rules that apply in international armed conflicts. It also defines ‘international armed conflict’ to include national liberation and other armed struggles in exercise of the right of self-determination. Additional Protocol II contains a more modest set of rules for internal armed conflicts.

In terms of their status, the 1949 Geneva Conventions and the 1977 Protocols have secured widespread ratification. In 2006, the 1949 Conventions became the first treaties in modern history to achieve ratification by every state in the world. Their rules are also generally considered binding as a matter of customary international law. As of 2025, 175 states are party to Protocol I, and many of its provisions are considered customary international law applicable in all armed conflicts. The United States is one of the few states not to ratify the Protocol (along with India, Indonesia, Iran, Israel, Myanmar (Burma), Nepal, Pakistan, Sri Lanka and Turkey). The U.S. Government, however, considers much of the Protocol binding customary international law. When the United Kingdom ratified the Protocol in 1998, it attached a reservation stating that ‘the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.’ Additional Protocol II has been ratified by 170 states. Its states parties include all permanent members of the Security Council except the United States, which has signed but not ratified the agreement.

The most recent international instrument to include a broad range of IHL prohibitions is the 1998 Rome Statute for the International Criminal Court. The drafters of the Rome Statute considered it their task to produce a treaty reflecting the existing IHL regime, not to develop new law. As a consequence, Article 8 is widely understood to codify customary IHL and thus serves as a useful reference point. The Rome Statute is, however, limited to rules that incur international criminal liability. State obligations under IHL conflict, of course, encompass far more than war crimes. In 2005, the International Committee of the Red Cross (ICRC) finalized a study on customary international humanitarian law. This vast set of materials provides the ICRC’s views on the rules that have acquired the status of custom in international and non-international armed conflict. The study, however, was not completed without controversy. The U.S. Government, for example, objected to parts of the methodology used to ascertain rules and some substantive conclusions of the study.²³⁵

The Relationship Between the Two Bodies of Law²³⁶

A principle familiar to many legal systems, public international law included, is *lex specialis derogat legi generali*. That is, a specific or special rule should take precedence over a general rule. This principle raises an important challenge for the legal regulation of warfare: should IHL supplant human rights law in defining the rights and obligations of individuals and states during an armed conflict?

In contrast with IHL, international human rights law applies during peacetime and wartime. The first formal recognition of the application of human rights law to armed conflict is often dated back to the 1968 International Conference on Human Rights at Teheran. That world conference also spurred a series of annual UN General Assembly Resolutions entitled ‘Respect for Human Rights in Armed Conflicts’, and those resolutions were a prelude to the 1977 Geneva Protocols. The recognition of the interconnections between human rights law and armed conflict, however, was a growing trend that began before the Teheran conference. Human rights instruments, some finalized before 1968 and some after, clearly contemplate situations of warfare and military matters. The European Convention on Human Rights (ECHR) (1950) and the Inter-American Convention (1969) both contain derogation clauses referring to ‘time of war’. The European Convention also lists the right to life as nonderogable ‘except in respect of deaths resulting from lawful acts of war’. The derogation clause in the ICCPR (1966) uses the phrase ‘public emergency which threatens the life of the nation’ and is well understood to encompass armed conflicts. Article 2 of the Torture Convention (1984) states: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war ... may be invoked as a justification of torture.’ The Convention on the Rights of the Child (1989) commits states to promoting the recovery and reintegration of ‘child victim[s] of ... armed conflicts’ and prohibits the recruitment and use of child soldiers. Article 30 of the Declaration on the Rights of Indigenous Peoples (2006) places

²³⁵ See J. Bellinger III and W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law’, 89 *Int’l. Rev. Red Cross* (2007) 443; and M. Milanovic and S. Sivakumaran, ‘Assessing the Authority of the ICRC Customary IHL Study’, 104 *Int’l. Rev. Red Cross* (2022) 1856.

²³⁶ See generally H. Duffy, ‘Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication’, in Z. Bohrer, J. Dill and H. Duffy (eds.), *Law Applicable to Armed Conflict* (2020) 15.

restrictions on ‘military activities’ in the lands and territories of indigenous peoples. And Article 43 of the 2006 Convention for the Protection of All Persons from Enforced Disappearance states that the ‘Convention is without prejudice to the provisions of international humanitarian law’.

In corresponding fashion, conventions related to IHL indicate the applicability of human rights norms to situations of armed conflict. The 1949 Geneva Conventions might have referred to universal human rights in preambular language, but disputes over unrelated language culminated in dropping the idea of having a preamble. As the historian Geoffrey Best explains, ‘[w]hat seems beyond doubt is that the human rights affiliation expressly claimed by the original, minimal preambles was in itself accepted by all parties to the 1949 diplomatic conference to the point even of being taken for granted.’²³⁷ The most readily apparent influence of human rights norms is perhaps Common Article 3, which regulates practices within states’ sovereign borders. According to the ICRC Commentaries, the article reflects ‘the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself.’

The 1977 Additional Protocols to the Geneva Conventions continued this trend. For example, Article 72 of Additional Protocol I, which delineates some of the convention’s field of application, acknowledges the relevance of human rights law: ‘The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention ... as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.’ Protocol II contains a preamble, which notes that ‘international instruments relating to human rights offer a basic protection to the human person’. More fundamentally, the 1977 Protocols represented a significant shift toward the convergence of human rights and humanitarian law norms. One of the leading commentators on the subject, G. I. A. D. Draper, voiced a series of cautions at the time. He advised that actors engaged in promoting such a fusion should consider the divergent interests and distinct structural concerns that animate the two domains of law. In a controversial essay that retains some influence, Draper explained his position:

... [International human rights] are neither intended nor adequate to govern an armed conflict between two states in a condition of enmity. The relevance of war to a human-rights regime is that the regime determines what happens to those human rights in that event. The regime in no way purports to regulate the conduct of the war between two states even assuming that both were subject to that human-rights regime. Hostilities and government-governed relationships are different in kind, origin, purpose, and consequences. ... Human-rights regimes and the humanitarian law of war deal with different and distinct relationships. ... It is not possible to have a regional law of war. It is possible to have a regional regime of human rights... .

...

The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed... .

... [T]he law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions. The humanitarian nature of the modern law of war neither justifies the confusion with, nor dispels the opposition to, human rights.²³⁸

²³⁷ G. Best, *War and Law Since 1945* (1994) 72.

²³⁸ G.I.A.D. Draper, ‘Humanitarian Law and Human Rights’, *Acta Juridica* (1979) 193.

More recently a different version of Draper's points has emerged: some commentators and a few states (the United States included) have argued that, in addressing particular issues during an armed conflict, IHL should displace or supplant the application of human rights law. For example, Yoram Dinstein, in 'The Recent Evolution of the International Law of Armed Conflict: Confusions, Constraints, and Challenges', 51 *Vand. J. Transnat'l L.* (2018) 701, at 704, acknowledges 'some synergy and even a degree of overlap' between the law of armed conflict (LOAC) and international human rights law (IHL), but insists that they also 'collide head-on in certain critical areas.' In such situations, 'LOAC must prevail over human rights law because ... it is the *lex specialis*.' The problem, in his view, 'is that zealous advocates of human rights law are not willing to yield the moral high ground. They behave like the high priests of a Holy Gospel who regard any deviation from their received dogma as apostasy. ... They think that, by rejecting military necessity, they will lead us to utopia. But what they are liable to bring about is dystopia. If international law were to ignore military necessity, military necessity would ignore international law. Belligerent Parties would simply shed off any inhibitions in the conduct of hostilities.'

The International Court of Justice provided one of the most influential statements on this matter in an Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*. The Court was faced with various opposing arguments. One argument maintained that the possession, threat or use of nuclear weapons violated the right to life under the ICCPR, a position supported by a General Comment of the Human Rights Committee in 1984. Another position held that the ICCPR protects human rights only in peacetime. And some states (including the Netherlands, the United Kingdom and the United States) took the position that IHL provides a safe harbour for parties to an armed conflict: if deaths result from actions that comply with IHL, those actions cannot be considered 'arbitrary' deprivations of the right to life. The British Government, for example, stated, 'The only sensible construction which can be placed on the term "arbitrary" in this context is that it refers to whether or not the deliberate taking of life is unlawful under that part of the international law which was specifically designed to regulate the conduct of hostilities, that is the laws of armed conflict.' In an oft-quoted passage, the ICJ stated:

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

As with many judicial opinions, the meaning of this statement has been subject to different, and sometimes conflicting, interpretations. Consider the following articulation of the Court's analysis and the rationale behind a broad application of the *lex specialis* doctrine:

Confronted with two legal regimes – human rights law and humanitarian law – containing rules on the taking of lives, the ICJ resorted to the principle that *lex specialis* derogat *lex generali* to reconcile them, holding that the ICCPR provision on the right to life must be construed by making a renvoi to humanitarian law. *Lex specialis* derogat *lex generali*, or, the specific provision overcomes the general provision, is a canon of construction that is widely considered to be a general principle of law, as applicable in the international legal system as it is in national legal systems. Koskeniemi [in a 2003 paper] provides the principle's rationale: a 'special rule is more to the point ("approaches more nearly the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules do'. The thinking goes that because many of the same states have negotiated and acceded to the human rights law and humanitarian law treaties, we should presume that these treaties are consistent with one another. We should not think, for example, that it violates the right to liberty under the ICCPR or ECHR to hold a combatant as a prisoner of war until the end of

active hostilities when, after all, the same states that negotiated the ICCPR and ECHR also negotiated an entire treaty on prisoners of war that allows exactly that. Because general rules ('No one shall be subjected to arbitrary arrest or detention.') may be interpreted in more than one way, we should interpret them in light of specific rules ('Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.') rather than vice versa.²³⁹

The ICJ issued two more recent opinions involving the application of human rights in armed conflict and military occupation. The first, in 2004, concerned Israel's construction of a physical barrier in occupied Palestinian territory. The second, in 2006, involved an armed conflict between the Democratic Republic of the Congo and Uganda. On both occasions, the Court provided the following formulation:

... [T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.²⁴⁰

Vaios Koutroulis, in 'Are IHL and HRL Still Two Distinct Branches of Public International Law?', in Robert Kolb, Gloria Gaggioli, and Pavle Kilibarda (eds.), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (2022) 29, at 56, begins his analysis with a reference to Robert Kolb's assessment in 2010 that:

All logically possible positions concerning the relationship between the two poles of IHL and HRL [human rights law] have been defended in legal writings. First it has been said that IHL and HRL are completely separate and should remain so. Second, it has been affirmed that IHL and HRL entertain specific relations of complementarity. Third, it has been held that IHL and HRL are but two branches of the same tree and that they largely merge into one another. ... Today [these debates] appear to belong to a bygone age. The close ties between both branches are now universally recognized.

But Koutroulis's own analysis injects an element of political reality when he concludes that:

... [N]othing prevents the distinct character of IHL and HRL from being used for the benefit of HRL, helping it deploy its full effects, even in situations of armed conflict. The fact that the majority of States have not until now chosen this path speaks volumes about how strongly they want to preserve IHL, and, probably, the prerogatives that they (wish to) draw from it.

In the same volume, Walter Kälin and Jörg Künzli, in 'Human Rights Bodies: A Comparative Approach', show that there has been a clear and continuous convergence of the two bodies of law in the jurisprudence of the UN treaty bodies and of the regional courts, but they suggest that '[i]rreconcilable peculiarities of specific guarantees as well as the fact that ultimately human rights bodies are only competent to find violations of IHRL and not of IHL arguably set intrinsic limits to their full merger' (at 208).

In *The Use of Force against Individuals in War under International Law* (2022), Ka Lok Yip contrasts two prominent approaches that reflect concern at the consequences of conflating the two branches of law:

²³⁹ W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *Eur. J. Int'l. L.* (2005) 741.

²⁴⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I. C. J. Reports 2004, para. 106.

[Modirzadeh]²⁴¹ ... sees the practical effect of their conflation as the transformation of LOAC into 'human rights policy' and IHRL into 'war governance', diluting the clarity of both and undermining the moral resonance of IHRL.

...

Attributing this 'blend of vague IHL concepts and human rights standards' to US-based IHRL lawyers' attempts to 'maintain a meaningful role in the policy discussion', she criticizes it as 'jumping over the question of whether the overall framing of the war against al Qaeda is anathema to human rights law and entering into the regulation of the killing itself'.

Both Modirzadeh and Moyn²⁴² are concerned about the imperialistic implications of the introduction of IHRL into cross-border armed conflicts, though from slightly different angles. For Modirzadeh the 'confusing admixture of IHL-like language, human rights rhetoric, and conduct-of-hostilities principles', most often used in transnational conflicts involving US attacks on non-state actors in a state with which the US is not, or at least does not acknowledge that it is, in conflict, helps sidestep its interventionist dimension. 'It becomes possible to say that IHRL can be utilized to allow for one state to invade another state's territory in order to murder individuals without an attempt to arrest, detain, charge, and try these individuals'. For Moyn, the chief concern has been 'the agenda of humanizing war while letting slip our more ambitious hopes for its eradication', referencing especially 'the Americans' situation today as we find ourselves in a "forever war" — one that has continued for almost two decades at least in part because of how humane it has been made to seem'. ... [T]he convergence of the two could entail a corrupting effect on IHRL. Not only would the compliance with LOAC be used to create the impression of a 'humane war', which masks the destructive aspect of war and dampens the urge to prevent aggression, but IHRL would also be drafted in to accentuate this illusion of the 'humaneness' of war.

By way of conclusion, Marko Milanovic, in 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (2016) 78, at 114, emphasizes the complexity of the various regimes that are being merged, argues that the *lex specialis* principle needs to be critically re-examined and perhaps abandoned, and suggests a pragmatic way forward:

The appeal of *lex specialis* lies in the veneer of antiquity of its Latin formula, in its apparent formality, simplicity, and objectivity. But all it really does is disguise a series of policy judgments about what outcomes are the most sensible, realistic, and practicable in any given situation. The strong variant of *lex specialis* is neither old, nor established, nor formally sound.

I would thus favor dropping the *lex specialis* language ... [and saying] that IHL and IHRL should be taken into account when interpreting one another, in accordance with Article 31(3)(c) [of the Vienna Convention on the Law of Treaties], without having to inquire into which one is special and which general.

...

... [N]ot everyone will agree with my critique How then to move forward ...? ...

²⁴¹ N. Modirzadeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance', 5 *Harr. Nat'l Sec. J.* (2014) 225, at 228.

²⁴² S. Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (2021).

... [B]oth camps must acknowledge that the adherents of the other camp make some valid arguments

Second, ... applying human rights in armed conflict involves striking a balance between the universality of human rights on the one hand and considerations of effectiveness on the other, just like IHL itself embodies a balance between humanitarianism and military necessity. In particular, the corpus of human rights law, developed over decades by courts and treaty bodies primarily in times of normalcy, must be adjusted and applied more flexibly in extraordinary situations in order to avoid imposing excessive, unrealistic burdens on states. ... [T]he really difficult question is how far do normal tools of interpretation allow us to go in order to achieve this flexibility. The watering down of human rights during armed conflict certainly must not go too far, so as to render them completely ineffectual or to compromise the integrity of the regime as a whole. We must also arrive at specific rules applying to specific problems that are clear and predictable, rather than endlessly ruminate on the relationship between IHL and IHRL as a whole. Derogations have the potential of being a powerful (if under-utilized) tool for achieving these goals of flexibility, regime integrity, and clarity.

NOTE

An important question that is not addressed in the materials above concerns the consequences of defining a situation neither in armed conflict nor in straightforward human rights terms. Consider this analysis by Special Rapporteur Ní Aoláin (UN Doc. A/77/345 (2022), para. 29):

... First, international humanitarian law has an undisputed set of treaty and customary law standards which frame both State and non-State actor obligations in situations of armed conflict, including but not limited to detention, protection of civilians, status of combatants, methods and means of warfare and impartial humanitarian action. Terrorism lacks an agreed international law definition and is characterized by significant imprecision in its use and application. Applying a vague, inexact and State-subjective set of regulations to a highly complex phenomenon means that we lack consistency in standards applied to State conduct; we do not have a clear consensus on what a breach of these standards might look like, and with so much inbuilt ambiguity there is an ongoing risk of abuse. Second, as a conceptual matter the fundamental logic of terrorism discourse and practice is focused on destroying the terrorist group, targeting and extinguishing its means of support and breaking up the leadership and structures that enable the production of violence. The mantra of “not negotiating with terrorists”, common across multiple political contexts, means that once a situation or group is framed in terms of “terrorism”, dialogue and negotiation is often formally prohibited and politically unacceptable. Armed conflict does not prohibit or preclude negotiation with the “enemy”, and in practice has multiple pathways to bring an end to conflict, whether by amnesty ... negotiation ... or exchange of prisoners Third, the acceptance of a counter-terrorism framework generally brings a number of its regulatory preferences into play, including proscription of groups and individuals, sanctions, emergency powers that impact due process, legal proceedings and freedom of movement, countering terrorism finance measures and limitations on freedoms of expression (e.g., Internet shutdowns). Many of these measures function to exacerbate fundamental grievances that drive violence and are consistently identified with systematic human rights violations in multiple countries. These measures restrict the capacity to resolve the violence or address grievance through a more comprehensive approach, such as by way of ceasefire or peace agreements.

C. RENDITIONS

Following the 11 September attacks and the Security Council recognition of the U.S. right to self-defence, US and British forces invaded Afghanistan on 7 October 2001. By January 2002, the United States began transporting alleged Taliban and Al Qaeda members to its military base at Guantánamo Bay, Cuba. Individuals linked to Al Qaeda were apprehended not only in Afghanistan, but in other countries as well including Bosnia-Herzegovina, Egypt, Gambia, Mauritania, Pakistan and Thailand, and then transferred to Guantánamo.

The U.S. Government contended that all Taliban and Al Qaeda members were ‘unlawful combatants’ who, therefore, failed to qualify as prisoners of war (POW) under the Third Geneva Convention. What was at stake? As a legal matter, according POW status to detainees would require the Government to guarantee specific trial rights not necessarily provided by U.S. military commissions. POW status would also provide combatant immunity for membership in an enemy armed force (though no immunity applies to the commission of acts of terrorism, perfidy or other war crimes). Furthermore, POW status would oblige the United States to provide for certain conditions of detention, though these conditions are not clearly far superior to conditions of detention required under the Civilians (Fourth Geneva) Convention.²⁴³ As a more general matter, according POW status might lend a form of legitimacy to these organizations.

Article 5 of the POW Convention states that ‘[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.’

The United States declared that the Geneva Conventions applied to the international armed conflict with Afghanistan. But it also contended that the Taliban and Al Qaeda and other associated groups failed to satisfy the POW criteria, that as a non-state actor (and especially as a terrorist group) Al Qaeda could not receive the protections of the Geneva Conventions, and because there was no doubt about status, an Article 5 tribunal was unnecessary.

A wide range of intergovernmental and nongovernmental organizations contested the U.S. position, including the Inter-American Commission on Human rights, the European Parliament, the International Committee of the Red Cross, the UN High Commissioner for Human Rights, and a number of foreign governments. In response, the United States pursued an inconsistent but self-serving set of legal approaches, revolving around the central question of whether or not the U.S. was involved in an armed conflict with Al Qaeda. Ryan Goodman traces some of the twists and turns:

**RYAN GOODMAN, THE LAWS OF WAR IN THE AGE OF TERROR
28 J. TRANSNAT’L L. & POL’Y (2018-2019) 1**

...

A. Turn 1.

Not an “Armed Conflict”: Militarization

In the weeks following September 11, many experts argued that the U.S. could not be, as a matter of international law, in an armed conflict with al-Qaeda.

What was at stake? ... Accepting the armed conflict paradigm would lead to a highly militarized response ... and expansive executive and governmental power. Accordingly, arguing that the situation did not constitute an armed conflict could potentially restrain the war machine internationally and limit excessive state power at home.

²⁴³ D. Jinks, ‘The Declining Significance of POW Status’, 45 *Harv. Int’l. L. J.* (2004) 367.

... Alain Pellet ... wrote an essay entitled, “No, This Is Not War!” [contending] that the idea that the U.S. could be in an armed conflict was “legally false” [and] could lead to a “spiral of hate” and violence, “create more ‘martyrs[.]’” and cost “thousands of lives of those who are already victims of the Taliban.”

B. Turn 2.

Is an “Armed Conflict”: Combatant Status-Determinations

Once U.S. forces began apprehending detainees in Afghanistan and elsewhere, some experts argued that the United States was in a standard armed conflict that included the Taliban and al-Qaeda.

What was at stake? The debate centered on whether the U.S. had an obligation under Article 5 of the Prisoners of War Convention to establish an independent tribunal to determine the status of individuals detained in Afghanistan and elsewhere (e.g., Bosnia). The Geneva Conventions apply only if an armed conflict exists. ... John Cerone, contended, “It is arguable that the law of international armed conflict should also govern relations between the [U.S.] and Al-Qaeda,” and he suggested that Article 5 applied to members of al-Qaeda. ... [I]f the situation did not constitute an armed conflict, one could not invoke those provisions of the law of armed conflict to provide procedural protections.

C. Turn 3.

Not an “Armed Conflict”: Indefinite Military Detention

Once long-term and indefinite military detention of individuals became a reality, many experts argued that the U.S. could not be in an armed conflict with al-Qaeda.

What was at stake? The Bush administration invoked the war model to argue that the law of armed conflict permits the U.S. to hold combatants in military detention “until the cessation of hostilities.” In response, many experts argued [including in an amicus brief submitted to the Supreme Court in *Al-Marri v. Spagone*] that the U.S. was not in an armed conflict. ...

D. Turn 4.

Not an “Armed Conflict”: Military Commission Jurisdiction

Following a Presidential Military Order establishing military commissions to try those responsible for September 11, many experts argued that such commissions were unlawful because the U.S. was not in an armed conflict with al-Qaeda.

What was at stake? ... [I]ndividuals could be tried before a military commission only for violations of the law of armed conflict. Arguing that the attacks on September 11 did not take place in an armed conflict could potentially stop military commissions in their tracks. ...

E. Turn 5.

Is an “Armed Conflict”: Fair Trial Rights and Torture

Once military commissions were underway, many experts argued that such trials were unlawful because the law of armed conflict applied. ... [M]any of the same experts (myself included) also took the position that torture of detainees was prohibited by the laws of war.

What was at stake? Common Article 3 of the Geneva Conventions applies to armed conflicts between state and nonstate actors. It requires that any trials meet international standards of fairness and that all detainees be treated humanely. If Common Article 3 applies, the commissions could be held unlawful under the Geneva Conventions and CIA interrogation practices would be invalid. As a matter of customary international law, the rule reflected in Article 75 of ... Additional Protocol I could also potentially invalidate the trials and inhumane treatment of detainees. However, to apply Common Article 3 and Article 75 of Additional Protocol I requires the existence of an armed conflict.

...

F. Turn 6.

Not an “Armed Conflict”: Extrajudicial Killings

Once attention became focused on the use of lethal force (e.g., targeted killings), many experts argued that the United States was not in an armed conflict with al-Qaeda.

What was at stake? The law of armed conflict is significantly more permissive than international human rights law in regulating the conditions under which individuals can be killed. Accordingly, many of the targeted killings and signature strikes carried out by the U.S. arguably would be illegal if they did not take place in an armed conflict. Professor Mary Ellen O’Connell ... has repeatedly argued that the legality of U.S. lethal force depended on this distinction; she has argued that the United States could not be in an armed conflict with al-Qaeda and therefore the U.S.’ use of lethal force is illegal.

G. Final Turns.

Is an “Armed Conflict”: The Future?

Other turns in the designation of the law of armed conflict have occurred with respect to the release of detainees from Guantanamo Bay. These turns include acceptance of the law of armed conflict model and calling for the release of wounded and sick detainees consistent with those provisions of the Geneva Conventions. More dramatically, they also include the call for the release of detainees on the ground that the armed conflict, or at least the condition of active hostilities, is now over.

...

In [the future], the United States will likely maintain, in step with presidential administrations over the past three decades, that international human rights law either does not apply or does not impose any additional restrictions in important situations. It is a familiar three-step move in which (1) the United States contests whether certain human rights law applies extraterritorially; (2) even if human rights law applies extraterritorially, the United States then contests whether certain human rights rules apply to some matters of armed conflict; and (3) even if human rights law applies extraterritorially and to matters of armed conflict, the United States then contests whether certain human rights rules apply when the United States does not exercise effective control on the ground. In short, the United States may disclaim that either the law of armed conflict or important international human rights obligations apply.

Under these circumstances, there will be strong pressures for experts to argue that the United States remains in an armed conflict as long as the government undertakes lethal military actions against organized armed groups--and that law of armed conflict should thus regulate the exercise of violence as a matter of law. In other words, there will be a reason to flip back again, this time in support of the application of the law of armed conflict. ...

* * *

Responding to renditions

Another way for the United States to avoid inconvenient legal constraints in prosecuting the ‘war on terror’ was to resort to secret detentions and clandestine transfers. The term ‘rendition’ is a euphemism to describe the practice of covertly sending a suspect for interrogation in a country where less rigorous, or no, human rights standards would be applied. Another alternative was to detain prisoners in Guantánamo, which was assumed to be beyond the reach of established systems of justice.

A range of UN human rights special procedures mechanisms sought to engage with the U.S. Government, over both renditions and Guantánamo, but to no avail. In 2005, the United States agreed to a one-day visit to Guantánamo by a group of these experts but refused to permit private meetings with detainees. The group rejected such terms as being incompatible with standard fact-finding procedures. In 2010, four mechanisms (dealing with torture, counter-terrorism, arbitrary detention, and disappearances) took the unprecedented step of issuing a 186-page ‘joint study on global practices in relation to secret detention’ (UN Doc. A/HRC/13/42). In 2022, the Special Rapporteur on human

rights and counter-terrorism submitted a follow-up to that report (UN Doc. A/HRC/49/45), concluding that current practices:

... [C]ontinue to be marked by an abject lack of adherence to fundamental human rights norms, thin lines of judicial oversight, meagre to non-existent legal and/or political accountability, targeting of religious and ethnic minorities, and a high degree of tolerance by democratic and non-democratic States alike for the subversion of the rule of law to enable persons to be rendered to jurisdictions where they have a high likelihood of being subjected to arbitrary detention, surveillance, and torture and other cruel, inhuman and degrading treatment or punishment. The permissive environment created for human right “lite” counter-terrorism since 11 September 2001, the growth of the global counter-terrorism architecture, the privatization of counter-terrorism and the weakening of national oversight mechanisms have all contributed to the current status quo.

...

The following materials illustrate some of the responses within the international human rights regime by focusing on the example of one individual whose detention has been the subject of extensive litigation. Zayn al-Abidin Muhammad Husayn, consistently known as Abu Zubaydah, is a stateless Palestinian who continues to be imprisoned as an ‘enemy combatant’ at the U.S. detention facility in Guantánamo Bay, Cuba. An accurate overview of his treatment is provided by Joseph Margulies, one of his attorneys, in an amicus curiae brief to the U.S. Supreme Court on 11 February 2021:²⁴⁴

For several years after his capture, Abu Zubaydah was held in various CIA “black sites” in foreign countries, where he was subjected to a relentless regime of “enhanced interrogations.” On 83 different occasions in a single month of 2002, he was strapped to an inclined board with his head lower than his feet while CIA contractors poured water up his nose and down his throat, bringing him within sight of death. He was handcuffed and repeatedly slammed into walls, and suspended naked from hooks in the ceiling for hours at a time. He was forced to remain awake for eleven consecutive days, and doused again and again with cold water when he collapsed into sleep. He was forced into a tall, narrow box the size of a coffin, and crammed into another box that would nearly fit under a chair, where he was left for hours. He was subjected to a particularly grotesque humiliation described by the CIA as “rectal rehydration.”

In ostensible justification of this torture, the CIA initially took the position that Abu Zubaydah had been, inter alia, the “third or fourth man” in al Qaeda, and that he was “involved in every major terrorist operation carried out by al Qaeda,” including as “one of the planners of the September 11 attacks.” The CIA also maintained that Abu Zubaydah had some unique ability to resist interrogations and that he had authored the al Qaeda manual on resistance techniques. But a 2014 report of the Senate Select Committee on Intelligence determined that all these allegations were either false or unsupported by any CIA record. The CIA eventually concluded, for instance, that Abu Zubaydah had been telling the truth when he protested that he was not a member of al Qaeda. Moreover, “CIA records [did] not support” the assertion that Abu Zubaydah helped plan the September 11 attacks or any other “major terrorist operation,” or that he had any expertise in resisting interrogations. And the most inflammatory allegation—that he had been a senior officer in al Qaeda—had been based on “single-source reporting that was recanted.” The Government’s contrary statement in its Petition – that Abu Zubaydah “was an associate and longtime terrorist ally of Osama bin Laden” – is categorically false.

²⁴⁴ For a personal account, see Abu Zubaydah, “I didn’t know who I was any more”: how CIA torture pushed me to the edge of death’, *The Guardian* (29 January 2022). See also H. Duffy, ‘Dignity Denied: A Case Study’, in C. Paulussen and M. Scheinin (eds.), *Human Dignity and Human Security in Times of Terrorism* (2020) 67.

HUSAYN (ABU ZUBAYDAH) V. POLAND
EUROPEAN COURT OF HUMAN RIGHTS, CHAMBER OF THE FOURTH SECTION,
APPLICATION NO. 7511/13 (24 JULY 2014)

[Note: Because the judgment runs to 225 pages, the original headings have been omitted below.]

[National security or confidentiality concerns]

360. [In *Al Nashiri v. Poland*, Application no. 28761/11, 24 July 2014, a case with similar facts to, and decided at the same time as, the present case] the Court was mindful that the evidence requested from the Government was liable to be of a sensitive nature or might give rise to national-security concerns. For that reason, already at the initial stage of the proceedings, it gave the Government an explicit guarantee as to the confidentiality of any sensitive materials they might have produced. ...

361. However, no national-security related arguments have ever been invoked by the Government in response to the Court's evidential requests and none of the requested documents have materialised. The Government justified their failure to produce the relevant evidence by the need to ensure the secrecy of the investigation into the applicant's allegations of torture and secret detention in Poland. ... [T]hey suggested that the Court should conform to the rules of their national law. ...

...

365. ... [T]he respondent State's refusal to submit evidence based on an alleged lack of sufficient procedural safeguards guaranteeing the confidentiality of the material that they were asked to provide cannot be justified in terms of Article 38 of the Convention [the duty to furnish all necessary facilities for the Court's examination of a case].

366. Nor can ... the respondent Government ... refuse to comply with the Court's evidential request by relying on their national laws or domestic legal impediments;

...

368. ... Given the exceptional difficulties involved in the obtaining of evidence by the Court owing to the high secrecy of the US rendition operations, the limitations on the applicant's contact with the outside world, including his lawyers, and his inability to give any direct account of the events complained of, those documents were also important for the examination of his complaints under other provisions of the Convention. The Polish Government have had access to information capable of elucidating the facts as submitted in the application. Their failure to submit information in their possession must, therefore, be seen as hindering the Court's tasks [T]he Court is entitled to draw inferences from the Polish Government's conduct

...

[Poland's cooperation]

435. ... [T]he Court finds that in the course of the relevant international inquiries the Polish authorities displayed conduct that can be characterised as denial, lack of cooperation with the inquiry bodies and marked reluctance to disclose information of the CIA rendition activities in Poland.

[Poland's knowledge and complicity]

...

444. ... [T]he Court finds that there is abundant and coherent circumstantial evidence, which leads inevitably to the following conclusions:

(a) that Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory;

(b) that, given that knowledge and the emerging widespread public information ..., Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

445. Consequently, Poland was in a position where its responsibility for securing “to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention” set forth in Article 1 was engaged in respect of the applicant at the material time.

...

[Article 3 – substantive obligations]

499. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. ... [It] makes no provision for exceptions and no derogation from it is permissible Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned.

...

508. ... The 2007 ICRC report gives a shocking account of the cruel treatment to which the applicant was subjected in CIA custody, from the waterboarding, through beating by the use of a collar and confinement in a box, to exposure to cold temperature and food deprivation. ...

...

511. The CIA documents state that this treatment was inflicted on the applicant with the aim of obtaining information – in particular, “actionable intelligence of future threats to the United States”. ... [The measures] were used in a premeditated and organised manner, on the basis of a formalised, clinical procedure, setting out a “wide range of legally sanctioned techniques” and specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects. Those – explicitly declared – aims were, most notably, “to psychologically ‘dislocate’ the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence”; “to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner”; “to create a state of learned helplessness and dependence”; and their underlying concept was “using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence [a High-Value Detainee’s] behaviour, to overcome a detainee’s resistance posture”.

... [T]he Court concludes that the treatment to which the applicant was subjected by the CIA during his detention in Poland at the relevant time amounted to torture

512. ... [T]he Polish State, on account of its “acquiescence and connivance” in the HVD Programme must be regarded as responsible for the violation of the applicant’s rights under Article 3 of the Convention committed on its territory.

...

* * *

In 2016, the European Parliament adopted a resolution (2016/2573(RSP)) in which it criticized the apathy of EU governments and institutions in response to the US Senate study, welcomed the 2016 European Court of Human Rights judgment in *Nasr and Gbali v Italy* (44883/09) ‘which found that the Italian authorities had been aware of the torture perpetrated [by CIA agents] against Egyptian imam Abu Omar, and had clearly made use of the principle of ‘state secrecy’ to ensure that those responsible were granted de facto impunity’, and called on the USA ‘to investigate and prosecute the multiple human rights violations resulting from the CIA rendition and secret detention programmes’.

UNITED STATES V. HUSAYN, AKA ZUBAYDAH, ET AL.
SUPREME COURT OF THE UNITED STATES, 595 U. S. ____ (2022), 3 MARCH 2022

JUSTICE BREYER delivered the opinion of the Court ... *

Abu Zubaydah, a detainee in the Guantánamo Bay Naval Base, [sought] to subpoena two former Central Intelligence Agency contractors. Zubaydah sought to obtain information (for use in Polish litigation) about his treatment in 2002 and 2003 at a CIA detention site, which Zubaydah says was located in Poland. ... The Government intervened. It moved to quash the subpoenas based on the state secrets privilege. That privilege allows the Government to bar the disclosure of information that, were it revealed, would harm national security.

The Court of Appeals for the Ninth Circuit mostly accepted the Government’s claim of privilege. *Husayn v. Mitchell*, 938 F. 3d 1123, 1134 (2019). But it concluded that the privilege did not cover information about the location of the detention site, which ... had already been publicly disclosed and that the state secrets privilege did not bar disclosure of information that was no longer secret

I A

...
 ... [Various] publicly available sources say that, in 2002 and 2003, Zubaydah was detained at a CIA facility in Poland. But, the Government states, the CIA itself has never confirmed that one or more of its clandestine detention sites was located in any specific foreign country. Neither, as far as we can tell from the record, have the contractors Mitchell and Jessen [who designed and implemented much of the interrogation program] named the specific foreign countries in which CIA detention sites were located. ... Finally, although at least one former Polish government official has stated that Poland cooperated with the CIA, to our knowledge, the Polish government itself has never confirmed such allegations.

B 1

In 2010, lawyers representing Zubaydah filed a criminal complaint in Poland asking prosecutors there to hold accountable any Polish nationals who were involved in his alleged mistreatment in that country. Invoking a Mutual Legal Assistance Treaty, the Polish prosecutors asked American authorities for information. The United States Department of Justice refused their request on the ground that providing the information would adversely affect our national security.

In response [to the ECHR judgment, above], the Polish prosecutors reopened their investigation. They again requested information from the United States [and it was again denied].

2

... Zubaydah asked for permission to serve the contractors, Mitchell and Jessen, with subpoenas commanding them to appear for depositions and to produce “documents, memoranda and correspondence” regarding an alleged CIA detention facility in Poland and Zubaydah’s treatment there. ...

... The Government claimed that disclosure of the information Zubaydah sought would violate the state secrets privilege. ...

To support its privilege claim, the Government submitted a declaration from the Director of the CIA. The Director said that Mitchell and Jessen’s response to Zubaydah’s subpoenas would, in this case, confirm or deny whether Poland had cooperated with the CIA. And that confirmation, the Director explained, would significantly harm our national security interests.

...

II A

* Various justices joined different parts of the plurality opinion.

The state secrets privilege permits the Government to prevent disclosure of information when that disclosure would harm national security interests. ...

JUSTICE GORSUCH agrees that the Government must show a reasonable danger of harm to national security, that a court must decide for itself whether the occasion is appropriate for claiming the privilege, and that in camera review is not always required to make that determination. ... We diverge from the dissent on how those principles should apply to the specific discovery requests Zubaydah has made in this litigation. Of course, our answer to that question is not a judgment of Zubaydah's alleged terrorist activities, nor of his treatment at the hands of the United States Government. Obviously the Court condones neither terrorism nor torture, but in this case we are required to decide only a narrow evidentiary dispute.

B

...

Because any response to Zubaydah's subpoenas allowed by the Ninth Circuit's decision will have the effect of confirmation or denial (by the Government or its former contractors) of the existence of a CIA facility in Poland, the primary question for us must be whether the existence (or non-existence) of a CIA detention facility in Poland falls within the scope of the state secrets privilege. For the reasons that follow, we conclude that it does.

1

We agree with the Government that sometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege. But see 938 F. 3d, at 1133 ("[I]n order to be a 'state secret,' a fact must first be a 'secret'"). The Government here has provided a reasonable explanation of why Mitchell and Jessen's confirmation or denial of the information Zubaydah seeks could significantly harm national security interests, even if that information has already been made public through unofficial sources.

The CIA Director stated in his declaration that the Agency's counterterrorism efforts rely on "clandestine" relationships with foreign intelligence services. The Director explained that foreign intelligence services "are a critical intelligence source," whose help is "vital to our world-wide efforts to collect intelligence and thwart terrorist attacks." He further explained that these "sensitive" relationships with other nations are "based on mutual trust that the classified existence and nature of the relationship will not be disclosed." To confirm the existence of such a relationship would "breach" that trust and have "serious negative consequences" In a word, to confirm publicly the existence of a CIA site in Country A, can diminish the extent to which the intelligence services of Countries A, B, C, D, etc., will prove willing to cooperate with our own intelligence services in the future.

JUSTICE GORSUCH believes that the Government has failed to meet its "burden of showing that a 'reasonable danger' of harm to national security would follow from sharing the information sought." ... We disagree. It stands to reason that a former CIA insider's confirmation of confidential cooperation between the CIA and a foreign intelligence service could damage the CIA's clandestine relationships with foreign authorities. Confirmation by such an insider is different in kind from speculation in the press or even by foreign courts because it leaves virtually no doubt as to the veracity of the information that has been confirmed. ...

...

3

The Court of Appeals also believed that, because Mitchell and Jessen are "private parties," their "disclosures [were] not equivalent to the United States confirming or denying anything." We do not agree with this conclusion. Mitchell and Jessen worked directly for the CIA as contractors. Zubaydah contends (without contradiction) that Mitchell and Jessen "devised and implemented" the CIA's enhanced-interrogation program and that they personally interrogated Zubaydah. Given Mitchell and Jessen's central role in the relevant events, we believe that their confirmation (or denial) of the information Zubaydah seeks would be tantamount to a disclosure from the CIA itself. ...

4

At the same time, Zubaydah's need is not great. At oral argument Zubaydah suggested that he did not seek confirmation of the detention site's Polish location so much as he sought information about what had happened there. ...

5

For these reasons, we conclude that in this case the state secrets privilege applies to the existence (or nonexistence) of a CIA facility in Poland. It therefore precludes further discovery ... [since] such discovery will inevitably confirm or deny the existence of such a facility.

...

JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR joins, dissenting.

There comes a point where we should not be ignorant as judges of what we know to be true as citizens.

...

...

The government invoked the state secrets privilege only 16 times between 1961 and 1980. ... Yet it has done so at least 49 times between 2001 and 2021. ...

...

... The record before us is stark. Zubaydah's detention in Poland took place 20 years ago. The location of the CIA's detention site has been acknowledged by the former Polish President, investigated by the Council of Europe, and proven "beyond reasonable doubt" to the European Court of Human Rights. Doubtless, these disclosures may have done damage to national security interests. But nothing in the record of this case suggests that requiring the government to acknowledge what the world already knows to be true would invite a reasonable danger of additional harm to national security. The government's only evidence is a declaration couched in conclusory terms

...

... [For the plurality] A bare expression of national security concern becomes reason enough to deny the ancient right to every man's evidence.

...

In the end, only one argument for dismissing this case at its outset begins to make sense. ... [T]he government wants this suit dismissed because it hopes to impede the Polish criminal investigation and avoid (or at least delay) further embarrassment for past misdeeds. Perhaps at one level this is easy enough to understand. The facts are hard to face. ... But as embarrassing as these facts may be, there is no state secret here. This Court's duty is to the rule of law and the search for truth. We should not let shame obscure our vision.

QUESTIONS

1. Is the U.S. Government's position on the relationship between the two bodies of law — IHL and human rights law — persuasive? Do human rights bodies have the necessary expertise and competence to interpret and apply IHL? What factors should determine the appropriate role for such an institution?

2. Does the special threat posed by terrorism suggest that older, more protective rules are less applicable in this new context? Or is the nature of the conflict so vague and open-ended such that greater judicial safeguards are needed?

3. How would you account for the very different approaches to the practice of rendition reflected in the judgments of the European Court and the US Supreme Court?

D. DETENTION

Prior to 11 September, the UK Parliament passed the Terrorism Act 2000. The law provides a general definition of terrorism, which serves as the backbone of British anti-terrorism laws and practices. Section 1 of the legislation reads:

1 Terrorism: interpretation

- (1) In this Act ‘terrorism’ means the use or threat of action where –
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it –
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section –
 - (a) ‘action’ includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, ...
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

In the aftermath of 11 September, the United Kingdom took two significant steps. First, Parliament passed the Anti-terrorism, Crime and Security Act 2001 (ATCSA). The Act provides broad powers to detain foreign nationals who cannot be deported, for example due to the threat of torture on their return or the lack of agreement with their home country. Section 23(1) states:

- (1) A suspected international terrorist may be detained ... despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by –

- (a) a point of law which wholly or partly relates to an international agreement, or
- (b) a practical consideration.

Second, the government submitted a detailed Derogation Order under the European Convention on Human Rights and the ICCPR in contemplation of the new detention rules.

Under the ATCSA, the UK Home Secretary certified a total of 17 foreign nationals as ‘suspected international terrorists’. These individuals were detained without the prospect of a criminal trial. They were alleged by the Home Secretary to have engaged in various activities including maintaining ‘extensive contacts to senior terrorists worldwide’, being ‘at the centre in the UK of terrorist activities associated with al-Qaeda’, being an ‘active supporter of various international terrorist groups, including those with links to Osama Bin Laden’s terrorist network ... [and engaging in] activities on their behalf include[ing] fund raising’, and being ‘an active supporter of the Tunisian Fighting Group, a terrorist organisation with close links to al-Qaeda ... [and having] provided direct assistance to a number of active terrorists.’

In a case brought before the UK’s highest court, the then House of Lords, the petitioners had been certified as suspected international terrorists between December 2001 and early 2002. They could not be deported to their home countries because they faced a risk of torture or inhuman or degrading treatment. The Home Secretary accordingly detained the petitioners pursuant to section 23(1) of the ATCSA. Two of the detainees exercised their right to leave the United Kingdom: one went to Morocco and the other to France. One detainee was released on bail on strict conditions in April 2004. The Home Secretary revoked the certification of another detainee in September 2004. Due to the significance of the case, the House of Lords convened a panel of nine rather than the ordinary five judges, an action that had occurred only once since the Second World War. The court held that the detention measures were incompatible with the European Convention on Human Rights. Only one Law Lord dissented in the case.²⁴⁵ On appeal to the European Court of Human Rights, the case was allocated to a Grand Chamber.

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10. The Government contended that the events of 11 September 2001 demonstrated that international terrorists, notably those associated with al-Qaeda, had the intention and capacity to mount attacks against civilian targets on an unprecedented scale... . In the Government’s assessment, the United Kingdom, because of its close links with the United States, was a particular target. They considered that there was an emergency of a most serious kind threatening the life of the nation. Moreover, they considered that the threat came principally, but not exclusively, from a number of foreign nationals present in the United Kingdom, who were providing a support network for Islamist terrorist operations linked to al-Qaeda. A number of these foreign nationals could not be deported because of the risk that they would suffer treatment contrary to Article 3 of the Convention in their countries of origin.

11. On 11 November 2001 the Secretary of State made a Derogation Order ... [and] lodged the derogation with the Secretary General of the Council of Europe. The derogation notice provided as follows:

...

As a result of the public emergency, provision is made in the [ATCSA], inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being

²⁴⁵ S. Shah, ‘The UK’s Anti-Terror Legislation and the House of Lords: The First Skirmish’, 6 *Hum. Rts. L. R.* (2006) 416.

possible ... The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ("SIAC")... . In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

The extended power of arrest and detention ... is a temporary provision which comes into force for an initial period of 15 months and then expires unless renewed by the Parliament. Thereafter, it is subject to annual renewal by Parliament...

...

It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where 'action is being taken with a view to deportation' (*Chahal v United Kingdom* (1996)). In that case the European Court of Human Rights indicated that detention will cease to be permissible under Article 5(1)(f) if deportation proceedings are not prosecuted with due diligence... . In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) as interpreted by the Court in the *Chahal* case. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 of the Convention... . If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

... To the extent, therefore, that the exercise of the extended power [to detain] may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

...

i. The Court's approach

173. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. ... [T]he national authorities are in principle better placed than the international judge to decide Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. ...

174. ... It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity. Moreover, the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.

ii. Whether there was a “public emergency threatening the life of the nation”

175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established.

176. ... [In] *Lawless* [the Court] held that [the words in] Article 15 ... referred to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”. In the *Greek Case* (1969), the Commission held that, in order to justify a derogation, the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate. In *Ireland v United Kingdom*, ... the Article 15 test was satisfied, since terrorism had for a number of years represented “a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province’s inhabitants”. ...

177. Before the domestic courts, the Secretary of State adduced evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence was adduced before SIAC. All the national judges accepted that the danger was credible (with the exception of Lord Hoffmann, who did not consider that it was of a nature to constitute “a threat to the life of the nation”). Although when the derogation was made no al’Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was “imminent”, in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. ... [T]he existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. ...

178. While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the ICCPR must be of “an exceptional and temporary nature”, the Court’s case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a “public emergency” within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al’Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not “temporary”.

179. The applicants’ argument that the life of the nation was not threatened is principally founded on the dissenting opinion of Lord Hoffman, who interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life. It had, in his view, to threaten “our institutions of government or our existence as a civil community”. However, the Court has in previous cases been prepared to take into account a much broader range of factors

180. ... [T]he national authorities enjoy a wide margin of appreciation under Article 15 While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al’Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the

judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.

181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation.

iii. Whether the measures were strictly required by the exigencies of the situation

182 ... As previously stated, the Court considers that it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention, unless it can be shown that the national court misinterpreted the Convention or the Court's case-law or reached a conclusion which was manifestly unreasonable. ...

183. The Government contended, first, that the majority of the House of Lords should have afforded a much wider margin of appreciation to the executive and Parliament to decide whether the applicants' detention was necessary. A similar argument was advanced before the House of Lords, where the Attorney General submitted that the assessment of what was needed to protect the public was a matter of political rather than judicial judgment.

184. ... [Despite the] wide margin of appreciation ... it is ultimately for the Court to rule whether the measures were "strictly required". In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse. The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time. In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament.

...
186. The Government's third ground of challenge to the House of Lords' decision was directed principally at the approach taken towards the comparison between non-national and national suspected terrorists. The Court, however, considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

187. Finally, the Government advanced two arguments which the applicants claimed [were new]. ...

188. The first ... was that it was legitimate for the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government has not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. In this respect the Court notes that the system of control orders, put in place by the Prevention of Terrorism Act 2005, does not discriminate between national and non-national suspects.

189. The second ... was that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, the Court notes that the national courts, including SIAC, which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

190. In conclusion, therefore, the Court, like the House of Lords, and contrary to the Government's contention, finds that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows there has been a violation of Article 5 § 1... .
...

THE HOUSE OF LORDS JUDGMENT IN *A AND OTHERS*

As the Grand Chamber mentioned, the House of Lords similarly invalidated the detention measures on the ground that they were disproportionate. However, in its proportionality analysis, the House of Lords not only concluded that the law was under-inclusive because it failed to cover British nationals. They also concluded that the law was: (1) under-inclusive in the use of coercive power because it allowed foreign nationals to leave for another country; and (2) over-inclusive in its coverage because it extended beyond Al Qaeda to target terrorist groups that posed no threat to the United Kingdom. The House of Lords explained:

[S]ections 21 and 23 [of the ATCSA] do permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him, as two of the appellants did when they left for Morocco and France respectively. Such freedom to leave is wholly explicable in terms of immigration control: if the British authorities wish to deport a foreign national but cannot deport him to country "A" because of Chahal their purpose is as well served by his voluntary departure for country "B". But allowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. It seems clear from the language of section 21 of the 2001 Act, read with the definition of terrorism in section 1 of the 2000 Act, that section 21 is capable of covering those who have no link at all with Al-Qaeda (they might, for example, be members of the Basque separatist organisation ETA), or who, although supporting the general aims of Al-Qaeda, reject its cult of violence... .

Some of these features of the 2001 Act were the subject of comment by the European Commissioner for Human Rights in his Opinion 1/2002 (28 August 2002):

The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international terrorist organisation irrespective of its presenting a direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

...

It would appear, therefore, that the derogating measures of the [ATCSA] allow both for the detention of those presenting no direct threat to the United

Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation.

The House of Lords independently considered a claim of discrimination under Article 14 of the European Convention. The Grand Chamber decided not to reach that question on the ground that the Chamber's reasoning and conclusion in relation to Article 5 rendered that determination unnecessary. The House of Lords' opinion, however, is an important judicial landmark in analyzing non-discrimination principles in the context of combating terrorism. An excerpt of the lead opinion by Lord Bingham follows:

The appellants complained that in providing for the detention of suspected international terrorists who were not UK nationals but not for the detention of suspected international terrorists who were UK nationals, section 23 unlawfully discriminated against them as non-UK nationals in breach of Article 14 of the European Convention... .

Jackson J reflected this belief in his well-known judgment in *Railway Express Agency Inc v New York* 336 US 106, 112–113 (1949), when he said:

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. ... [N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

...

The United Kingdom did not derogate from Article 14 of the European Convention (or from Article 26 of the ICCPR, which corresponds to it)

...

... [T]he appellants' chosen comparators were suspected international terrorists who were UK nationals. The appellants pointed out that they shared with this group the important characteristics (a) of being suspected international terrorists and (b) of being irremovable from the United Kingdom. Since these were the relevant characteristics for purposes of the comparison, it was unlawfully discriminatory to detain non-UK nationals while leaving UK nationals at large.

Were suspected international terrorists who were UK nationals, the appellants' chosen comparators, in a relevantly analogous situation to the appellants? ... The Court of Appeal thought not because (per Lord Woolf, para 56) "the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed". This is, however, to accept the correctness of the Secretary of State's choice of immigration control as a means to address the Al-Qaeda security problem, when the correctness of that choice is the issue to be resolved. In my opinion, the question demands an affirmative answer. Suspected international terrorists who are UK nationals are in a situation analogous with the appellants because, in the present context, they share the most relevant characteristics of the appellants.

... The undoubted aim of the relevant measure, section 23 of the 2001 Act, was to protect the UK against the risk of Al-Qaeda terrorism. As noted above that risk was thought to be presented mainly by non-UK nationals but also and to a

significant extent by UK nationals also. The effect of the measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status... .

...

The Court of Appeal differed from SIAC on the discrimination issue: [2004] QB 335. Lord Woolf CJ referred to a tension between Article 15 and Article 14 of the European Convention. He held that it would be “surprising indeed” if Article 14 prevented the Secretary of State from restricting his power to detain to a smaller rather than a larger group

I must respectfully differ from this analysis... . Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another... .

Following *A and Others*, the Prevention of Terrorism Act 2005 provided for two types of control order to be introduced: ‘derogating’ and ‘non-derogating’ orders. The former required a derogation before they could be imposed, and have never been used. The latter enabled various restrictions to be imposed on individuals, including house arrest, limitations on freedom of movement, electronic tagging and forced relocation. Following various court challenges to this regime, the Terrorism Prevention and Investigation Measures (TPIM) Act 2011 was adopted, partly in an effort to increase compliance with Article 5 of the ECHR, although it has been described as achieving ‘covert derogation’ and normalising extraordinary measures.²⁴⁶ In a parliamentary debate on 30 November 2021, which preceded the extension of the Act through 2026, Baroness Jones of Moulsecoomb recalled the views that the then Prime Minister, Boris Johnson had expressed in 2005 when the Conservative Party opposed the original Bill. He said:

It is a cynical attempt to pander to the many who think the world would be a better place if dangerous folk with dusky skins were just slammed away, and never mind a judicial proceeding; and, given the strength of this belief among good Tory folk, it is heroic of the Tories to oppose the Bill. We do so because the removal of this ancient freedom is not only unnecessary, but it is also a victory for terror.

In 2021, the Home Secretary, Priti Patel, certified that the provisions of the legislation were compatible with the rights recognized in the ECHR. In the same year, the Counter-Terrorism and Sentencing Act was adopted after attacks in 2019 and 2020 by ‘known terrorist offenders’. It lowered the standard of proof required from ‘the balance of probabilities’ to ‘reasonable belief,’ extended the maximum duration of a TPIM from two to five years, and introduced drug and polygraph testing requirements. Between 2011 and 2021, 24 TPIM orders were imposed. A prominent British law firm describes these orders as having ‘a draconian impact on a person’s life, not only restricting the freedom of the individual but also the freedoms of any family members who live with them.’²⁴⁷

²⁴⁶ H. Fenwick, ‘Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of “Defensive democracy”?’; *Public Law* (2017) 609.

²⁴⁷ <https://www.bindmans.com/knowledge-hub/blogs/tpims-what-you-need-to-know/>

QUESTIONS

1. Is the definition of terrorism in the Terrorism Act 2000 excessively vague? Which provisions are most vulnerable to criticism along those lines? What purposes might be served by the use of ambiguity? Is this vagueness more acceptable in the context of administrative law (e.g., immigration and nationality law) than in other legal domains such as criminal law? For example, should the state retain greater power and discretion in the regulation of its borders? Are the interests in avoiding vagueness stronger for criminal defendants than for other subjects of the law?
2. In *A and Others v United Kingdom*, the Grand Chamber announced a relaxed standard of review '[i]n the unusual circumstances ... where the highest domestic court has examined the issues ...' Do you agree with the logic behind this approach? Why should the European Court relax its scrutiny only when state action is invalidated, rather than upheld, by an apex court? Should this approach be limited to the situation of derogations?
3. Consider the proportionality analysis by the Grand Chamber in *A and Others*. Are there other plausible reasons that could justify treating the class of individuals subject to detention differently than British nationals? The Court suggests that the level of threat posed by the two groups is essentially indistinguishable. Do you agree? Could British nationals generally pose a greater threat than foreign nationals? Are there other factors the Court should have used to compare the two classes of individuals? Is this decision compatible with the war model for combating terrorism discussed previously?

E. FAIR TRIALS

The right to a fair trial ranks among the most basic protections in humanitarian and human rights law. Three provisions of the 1949 Geneva Conventions and their Protocols deserve special mention. First, Common Article 3 outlaws 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.' The ICRC Commentaries explain that this provision calls for extension of the general law concerning fair trials to the arena of warfare: 'All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war.' Second, the Civilians Convention contains a 'security proviso' permitting states to suspend treaty obligations when dealing with unlawful combatants such as spies and saboteurs; yet it too requires that 'such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.' Third, Article 75 (entitled 'Fundamental Guarantees') of Additional Protocol I is generally recognized, including by the United States, as binding customary law. It specifies elements of the right to a fair trial that are guaranteed to all individuals who do not benefit from more favourable treatment under the 1949 Conventions or the Additional Protocol. These three IHL provisions establish a floor of fair trial rights below which no state may pass. Recall that the Human Rights Committee's General Comment 29 relies on such fundamental protections in reasoning that, if certain elements of a fair trial cannot be lawfully transgressed in war, they can never be subject to derogation under the ICCPR. A difficulty is defining the content of those core fair trial rights.

IBRAHIM AND OTHERS V. THE UNITED KINGDOM
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER,
APPLICATION NOS. 50541/08, 50571/08, 50573/08 AND 40351/09 (13 SEPTEMBER 2016)

[The following description of the facts is taken from the Court's Information Note on the case: On 21 July 2005, two weeks after 52 people were killed as the result of suicide bombings in London, further bombs were detonated on the London public transport system but, on this occasion, failed to explode. The perpetrators fled the scene. The first three applicants were arrested but were refused legal assistance for periods of between four and eight hours to enable the police to conduct "safety interviews". During the safety interviews, they denied any involvement in or knowledge of the events of 21 July. At trial, they acknowledged their involvement in the events but claimed that the bombs had been a hoax and were never intended to explode. The statements made at their safety interviews were admitted in evidence against them and they were convicted of conspiracy to murder. The Court of Appeal refused them leave to appeal.

The fourth applicant was not suspected of having detonated a bomb and was initially interviewed by the police as a witness. However, he started to incriminate himself by describing his encounter with one of the suspected bombers shortly after the attacks and the assistance he had provided to that suspect. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement. He was subsequently arrested and offered legal advice. In his ensuing interviews, he consistently referred to his written statement, which was admitted as evidence at his trial. He was convicted of assisting one of the bombers and of failing to disclose information about the bombings. His appeal against conviction was dismissed.

In their applications to the European Court of Human Rights, the applicants complained that their lack of access to lawyers during their initial police questioning and the admission in evidence at trial of their statements had violated their right to a fair trial ...]

251. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole ...

252. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. There can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. In these challenging times, ... it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, inter alia, the minimum guarantees of Article 6 of the Convention. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration. Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights. ...

...

257. ... [A]ssessing whether a restriction on access to a lawyer is compatible with the right to a fair trial [involves] two stages. [First], the Court must assess whether there were compelling reasons for the restriction. [Second], it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must ... decide whether the proceedings as a whole were fair. ...

...

259. The Court accepts that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims However, ... a non-specific claim of a risk of leaks cannot constitute compelling reasons so as to justify a restriction on access to a lawyer.

...
 276. ... The Court has accepted above that compelling reasons may exist where an urgent need to avert serious adverse consequences for life, liberty or physical integrity has been convincingly made out. It is in no doubt that such a need existed at the time when the safety interviews of the first three applicants were conducted. [Given what happened,] it was inevitable that the police would conclude that the United Kingdom had become the target of a wave of terrorist attacks. ... The police were operating under enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot. ...

...
 281. [In terms of the fairness of the overall process] the possibility of restricting access to legal advice was set out in law and in spite of the pressures under which the police were operating, ... the police adhered strictly to the legislative framework ... [and] the purpose of the safety interviews – to obtain information necessary to protect the public – was strictly observed

...
 293. Finally, there can be no doubt that there was a strong public interest in the investigation and punishment of the offences in question. Indiscriminate terrorist attacks are, by their very nature, intended to strike fear into the hearts of innocent civilians, to cause chaos and panic and to disrupt the proper functioning of everyday life. In such circumstances, threats to human life, liberty and dignity arise not only from the actions of the terrorists themselves but may also arise from the reaction of the authorities in the face of such threats. ... The public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives, is of the most compelling nature.

294. In conclusion, ..., the proceedings as a whole in respect of each [of the first three applicants] were fair. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

...
 295. The fourth applicant complained that the self-incriminating statement he made as a witness, and therefore without having been notified of his privilege against self-incrimination or having been provided with access to a lawyer, was admitted at his trial.

...
 298. ... The question is whether these exceptional circumstances were sufficient to constitute compelling reasons in the fourth applicant's case for continuing with his interview without cautioning him or informing him of his right to legal advice.

...
 300. ... [T]he Court finds that the Government have not convincingly demonstrated ... compelling reasons in the fourth applicant's case, taking account of the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.

...
 311. ... While the offences for which [the fourth applicant] was indicted were not of the magnitude of the offences committed by the first three applicants, the threat posed by terrorism can only be neutralised by the effective investigation, prosecution and punishment of all those involved in terrorism. However, taking into account the high threshold which applies where the presumption of unfairness arises and having regard to the cumulative effect of the procedural shortcomings in the fourth applicant's case, the Court considers that the Government have failed to demonstrate why the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution him and to restrict his access to legal advice. There has therefore been a violation of Article 6 §§ 1 and 3 (c) in the case of the fourth applicant.

...
 JOINT PARTLY DISSENTING, PARTLY CONCURRING, OPINION OF JUDGES SAJÓ AND LAFFRANQUE

1. We understand the primary importance of protecting societies from terrorism. ... However, ... in striking the right balance between security needs and [human rights for States to] show due regard for the requirements of the rule of law and avoid straying from human-rights and rule-of-law principles. ...

2. ... [In this case,] the Court itself waters down rights, by failing to adhere to the guarantees of Article 6 ..., and without expressly stating it, de facto departs from that earlier well-established case-law A human-rights court must not relinquish a level of protection that it has already granted.

19. ... [T]he existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case is an essential consideration in finding compelling reasons to restrict access to legal advice. ... In such circumstances one need not wait for a lawyer to be present before an interrogation starts. Is this urgent need a good enough reason not to admit access to an available lawyer? ...

20. The Court's approach relies explicitly on *New York v. Quarles* 467 U.S. 649 (1984), which recognised a "public safety exception" to the Miranda rule, permitting questioning to take place in the absence of a lawyer and before a suspect has been read his rights where there is a threat to public safety. The reference to the American approach is misplaced The case-law ... clearly indicates that it applies to actual threat. ... The public-safety exception has never been used in the context of preventing future terrorist attacks which are deemed likely. In the recent terrorism case of Dzhokhar Tsarnaev, the prosecution refrained from including admissions made in the absence of a lawyer. ...

21. The fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives. (Again, assuming that it does not cause delay). Are we assuming that the psychological comfort derived from a lawyer's presence is of such comfort to terrorists that it undermines the prevention of calamities? The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. Or is the Court of the view (as the Chamber seemed to concede) that the lawyer will help the cause of terrorists by precluding certain police tactics?

30. ... Even assuming that there were compelling reasons for not allowing access to counsel at the crucial investigative moment, the Court should have applied heightened scrutiny to determine whether the absence of the lawyer did, or did not, unduly prejudice the rights of the accused under Article 6. ...

31. There is no sign of counterbalancing by the judicial authorities in the present case. Moreover, the Court has conducted a very deferential analysis of the overall fairness and the actions of the trial judge. ... The strong public interest in a conviction cannot overrule the Convention guarantees ..., contrary to what the Court claims, namely that "the public interest in preventing and punishing terrorist attacks of this magnitude ... is of the most compelling nature". If punishment is of the "most compelling nature", then what is the role of all the safeguards granted by the Convention? If a State is of the view that such a compelling public interest exists, then the Convention provides the proper mechanism in Article 15. Derogation is possible, under the supervision of the Court. ...

JOINT PARTLY DISSENTING OPINION OF JUDGES HAJIYEV, YUDKIVSKA, EMMENS, MAHONEY, SILVIS AND O'LEARY

1. ... [W]e are unable to agree with the view of the majority that the fourth applicant's defence rights were violated

2. ... [I]t would be a mistake to present the basic Convention issue at the heart of the four applicants' cases as being solely one of fixing the limits on the inroads that the security interests of the State may

make into individual human rights That would be an excessively narrow focus [T]he present case directly involve[s] the human rights of many other people than the four applicants. ... [T]his Court [is] required to identify the appropriate relationship between the fundamental procedural right to a fair trial of persons charged ... and the right to life and bodily security of the persons affected by the alleged criminal conduct. ...

3. ... The Contracting States are ... duty-bound under the Convention to act, both preventively and repressively, with a view to diminishing the threats that terrorism at its current levels and in its current forms represents for the life and bodily security of each individual coming within their jurisdiction. ...

4. ... [T]he majority focuses its analysis too narrowly on the purely procedural aspects of the fourth applicant's case, to the detriment of the wider-angled assessment of the overall picture, including the impact on the interests of other holders of Convention rights

...
13. ... The police had a difficult choice to make: whether, in the absence of other direct information from or connected with the suspected bombers – only one was in custody, but was not talking to the police; and the others were still at large –, to continue obtaining from the applicant information capable of saving lives and protecting the public or to comply with the applicable police code by cautioning the applicant, with the attendant risk of stopping the flow of valuable security information. ...

...
15. ... [T]he majority ... attach ... decisive importance ... to the question whether the police decision not to caution him and grant access to a lawyer had a basis in domestic law. ... [The essential question is:] were the authorities justified in thinking at the relevant time that cautioning the witness as a suspect would have frustrated fulfilment of the urgent need to avert the serious consequences which would result from a successfully executed terrorist attack? This question of factual substance goes to the heart of the compelling-reasons analysis but is passed over by the majority, who prefer instead to concentrate on the procedural issue

...
17.... [N]on-compliance with the applicable police code of practice cannot obliterate the objective assessment of the dangerousness and volatility of the circumstances which the police and general public were facing. ...

18. ... [W]e consider that there were indeed “compelling reasons”, at that crucial time in the investigation of the failed bomb attack, for the police not to caution the fourth applicant and to delay temporarily his access to legal advice on the basis of an individual assessment of the specific facts before them. ...

...
35. Contrary to the suggestion of the majority judgment, the fourth applicant's conviction was not substantially based on his initial statement. While it could be said to have played an important part in the prosecution case, its importance was significantly conditioned by the fourth applicant's decision not to retract it but rather to repeat and rely on it after he had been arrested and received legal advice, as well as his decision to remain silent at his trial

...
36. ... The atrocities perpetrated in recent years ... amply demonstrate the key part that logistical and other support plays in the commission of modern-day terrorist offences involving, as they do, indiscriminate mass murder. What follows from this is, firstly in time, urgent action by the police to limit to the maximum the continuing imminent danger to the public once a terrorist attack has occurred or is under way (primarily an issue of “compelling reasons”) and, thereafter, the need to prosecute wherever possible, in proceedings where fair trial rights are respected, those reasonably suspected of being part of a support network of a terrorist group. ... [T]here is a risk of “failing to see the wood for the trees” if the analysis is excessively concentrated on the imperatives of criminal procedure to the detriment of wider considerations of the modern State's obligation to ensure practical and effective human rights protection to everyone within its jurisdiction. ... [P]ublic-interest concerns, including the fight against terrorism, cannot justify measures which extinguish the very essence of a suspect's or an accused person's defence rights. A parallel consideration, however, is that neither can the imperatives of criminal procedure extirpate the legitimacy of the public interest at stake, based as it is on the core Convention rights to life and to bodily safety of other individuals.

...

Military Tribunals

One of the most vexing issues in defining the right to a fair trial in the national security context involves military tribunals. Can a military tribunal provide a fair trial and, if so, under what conditions? The following readings address this set of concerns. A report by the Inter-American Commission on Human Rights sets the stage by discussing the broader legal and normative framework. The Inter-American Commission took up the general subject of human rights law and terrorism, and issued a lengthy report in 2002. The report provides, *inter alia*, one of the most comprehensive formal pronouncements on the content of derogable and nonderogable fair trial rights. The Commission developed these legal principles partly in response to the use of military courts by Latin American governments in the 1980s and early to mid-1990s. Governmental practices that sparked international criticism included Colombia's use of 'faceless' prosecutors, judges, witnesses and attorneys in cases of terrorism and subversion; Peru's trials of civilians accused of treason and terrorism in closed proceedings before a military court and with defence counsel prohibited from accessing the government's evidence or questioning military and police witnesses; Guatemala's Special Courts for subversive activities which operated in secret locations, relied on confessions from the accused taken without counsel present and provided little time for the accused to prepare a defence; and Uruguay's secret hearings, materially ineffective appeals process for objecting to an indictment, and inadequate access of defence counsel to evidentiary files.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS (22 OCTOBER 2002)

Right to a Hearing by a Competent, Independent and Impartial Tribunal previously established by Law.

229. Underlying this aspect of the right to a fair hearing are the fundamental concepts of judicial independence and impartiality... . The requirement of independence in turn necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent performance of judicial functions, including tenure and appropriate professional training... . These requirements in turn require that a judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias.

230. In the context of these fundamental requirements, the jurisprudence of the inter-American system has long denounced the creation of special courts or tribunals that displace the jurisdiction belonging to the ordinary courts or judicial tribunals and that do not use the duly established procedures of the legal process. This has included in particular the use of ad hoc or special courts or military tribunals to prosecute civilians for security offenses in times of emergency, which practice has been condemned by this Commission, the Inter-American Court and other international authorities. The basis of this criticism has related in large part to the lack of independence of such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes.

231. It has been widely concluded in this regard that military tribunals by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians, because they are not a part of the independent civilian judiciary but rather are a part of the Executive branch, and because their fundamental purpose is to maintain order and discipline by punishing military offenses committed by members of the military establishment. In such instances, military officers assume the role of judges while at the same time remaining subordinate to their superiors in keeping with the established military hierarchy.

232... . Military tribunals are also precluded from prosecuting civilians, although certain human rights supervisory bodies have found that in exceptional circumstances military tribunals or special courts might be used to try civilians but only where the minimum requirements of due process are guaranteed. During armed conflicts, a state's military courts may also try privileged and unprivileged combatants, provided that the minimum protections of due process are guaranteed. ...

...

Fair Trial, Due Process of Law and Derogation

...

246... . [N]o human rights supervisory body has yet found the exigencies of a genuine emergency situation sufficient to justify suspending even temporarily basic fair trial safeguards...

249. Without detracting from the above standards, prevailing norms suggest that there may be some limited aspects of the right to due process and to a fair trial from which derogation might in the most exceptional circumstances be permissible. Any such suspensions must, however, comply strictly with the principles of necessity, proportionality and non-discrimination, and must remain subject to oversight by supervisory organs under international law.

250. Due process and fair trial protections that might conceivably be subject to suspension include the right to a public trial where limitations on public access to proceedings are demonstrated to be strictly necessary in the interests of justice. Considerations in this regard might include matters of security, public order, the interests of juveniles, or where publicity might prejudice the interests of justice. Any such restrictions must, however, be strictly justified by the state concerned on a case by case basis and be subject to on-going judicial supervision.

251. The right of a defendant to examine or have examined witnesses presented against him or her could also be, in principle, the subject of restrictions in some limited instances. It must be recognized in this respect that efforts to investigate and prosecute crimes, including those relating to terrorism, may in certain instances render witnesses vulnerable to threats to their lives or integrity and thereby raise difficult issues concerning the extent to which those witnesses can be safely identified during the criminal process. Such considerations can never serve to compromise a defendant's non-derogable due process protections and each situation must be carefully evaluated on its own merits within the context of a particular justice system...

252. Similarly, the investigation and prosecution of terrorist crimes may render judges and other officials involved in the administration of justice vulnerable to threats. As noted above, states are obliged to take all necessary measures to prevent violence against such persons. Accordingly, states may be compelled by the exigencies of a particular situation to develop mechanisms to protect a judge's life, physical integrity and independence ... subject to such measures as are necessary to ensure a defendant's right to challenge the competence, independence or impartiality of his or her prosecuting tribunal ...

...

International Humanitarian Law

...

256. As noted above, while international human rights law prohibits the trial of civilians by military tribunals, the use of military tribunals in the trial of prisoners of war is not prohibited ...

261... . [M]ost fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law ... includ[ing] the following:

... The right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards. In respect of the prosecution of civilians, this requires trial by regularly constituted courts that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training, and generally prohibits the use of ad hoc, special, or military tribunals or commissions to try civilians. A state's military courts may prosecute members of its own military for crimes relating [to] the functions that the law assigns

to military forces and, during international armed conflicts, may try privileged and unprivileged combatants, provided that the minimum requirements of due process are guaranteed.

...

**HUMAN RIGHTS COMMITTEE, ARTICLE 14: RIGHT TO EQUALITY BEFORE COURTS AND
TRIBUNALS AND TO A FAIR TRIAL, GENERAL COMMENT 32
(2007)**

... The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials 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.

İNCAL V. TURKEY

**EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 22678/93 (9
JUNE 1998)**

[İbrahim İncal, a member of the local executive committee of a pro-Kurdish political party (the People's Labour Party), was convicted for participating in the preparation of a leaflet that attempted to incite hatred and hostility through racist words. The leaflet criticized the local government's restrictions on small-scale illegal trading and squatter camps, which it said were part of a larger campaign to drive Kurds back to their own regions; stated that 'passivity as a form of defence against this devastation has encouraged the State'; and that the Kurdish population should organize themselves into 'neighbourhood communities ... to assume their responsibilities and oppose this special war being waged.'

The National Security Court, composed of three judges, one of whom was a member of the military, refused to apply the Prevention of Terrorism Act but otherwise found the applicant guilty of the offences charged and sentenced him to nearly seven months' imprisonment and a fine of 55,555 Turkish lira. Following is the decision of the Grand Chamber of the ECtHR.]

63. [The Grand Chamber first analyzed and decided that İncal's criminal conviction infringed his right to freedom of expression under the Convention. The Chamber then turned to the right to a fair trial under Article 6.] The Government submitted that the ... arguments concerning these judges' responsibility towards their commanding officers and the rules governing their professional assessment were overstated; their duties as officers were limited to obeying military regulations and observing military courtesies. They were safe from any pressure from their hierarchical superiors, as such an attempt was punishable under the Military Criminal Code. The assessment system applied only to military judges' non-judicial duties. In addition, they had access to their assessment reports and could even challenge their content in the Supreme Military Administrative Court.

In the present case, neither the colleagues or hierarchical or disciplinary superiors of the military judge in question nor the public authorities who had appointed him had any connection with the parties to Mr İncal's trial or any interest whatsoever in the judgment to be delivered.

...

65. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its

members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.

...

66... National Security Courts ... are composed of three judges, one of whom is a regular officer and member of the Military Legal Service. ...

67. The Court notes that the status of military judges sitting as members of National Security Courts provides certain guarantees of independence and impartiality. For example, military judges undergo the same professional training as their civilian counterparts, which gives them the status of career members of the Military Legal Service. When sitting as members of National Security Courts, military judges enjoy constitutional safeguards identical to those of civilian judges; in addition, with certain exceptions, they may not be removed from office or made to retire early without their consent; as regular members of a National Security Court they sit as individuals; according to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties.

68. On the other hand, other aspects of these judges' status make it questionable. Firstly, they are servicemen who still belong to the army, which in turn takes its orders from the executive. Secondly, they remain subject to military discipline and assessment reports are compiled on them by the army for that purpose. Decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army. Lastly, their term of office as National Security Court judges is only four years and can be renewed.

...

70. At the hearing before the Court the Government submitted that the only justification for the presence of military judges in the National Security Courts was their undoubted competence and experience in the battle against organised crime, including that committed by illegal armed groups. For years the armed forces and the military judges — in whom, moreover, the people placed great trust — had acted, partly under martial law, as the guarantors of the democratic and secular Republic of Turkey, while assuming their social, cultural and moral responsibilities. For as long as the terrorist threat persisted, military judges would have to continue to lend their full support to these special courts, whose task was extremely difficult.

... [The Court's] ... task is ... to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial.

71. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. ... What is decisive is whether his doubts can be held to be objectively justified.

72. ... [T]he Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case

73. In conclusion, the applicant had legitimate cause to doubt the independence and impartiality of the Izmir National Security Court.

There has accordingly been a breach of Article 6 § 1.

joint partly dissenting opinion of judges thór vilhjálmsson, gölcüklü, matscher, foighel, sir john freeland, lopes rocha, wildhaber and gotchev

...

In a number of cases the Court has acknowledged that a special court whose members include "experts" may be a "tribunal" within the meaning of Article 6 § 1. The domestic legislation of the

Council of Europe member States provides many examples of courts in which professional judges sit alongside specialists in a particular sphere whose knowledge is desirable and even necessary in deciding certain cases, provided that all the members of the court can offer the required guarantees of independence and impartiality.

As to military judges who are members of the National Security Courts, paragraph 67 of the judgment describes the constitutional safeguards they enjoy, and paragraph 68 goes on to say that certain aspects of their status make it questionable. We consider the conclusions the Court drew from these aspects ... unconvincing.

In that connection we would observe that it is possible for ordinary judges too to be subject to assessment and to disciplinary rules and for decisions pertaining to their appointment to be taken by the administrative authorities, and that the Court has held even a three-year term of office to be sufficient. In addition, at the end of their term of office as National Security Court judges, where that term is not renewed, the judges in question remain military judges for the whole duration of their careers.

As to the argument that the composition of the court may have caused the applicant to harbour doubts about its impartiality and independence, from the point of view of “appearances”, we consider that, in view of the constitutional safeguards enjoyed by military judges, doubts about their independence and impartiality cannot be regarded as objectively justified.

The logical consequence of asserting the contrary would be to cease to consider that even specialised courts can be “tribunals” for the purposes of Article 6 § 1, thus departing from the Court’s well-established case-law.

ÖCALAN v. TURKEY
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER,
APPLICATION NO. 46221/99 (12 MAY 2005)

In a high-profile case and one of the first international court decisions following 11 September, the Grand Chamber reaffirmed its ruling in *İncal v. Turkey*. The case involved the capture and trial of Abdullah Öcalan, the leader of the militant separatist group, Kurdistan Workers Party. In early 1999, Turkish forces captured Öcalan in Kenya and transferred him to Turkey where he was subject to prosecution before a State Security Court. A 139-page indictment accused him of founding an armed group to secede from Turkey’s national territory and of instigating numerous terrorist acts.

Öcalan’s trial before the Ankara State Security Court, composed of two civilian judges and one military judge, began in late March 1999. Following the *İncal* judgment, Turkey started to amend its Constitution and national legislation to permit only civilian judges to sit on state security courts. The legislative amendments passed on 22 June 1999 and went into immediate effect. The next day, a civilian judge replaced the military judge in Öcalan’s trial court. The replacement judge had been present throughout the proceedings and attended all the hearings of the State Security Court from the beginning of the trial. On 29 June, the security court found Öcalan guilty.

A majority of the Grand Chamber of the ECtHR held that the presence of the military judge violated Öcalan’s right to be tried by an independent and impartial tribunal:²⁴⁸

113. It is understandable that the applicant — prosecuted in a State Security Court for serious offences relating to national security — should have been apprehensive about being tried by a bench which included a regular army officer belonging to the military legal service. On that account he could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.

²⁴⁸ The Court also held, *inter alia*, that the government violated the right of Öcalan to be brought promptly before a judge following his arrest, the right to initiate proceedings to determine the lawfulness of his detention and the right to legal assistance.

114. As to whether the military judge's replacement by a civilian judge in the course of the proceedings before the verdict was delivered remedied the situation, the Court considers, firstly, that the question whether a court is seen to be independent does not depend solely on its composition when it delivers its verdict. In order to comply with the requirements of Article 6 regarding independence, the court concerned must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings, namely the investigation, the trial and the verdict (those being the three stages in Turkish criminal proceedings according to the Government).

...

116. In its previous judgments, the Court attached importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see, among other authorities, *İncal*). Such a situation seriously affects the confidence which the courts must inspire in a democratic society.

Then-President of the ECtHR, Judge Luzius Wildhaber, together with five other judges, issued a dissenting opinion disagreeing strongly with the majority's view on the independence and impartiality of the trial court. The dissenting opinion stated:

6... . To say that the presence of a military judge, who was replaced under new rules (that were introduced to comply with the case-law of the European Court of Human Rights) made the State Security Court appear not to be independent and impartial is to take the "theory" of appearances very far. That, in our opinion at least, is neither realistic, nor even fair.

...

8. In addition, in Mr Öcalan's case [sic], and without departing from the principles established in the *İncal* judgment itself, it is hard to agree with what is said in paragraph 116 of the judgment. The applicant is there described as a civilian (or equated to a civilian). However, he was accused of instigating serious terrorist crimes leading to thousands of deaths, charges which he admitted at least in part. He could equally well be described as a warlord, which goes a long way to putting into perspective the fact that at the start of his trial one of the three members of the court before which he appeared was himself from the military.

U. S. Military Commissions

The United States government determined within two months of 9/11 that detainees would be tried by military commissions.²⁴⁹ An early case involved Salim Ahmed Hamdan, Osama bin Laden's driver, who had been captured in Afghanistan, transferred to Guantánamo and selected for trial. In *Hamdan v. Rumsfeld* (126 S. Ct. 2749 (2006)) the US Supreme Court invalidated the commissions on the ground that they were not properly authorized by Congress. It held that they violated a congressional statute requiring the President to adhere to IHL, but it left open the possibility that Congress could subsequently authorize such commissions.

A majority of the Court ruled that Common Article 3 applies to the conflict between the United States and Al Qaeda and that the military commissions violated the fair trial provisions of the article. The majority held that the US commissions did not constitute a 'regularly constituted court', because the government failed to justify setting up special ad hoc tribunals outside the existing courts martial system. The majority thus implicitly accepted that a court martial — a standing US military tribunal — would constitute a regularly constituted court. A plurality of the Supreme Court went on to conclude that particular procedures of the military commission — precluding the defendant from seeing classified evidence — failed to 'afford ... all the judicial guarantees which are recognized as indispensable by civilized peoples'. Following are excerpts from *Hamdan*:

... While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly

²⁴⁹ Military Order governing the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (13 November 2001).

constituted” tribunals to include “ordinary military courts” and “definitely exclud[e] all special tribunals.” GCIV Commentary 340 (defining the term “properly constituted” in Article 66, which the commentary treats as identical to “regularly constituted”); see also *Yamashita*, 327 U.S., at 44, 66 S. Ct. 340 (Rutledge, J., dissenting) (describing military commission as a court “specially constituted for a particular trial”). And one of the Red Cross’ own treatises defines “regularly constituted court” as used in Common Article 3 to mean “established and organized in accordance with the laws and procedures already in force in a country.” Int’l. Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that “ordinary military courts” will “be set up in accordance with the recognized principles governing the administration of justice”).

... At a minimum, a military commission “can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice.”²⁵⁰ ...

[A plurality of the Court continued.]

Inextricably intertwined with the question of a regular constitution is the evaluation of the procedures governing the tribunal and whether they afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.” Like the phrase “regularly constituted court,” this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of [Protocol I]. Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *Yale J. Int’l. L.* 319, 322 (2003). Among the rights set forth in Article 75 is the “right to be tried in [one’s] presence.” Protocol I, Art. 75(4)(e).²⁵¹

... [V]arious provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

Subsequent to the Supreme Court decision, Congress passed the Military Commission Acts of 2006 and 2009. Notably the statute expressly embraces the application of Common Article 3 to the conflict between the United States and Al Qaeda. It authorizes the President to prosecute ‘unprivileged enemy belligerent’ before military commissions.²⁵²

²⁵⁰ Further evidence of this tribunal’s irregular constitution is the fact that its rules and procedures are subject to change mid trial, at the whim of the Executive. See Commission Order No. 1, B 11 (providing that the Secretary of Defense may change the governing rules ‘from time to time’).

²⁵¹ Other international instruments to which the United States is a signatory include the same basic protections set forth in Art. 75. See, e.g., ICCPR, Art. 14(3)(d) (setting forth the right of an accused ‘[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing’). Following the Second World War, several defendants were convicted by military commission for violations of the law of war for failing to afford fair trials to captives, including not apprising accused individuals of all evidence against them. See 5 UN War Crimes Commission 30 and 75.

²⁵² For details, including the 2019 *Edition of the Manual for Military Commissions*, see <https://www.mc.mil/legalresources/MilitaryCommissionsDocuments.aspx>

Guantánamo

A detailed report by a Working Group led by Claire Finkelstein and Harvey Rishikof, entitled *Beyond Guantánamo: Restoring The Rule of Law to the Law of War* (2022) provided an overview of the impact of these long-running military commissions:

... [Guantánamo] is a highly inefficient operation, one that costs taxpayers \$540 million per year to operate, or \$13 million per prisoner annually

...

As of ... July 1, 2022, Guantánamo is home to thirty-six detainees: ... nineteen are recommended for transfer, ten are in the military commission prosecution process, five are being held in indefinite law-of-war detention and not recommended for transfer, and two are serving penal sentences as the result of conviction by the military commissions. Many of these individuals suffer from the psychological and physical consequences of abusive treatment, practices that federal judges, convening authorities, and even two U.S. presidents have referred to, or characterized as “torture.”

The Working Group unanimously concludes that the military commissions are dysfunctional, and that the system is unlikely ever to produce meaningful trials and impartial verdicts. Whatever the original intention, the military commissions have failed to provide either the promised transparency or justice, and most of the pending cases continue to languish in pretrial proceedings, showing little hope of resolution. The start of the earliest trial is at least a year off, and the Department of Defense is building a new courtroom at the facility, both of which suggest that the Biden administration is not planning to close Guantánamo any time soon. A number of factors have conspired to produce the delays in trial: the geographic location, the lack of a governing body of law, the involvement of multiple bureaucracies and agencies that render procedures cumbersome and inefficient, multiple judges, the felt need on the part of the U.S. government to maintain high levels of secrecy, and repeated instances of governmental misconduct and interference with the process. These factors, and the delays they have produced, have created an indelible taint that calls into question the likelihood these tribunals will be capable of producing impartial verdicts or outcomes perceived as legitimate.

A report by Letta Tayler and Elisa Epstein, of Human Rights Watch, entitled *Legacy of the “Dark Side”: The Costs of Unlawful U.S. Detentions and Interrogations Post-9/11* (9 January 2022) provides another highly critical perspective:

No U.S. government officials have been held accountable for creating, authorizing, or implementing the CIA’s secret detention and torture programs. All but a heavily redacted summary of the landmark 2014 U.S. Senate Intelligence Committee report on the covert CIA program (the “Torture Report”) remains classified. The portions that have been released make clear that the torture was as useless in producing actionable intelligence as it was brutal. Like Presidents Obama and Donald J. Trump before him, President Joseph R. Biden has shown no appetite for releasing the Torture Report, much less criminally investigating the architects of the Rendition, Detention, and Interrogation (RDI) program or other post-September 11 abuses. Biden also opposes allowing the International Criminal Court to include abuses by U.S. nationals in its investigation on grave human rights crimes in Afghanistan.

Abroad, the U.S. has continued abusive practices against terrorism suspects including transferring them to countries that torture, and, in at least some cases, unlawfully detaining them at U.S.-run sites abroad or at sea. Although such U.S. detention-related counterterrorism violations have dramatically decreased, Washington has replaced capture with kill, conducting air strikes—often with armed drones that have killed thousands of civilians, including outside recognized battlefields. Its counterterrorism campaign has spread to 85 countries with scant transparency or oversight.

...

... U.S. extraordinary renditions, unlawful detentions, and torture after September 11 [have involved massive costs,] including to the victims and suspects, to U.S. taxpayers, and to U.S. moral authority and counterterrorism efforts worldwide, ultimately jeopardizing universal human rights protections for everyone. [The report] argues that significant counterterrorism reforms, including closing the prison at Guantánamo, strengthening measures to protect civilians from death and harm, increasing

transparency and accountability for the crimes the U.S. has committed, and addressing religious and racial biases, are critical steps toward mitigating the damage.

QUESTIONS

1. Which of the three approaches articulated in the judgments in *Ibrahim v. United Kingdom* strike the most appropriate balance between upholding security and protecting the rights of both the citizenry and the defendants?
2. What aspect, if any, of the European Court of Human Rights' analysis in *İncal* turns on the status of the defendant (civilian versus military) or on the nature of the offence? Do those distinctions explain the source of disagreement between the majority and dissenting opinions? Why should the test for an independent and impartial tribunal turn on such considerations? Should it matter whether a conflict is between a government and an internal separatist movement, a state and a transnational terrorist organization, or two states?
3. Why does the Inter-American Commission suggest that any trial of a civilian by a military court is categorically prohibited? Should that rule apply as well in international and transnational armed conflicts?
4. Should the presence of a single military judge on a three-judge panel, as in *İncal*, be a sufficient reason to invalidate the proceedings? Does the presence of civilian judges help counteract potential bias? How might military judges be different from other 'expert' judges that the dissenters in *İncal* suggest are permitted under the Court's case law? Would modifying other aspects of the proceedings — a different number and ratio of civilian and military judges, weighted voting rules, or appellate review — make the presence of military judges acceptable in your view?
5. Within three months of Russia's invasion of Ukraine, in February 2022, Ukraine's Prosecutor General had opened over 13,000 cases. On May 23, a 21-year-old Russian soldier, Vadim Shishimarin, was sentenced to life imprisonment for shooting a civilian. Governments supporting Ukraine have not raised significant concerns about this development, but commentators have been troubled: 'War crime trials are fraught affairs in general, but they're especially tricky when held against enemy soldiers in the midst of a conflict. Domestic judges' impartiality and ability to dispense justice to the adversary accused of atrocities are bound to be questioned. The other side will always vilify the proceedings as vicious propaganda, show trials, or lawfare.'²⁵³ Discuss.

²⁵³ S. Vasiliev, 'The Reckoning for War Crimes in Ukraine Has Begun', *Foreign Policy* (17 June 2022).

PART C: RIGHTS, DUTIES AND DILEMMAS OF UNIVERSALISM

The preceding chapters conveyed no sense of a uniform, coherent, uncontested human rights regime. From the controversies over capital punishment in Chapter 1, the dispute over permitted methods for interrogating prisoners in Chapter 3, the challenges to the very concept of economic and social rights in Chapter 4, and the competing conceptions of national security in Chapter 5, we have seen major differences in understandings of human rights both among legal orders of different states and within states. Such contests within and about the human rights regime are both predictable and appropriate. The struggle to define and uphold human rights is inevitably an ongoing one that is never definitively won (or lost).

Part C concentrates on notions of rights and of contests and disputes about them, exploring the very idea of rights more systematically than did the prior materials. Chapter 6 examines the nature of rights and rights discourse, and the character and consequences of duty-oriented rather than rights-oriented social systems. Chapter 7 begins with exploration of the opposition between universalism and cultural relativism in understanding the character of the human rights regime.

Chapter 6. Rights versus Duties

Thus far the materials have described, but barely commented on, the fundamental characteristic of the UDHR and ICCPR: their foundation in the rhetoric and concept of rights. Many view that rhetoric as unproblematic, as the central and inevitable component of a universal discourse about human dignity and humane treatment of individuals by governments. Others, to the contrary, view a discourse about rights as alien and harmful to their states or cultures, disruptive of traditional social structures, or subversive of authority. Consider the following queries:

- (1) Why does the language of rights dominate the texts of the declarations and treaties as well as many new constitutions and even the slogans and polemics of political debate?
- (2) Is that language intrinsically superior to other possible ones — for example, the language of duties, which might lead to a Universal Declaration of Human Duties, or the language and methods of utility? Is rights language essential to the values and goals of the human rights regime? Or is the currency of that language a matter of historical contingency, in that the postwar movement to protect human dignity found its roots in liberal political cultures in which rights had long ago taken root?
- (3) Does a particular substantive content necessarily attach to the language of rights? For example, do ‘rights’ necessarily express the principles of the liberal political tradition, as with respect to non-discrimination, due process, or freedom of religion or speech? Are the same questions equally relevant to the language of duties? Are either rights or duties empty receptacles that are open to many different types of values and ideas, some of which might be antagonistic to the liberal tradition?
- (4) Universality informs the discourse and content of rights in the UDHR and the basic treaties. But why should we accept that the stated norms are universal? Are arguments about their universal character accepted worldwide? Or do some parts of the world view many important provisions in the basic human rights instruments as particular to the Western liberal tradition, hence inapplicable to radically different states and cultures? Would the same criticism be as applicable to a duty-based Universal Declaration?

A. RIGHTS AND RIGHTS RHETORIC

We here consider different understandings, historical and contemporary, of the notion of ‘rights’ and inquire whether rights have inherent implications for a society’s moral, political and socio-economic order. For example, does rights rhetoric in a constitution and statutes, or in a dominant moral and political theory, point to an individualistic, communitarian, or other type of society? Does it necessarily assume certain institutional arrangements for government, such as a constitutional separation of powers and an independent judiciary? Are the answers to questions such as these most likely to be found through philosophical reflection, deeper understanding of the history of rights, or in looking to human rights in practice in today’s world.

The twenty-first century has witnessed a remarkable explosion of writing and debate over both the philosophical and historical dimensions of human rights. It is impossible for a casebook of this type to do justice to the richness of the increasingly specialized and sophisticated debates, although elements of them are spread throughout the book as a whole. The same applies to non-Western approaches to the theory of rights, with a wide range of Global South perspectives being captured in different chapters. But the largely theoretical or conceptual writings on theories of rights that are excerpted below emanate largely from the Global North and engage largely with Western traditions. Rights as a fundamental language of law, politics and morals grew within and are associated with the Western liberal tradition. This is not, however, to say that the claims, interests, values and ideals expressed through rights language in the basic human rights instruments are exclusive to the Western

liberal tradition. Many of them, as we have seen, may be expressed through other languages as well — for example, the language of duty and responsibility of the state, government and individuals.

The various authors whose writings follow have been selected because they illustrate very different and often incompatible perspectives, ranging from the sceptical (Koskeniemi), liberal (Steiner), pragmatic (Beitz), Marxist (O’Connell), feminist (Brown), and critical (Kennedy), to the non-anthropocentric (Mégret), and iterative/engaged (Cotulo). The goal of the materials is not to arrive at any single theory or understanding of the nature, origins, or significance of rights or rights-talk, but to gain an understanding of the complexity and richness of the notions involved.

MARTTI KOSKENIEMI, RIGHTS, HISTORY, CRITIQUE
ADAM ETINSON (ED.), HUMAN RIGHTS: MORAL OR POLITICAL? (2018) 41

What are human rights? Where do they come from? How can we know them, or know if we “have” them? (And what does “having a right” mean?) Any discussion of the nature or role of rights tends very rapidly to lead to questions that seem soluble only by taking a stand on some pretty tough issues that have been debated for at least 2,000 years of Western political thought. Although some do suggest, or at least imply, that we are now finally in a position to give good responses to questions such as these, most would think it ridiculous to expect that we may have legitimate recourse to right-talk only once this has actually taken place. Surely it is possible to talk meaningfully of rights even in the absence of any firm philosophical founding. ... There is much in the world that we do although we cannot quite explain why we do so. Perhaps all we can say about rights, at least for now, is that something like them needs to be supposed for the other things we do in or think about the world to make sense. This would make them articles of a pragmatic faith, referring back to nothing grander than the effortless intimacy we have with our practices. But why would this be wrong? Is not asking those grander questions just to have missed the postmodern boat?

... Rights-language has distributive consequences. In an otherwise utilitarian policy-environment, rights indicate preferences that, we believe, should not be overridden by whatever net benefits a policy might offer. This is why everyone has a great interest in translating their preferences into rights. Without an authoritative list of such preferences, however, there is no limit to the translation process. In the end, all social conflict will appear as rights-conflict. At that point, it begins to seem imperative to find an answer to questions such as: “What really is a ‘right’ (in contrast to a mere ‘preference’)? How do we know them? Do they exist in some hierarchy? What values determine their position?” ...

A return to philosophy will hardly prove helpful. The twentieth century has not been kind to the idea that the resolution of social conflicts should take place by abstract reasoning. ... Speaking in a universal language has come to appear as an effort to exercise hegemony. Hence, I think, the increasing recourse to anthropology and sociology in rights-analysis. Hence also the impressive recent surge of histories of rights. ... Perhaps, if rights cannot be grounded on faith or philosophy, we might at least think of them historically, as part of the normative organization of a period. Much new historical work has looked for the origin of our present obsession with individual (human) rights. That origin has been found in different periods. Were “human rights” part of Roman (civil) law? Or did they only emerge in the process or recovery of that law in the twelfth and thirteenth centuries? Did they belong to Canon law or emerge only with the nominalist attack upon Thomistic rationalism? Should the first significant articulation of the idea of human rights be credited to the Spanish scholastics? Or would it be more appropriate to focus on Protestant ideas about resistance to authority in the sixteenth century? Should Hobbes or Grotius be heralded—for good or ill—as the intellectual fathers of the idea of individual (natural) rights? Or did the idea of such rights emerge only with eighteenth-century Enlightenment, the American Bill of Rights (1776), or the French *Déclaration des droits de l’homme et du citoyen* (1789)? What about the connection between the emergence of human rights and the abolition of slavery, or the rise of the various humanitarian movements in the nineteenth century?

Others have argued that there is no such long trajectory of “rights” passing through history at all. They have suggested that rights should be seen as part of twentieth-century institutional politics—perhaps that it “began” in the debates on minority protection within the League of Nations, or the passing of

the 1948 Universal Declaration on Human Rights (UDHR), and as a reaction to Hitlerite racial aggression. Others have claimed that our present rights talk should be seen in even more recent light—as part of an effort to marry free market liberalism and religious conservatism in the postwar era, an offshoot of 1970s cold war strategies or the ideological foundation for 1990s institutional developments in international human rights law.

The turn to history in order to understand rights today is surely useful, though not as an effort to search for the origin of our present rights-practices. That would presuppose the self-evidence of our present rights—the very starting-point that was questioned—and reduce the past into its immature “predecessor”. History is useful not because it “originates” or “foreshadows” present practices but because it provides illustrations of the ways in which a political vocabulary (such as rights-language) can be used for the accomplishment of different tasks. There are serious interpretative questions about the meaning and relations of “natural rights”, “individual rights”, “subjective rights”, and “human rights” in different periods. They resemble each other, but are also different. While political philosophy seeks to clarify the differences and resemblances in its pursuit of a good rights-vocabulary, history, or at least conceptual history, seeks to locate rights in the contexts of contestation where they have been used to defend or attack distributive schemes and claims of jurisdiction. History does not resolve today’s problems. But it may relieve us from the anxiety that a loss of faith in rights as providing a ready-made set of answers to social conflict may engender. It brings them down from a conceptual heaven and shows them as parts of a human world where they give shape and meaning to our agendas and pursuits. What we should think of them, or how they might be implemented in a world of scarce resources will still remain a matter of political judgement.

...

II. The Power and Weakness of Rights: Some Conclusions

... Rights have both supported and challenged the power of religious institutions. They have been a key ideological instrument to support private property against extractions by the king or public power, as well as a basis to challenge the inequality of property and the power of money. In early modern Germany, rights were invoked to defend individual liberty but also to retrench a firm central power assigned to look after the security and happiness of the citizens. During the European Enlightenment rights supported revolution but also state-building and then, as now, the two things have often gone together. As much as rights have defended individuals against their communities, they have also underwritten the community’s power to demand that individuals respect its traditions: liberalism, republicanism, and even socialism have thrived on rights.

...

... [T]he common discourse about rights being “universal, inalienable and indivisible” is an intellectual stopgap and a political dead end. It looks towards a world of harmony where the right of all humans—that is to say the preferences of all—would organize themselves harmoniously and in a coterminous way. Neither conceptual logic nor historical experience supports such a view. Since Kant, and perhaps earlier, the view that rights exist in harmony has been an aspect of rationalist imagination whose political force may have been formidable, but which has lent itself to assist whatever cause and agenda. Because it denies the reality of conflicts, explaining them as misunderstandings about everyone’s real preferences, it has complicated, instead of facilitated, their resolution.

No doubt, rights theorists have long since recognized that the way to utopia is not opened by assuming a pre-existing harmony where none exists. The process of redescribing some interests or preferences as “rights” has been and continues to be about struggle and compromise in which some claimants win, others lose. ... The massive translation of “interests” into “rights” in the late twentieth century was occasioned precisely by the hope that in this way they could be made untouchable, lifted outside politics altogether. But there is no limit to this translation, which is why the world of politics became saturated by rights-claims. For every claim of right, the burden that is to fall upon somebody for honouring it may be seen as a violation of the rights of the latter. Every increase of the right to freedom of somebody is felt as an encroachment on the right to security of someone else. And so on. There is no social conflict in which both sides could not, with some plausibility, invoke their interest as a “right”. The result has been the rise of the bureaucratic management of rights through ubiquitous

practices of “balancing” whose criteria are received from an institutional bias that cannot be articulated by the rights whose limit and content it sets.

...

... [Rights-talk focuses] on things we “have” or (to follow Grotius) “faculties” we “possess” [and] seems obsessively concerned with identities rather than the structural determination of those identities. Rights-talk may support our capacity to exercise a religion we profess, to express an opinion or to support a party we prefer, or to use a property we have—that is to say, to be “true” to ourselves and our life projects. But it is blind to the conditions within which we come to think of ourselves as “religious” in a particular way, members of a party, property-owners or persons with specific opinions. This, I think, is an important aspect of the intellectual dead end that rights bring with them. They claim to protect our (person, group) identities and preferences without ever questioning how we came to have them. They are so close, so intimate with our assumed selfhood that they make it impossible for us to situate ourselves in any larger context—especially the context of an ubiquitous identity-producing power.

...

HENRY STEINER, SOME CHARACTERISTICS OF THE LIBERAL POLITICAL TRADITION
HENRY STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT
(1996) 187

Observers from different regions and cultures can agree that the human rights movement, with respect to its language of rights and the civil and political rights that it declares, stems principally from the liberal tradition of Western political and legal thought. That observation lies at the core of argument by states from non-Western parts of the world that some basic provisions in instruments like the UDHR or ICCPR are inappropriate and inapplicable to their circumstances. Those instruments, the argument goes, purport to give a genuinely universal expression to certain tenets of liberal political culture, and advocates basing their criticism of countries in the developing world on the human rights movement are effectively advancing a contemporary form of imperialism. Thus liberal thought and practices inform much contemporary debate ... about the meaning and relevance of cultural relativism.

For the purpose of facilitating some comparisons between liberalism and the human rights movement, this Comment sketches characteristics that observers would associate with the different expressions of the liberal tradition during the twentieth century. The Comment has a limited historical scope. It does not reach back to the origins of liberal thought in the seventeenth century and Age of Enlightenment, or to changes in that body of thought in the nineteenth century.

The liberal political tradition has never been and surely is not today a monolithic body of thought requiring one and only one form of government. The very term ‘liberal’ has assumed different meanings, from the liberal economics associated with the laissez faire school of the nineteenth century to contemporary associations of liberalism in a country like the United States with a more active and engaged state concerned with the general welfare of the population and with regulation of the market and nongovernmental actors — the modern regulatory and welfare state so familiar to Western states.

The contemporary expressions of liberal thought by theorists like Dworkin or Rawls depart significantly from the writings of the classical theorists influencing its development, like Bentham, Kant, Locke, Mill, Rousseau and Tocqueville. The differences among such classical writers are reflected in the distinct versions of liberal ideology and the varied structures and practices of self-styled liberal democracies. This variety and ongoing transformation suggest caution in making inclusive and dogmatic comparisons between, say, liberalism and the human rights movement, which has during the last six decades generated its own internal conflicts and has itself undergone significant change.

No characteristic of the liberal tradition is more striking than its emphasis on the individual. Liberal political theory and the constitutive instruments of many liberal states frequently employ basic concepts or premises like the dignity and autonomy of the individual, and the respect that is due to all individuals. The vital concept of equality informs these terms: the equal dignity of all human beings,

the equal respect to which individuals are entitled, the equal right for self-realization. It is not then surprising that equal protection and equal opportunities without repressive discrimination constitute so cardinal a value of contemporary liberalism. In general, the protection of members of minorities against invidious discrimination continues to be a central concern for the liberal state.

Such stress on the individual informs basic justifications for the state. The liberal state rests on, its very legitimacy stems from, the consent of the people within it. Within liberal theory, that consent is both hypothetical, as in the notion of a social contract among the inhabitants of a state of nature to create the political state, and institutionalized through typical practices such as periodic elections. Such ideas are explicit in the basic human rights instruments. Note Article 21 of the UDHR (“The will of the people shall be the basis of the authority of government”) and Article 25 of the ICCPR (the importance of elections ‘guaranteeing the free expression of the will of the electors’).

From the start, liberal theory has been attentive to the risk of abuse of the individual by the state. The rights language that is found in constitutional bills of rights, statutory provisions for basic rights, political traditions not expressed in positive law and writings of theorists and advocates respond to this need for protection against the state. The rights with which the individual is endowed limit governmental power — the right not to be tortured, not to be discriminated against on stated grounds. Until the early twentieth century, liberal theory and the liberal state were far less attentive to violations of rights by non-state actors, corporations or individuals, but heightened regulation of the non-state (private) sector and the growth of international human rights have brought significant change, particularly since World War II.

Historically the protection of the property right against interference by the state and others played a major role in liberal theory. Indeed, questions of the relationships between liberalism and free enterprise or capitalism have long been debated. They take on a particular pungency in the post-Cold War world of spreading markets, spreading democracy and globalization.

Sometimes the types of rights just referred to are described as ‘negative’: the hands-off or non-interference rights (don’t touch), or the right to be interfered with (as by arrest, imprisonment) only pursuant to stated processes. It is partly the prominence of the rights related to notions of individual liberty, autonomy and choice and the right related to property protection that produces the sharp division in much liberal thought between the state and individual, between government and nongovernmental sectors, between what are often referred to as the public and private realms or spheres of action.

This conception of negative rights, and of negative freedom as the absence of external constraints, together with the historical alliance of political liberalism with conceptions of a free market and *laissez faire*, led to liberalism’s early emphasis on sharply limited government. The tension between that early ideology and background, and the growing emphasis over more than a century on the welfare and regulatory functions of the modern liberal state, remain central to much political and moral debate today.

That debate is related to an opposition that has developed in liberal thought between negative rights or negative liberty (freedom), and positive or affirmative rights or liberty (freedom). Those terms have acquired different meanings. For example, ‘positive rights’ have been described as entitlements of individuals to the effect that the state should not simply respect the ‘private’ sphere of inviolability of the individual (the negative rights), but should also ‘act’ in particular ways to benefit the individual, perhaps by providing education or health care. In this sense, the ‘positive rights’ of individuals such as the right to education or health care impose duties on the state to provide the necessary institutions or resources.

In a different and more ample sense, positive liberty has been described as ‘liberty to’ as opposed to ‘liberty from’ — for example, the liberty to realize oneself, to satisfy one’s real interests, to achieve individual self-determination. One form of such positive liberty facilitated by the state would be governmental policies and institutions fostering the active political participation of citizens in electoral

and other processes that help to determine the exercise of public power. Through such positive liberty, the individual can participate in the creation and recreation of self and state. The state readily and naturally becomes involved in this search of individuals for positive liberty, characteristically by creating the conditions that make the individual quest more likely to succeed, but at the dangerous authoritarian extreme by attempting to define the content of genuine self-realization and by coercing individuals to achieve it.

What an individual should seek in life, what idea of the good in life that individual holds, how the individual seeks self-realization, remain in the liberal state matters of individual choice to which both negative and positive conceptions of rights and freedom are relevant. That state must be open to a variety of ends, a variety of conceptions of the good, that individuals will express. The liberal state must then be a pluralist state. Its structure of rights, going beyond the rights to personal security and equal protection to include rights of conscience and speech and association, facilitates and protects the many types of diversity within pluralism, as well as ongoing argument in the public arena about the forms and goals of social and political life.

Precisely what governmental structures best realize such liberal principles is among the disputed features of the liberal tradition. The liberal state is closely associated with the ideal of the rule of law, hence with some minimum of separation of government powers such as an independent judiciary that can protect individual rights against executive abuse. The fear of tyranny of the majority lies at the foundation of the argument for restrictions on governmental power through a constitutional bill of rights limiting or putting conditions on what government can do. How to enforce that bill of rights against the executive and legislature has never achieved a consensus among liberal states. They vary in the degree to which they subject legislative action to judicial review, hence in the degree to which governmental power, even if supported by a freely voting majority of the population, can abridge or transform or abolish rights. The trend among liberal democracies over the last few decades has been toward judicial review of legislative as well as executive action.

The liberal tradition continues to be subjected to deep challenges from within and without, and thus continues its process of evolutionary change. During and particularly after the Cold War, its interaction with states of the developing world posed complex issues in relation to efforts of some of those states to develop new forms of government and economy. For example, the relationships in the former Communist states of Central and East Europe between liberalism, privatization and property rights, markets and regulation thereof, and the provision of welfare remain ambiguous and in flux. More generally, questions of the relationship between liberalism and a market economy, or liberalism and ethnic nationalism, have assumed heightened prominence. In a Western country such as the United States, liberalism responds to challenges from diverse perspectives such as communitarian ideas, civic republicanism, and multiculturalism (cultural particularism).

Some of these contemporary challenges underscore a continuing debate within liberalism, the two sides to which can lead to significantly different political and social orders: individual or group identity as primary. The group may be — to use the conventional porous and overlapping terms — national, linguistic, religious, cultural, ethnic. At the extreme, it is not compatible with a liberal creed for a governing order to subordinate individuals fully to the demands of such kinds of groups. With respect to the core values of liberalism, individual rights remain lexically prior to the demands of a culture or group, to the claims of any collective identity or group solidarity.

Nonetheless, the liberal state is hardly hostile to groups as such. It is not blind to the influence of groups (religious, cultural, ethnic) or of group and cultural identity in shaping the individual. Indeed, the political life of modern liberal democracies is largely constituted by the interaction, lobbying and other political participation of groups, some of which are natural in their defining characteristic (race, sex, elderly citizens), and some formed out of shared interests (labour unions, business associations, environmental groups). The liberal state, by definition committed to pluralism, must accommodate different types of groups, and maintain the framework of rights in which they can struggle for recognition, power and survival.

Such issues indicate how much is open and debated within liberalism about the significance of the priority of the individual in the contemporary liberal state — or different types of liberal states. Should we, for example, understand the ‘individual’ abstractly, as similar in vital respects everywhere, both within the same state and universally? Or do we understand the individual contextually, as influenced or even determined by ethnic, cultural, national, religious and other traditions and communities? Should we even phrase the question in such dramatic contrasts, or should we rather assume that the answers are too complex for any clear choice between them?

Since the birth of the human rights movement, ... such issues about the individual and the collective have taken on great pungency in the contradictions bred, on the one hand, by the spread of both liberal ideology with its emphasis on the individual and of market ideology with its stress on private initiative, and on the other hand, by the often savage bursts of ethnic nationalism in many parts of the world with their stress on collective rather than individual identity.

... Rights are no more determinate in meaning, no less susceptible to varying interpretations and disputes among states, than any other moral, political or legal conception — for example, ‘property’, or ‘sovereignty’, or ‘consent’, or ‘national security’. Within liberal states, different institutional solutions have been brought to the question of who should determine and develop the content of rights, and who should resolve the many and puzzling conflicts among rights. In the international arena, this problem becomes all the more complex. What mechanisms, what institutional framework, what allocation or separation of powers, what blend of overtly political and judicial resolution of these issues, will we find in the international human rights movement?

CHARLES BEITZ, THE IDEA OF HUMAN RIGHTS (2009) 7

... Some philosophers have conceived of human rights as if they had an existence in the moral order that can be grasped independently of their embodiment in international doctrine and practice—for example, as “natural rights” or their secular successors, as fundamental moral rights possessed by all human beings “as such” or “solely in virtue of their humanity,” or as conditions for social institutions about which all the world’s social moral codes agree. These possibilities are not mutually exclusive. The usual view is that international human rights ... express and derive their authority from some such deeper order of values. For those who accept some variation of this kind of view, the task of a theorist of international human rights is to discover and describe the deeper order of values and judge the extent to which international doctrine conforms to it.

I shall argue that it is a mistake to think about international human rights in this way. These familiar conceptions are question-begging in presuming to understand and criticize an existing normative practice on the basis of one or another governing conception that does not, itself, take account of the functions that the idea of a human right is meant to play, and actually does play, in the practice. ... [T]hey are also at odds with the historical development of international human rights doctrine. Its authors disowned the thought that human rights are the expression of any single conception of human nature or human good or of any but the most general understanding of the purposes of human social organization. They took it as an ineliminable fact that people would differ about these matters. They therefore aspired to a doctrine that could be endorsed from many contemporary moral, religious, and cultural points of view and that was suited to be implemented by means distinctive to characteristically modern forms of social organization. The approach that takes human rights as the expression of a received philosophical idea risks missing this feature of international human rights.

... [T]he human rights enterprise is a global practice. The practice is both discursive and political. As a first approximation, we might say that it consists of a set of norms for the regulation of the behavior of states together with a set of modes or strategies of action for which violations of the norms may count as reasons. The practice exists within a global discursive community whose members recognize the practice’s norms as reason-giving and use them in deliberating and arguing about how to act. These norms are expressed in the [UDHR and the major treaties, though] these formulations are open to interpretation and revision within the practice. The discursive community in which the practice resides

is global and consists of a heterogeneous group of agents, including the governments of states, international organizations, participants in the processes of international law, economic actors such as business firms, members of nongovernmental organizations, and participants in domestic and transnational political networks and social movements. The approach I shall explore tries to grasp the concept of a human right by understanding the role this concept plays within the practice. Human rights claims are supposed to be reason-giving for various kinds of political action which are open to a range of agents. We understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons.

... I note two qualifications. First, in holding that the practice consists of norms which are widely recognized within a discursive community, I do not mean to say that there is agreement within the community about the scope and content of the system of norms taken as a whole, about the weights that should be attached to the reasons for action supplied by these norms, or about how conflicts among human rights, or between human rights and other values, should be resolved. Indeed, ... it is not only an inevitable but also a functionally significant aspect of the practice of human rights that its norms serve as much to frame disagreement as agreement. ... We rely on the practice for an understanding of the discursive roles of human rights, not (or anyway not directly) to delineate their scope or content.

The other qualification is that the practice of human rights is emergent. It is ... not a mature social practice. There is disagreement about all its main elements—for example, about the content of its norms, the eligible means for their application and enforcement, the distribution of responsibilities to support them, and the weight to be accorded to considerations about human rights when they come into conflict with other values. International human rights institutions lack capacities for authoritative adjudication of disputes and coercive enforcement of the practice's norms. The division of labor between public human rights institutions and nongovernmental organizations that participate in international institutional processes is unstable. Most importantly for our purposes, there is no unambiguous basis for establishing the boundaries of the discursive community within which the practice takes place. I have said that the meaning of the idea of a human right can be inferred from its role in a discursive practice, but if the boundaries of the discursive community are indistinct—for example, if there is no authoritative basis for ruling participants in or out—then there may be unavoidable indeterminacy in our understanding of the idea. All of these features reflect the practice's emergent character and all complicate a practical analysis. Notwithstanding the complications, ... the practice of human rights ... organizes much of the normative discourse of contemporary world politics and commands the energy and commitment of large numbers of people and organizations.

... [A] practical approach ... [calls] into question ... two familiar conceptions ... —the idea of human rights as entitlements that belong to people “by nature” or “simply in virtue of their humanity” and the distinct idea of human rights as objects of agreement among diverse moral and political cultures.

...
...

[This approach does not suggest that it is necessary] to accept the contents of existing human rights doctrine as binding on us or to agree that the practice as we find it is the best way to realize the hope one might see in it as a matter of first impression. These are questions to be examined in their own right. But neither question can be rendered coherently without a clear grasp of the idea of human rights. To achieve such a grasp we do not suppose that human rights must express or derive from a single basic value or that they constitute a single, fundamental category of moral concern. Instead, we treat international human rights as a normative practice to be grasped *sui generis* and consider how the idea of a human right functions within it.

PAUL O'CONNELL, ON THE HUMAN RIGHTS QUESTION
40 HUM. RTS. Q (2018) 965

...

A. Marx on Rights

... Marx's ... 1843 essay *On the Jewish Question* ... was written as a response to Bruno Bauer's argument that if Jewish people in Germany were to receive political emancipation, the same civil and political rights as other Germans, they must first renounce (or, from Bauer's perspective, emancipate themselves) from Judaism. In an excoriating critique of Bauer's argument, Marx also engaged in a general reflection on the nature of rights as such. Crucial to Marx's analysis of rights, and their limitations, is the distinction he draws between *political* emancipation and *human* emancipation. The former can be achieved by the conferral of civil and political rights, but is formal and limited; the latter is substantive, genuine, and can only be achieved through transcending existing social relations (capitalism), and collapsing the division between political citizens active in and through the state and private individuals who exist in "civil society."

Starting from this premise, Marx argues that "the so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of a *member of civil society*, that is, of egoistic man, of man separated from other men and from the community." To demonstrate this, Marx identifies what he sees as the core rights in the *French Declaration of the Rights of Man and the Citizen* (equality, liberty, security, and property) and sets out to show the necessarily truncated nature of each of these rights within the capitalist system. So, for example, he argues that "liberty as a right of man is not founded upon the relations between man and man, but rather upon separation of man from man. It is the right of such separation. The right of the *circumscribed* individual, withdrawn into himself."

In a similar vein, he argues that property is "the right of self-interest" which "leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty." Equality, in this context, is merely the guarantee that "every man is equally regarded as a self-sufficient monad," while security is the guarantee of each selfish, isolated individual's property. In light of this, Marx concludes that:

None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice. Man is far from being considered, in the rights of man, as a species-being; on the contrary, species-life itself—society—appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the preservation of their property and their egoistic persons.

In sum, Marx argues that the rights of man do not, in substance, reflect genuine human emancipation. Instead, while purporting to emancipate individuals they are, in fact, constitutive of a set of social relations that denies individuals the capacity to realize their true nature (species-being) as social beings. Real emancipation will only take place when the social relations of capitalism are transcended, and the distinctions between formal political freedom and action in the "private" sphere are replaced by genuine community.

...

... [I]n his *Critique of the Gotha Program* ... Marx criticizes the limitations of "bourgeois right"—in particular the inability of formal, legal equality to account for substantive real world differences between individuals and classes. This, in turn, means that the language of equality, and formal guarantees of equal right, in fact serve to conceal and entrench substantive inequality. Marx concludes his critique of the Gotha Program by dismissing the idea of equal rights as "dogmas, ideas which in a certain period had some meaning but have now become obsolete verbal rubbish" and been reduced to mere "ideological nonsense."

Though highly critical of the concept of right as used in the Gotha Program, Marx also acknowledges that right "can never be higher than the economic structure of society and its cultural development conditioned thereby," or, in other words, that equal rights, as such, can never challenge the inherent inequalities produced by the capitalist system. Marx concludes by noting that only when capitalism is

transcended and a truly new form of society has begun to consolidate itself “can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banner: From each according to his ability, to each according to his needs!” As with *On the Jewish Question*, Marx could be read here as rejecting rights, or, he can be seen as engaging in a thorough and necessary critique of blind faith in rights. Bringing to the fore the ways in which the un-freedom produced by capitalism structurally and necessarily frustrates the high ideals contained in appeals to human rights, without necessarily constituting a rejection of rights *tout court*.

...

... Clearly, then, Marx’s stated views on rights throughout his life can best be described as “critical, differentiated, underdeveloped and, in more than a few instances, ambiguous.” All of which is to say that while Marx was certainly critical of human rights as lauded, liberal abstractions, he was also aware of their value and importance in political struggles to advance the interests of the working class. ...

...

WENDY BROWN, SUFFERING THE PARADOXES OF RIGHTS
WENDY BROWN AND JANET HALLEY (EDS.), LEFT LEGALISM/LEFT CRITIQUE (2002)
420254

This essay does not take a stand for or against rights, but rather, seeks to map some of the conundrums of rights for articulating and redressing women’s inequality and subordination in liberal constitutional regimes. ...

Speaking for the disenfranchised in loose cross-cultural fashion, Gayatri Spivak depicts liberalism (and other modernist emancipatory formations) as “that which we cannot not want.” This from a Derridean Marxist postcolonial feminist critic keenly aware of what liberalism cannot deliver, what its hidden cruelties are, what unemancipatory relations of power it conceals in its sunny formulations of freedom and equality. Indeed, Spivak’s grammar suggests a condition of constraint in the production of our desire so radical that it perhaps even turns that desire against itself, foreclosing our hopes in a language we can neither escape nor wield on our own behalf. Patricia Williams refigures this condition of entrapment as one that might be negotiated through dramatic catachresis. Forcing rights out of their usual ruses of abstraction that mystifies and universalism that excludes, she insists that we procure them for “slaves . . . trees . . . cows . . . history . . . rivers and rocks . . . all of society’s objects and untouchables.” Albeit in a very different register, Drucilla Cornell argues in parallel with Williams, insisting that women’s right to “minimum conditions of individuation,” and in particular to an imaginary domain in which a future anterior is not beyond women’s grasp, is the surest way to finesse the tradeoff between liberty and equality that liberal rights discourse is generally thought to force. Yet even in Williams’s and Cornell’s critical yet ultimately utopian rapprochements with rights discourse, there is a tacit confession that recalls Spivak’s own weary recognition of the historical limits of our political imagination. If we are constrained to need and want rights, do they inevitably shape as well as claim our desire without gratifying it?

...

... [A] provisional answer to the question of the value of rights language for women is that it is deeply paradoxical: rights secure our standing as individuals even as they obscure the treacherous ways that standing is achieved and regulated; they must be specific and concrete to reveal and redress women’s subordination, yet potentially entrench our subordination through that specificity; they promise increased individual sovereignty at the price of intensifying the fiction of sovereign subjects; they emancipate us to pursue other political ends while subordinating those political ends to liberal discourse; they move in a transhistorical register while emerging from historically specific conditions; they promise to redress our suffering as women but only by fracturing that suffering—and us—into discrete components, a fracturing that further violates lives already violated by the imbrication of racial, class, sexual, and gendered power.

...

Paradox may be distinguished from contradiction or tension through its emphasis on irresolvability: multiple yet incommensurable truths, or truth and its negation in a single proposition, or truths that

²⁵⁴ In response, see A. Lever, “The Politics of Paradox: A Response to Wendy Brown”, 7 *Constellations* (2000) 242.

undo even as they require each other. But paradox also signifies a doctrine or opinion that challenges received authority, goes against the doxa. In *Only Paradoxes to Offer*, a study of nineteenth-century French feminists, Joan Wallach Scott parlays this definition into a political formation: “Those who put into circulation a set of truths that challenge but don’t displace orthodox beliefs create a situation that loosely matches the technical definition of paradox.” Scott then suggests that the paradoxical utterances and strategies of the feminists she studied emerged as a consequence of arguing on behalf of women’s rights, and of women’s standing as individuals, in a discursive context in which both individuals and rights were relentlessly identified with masculinity. Thus, feminists were arguing for something that could not be procured without simultaneously demanding a transformation in the nature of what they were arguing for, namely, the “rights of man” for women. This rendered paradox the structuring rather than contingent condition of their political claims.

Scott’s insight into nineteenth-century French feminism may be of help in understanding our own circumstances. First, the problem she identifies persists into the present, namely, that women’s struggle for rights occurs in the context of a specifically masculinist discourse of rights, a discourse that presumes an ontologically autonomous, self-sufficient, unencumbered subject. Women both require access to the existence of this fictional subject and are systematically excluded from it by the gendered terms of liberalism, thereby making our deployment of rights paradoxical. Second, moving beyond Scott’s focus, even as invocations of rights for a particular subject (e.g., women) on a particular issue (e.g., sexuality) in a particular domain (e.g., marriage), all of which have been historically excluded from the purview of rights, may work to politicize the standing of those subjects, issues, or domains, rights in liberalism also tend to depoliticize the conditions they articulate. Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way. Thus rights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that violation. Yet the absence of rights in these domains leaves fully intact these same conditions.

If these are the conditions under which rights emerge as paradoxical for women, as simultaneously politically essential and politically regressive, what are the possibilities for working these paradoxes in politically efficacious fashion? Unlike contradictions, which can be exploited, or mystification, which can be exposed, or disavowal, which can be forced into confrontation with itself, or even despair, which can be negated, the politics of paradox is very difficult to negotiate. Paradox appears endlessly selfcanceling, as a political condition of achievements perpetually undercut, a predicament of discourse in which every truth is crossed by a countertruth, and hence a state in which political strategizing itself is paralyzed.

... How might attention to paradox help formulate a political struggle for rights in which they are conceived neither as instruments nor as ends, but as articulating through their instantiation what equality and freedom might consist in that exceeds them? In other words, how might the paradoxical elements of the struggle for rights in an emancipatory context articulate a field of justice beyond “that which we cannot not want”? And what form of rights claims have the temerity to sacrifice an absolutist or naturalized status in order to carry this possibility?

DAVID KENNEDY, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: PART OF THE PROBLEM?

15 HARVARD HUM. RTS J. (2002) 101

...

II. A Short List of Pragmatic Worries and Polemical Charges

...

A. Human Rights Occupies the Field of Emancipatory Possibility

Hegemony as resource allocation. The claim here is that this institutional and political hegemony makes other valuable, often more valuable, emancipatory strategies less available. This argument is stronger, of course, when one can say something about what those alternatives are - or might be. But there may be something to the claim that human rights has so dominated the imaginative space of emancipation that alternatives can now only be thought, perhaps unhelpfully, as negations of what human rights asserts- passion to its reason, local to its global, etc. As a dominant and fashionable vocabulary for thinking about emancipation, human rights crowds out other ways of understanding harm and recompense. This is easiest to see when human rights attracts institutional energy and resources that would otherwise flow elsewhere. But this is not only a matter of scarce resources.

Hegemony as criticism. Human rights also occupies the field by implicit or explicit delegitimation of other emancipatory strategies. ... Where this is so, pursuing a human rights initiative or promoting the use of human rights vocabulary may have fully unintended negative consequences for other existing emancipatory projects. ...

Hegemony as distortion. To the extent emancipatory projects must be expressed in the vocabulary of "rights" to be heard, good policies that are not framed that way go unattended. This also distorts the way projects are imagined and framed for international consideration. For example, it is often asserted that the international human rights movement makes an end run around local institutions and strategies that would often be better - ethically, politically, philosophically, aesthetically. ... A "universal" idea of what counts as a problem and a solution snuffs out all sorts of promising local political and social initiatives to contest local conditions in other terms. But there are other lost vocabularies that are equally global - vocabularies of duty, of responsibility, of collective commitment. Encouraging people concerned about environmental harm to rethink their concerns as a human rights violation will have bad consequences if it would have turned out to be more animating, for example, to say there is a duty to work for the environment, rather than a right to a clean environment.

The "right to development" is a classic-and well known-example. Once concerns about global poverty are raised in these terms, energy and resources are drawn to developing a literature and an institutional practice at the international level of a particular sort. Efforts that cannot be articulated in these terms seem less legitimate, less practical, less worth the effort. ...

B. Human Rights Views the Problem and the Solution Too Narrowly

Narrow in many ways. People have made many different claims about the narrowness of human rights. Here are some: the human rights movement foregrounds harms done explicitly by *governments* to individuals or groups - leaving largely unaddressed and more legitimate by contrast harms brought about by governments indirectly or by private parties. Even when addressing private harms, human rights focuses attention on *public* remedies - explicit rights formalized and implemented by the state. One criticizes the *state* and seeks *public* law remedies, but leaves unattended or enhanced the powers and felt entitlements of private actors. ...

Insulating the economy. ... Human rights foregrounds problems of *participation* and *procedure*, at the expense of distribution, implicitly legitimating the existing distributions of wealth, status and power in societies once rights have been legislated, formal participation in government achieved, and institutional remedies for violations provided. ...

... [T]he imbalance between civil/political and social/economic rights is neither an accident of policies nor a matter that could be remedied by more intensive commitment. It is structural, to the philosophy of human rights, to the conditions of political possibility that make human rights an emancipatory strategy in the first place, to the institutional character of the movement, or to the ideology of its participants and supporters.

Foregrounding form. The strong attachment of the human rights movement to the legal formalization of rights and the establishment of legal machinery for their implementation makes the achievement of these forms an end in itself. ...

Backgrounding the background. The effects of a wide array of laws that do not explicitly condone violations but nevertheless affect the incidence of violation in a society are left unattended. ...

C. Human Rights Generalizes Too Much

Universal goods and evils. The vocabulary and institutional practice of human rights promotion propagates an unduly abstract idea about people, politics and society. A one-size-fits-all emancipatory practice underrecognizes and reduces the instance and possibility for particularity and variation. This claim is not that human rights are too “individualistic.” Rather, the claim is that the “person,” as well as the “group,” imagined and brought to life by human rights agitation is both abstract and general in ways that have bad consequences.

...

Becoming free only as an instance of the general. To come into understanding of oneself as an instance of a pre-existing general – “I am a ‘person with rights’” - exacts a cost, a loss of awareness of the unprecedented and plastic nature of experience, or a loss of a capacity to imagine and desire alternative futures. ...

Not just bad for victims. The articulation of concrete good and evil in abstract terms is not only limiting for victims. The human rights vocabulary makes us think of evil as a social machine, a theater of roles, in which people are “victims,” “violators,” and “bystanders.” At its most effective, human rights figures victims as passive and innocent, violators as deviant, and human rights professionals as heroic. Only the bystanders are figured in ambivalent or uncertain terms. ...

D. Human Rights Particularizes Too Much

Emancipating the “right holders.” The specific way human rights generalizes is to consolidate people into “identities” on the basis of which rights can be claimed. There are two issues here: a focus on *individuals* and a focus, whether for individuals or groups, on *right-holding identity*. The focus on individuals and people who come to think of themselves as individuals blunts articulation of a shared life. The focus on discrete and insular right holding identities blunts awareness of diversity, of the continuity of human experience, of overlapping identities. Together these tendencies inhibit expression of the experience of being part of a community.

...

* * *

A decade later, David Kennedy concluded, in “The International Human Rights Regime: Still Part of the Problem?”, in Rob Dickinson et al. (eds.), *Examining Critical Perspectives on Human Rights* (2012) 19 at 34, that:

Human rights is no longer the way forward – it focuses too longingly on the perfection of a politics already past its prime. Like constitutional orders before it, a new global governance regime will be imagined and built through collective hope, struggle, and disappointment. It took a long time to invent and civilize a national politics, to organize the world in nation states, and to subject them to one another’s ethical judgment. Building a national politics across the planet had

a strong emancipatory dimension – slaves, women, workers, peasants, colonial dominions obtained citizenship in relationship to the new institutional machinery of a national politics. We can see human rights as the apogee and epitaph for that politics. Building a new politics for a global society and a global economy will be every bit as difficult. Let us hope it does not take as long; and does not require as much violence in order to be born.

**PAUL O'CONNELL, ON THE HUMAN RIGHTS QUESTION
40 HUM. RTS. Q (2018) 975**

III. Critiques of Rights

...

A. Critical Legal Studies and the Critique of Rights

In the early 1980s, the Critical Legal Studies (CLS) movement engaged in a sustained critique of the concept of rights. Some of the key aspects of the various CLS critiques were that rights, and rights talk, tended: (i) to insulate and valorize subordination in the private sphere; (ii) to legitimate, perpetuate, and conceal greater injustice than they addressed; and (iii) that the language of rights tended to be atomistic and to alienate people from one another. A further, central element of the CLS critique was that human rights, as with all legal discourse, were inherently indeterminate. All of this stemmed from a "loss of faith in rights" on the part of sections of the American left.

...

B. The Critique of Rights Today

... [In the early 2000s] a new wave of human rights critiques emerged. One prominent account was articulated by David Kennedy. ...

...

Similar misgivings about human rights have been expressed by ... Martti Koskenniemi. ... With Kennedy and Koskenniemi we have a restatement of key elements of the earlier CLS critique, namely that rights are indeterminate and do not touch the real, material causes of injustice and inequality. From Wendy Brown, and others, we also get a restatement of the idea that human rights are problematic because they entrench forms of individuality and subjectivity which, on balance, tend to sustain the status quo. Likewise, Žižek and others argue that the language of human rights mainly provides an ideological apologia for Western imperial interventions around the world. In this way, "human rights practice essentially results in both the reproduction and strengthening of the very state-governing apparatuses it confronts, and as a result ultimately undermines its own aims." From all of this, it follows that movements for fundamental social change should be skeptical of and eschew the language of human rights, and instead should focus on other emancipatory discourses.

C. The Limits of Critique

The first thing that needs to be said about these critical accounts of human rights is that they raise crucially important and valid critiques of dominant liberal discourses of human rights. With that said, these critiques also fall short in several important ways. Three of the main shortcomings in these critiques are: (i) the overemphasis on the dominant narrative of human rights; (ii) the idealistic nature of the critiques (in the sense that they are, in the first instance, an engagement with and critique of ideas and concepts in the abstract); and (iii) the divorce of this critique from concrete struggles. Each of these shortcomings, more pronounced in some cases than others, reduces these critical accounts to a sort of radical quietism; a stance which decries the extant order, without conceiving or countenancing any meaningful alternative.

The indeterminacy critique, highlighting the atomistic forms of individuality at the heart of mainstream accounts of human rights and the cynical deployment of human rights to justify imperialist depredations, are all valid. The problem, however, is when these legitimate critiques of

liberal/dominant rights discourses evolve into a rejection of rights as such. It is undeniable, as Blackburn puts it, that human rights are cynically deployed for “great-power ends,” that liberal rights discourse entrenches a truncated form of individuality, and that rights are not the neutral, determinate rules that liberal legalism pretends they are. All of this, however, merely demonstrates the inaccuracy of the self-perception of dominant human rights discourses, and says little or nothing about how movements striving for fundamental social change can or should engage with the language and concept of rights as such.

Tied to this one-sidedness is the idealistic character of these rights critiques. ... Anthony Chase highlighted this shortcoming ...:

Nothing is more striking about the literary criticism approach than the unwillingness or inability of its practitioners to provide concrete historical and sociological studies of instances where the “self-confidence” or “self-activity” of radical social movements ... have actually been “crushed”, not by arduous working conditions or impoverization, not by the inability of civil society to impose civil rights and liberties against state power, not by police surveillance or death squads, not by famine or inadequate public health services, not by the dull necessity of economic reproduction, not by armed invasions, prison and torture cells, or “surgical air strikes” against villages and cities, but, rather extraordinarily, by the central target of CLS critique: appellate judicial reasoning in the liberal mode. The enormous emphasis upon and exclusive focus given to the rhetoric of judges in (apparently) maintaining empires, civilizations, and the fabric of societies, has made CLS a unique form of social theory (if one may call it that), in existence hardly anywhere outside of the cloistered legal academy.

... Critiques of rights in the broad CLS tradition routinely lose sight of this, and become trapped in a hall of mirrors where the enemy is a discourse, rather than the material relationships that structure discourses one way or another.

Finally, then, these critiques are lacking because they are divorced from concrete struggles and the ideas which animate such struggles. So, for example, it is true to say that rights can have myriad different meanings in the abstract, but in concrete cases they are given a specific meaning. This meaning is fought over and determined in and through social struggles, which sometimes make their way to the rarefied environs of the courtroom, but are not limited to this. The critique of rights, in the abstract, loses much of its veracity and efficacy when the messiness of political and social struggles have to be accounted for. ...

...

V. Conclusion

Critiques of human rights highlight crucial shortcomings in the dominant, liberal discourse. However, shifting the frame of reference and situating discussions of human rights within a Marxist tradition that emphasizes contradiction, social struggle, and the need to transcend the system which structurally undermines human flourishing, opens a way of understanding human rights that can support movements for radical social change. Of course, the assertion of human rights will not bring about fundamental transformation in and of itself, but they can play an important role in broader struggles to do that. ...

**FRÉDÉRIC MÉGRET, THE ANTHROPOCENTRISM OF HUMAN RIGHTS
VINCENT CHAUX, FRÉDÉRIC MÉGRET AND USHA NATARAJAN (EDS.), THE ROUTLEDGE
HANDBOOK OF INTERNATIONAL LAW AND ANTHROPOCENTRISM (2023) 35**

Introduction

... By anthropocentric I mean a philosophy of centring the human, based on the idea that humans have primary moral standing and are the only measure of justice. That human rights are

anthropocentric may strike one as precisely the point. After all, human rights are the rights of humans and, therefore, how could they be anything other than anthropocentric?

...

... I make the case that the human rights project is, in fact, more deeply, centrally, and problematically anthropocentric than the focus on intra-human justice suggests; that it is, in fact, only exclusively focused on intra-human justice because it has fundamentally bracketed and excluded questions of relations to other animal species and, more broadly, to the environment. I suggest that, by contrast, much can be gained from a reading of human rights as not so much a political arrangement *inter se* (as suggested, for example, by the anthropocentric focus of the language of social contract) but at least in part as much as a political arrangement from which nature, including non-human animals, is specifically and deliberately – if implicitly and covertly – excluded.

... I will argue that there could not be a ‘human’ in international human rights law without the human encounter with its radical (animal, natural) other.

...

The key question ... is not so much whether non-human animals or nature should have rights, but what it might mean for the human rights project itself if they were to have such rights. In turn, that debate hinges on the degree to which protections of non-human animals or nature should be anthropocentric or ecocentric. Closely related is the notion of whether the foundation for rights protection is deontological or utilitarian and, ultimately, what the basis for humans having rights is in the first place. ...

...

Defining the Human Rights Project in Opposition to Nature

...

First, the human rights project is premised on a fundamental intuition about the distinction of the human subject from nature and not simply, as is conventionally understood, about the equality of humans between themselves. ... [T]he modern discourse of human rights was in fact preceded by eighteenth-century efforts to distinguish humanity from both God and animals The claim that only humans have rights is, in turn, tied to ideas about the distinctiveness and, indeed, the superiority of human animals. ...

Second, the human rights project, having proclaimed the fundamental distinguishability of humans from nature doubles down on that intuition by defining freedom as the fundamental right in a liberal order. Freedom involves the right to pursue one’s uniquely human goals, to self-determine unhindered. ...

Lurking within that familiar political definition of freedom, however, is an underlying claim that does not even need to be mentioned, namely that there are no worthwhile non-human limitations to freedom – that humans, in short, should have complete freedom from nature itself. Human freedom is the freedom to continuously emancipate oneself from nature and, in the process, further cement one’s humanity as fundamentally distinct from nature. ...

Third and logically, claims about human rights quickly lead to claims of dominion over nature as the natural consequence of freedom from nature. Nature does not have dominion over itself. ...

A fortiori, this means that humans can engage in killing non-human animals. Just as the end of society is self-preservation, killing ‘wild savage beasts’ such as lions and tigers amidst which ‘men can have no society nor security’ (Locke) is fundamental to human freedom. More fundamentally, this means that humanity can ‘remake the world’ in its image

...

A Crisis of Humanism?

... [T]he model on which ideas of human rights and the legal institutional machinery of international human rights law are premised has been subjected to a triple crisis of Western modernity. ...

First, a relative normalisation of ‘humanity’. If the shiny specificity of human rights was based on ideas about the incommensurability of the human to other living and inanimate categories and a sense of ‘human exceptionalism’, that myth has been deeply challenged. ...

...

The second crisis involves a major rediscovery in the West of the vulnerability of humans to nature, following centuries of an inflated notion of human dominion over it. Amidst increasing panic about global ecological catastrophe, resource depletion, and even the possibility of human extinction, an overarching sense of doom is projected. ...

...

Third, a late modern disenchantment with humanity. The Holocaust proved beyond doubt humans’ cruelty to humans, but also that cruelty’s specific enabling at the heart of modernity. In a sense, moreover, that failed promise of modernity had already long been the ordinary experience of victims of slavery or colonisation. ... [C]limate change and the emergence of the Anthropocene, by suggesting both the finitude of planetary resources and the ultimately self-destructive nature of human freedom alongside capitalism’s deep complicity in racism, may precipitate an even deeper crisis of Western modernity. Where the Holocaust could be dismissed as a perversion of modernity, the colossal harm wreaked by the pursuit of material accumulation arises in a context where modernity is working exactly as it was supposed to.

...

The Problem of Integration with the Human Rights Project

...

The dominant thinking within the human rights community seems to be one of benevolent indifference or agnosticism about the rights of non-humans, without a sense of the intellectual crisis that such extension should evoke or thinking about what an overall post-humanist rights project might mean for the classical human rights project. At worst, the siloed conception to rights may lead to a kind of separatism wherein the internal integrity of the human rights project is not challenged but merely leads to a deferral of much-needed critical synthesis. What is currently lacking are theories that would integrate both human rights, animal rights, and nature rights. It seems as if the latter two have been deployed as counter-fires to the first but with little recognition of how they might have to cede to or override each other, leaving the impression of a disjointed patchwork that skirts some of the difficult questions.

One can wonder, in particular, whether proclamations of rights of non-humans alone can offset the hegemonic propensities of an anthropocentric conception of human rights. Although the image of a triangle between human animal, non-human animal, and nature might give the impression that the three are equal poles, in truth by far the more ambitious pole if one is willing to let go of the tyranny of the anthropocentric mindset is the biocentric one (focusing on nature), in that it stands to encompass others into a theory of all beings. Non-human animal rights, particularly those traditions focusing on mammals and sentient animals, are extremely wedded to a certain view of their proximity to human-ness. Only rights of nature potentially offer a radical and holistic decentring from not just the human subject, but any sense that the particular qualities of humans (distributed and found in other near-species as they may be) ought to be the sole measure of rights.

...

Conclusion

...

In practise, some kind of reconciliation of bio-centric and anthro-centric theories of rights is unavoidable, perhaps one that emphasises their eco-centric commonalities from some kind of meta-normative standpoint. Whatever non-anthropocentric line of argument may be available to challenge environmental disruptions, there will often be an anthropocentric one as well. ...

The possibility remains, it is true, that some harms are either not captured by human rights violations or at such a level of generality (e.g., global warming) as to create insolvable problems of juridical standing and of collective action. Deep ecological philosophies of rights at least caution against the

temptation of technological quick fixes (e.g., geoengineering) for the exclusive benefit of humans and more generally about the continuing value of that which is beyond humans. ...

Still, that environmental degradation and animal cruelty are simply another facet of ‘man’s inhumanity to man’ is hard to resist as a conclusion. It calls into question the very ‘colonial matrix’ of modernity as it has expressed both in relation to nature and the dispossessed. It suggests that the search for environmental harmony may paradoxically be a much more agonistic process than bland UN appeals to the compatibility of human rights and the environment suggest (‘we are all in this together’), one deeply implicated in class, gender, race, and colonial struggles. And it suggests a re-energising of the human rights project in conditions of global environmental degradation

Finally, although much of the emphasis on nature and non-human animals is on how the human is called upon to continuously reframe the rights of both, it is important to note the extent to which both then retroact on the very intellectual project of humanity

... [N]on-anthropocentric conceptions of human rights might reinstate a sense that Humanity rather than the traditional individual human subjects of rights is the appropriate framework for conceptualising inter-realm relations – indeed, that the focus on individuals is what has led human rights into some of the dead ends from which global environmental degradation is born. Instead of a self-knowing, self-referring, and self-empowering Humanity, the move to nature and to a lesser extent non-human animal rights prompts a renewed framing of the human species’ destiny and, in fact, an embrace of human diversity as it expresses itself in a pluralist patchwork of conceptions of nature and legacies of differentiated responsibilities towards it.

Whereas modernity, imperfectly universalised among others through the international law of human rights, emphasised an untrammelled right to frame nature in one’s image, the Anthropocene may yet highlight conditions in which a wounded humanity’s role is framed not so much by itself than by the obligations imposed upon it by its immersion into forms of existence beyond it and how those stand to be affected by continuing inequities between humans. ...

The proclamation of non-human rights might thus help spell out anew the specificity of the human rights project. Indeed, projects of non-human rights do not give up on a sense of human specificity; they arguably merely reframe it, except as a specificity that does not cut humans from the world through a relationship of dominion as much as one that reinscribes nature within the human and the human within nature. In that respect, not so much ecocentrism itself, but the ecocentric critique of rights and, as the case may be, the rights’ reception of that critique could be in the best tradition of critiques of rights that have, since at least Marx and extending to contemporary feminist and communitarian thinkers, underscored the poverty of liberal conceptions of rights framed around the atomistic and desocialised nature of the human.

LORENZO COTULA, BETWEEN HOPE AND CRITIQUE: HUMAN RIGHTS, SOCIAL JUSTICE AND RE-IMAGINING INTERNATIONAL LAW FROM THE BOTTOM UP
48 GA. J. INT’L & COMP. L. (2020) 473

This Article reflects on the place of human rights, particularly international human rights law, in strategies to advance social justice. It argues that, while some critique takes aim at an encompassing human rights “project,” the contested nature of human rights calls for more granular analyses that consider the diverse constellations of actors, agendas, arenas, and approaches connecting human rights to social justice. And while much public debate has focused on institutionalized human rights actors and frameworks, the article identifies human rights’ primary emancipatory promise in the agency of the social actors— indigenous peoples, agrarian movements, trade unions, non-governmental organizations (NGOs), grassroots groups—that have appropriated and in some cases reconfigured human rights from the bottom up.

Examples include international litigation to validate new interpretations of long-recognized rights; public campaigning for new international instruments to shift the contours of human rights; and invoking internationally recognized rights to change public discourses in local to global policy arenas. This recentring of the discussion around how social actors mobilize internationally recognized human rights is part of a wider shift in the way international law is conceived of, not just as a practice located in the global centers of international diplomacy, but as a phenomenon that is both experienced and to some extent shaped at the grassroots as well.

...

... [The article examines] two case studies of “reactive” and “constitutive” forms of rights-claiming to distil qualitative insights on the place of human rights in social justice strategies. ...

The first case study ... concerns the “reactive” use of human rights in indigenous peoples’ struggles to challenge the award of commercial natural resource concessions in their ancestral territories. This case study relies particularly heavily on human rights litigation and jurisprudential developments that occurred within the regional human rights systems of Africa and the Americas. The second case study considers the use of human rights in “constitutive” strategies to transform the economic paradigm that underpins the global food system. This part focuses on the longstanding and ultimately successful advocacy of international agrarian movements for the adoption, by the United Nations General Assembly, of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas [General Assembly Res. 73/165 (2018)].

...

V. Discussion

A. Human Rights: Intellectual Histories, Legal Configurations, and Social Practices

... Both [case studies] reflect significant “wins,” whether in the form of public interest litigation or international (soft) law making. Yet both also beg difficult questions about the real scale of the advances made, and whether these advances can ultimately transform socioeconomic relations.

The issue is not just that it is difficult for social actors to secure international judgments or declarations, or to properly enforce or implement them once they have been obtained, particularly in the face of powerful vested interests. The more probing question is whether even a properly implemented ruling or instrument would meaningfully reshape socio-economic ordering. Taken alone, a few judgments do not reverse the long history of mass dispossession affecting indigenous lands, and an international soft-law instrument does not alter entrenched patterns of land ownership, the international protection of intellectual property rights affecting the governance of seed systems, or the structure of agricultural value chains. By resorting to the instruments of positive law, social actors must translate their demands into conceptual categories—such as the right to property—that are associated with dominant economic and political organization.

In harnessing such hegemonic concepts in counter-hegemonic terms, and in locating social justice advocacy within institutionalized human rights processes, strategies to “juridify” inherently political disputes must operate “within the system.” They may entail advocated-for and even actually observed reforms, as illustrated by the jurisprudential reconfiguration of the right to property in the light of legal categories that resonate with indigenous conceptions. But they do not necessarily challenge the foundational parameters of the system. Indeed, the mobilizing and even the reconfiguring ultimately rest on the acceptance of the very state-centric international system of control over natural resources and development pathways that is instrumental to advancing commercial modes of production and to the dispossession of peasants and indigenous peoples in many parts of the world. While the two case studies illustrate bottom-up agency by indigenous and agrarian movements, states played important roles in both, whether as bearers of human rights obligations and respondents in human rights litigation, or as negotiators and adopters of international soft law.

...

... [T]he use of internationally recognized human rights in discursive strategies and social processes can transcend the juristic limitations of the legal concepts at play. ...

[W]here activists appropriate human rights to catalyse public mobilization, the scope of the resulting action is not necessarily restricted to the perimeter delineated by jurisprudential interpretations of international human rights law. The experience of the Sawhoyamaya community occupying its traditional lands now under commercial operations exemplifies how social actors can shift registers—moving from legal proceedings to direct action—in different times and places, while also using the human rights register to legitimize land occupations that would otherwise contravene positive law.

In these regards, any assessments of the emancipatory potential of human rights in social justice struggles cannot be limited to a discussion of the ways in which those rights have been construed by drafters, tribunals and jurists, or of the intellectual origins and cultural matrices that have affected the historical development of human rights law. While legal experts will be primarily concerned with the techniques of legal drafting and interpretation, emancipatory potential is a function of a wider range of socio-political as well as juridical variables.

Therefore, those assessments would also need to consider how human rights are appropriated in socio-political arenas, where discursive practices may create ruptures with established ideational matrices and departures from the traditional canons of juristic interpretation. Considering these practices would require broadening the methods of inquiry to pursue a more grounded understanding of rights in their social context. To different extents and in different ways, both the indigenous rights jurisprudence and the United Nations Declaration on the Rights of Peasants indicate that this “activist” use of human rights can ultimately sustain evolutions in normative configurations, via jurisprudential interpretations and international (soft) law making, thereby intersecting with, and cross-fertilizing, the traditional purview of doctrinal analyses.

In these respects, the two case studies call for expanding the horizons of current debates about the relation between human rights and social justice. While public debates have often focused on the work of mainstream human rights organizations based in the global North, both examples highlight the prominent role that social movements that are at least partly located in the global South—including actors that do not primarily identify themselves as human rights organizations—have played in developing distinctive modes to invoke and reshape human rights in pursuit of social justice.

B. From Human Rights Frameworks to Rights-Claiming as a Practice of Contestation

...

This harnessing of human rights by indigenous and agrarian movements illustrates the need to re-center the debates about the emancipatory potential of human rights from institutionalized human rights actors and frameworks to rights-claiming as a practice of contestation. In this perspective, invoking human rights may constitute a channel for social actors to articulate a rupture with aspects of socio-political ordering, as much as a juridical avenue for producing legally enforceable outcomes to change a given material situation. Human rights are therefore viewed as both vehicles and outcomes of political struggle, and their development is, at least in part, the story of how social actors—including groups that do not primarily define their institutional mandates in human rights terms—have appropriated rights language and instruments to advance their agendas.

This perspective outlines a different set of dimensions in the practice of human rights, one where legal forms are embedded in social processes and where human rights are advanced, at least in part, through the vision, resolve and action of social groups. In addition, the import and effectiveness of rights-claiming are to be assessed not only in terms of judicial, legislative, or even material outcomes, but also in relation to the ways in which advocacy can use human rights to legitimize counter-hegemonic worldviews and catalyse collective action.

These considerations apply in different ways to reactive and constitutive strategies, and failure to disaggregate the discussion can lead to analytical confusion. In reactive modes, the main concern may be about addressing a specific situation or pattern of human rights abuse. In many situations, this reactive rights-claiming will reflect a principled position that fundamentally espouses the framing of the human rights being invoked. But recourse to human rights in reactive mode can also be instrumental and even opportunistic. ...

...

In constitutive modes, on the other hand, recourse to human rights may have more foundational and normative connotations, there may be more space for more explicit ruptures with prevailing juridical arrangements. This does not necessarily mean that the substantive social justice demands are themselves qualitatively more radical than in reactive modes, and if the advocacy translates into formalised inter-governmental processes it may have to come to terms with the compromises that tend to characterise international negotiations and law making. But when articulating social justice demands in constitutive human rights modes, advocates are less constrained by established human rights forms, and they may enjoy greater latitude in aligning human rights concepts with their own social justice goals.

C. Rights-Claiming in Contested Socio-Political Terrains

...

Critique is the engine of change, so it is essential that social justice (and human rights) thinkers and practitioners continuously interrogate their assumptions and approaches and, where necessary, reorient them accordingly. Critiques of rights both old and new have exposed human rights' limitations— whether structural or contingent—in promoting more just socio-economic relations. They have established a challenge for advocates to develop ever more ambitious and effective human rights practices, and to explore alternative or complementary strategies to comprehensively address social justice challenges. At the same time, there is a need to broaden current debates to more plural perspectives that recognize the diversity of human rights actors, agendas, arenas and approaches, and to open spaces for more fully engaging with the practices of actors located outside the human rights mainstream. By seeking to understand how diverse social actors have appropriated and reimagined human rights from the bottom up, it might become possible to ask different questions about whether and how human rights can sustain emancipatory action.

NOTE

A number of different understandings about rights — their derivation, nature, content and consequences — appear in the readings above. Consider the following binaries, with the characterizations on the left reflecting natural rights-type approaches, and those on the right more flexible, policy-oriented approaches:

inalienable	socially constructed
absolute	qualified, contingent, context dependent
universal	particular, culturally specific
eternal, ahistorical	historicist, evolving, open to change
based on human dignity	based on utility, power

QUESTIONS

1. With respect to David Kennedy's arguments, consider:

(a) What illustrations could you offer of situations where reliance on rights rhetoric to advance popular claims crowded out other 'emancipatory vocabularies' and strategies — for example, mass political action — that could possibly or even likely have achieved more? Consider, for example, earlier materials examining the struggles for 'women's rights', the arguments against torture, and arguments in favour of economic/social rights like health care or housing. Is mass political action — electoral campaigns, marches by protestors to a capital city, boycotts — necessarily independent of rights rhetoric embedded in such action?

(b) Suppose that a human rights advocate argued to a minister of education in a developing country that giving schoolgirls equal educational opportunities would improve talent, energy, productivity and the level of economic well-being within the family and the country — that is, benefits will far exceed costs. Is the 'hegemony' of rights rhetoric apt to block such an argument? Could both modes of argument be used together? What of using simultaneously several different modes of argument — utilitarian, fairness-based, rights-based — with respect to environmental degradation?

(c) Do this book's earlier materials support the author's argument that human rights directs so much attention to the public sector (that is, the state as the only identified violator of human rights in the conventions and in human rights discourse) that many violations occurring in the non-state sector (employment discrimination, family violence) are apt to remain hidden and untouched?

(d) The author several times characterizes human rights as claims and arguments based on reason, whereas other emancipatory languages and strategies rely on faith and passion. Do you agree with this distinction, which tends to characterize 'rights' as cerebral and abstract, while other languages/strategies are more basic, emotional, appealing, stimulating to people?

B. DUTY-BASED SOCIAL ORDERS

1. Duties

While most human rights treaties acknowledge that individuals have duties as well as rights, the former are generally not spelled out and have been given relatively little attention. But recent scholarship presents a different picture. According to Mila Versteeg, Adam Chilton, and Erensu Altan, in ‘Constitutional Duties’, 72 *Am. J. Comp. L.* (2024) 685, roughly two-thirds of national constitutions now recognize duties and there is widespread public support for their inclusion. They caution, however, that countries with more duties often have worse human rights records.

The following readings describe and analyse duty-oriented, rather than rights-oriented, social ordering through law and cultural tradition. Robert Cover comments on the legal culture of Judaism, which stresses obligations imposed by God rather than rights. He suggests historical reasons why Western states and Judaism developed in these different ways. Jomo Kenyatta describes aspects of the education of the young in the Gikuyu people in Kenya, particularly the inculcation of elements of social obligations and duty. Finally, Christopher Roberts recounts Mahatma Gandhi’s emphasis on duties rather than rights. Although the cultural and religious contexts and the content of the duties referred to are radically different in these readings, they suggest important consequences of an orientation towards duty/obligation and the gap between such an orientation and the liberal political culture that influenced the human rights regime.

Note that the duties/obligations referred to in these readings are *not* the same as duties within a *scheme of rights* that correlate to the described rights. For example, the individual’s basic right to be free from torture imposes a correlative (corresponding) duty on the state not to torture. The following readings talk of duties imposed on *individuals* rather than on the state or some other collective entity. That is, they are not correlative duties to others’ rights, but imposed on the individual from the outset. Article 29(1) of the UDHR offers an analogy to such use of duties, as does the preamble to the ICCPR. But explicit language of individual duty to other individuals (other than the implied, traditional correlative duties), to society, or to the state in the universal human rights system is rare. A closer analogy to the present readings, particularly the excerpts from Kenyatta, is provided by the African Charter on Human and Peoples’ Rights, examined at Sec. B3, below.

**ROBERT COVER, OBLIGATION: A JEWISH JURISPRUDENCE OF THE SOCIAL ORDER
5 J. OF L. AND RELIG. (1987) 65**

I. Fundamental Words

Every legal culture has its fundamental words. When we define our subject this weekend as human rights, we also locate ourselves in a normative universe at a particular place. The word ‘rights’ is a highly evocative one for those of us who have grown up in the post-enlightenment secular society of the West. ...

Judaism is, itself, a legal culture of great antiquity. It has hardly led a wholly autonomous existence these past three millennia. Yet, I suppose it can lay as much claim as any of the other great legal cultures to have an integrity to its basic categories. When I am asked to reflect upon Judaism and human rights, therefore, the first thought that comes to mind is that the categories are wrong. I do not mean, of course, that basic ideas of human dignity and worth are not powerfully expressed in the Jewish legal and literary traditions. Rather, I mean that because it is a legal tradition Judaism has its own categories for expressing through law the worth and dignity of each human being. And the categories are not closely analogous to ‘human rights’. The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s ‘rights’, is the word ‘mitzvah’ which literally means commandment but has a general meaning closer to ‘incumbent obligation’.

Before I begin an analysis of the differing implications of these two rather different key words, I should like to put the two words in a context — the contexts of their respective myths. For both of us these words are connected to fundamental stories and receive their force from those stories as much as from the denotative meaning of the words themselves. The story behind the term ‘rights’ is the story of social contract. The myth postulates free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security. The myth makes the collective arrangement the product of individual choice and thus secondary to the individual. ‘Rights’ are the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else. Rights are traded for collective security. But some rights are retained and, in some theories, some rights are inalienable. In any event the first and fundamental unit is the individual and ‘rights’ locate him as an individual separate and apart from every other individual.

I must stress that I do not mean to suggest that all or even most theories that are founded upon rights are ‘individualistic’ or ‘atomistic’. Nor would I suggest for a moment that with a starting point of ‘rights’ and social contract one must get to a certain end. Hobbes as well as Locke is part of this tradition. And, of course, so is Rousseau. Collective solutions as well as individualistic ones are possible but, it is the case that even the collective solutions are solutions which arrive at their destination by way of a theory which derives the authority of the collective from the individual. ...

The basic word of Judaism is obligation or mitzvah. It, too, is intrinsically bound up in a myth — the myth of Sinai. Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective — indeed, a corporate — experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments. In all Rabbinic and post Rabbinic embellishment upon the Biblical account of Sinai this event is the Code for all Law. All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice.

...
What have these stories to do with the ways in which the law languages of these respective legal cultures are spoken? Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a ‘Rights’ movement is started. Civil rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we ‘take rights seriously’ we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing. ...

Indeed, to be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community. A child does not become emancipated or ‘free’ when he or she reaches maturity. Nor does she/he become sui juris. No, the child becomes bar or bat mitzvah, literally one who is of the obligations. Traditionally, the parent at that time says a blessing. Blessed is He that has exonerated me from the punishment of this child. The primary legal distinction between Jew and non-Jew is that the non-Jew is only obligated to the 7 Noachide commandments ...

The Uses of Rights and Obligations

The Jewish legal system has evolved for the past 1900 years without a state and largely without much in the way of coercive powers to be exercised upon the adherents of the faith. I do not mean to idealize the situation. The Jewish communities over the millennia have wielded power. Communal sanctions of banning and shunning have been regularly and occasionally cruelly imposed on individuals or groups. Less frequently, but frequently enough, Jewish communities granted quasi-autonomy by gentile rulers, have used the power of the gentile state to discipline dissidents and deviants. Nonetheless, there remains a difference between wielding a power which draws on but also depends on pre-existing social solidarity, and, wielding one which depends on violence. ...

In a situation in which there is no centralized power and little in the way of coercive violence, it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual,

reciprocal obligation is necessary. The myth of divine commandment creates that web. ... It was a myth that created legitimacy for a radically diffuse and coordinate system of authority. But while it created room for the diffusion of authority it did not have a place for individualism. One might have independent and divergent understandings of the obligations imposed by God through his chosen people, but one could not have a world view which denied the obligations.

The jurisprudence of rights, on the other hand, has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories. Certainly, it may be argued, it has been essential to counterbalance the development of the state with a myth which a) establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security — i.e., one must tell a story about the State's utility or service to us, and b) potentially justifies individual and communal resistance to the Behemoth. It may be true as Bentham so aptly pointed out that natural rights may be used either apologetically or in revolutionary fashion, and there is nothing in the concept powerful enough analytically to constrain which use it shall be put to. Nevertheless, it is the case that natural right apologies are of a sort that in their articulation they limit the most far-reaching claims of the State, and the revolutionary ideology that can be generated is also of a sort which is particularly effective in countering organic statist claims.

Thus, there is a sense in which the ideology of rights has been a useful counter to the centrifugal forces of the western nation state while the ideology of mitzvot or obligation has been equally useful as a counter to the centripetal forces that have beset Judaism over the centuries.

...

... [T]he Maimonides system contrasts the normative world of mitzvot with the world of vanity — hebel. It seems that Maimonides, in this respect, as in so many others has hit the mark. A world centered upon obligation is not, really cannot be, an empty or vain world. Rights, as an organizing principle, are indifferent to the vanity of varying ends. But mitzvot because they so strongly bind and locate the individual must make a strong claim for the substantive content of that which they dictate. The system, if its content be vain, can hardly claim to be a system. The rights system is indifferent to ends and in its indifference can claim systemic coherence without making any strong claims about the fullness or vanity of the ends it permits.

...

JOMO KENYATTA, FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU (1965) 109

[These excerpts are taken from a description by Kenyatta, who later became the first post-colonial president of Kenya, of the Gikuyu people (often rendered from Swahili into English as 'Kikuyu') in that country.]

[The children] are also taught definitely at circumcision the theory, as it were, of respect to their parents and kinsfolk. Under all circumstances they must stay with them and share in their joys and sorrows. It will never do to leave them and go off to see the world whenever they take the notion, especially when their parents are in their old age. They must give them clothes, look after their garden, herd their cattle, sheep and goats, build their grain stores and houses. It thus becomes a part of their outlook on life that their parents shall not suffer want nor continue to labour strenuously in their old age while their children can lend a hand and do things to give them comfort.

...

The teaching of social obligations is again emphasised by the classification of age-groups to which we have already referred. This binds together those of the same status in ties of closest loyalty and devotion. Men circumcised at the same time stand in the very closest relationship to each other. When a man of the same age-group injures another it is a serious magico-religious offence. They are like blood brothers; they must not do any wrong to each other. It ranks with an injury done to a member of one's own family. The age-group (riika) is thus a powerful instrument for securing conformity with tribal usage. The selfish or reckless youth is taught by the opinion of his gang that it does not pay to incur displeasure. He will not be called to eat with the others when food is going. He may be put out

of their dances, fined, or even ostracised for a time. If he does not change his ways he will find his old companions have deserted him.

...

Owing to the strength and numbers of the social ties existing between members of the same family, clan and age-group, and between different families and clans through which the tribe is unified and solidified as one organic whole, the community can be mobilised very easily for corporate activity. House-building, cultivation, harvesting, digging trap-pits, putting up fences around cultivated fields, and building bridges, are usually done by the group; hence the Gikuyu saying: 'Kamoinge koyaga ndere', which means collective activities make heavy tasks easier. ...

...

The selfish or self-regarding man has no name or reputation in the Gikuyu community. An individualist is looked upon with suspicion and is given a nickname of mwebongia, one who works only for himself and is likely to end up as a wizard. He may lack assistance when he needs it. ...

In the Gikuyu community there is no really individual affair, for everything has a moral and social reference. The habit of corporate effort is but the other side of corporate ownership; and corporate responsibility is illustrated in corporate work no less than in corporate sacrifice and prayer.

...

**CHRISTOPHER N.J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS
(2014) 140**

...

... Nearly forty years before the UDHR was adopted, [Mahatma Gandhi] wrote that under British law, those living in dependencies "have never got and never can get their rights until they have performed their corresponding duties." For Gandhi, the path to rights – that is, rights to be invoked and relied on with full certainty – was through one's duties. He applied this philosophical and practical orientation to all types of political and social dilemmas. For example, when he spoke in 1921 to a gathering of laborers on strike in the Indian city of Madras about the rights they had to living wages, to education, and to the "same fresh water and fresh air as [their] employers," he also went to lengths to admonish the workers that they had corresponding duties and obligations that must be performed to effect such rights. What was essential in obtaining one's rights was, for Gandhi, to become an integral part of a broader system of human relationships. It was only through a relationship of mutual dependence that an individual could demand the rights that corresponded to the nature and strength of the relationship already formed. When in 1940 he wrote to H. G. Wells about his new book on the rights of man, Gandhi suggested that Wells would be better off thinking less about rights. "Begin with a charter of Duties of Man . . . and I promise the rights will follow as spring follows winter." And by 1946 he had virtually abandoned the quest for rights. ...

So in 1947 when the seventy-seven-year-old leader of the independence movement was asked to present his views on human rights for the UNESCO compendium, his response would have come as no surprise to any of his devotees. Gandhi's contribution was inseparable from his larger struggle against the institutions and practices of colonialism. ... While other contributors provided detailed and lengthy philosophical tomes, Gandhi's three-paragraph contribution captured in a few, short sentences the powers and illusions of human rights.

I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.

QUESTIONS

1. 'A duty-based social order seems inherently less subject to universalization (with respect to the duties imposed on individuals) than a rights-based social order (with respect to the rights attributed to individuals). That is, the content of duties (obligations toward elders, toward the community, toward God) seems to be very particular and bound to a given context, a product of a given religion or political or social culture or history, whereas individuals' rights seem to be more divorced from a particular context and can therefore be stated more abstractly.' Do you agree? Can you suggest any examples?
2. "Individual rights" necessarily imply equality among all rights holders, which is to say among all members of society. This in fact is what the contemporary human rights instruments declare. To the contrary, duties can be (and frequently are) defined so as to impose hierarchy, status, and discrimination in a given social order.' Do you agree? Can you suggest examples?
3. 'Different from a regime of rights, a regime of duties intrinsically exerts an inward, centripetal force. It draws individual duty-bearers into the society, connects them intricately with other individuals and the community in a variety of ways, blurs the separate identity of the individual from society, and leads to a more communal and collective structure of life.' Do you agree?
4. Note that Article 2(3) of the ICCPR requires states to provide all persons whose rights have been violated with 'an effective remedy', and to develop particularly the possibilities of 'judicial remedy'. Do rights imply a preference for or even require individual (judicial or other) remedies against the state, whereas a regime of individual duties is less likely to provide such remedies?

2. Duty Provisions of National Constitutions

In modern constitutions, as in human rights treaties, provisions conferring rights on individuals far outnumber those imposing duties. Nevertheless, many state constitutions in force in 2024 contain provisions expressing duties. Consider the following examples:

CHINA

Article 42: Citizens ... have the right as well as the duty to work.

Work is a matter of honour for every citizen who is able to work. ... The State encourages citizens to take part in voluntary labour. ...

...

Article 46: Citizens ... have the duty as well as the right to receive education.

...

Article 49: ... Both husband and wife have the duty to practise family planning.

...

Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents.

...

Article 52: It is the duty of citizens of the People's Republic of China to safeguard the unification of the country and the unity of all its nationalities.

ECUADOR

Article 69: To protect the rights of persons who are members of a family: ...

5. The State shall promote the joint responsibility of both mother and father and shall monitor fulfillment of the mutual duties and rights between mothers, fathers, and children.

Article 83: Ecuadorians have the following duties and obligations ...: ...

2. To not be lazy, not lie, not steal. ...

5. To respect human rights and to fight for their enforcement.

6. To respect the rights of nature, preserve a healthy environment and use natural resources rationally, sustainably and durably.

7. To promote public welfare and give precedence to general interests over individual interests, in line with the good way of living. ...

14. To respect and recognize ethnic, national, social, generational, and gender differences and sexual orientation and identity. ...

16. To help, feed, educate and raise one's children. ...

UGANDA

Objective XXIX: Duties of a citizen.

The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations; and, accordingly, it shall be the duty of every citizen—

- (a) to be patriotic and loyal to Uganda and to promote its well-being;
- (b) to engage in gainful work for the good of that citizen, the family and the common good and to contribute to national development;
- (c) to contribute to the well-being of the community where that citizen lives;
- (d) to promote responsible parenthood;
- (e) to foster national unity and live in harmony with others;
- (f) to promote democracy and the rule of law; ...

QUESTIONS

1. Are any of the preceding provisions inconsistent with international human rights law?
2. Would you support the inclusion in your own country's constitution of duties relating to work, environment, care of children and parents, and voting?

3. Rights and Duties in the African Charter

The African Charter on Human and Peoples' Rights was adopted in 1981, entered into force in 1986, and as of 2024 had been ratified by 54 of the African Union's 55 member states. The application of the Charter is examined in Chapter 11C below. The focus here is on those of its provisions that distinguish it from other international human rights treaties, especially its emphasis on African values and duties. It is also distinctive in recognizing a range of collective or peoples' rights, such as peoples' rights to 'economic, social and cultural development', 'to national and international peace and security', and 'to a generally satisfactory environment favourable to their development' (Articles 22-24).

In terms of African values, consider first the following provisions in the Preamble to the Charter:

The African States ... parties to the present convention ...,

...

Reaffirming the pledge they solemnly made in Article 2 of the [Charter of the Organization of African Unity] to eradicate all forms of colonialism from Africa ...;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

...

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

...

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination ...;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

...

Chapter I of Part I of the Charter lists the specific ‘human and peoples’ rights’. While many of the rights address the same themes as in the ICCPR, there are important language differences which can be seen by comparing, for example, Article 7 of the Charter on criminal procedure with Articles 14 and 15 of the ICCPR, or Article 13 of the Charter on political participation with Article 25 of the ICCPR. Similarly, permissible limitations are stated differently. Thus, Article 6 assures the right to liberty ‘except for reasons and conditions previously laid down by law’; Article 8 subjects freedom of conscience and religion ‘to law and order’; and Article 10 recognizes the right to free association ‘provided that [the individual] abides by the law’. Article 14 protects the right to property, but provides for ‘encroachments’ that differ from standard approaches.

Some provisions explicitly recall Africa’s experience with the slave trade and colonization. Thus, Article 20 states that:

...

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.

Article 12(5) responds to the expulsion of tens of thousands of Ugandan citizens of Asian descent by President Idi Amin in 1972. It prohibits the ‘mass expulsion of non-nationals’, defined as measures ‘aimed at national, racial, ethnic or religious groups’. The Charter has no provision for derogation of rights in situations of national emergency equivalent to Article 4 of the ICCPR.

The Charter includes an abbreviated list of economic and social rights in Articles 15-17. Unlike the ICESCR, no qualification is included in relation to progressive realization or available resources. But, for present purposes, our focus is on Chapter II of Part I which deals with ‘individual duties’.

References to ‘duties’ are not alien to human rights instruments. Consider Article 29 of the UDHR, the preambles to the UN Charter and the two Covenants, and the American Declaration of the Rights and Duties of Man. Nonetheless, the African Charter is the first human rights treaty, as opposed to a declaration, to include an enumeration of or to give forceful attention to individuals’ duties. In this respect, it goes well beyond the conventional notion that duties may be correlative to rights, such as the obvious duties of states that are correlative (corresponding) to individual rights — for example, states’ duties not to torture or to provide a structure for voting in political elections. The Charter also goes beyond correlative duties of individuals that many human rights instruments explicitly or implicitly impose — for example, an individual’s right to bodily security imposes a duty on other individuals not to invade that right. The Charter differs by defining duties that are not simply the ‘other side’ of individual rights, and that run from individuals to the state as well as to other groups and individuals. Hence the Charter directly raises the issues of universalism and cultural relativism that are addressed in Chapter 7.

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.
2. To serve his national community by placing his physical and intellectual abilities at its service.
3. Not to compromise the security of the State whose national or resident he is.
4. To preserve and strengthen social and national solidarity, particularly when the latter is strengthened.
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law.
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society.
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Consider the following analysis of duties and their relationships both to rights and to African tradition and culture.

MAKAU MUTUA, HUMAN RIGHTS AND THE AFRICAN FINGERPRINT
MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002) 71

...

... [M]uch of the criticism of the Charter has been directed at its inclusion of duties on individuals. ... This criticism ... should [lead us to] examine the concept of duty in precolonial African societies and demonstrate its validity in conceptualizing a unitary, integrated conception of human rights in which the extreme individualism of current human rights norms is tempered by the individual's obligation to the society.

Capturing the view of many Africans, B. Obinna Okere has written that the 'African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity.'...

...

In practical terms, this philosophy of the group-centered individual evolves through a series of carefully taught rights and responsibilities. At the root were structures of social and political organization, informed by gender and age, which served to enhance solidarity and ensure the existence of the community into perpetuity. ... Relationships, rights, and obligations flowed from these organizational structures, giving the community cohesion and viability. Certain obligations, such as the duty to defend the community and *its* territory, attached by virtue of birth and group membership. ...

...

Defense of the community, a state-type right exacted on those who came under its protection, was probably the most serious positive public obligation borne by young men. ... [M]ost individual duties attached at the family and kinship levels. ...

...

This conception, that of the individual as a moral being endowed with rights but also bounded by duties, proactively uniting his needs with the needs of others, was the quintessence of the formulation of rights in precolonial societies. It radically differs from the liberal conception of the individual as the state's primary antagonist. ... Moreover, it provides those concerned with the universal conception of human rights with a basis for imagining another dialectic: the harmonization of duties and rights. ... This African worldview, [Cobbah] writes, "is for all intents and purposes as valid as the European theories of individualism and the social contract." Any concept of human rights with pretensions of universality cannot avoid mediating between these two seemingly contradictory notions.

The Duty/Rights Conception

... [T]he African Charter is the first human rights document to articulate the concept [of duty] in any meaningful way. ...

...

Ironically, colonialism, though a divisive factor, created a sense of brotherhood or unity among different African nations within the same colonial state, because they saw themselves as common victims of an alien, racist, and oppressive structure. Nevertheless, as the fissures of the modern African state amply demonstrate, the unity born out of anticolonialism has not sufficed to create an enduring identity of nationhood in the context of the postcolonial state. ...

...

... While acknowledging that it is impossible to recapture and reinstitute precolonial forms of social and political organization, this chapter nonetheless asserts that Africa must partially look inward, to its precolonial past, for possible solutions. Certain ideals in precolonial African philosophy, particularly the conception of humanity, and the interface of rights and duties in a communal context as provided for in the African Charter, should form part of that process of reconstruction. ...

...

The series of explicit duties spelled out in articles 27 through 29 of the African Charter could be read as intended to recreate the bonds of the precolonial era among individuals and between individuals and the state. They represent a rejection of the individual "who is utterly free and utterly irresponsible and opposed to society." In a proper reflection of the nuanced nature of societal obligations in the precolonial era, the African Charter explicitly provides for two types of duties: direct and indirect. A direct duty is contained, for example, in article 29(4) of the Charter which requires the individual to "preserve and strengthen social and national solidarity, particularly when the latter is threatened." There is nothing inherently sinister about this provision; it merely repeats a duty formerly imposed on members of precolonial communities. If anything, there exists a heightened need today, more than at any other time in recent history, to fortify communal relations and defend national solidarity. ...

The African Charter provides an example of an indirect duty in article 27(2), which states that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This duty is in fact a limitation on the enjoyment of certain individual rights. It merely recognizes the practical reality that in African societies, as elsewhere in the world, individual rights are not absolute. Individuals are asked to reflect on how the exercise of their rights in certain circumstances might adversely affect other individuals or the community. ...

Duties are also grouped according to whether they are owed to individuals or to larger units such as the family, society, or the state. Parents, for example, are owed a duty of respect and maintenance by their children. Crippling economic problems do not allow African states to contemplate some of the programs of the welfare state. The care of the aged and needy falls squarely on family and community members. This requirement — a necessity today — has its roots in the past: it was unthinkable to abandon a parent or relative in need. ...

Some duties are owed by the individual to the state. These are not distinctive to African states; many of them are standard obligations that any modern state places on its citizens. ... Such duties are rights that the community or the state, defined as all persons within it, holds against the individual. ...

The duties that require the individual to strengthen and defend national independence, security, and the territorial integrity of the state are inspired by the continent's history of domination and occupation by outside powers over the centuries. The duties represent an extension of the principle of self-determination, used in the external sense, as a shield against foreign occupation. ... Likewise, the duty to place one's intellectual abilities at the service of the state is a legitimate state interest, for the "brain drain" has robbed Africa of massive intellect. In recognition of the need for the strength of diversity, rather than its power to divide, the Charter asks individuals to promote African unity, an especially critical role given arbitrary balkanization by the colonial powers and the ethnic animosities fostered within and between the imposed states.

... [T]he Charter also requires the state to protect the family, which it terms "the natural unit and basis of society," and the "custodian of morals and traditional values." There is an enormous potential for advocates of equality rights to be concerned that these provisions could be used to support the patriarchy and other repressive practices of precolonial social ordering. It is now generally accepted that one of the strikes against the precolonial regime was its strict separation of gender roles and, in many cases, the limitation on, or exclusion of, women from political participation. ...

However, these are not the practices that the Charter condones when it requires states to assist families as the "custodians of morals and traditional values." Such an interpretation would be a cynical misreading of the Charter. The reference is to those traditional values which enhanced the dignity of the individual and emphasized the dignity of motherhood and the importance of the female as the central link in the reproductive chain; women were highly valued as equals in the process of the regeneration of life. The Charter guarantees, unambiguously and without equivocation, the equal rights of women in its gender equality provision by requiring states to "eliminate every discrimination against women" and to protect women's rights in international human rights instruments." ...

... The most damaging criticism of the language of duties in Africa sees them as "little more than the formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples." However, critics who question the value of including duties in the Charter point only to the theoretical danger that states might capitalize on the duty concept to violate other guaranteed rights. The fear is frequently expressed that emphasis on duties may lead to the "tramping" of individual rights if the two are in opposition. ...

...

* * *

For all of the concerns expressed by commentators when the Charter was first adopted, the duties provisions have played a surprisingly minor role in practice, as explained by Rachel Murray, in *The African Charter on Human and Peoples' Rights: A Commentary* (2019) 576:

... [A]n interpretation of perhaps what one may have considered to be the crux of individual duties, namely that individuals, rather than the State, have responsibilities towards fellow human beings, one's family, community and the country in which one lives, [has] not been the focus of the African Commission's attention, nor yet, that of the African Court. It is possible that both the African Commission and Court and those litigating before them have shied away from advancing these duties, save those instances where a State has, unsuccessfully, attempted to use them to limit rights. ... It is a shame that the opportunity that the ACHPR offers in Articles 27–29 to influence a 'new direction in the thinking of human rights', has not been fully exploited. ...

...

While others have attempted to clarify the content of the provisions, suggesting that they can be divided into 'general duties' and 'special duties', or 'direct and

indirect' duties, or indeed that Article 27 'introduces the legal edifice relating to individual duties, as a general statement of the duties and the following Articles as providing an exhaustive enumeration and explanation of them', the fact remains that there has been little analysis from the African Commission and African Court which confirms or denies whether these specific duties are legal or simply moral.

One of the consequences of this relative silence on these provisions, beyond Article 27(2), is evidence of a lack of clarity among States at least as to what the duties actually entail. An analysis of the State reports under Article 62 reveal differing interpretations of the duties, and it has not gone unnoticed by the African Commission that some States have omitted them entirely from their reports. Indeed, Malila's analysis of the coverage of individual duties in State reports is insightful, citing a question from Lesotho that it would 'appreciate guidance of the African Commission ... on [Articles 27, 28 and 29] as we do not seem to comprehend exactly what is required of us'.

It has been argued that the duties are so vague as to be unenforceable. Further, even on the few occasions where obligations or recommendations have been addressed in specific instances to individuals and non-State actors, the African Commission has no means to enforce their implementation beyond inclusion in its resolutions, press releases and other statements.

...

... [T]he presumption is that such duties may be enforced at the domestic level and thereby 'their enshrinement in the African charter does not therefore place any additional burden on the individual'. As to whether they should be provided for in national legislation, Malila cautions against an obligation on States to 'replicate these duties in their domestic law', given that there is no express requirement in the ACHPR on them to do so.

QUESTIONS

1. How does the emphasis in Article 29 of the African Charter on 'harmony', 'cohesion', 'community', 'security', 'social and national solidarity', 'territorial integrity', 'positive African cultural values', the 'moral well-being of society' and 'African unity' fit with the relatively traditional human rights recognized earlier in the Charter?
2. Does Mutua's article (a) explain and seek to justify in terms of African history and culture the relevant provisions of the Charter, or (b) seek to reconcile those provisions with the human rights regime, or (c) both? Does he succeed in the second task? Does he suggest that the West and Africa should in some respects go their separate ways, or that Africa has indeed much to teach the West about the directions of its own rights-oriented thought?

4. Recent Debates over Duties and Responsibilities

Over the past two decades there has been a revival in the Global North of debates over rights and duties amid claims that the latter have been neglected, thereby impoverishing the former and facilitating the emergence of a deeply problematic culture of rights. These debates are different from the earlier examples explored in this Chapter. Ben Saul, in 'In the Shadow of Human Rights: Human

Duties, Obligations, and Responsibilities', 32 *Colum. Hum. Rts. L. Rev.* (2001) 565 gives a sense of some of the motivating concerns:

Over the past decade, critics ... have become concerned, even alarmed, by a supposed "imbalance between rights and responsibilities." ... [C]ommentators have argued that the discourse of human and civil rights has become "characterized by hyper-individualism, exaggerated absoluteness, and silence with respect to personal, civic, and collective responsibilities." A questionable explosion of individual rights has supposedly conspired to compromise the general welfare and the public good, overshadow corresponding human responsibilities, and impoverish political life. People no longer ask what they can do for their country, only what their country can do for them.

On this view, a "flight from individual responsibility" has produced an expectant citizenry that feels entitled to government services, without any sense of obligation to pay taxes, perform jury service, or undertake national service. Many irresponsible people, for example, depend blissfully on welfare--as if by choice rather than economic necessity. Rights consciousness has allegedly led to a surge of self-interested litigation, creating a moral culture of highly atomistic individuals motivated by advocacy; "a society driven by [responsibilities] ... promotes service, tolerance, compromise, and progress, whereas a society driven by [rights] ... is preoccupied with acquisition, confrontation, and advocacy."

The traditional response to such concerns has been that democratically elected governments are limited only by the need to respect human rights in their ability and entitlement to impose obligations, duties, or responsibilities upon the citizenry. Whereas international human rights standards are designed to hold governments to account for their inevitable failures to respect or ensure rights, there is no equivalent need for international standards to empower governments to impose duties. But this has not quieted the debate. What is surprising is that calls for a greater emphasis on duties have come from commentators across the political spectrum. The following excerpts provide a sampling:

(i) Samuel Moyn, *Reclaiming the Language of Duty in an Age of Human Rights*, ABC [Australian Broadcasting Corporation] Religion and Ethics portal, 30 Oct 2019:

Today ..., liberal emphasis on duties is a distant memory at every scale. Political theory lost track of the concept in the second half of the twentieth century. ... In the public sphere, duties are similarly absent. Neither liberals in their domestic projects, nor the Universal Declaration and subsequent international movements, have successfully offered powerful public visions of social interdependence, collective agency, or planetary responsibility.

Our age of rights, lacking a public language of duties, is an historical outlier. The consequences are significant. Human rights themselves wither when their advocates fail to cross the border into the language of duty; insofar as compliance with norms on paper is sought, the bearers of duties have to be identified and compelled to assume their burden.

...

But duties may have an even larger role to play than simply completing the circuit of rights fulfilment. ... Gandhi's cosmopolitan responsibility, ... might help to confront these global-scale menaces. ... [I]nternational law in particular beckons for duties corresponding to the human rights established by the last generation's work. Specifically, one might call for cosmopolitan responsibilities for the sake of the many to balance the transnational commercial freedoms that currently redound to the benefit of a few.

Another forgotten tradition asserts cosmopolitan duties of states ... [through] ... the proposition that rich states owe duties to the world's poor and the global commons. ...

Of course, it would be a grievous mistake to insist, as ... Gandhi apparently did, that enjoyment of rights ought to depend on assumption of duties first. And it is undeniable that the rhetoric of duties has often been deployed euphemistically by those whose true purpose is a return to tradition won by limiting the rights of others.

...

... [R]ejecting duty entirely means rejecting a public vocabulary that might save a range of values from continuing neglect, whether socioeconomic equality, global justice or environmental welfare.

Further, duties could matter precisely because many of our most intractable problems are global. ... Gandhi's call to prioritise duties reflected a self-conscious cosmopolitanism: duties are at the core of a worthy citizenship of the world. It is highly doubtful that human rights alone will address these public dilemmas in either theory or practice. In fact, they have already failed to do so.

...

The anxious sense that to legitimate talk of duty is to flirt with disaster – that, all things considered, it is best to stick exclusively to the vindication of hard-won rights – is understandable but indefensible. ...

... There is a growing realisation among activists that talking the talk of other people's rights may lead inexorably to experiences of solidarity that, in turn, affect how claims are made. A self-styled human-obligations movement ... would not only better capture some aspects of existing activism. It also would help dispel worries about its libertarian associations, particularly since northern activists have a continuing penchant for demoting economic and social rights and distributive justice

(ii) Nigel Biggar, *What's Wrong with Rights?* (2020) 334:

... [Those] of us in the rights-saturated West need to get beyond whatever it is that is tying our tongues over duty and virtue. Rights-talk is just not enough. It implies as much, of course, since legal rights must have correspondent legal duties. But legal right-holders are also subject to moral duties that determine how they should exercise their rights, and whether they should exercise them at all; and all legal duty-bearers need moral virtues that enable them to carry out their duties. ... [F]or too long we have suppressed [these ideas], acquiescing in the lazy notion that law suffices to structure our public relations and that morality can and should be left at home. But this is not true. We cannot out-source all responsibility for governing relations between citizens to the police, the courts, and penal institutions. ... [I]n addition to law and legal rights, we need common moral norms that civil social bodies own, promote, and enforce. For the sake of the plausibility of rights-talk, the prudence of rights, and the possibility of respecting them, we need to muster the courage to own and affirm duty and virtue in public [We need] a sustainable, morally realist form of modernity—one that recognises right before it asserts and multiplies rights.

(iii) Kathryn Sikkink, *The Hidden Face of Rights: Toward a Politics of Responsibilities* (2020) 1:

... We who believe in human rights need to begin talking and thinking explicitly about the politics and ethics of responsibility. A rights-and-responsibilities approach is a framework, not a recipe for action. It requires us to think strategically about the networked responsibilities of many state and non-state actors, including individuals, to work collectively to implement human rights. There are risks and discomforts in emphasizing responsibilities, but the risks of inaction and complacency are worse.

...

- To address environmental crises, it is necessary to emphasize not only our rights to a clean environment, but also the obligations of states, corporations, institutions, and individuals to protect the environment. ...
- To protect digital privacy and combat digital disinformation, we must demand that our government do more. But unless other organizations—especially corporations like Facebook and Google—take action, implementation will be radically incomplete. There is also a role for schools, universities, and individuals to step up digital training
- To strengthen our political system, it is not enough to stress our right to vote; we also need to practice our responsibility to vote and to help others vote. ...
- To confront economic inequality, it is necessary to stress both the economic rights of individuals to an adequate standard of living and the duties of corporations and individuals to pay taxes
- We need to protect our right to free speech and protest not only by exercising it, but also by practicing the responsibility not to drown out the speech of others.
- ... The state can and should use incentives or sanctions to compel responsibility, but these are costly and crude tools. The voluntary acceptance of mutual responsibilities by a variety of actors is the key to full implementation of rights. ...

(iv) United Kingdom Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights – consultation* (updated 12 July 2022), Chapter 3:

A ‘rights culture’ that displaces personal responsibility and the public interest

124) The international human rights framework recognises that not all rights are absolute and that an individual’s rights may need to be balanced, either against the rights of others or against the wider public interest. ...

125) The idea that rights come alongside duties and responsibilities is steeped in the UK tradition of liberty, but is also reflected in the qualifications in the [European Convention and the UDHR]. The increasing reliance on human rights claims over the years has, however, led to a culture of rights decoupled from our responsibilities as citizens, and a displacement of due consideration of the wider public interest.

126) Since 2000, human rights claims have been brought by many people who have themselves showed a flagrant disregard for the rights of others. We have seen, for example, the right to respect for a family and private life used to avoid deportation by foreign offenders who have committed serious crimes. The case against the UK on prisoner voting [the government introduced a blanket ban on

voting by those in prison] was originally brought by John Hirst, convicted of manslaughter for killing his landlady with an axe.... We have also seen the right to a family life used to challenge the separation of sexual partners in prison, and to challenge the refusal of all telephone contact and inter-prison visits between a couple who married in one prison but were later separated.

...

130) These claims were unsuccessful, but often the fact that they can be brought at public expense serves to undermine public confidence in the Human Rights Act. ...

131) Whilst human rights are universal, a Bill of Rights could require the courts to give greater consideration to the behaviour of claimants and the wider public interest when interpreting and balancing qualified rights. More broadly, our proposals can also set out more clearly the extent to which the behaviour of claimants is a factor that the courts take into account when deciding what sort of remedy, if any, is appropriate. This will ensure that claimants' responsibilities, and the rights of others, form a part of the process of making a claim based on the violation of a human right.

(v) InterAction Council, Universal Declaration of Human Responsibilities (1997):

[The Council is a group of former Presidents and Prime Ministers. They proposed that this declaration be adopted by the UN General Assembly, as the UDHR had been.]

Fundamental Principles for Humanity

Article 1

Every person ... has a responsibility to treat all people in a humane way.

Article 2

No person should lend support to any form of inhumane behavior, but all people have a responsibility to strive for the dignity and self-esteem of all others.

Article 3

No person, no group or organization, no state, no army or police stands above good and evil; all are subject to ethical standards. Everyone has a responsibility to promote good and to avoid evil in all things.

Article 4

All people, endowed with reason and conscience, must accept a responsibility to each

and all ... in a spirit of solidarity: What you do not wish to be done to yourself, do not do to others.

Non-Violence and Respect for Life

Article 5

Every person has a responsibility to respect life. ...

Article 6

Disputes between states, groups or individuals should be resolved without violence. ... Every

citizen and public official has a responsibility to act in a peaceful, non-violent way.

...

Justice and Solidarity

Article 8

Every person has a responsibility to behave with integrity, honesty and fairness.

...

Article 9

All people, given the necessary tools, have a responsibility to make serious efforts to overcome poverty, malnutrition, ignorance, and inequality. ...

Article 10

All people have a responsibility to develop their talents through diligent endeavor; they should have equal access to education and to meaningful work. Everyone should lend support to the needy, the disadvantaged, the disabled and to the victims of discrimination.

Article 11

All property and wealth must be used responsibly in accordance with justice and for the advancement of the human race. ...

...

(vi) Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016) 112:

The idea of fundamental duties owed to the State encounters misgivings. A first problem results from the fact that ... the assumption of fundamental duties in reality often constitutes a pretext for the State to limit fundamental rights. Secondly, there is a risk of circumvention: According to current law, limitations of international human rights must satisfy the requirements set out in treaties in accordance with the rule of law, and they must especially be based on a sufficient legal foundation and be proportionate. An undifferentiated invocation of “fundamental duties” risks circumventing precisely these limits on limitations of human rights set out in positive international law.

Thirdly and generally speaking, the assertion of fundamental duties vis-à-vis the State constitutes an attempt to provide additional legitimization of State power. ...

Finally, the conception of fundamental duties owed to the State as a corollary to fundamental rights is misleading at a basic level. It suggests that the State in turn has “fundamental rights” and “claims” vis-à-vis individuals. This is misguided, because the State is in a superior position in light of its instruments of power. It is not in need of protection like the individual. It is not an end in itself and does not enjoy any rights, only powers.

...

... Fundamental duties in the sense of hard legal obligations legally owed to the State are not a component of universal international law, nor should they be.

QUESTIONS

1. What understandings of duties emerge from these different analyses? Are the commentators talking only about a change of strategy or emphasis, or would some of the proposals bring fundamental change?
2. Moyn and Sikkink both emphasize the potential of a duties-based approach to rescue values such as 'socioeconomic equality, global justice, or environmental welfare' from neglect. How would this be transformative?
3. Is an emphasis on 'cosmopolitan responsibilities' just a way of acknowledging that because human rights obligations do not extend directly to corporate and other private actors, the only recourse available is to moral conceptions

Chapter 7. Conflict in Culture, Tradition and Practices: Challenges to Universalism

A. UNIVERSALISM AND CULTURAL RELATIVISM

The question of the ‘universal’ or ‘relative’ character of human rights has been a source of debate and contention from the outset. These divergent understandings of the nature of human rights have sometimes been cast as alternatives, as polar visions with no intermediate ground between them, and sometimes as allowing for a more complex view that understands some norms as universal and others as relative to context and culture. The generally antagonistic positions have borne a number of descriptions — for example, ‘absolute’ (‘universal’) as opposed to ‘contingent’ (‘relative’), or imposed (‘universal’) as opposed to self-determined (‘relative’) rights. The contest between these positions took on renewed vigour as the human rights regime slowly developed, and in important respects weakened, earlier more robust understandings of the scope of national sovereignty and of domestic jurisdiction. Indeed, significant links have developed over the decades between some of the claims associated with cultural relativism and claims of sovereign autonomy for a state to follow its own path.

Put simply, the partisans of universality claim that international human rights — like rights to equal protection, physical security, fair trials, free speech, freedom of religion and free association — are and must be the same everywhere. This claim applies at least to the rights’ general content, for advocates of the position that rights are universal of course recognize that many basic rights (such as the right to a fair criminal trial) allow for historically and culturally influenced forms of implementation or realization (i.e., states are not required to use the Anglo-American jury to assure a fair trial; states need not follow any one particular voting system to meet the requirement of a government that represents the will of the people).

Advocates of cultural relativism claim that (most, some) rights and rules about morality are encoded in and thus depend on cultural context. They often use the term ‘culture’ in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures. Hence notions of right and wrong, and moral rules based on them, necessarily differ throughout the world because the cultures in which they take root and inhere themselves differ. This relativist position can thus be understood simply to assert the empirical claim that the world contains an impressive diversity in views about right and wrong which is linked to the diverse underlying cultures.

But the strong relativist position goes beyond arguing that there is — as a matter of fact, empirically — an impressive diversity of rights and moralities. It attaches an important consequence to this diversity: that no transcendent or transcultural ideas of right can be found or agreed on, and hence that no culture or state (whether or not in the guise of enforcing international human rights) is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with the imposing culture. In this strong form, cultural relativism necessarily contradicts a basic premise of the human rights regime. Its core values are respect for diversity and the related local autonomy.

Mayanthi Fernando, in ‘Cultural Relativism’, *Oxford Bibliographies in Anthropology* (2013) gives an overview of the different forms of relativism:

In a 1580 essay called “On the Cannibals,” early Enlightenment thinker Michel de Montaigne posited that men are by nature ethnocentric and that they judge the customs and morals of other communities on the basis of their own particular customs and morals, which they take to be universally applicable. Montaigne’s essay foreshadowed the emergence in early 20th-century American anthropology of the principle of cultural relativism in a more robust and programmatic form, as a descriptive, methodological, epistemological, and prescriptive approach to human diversity. Franz Boas and his students,

especially Melville J. Herskovits, were at the forefront of this new development, one that became foundational to modern anthropology. Against the biological and racial determinism of the time, they held that cultures develop according to the particular circumstances of history rather than in a linear progression from “primitive” to “savage” to “civilized,” that culture (rather than race or biology) most affects social life and human behavior, and that culture shapes the way members of a particular cultural group think, act, perceive, and evaluate. This new theorization of the culture concept led to a multifaceted approach to studying human diversity called cultural relativism. Cultural relativism is an umbrella term that covers different attitudes, though it relies on a basic notion of emic coherence: Each culture works in its own way, and beliefs and practices that appear strange from the outside make sense when contextualized within their particular cultural framework. More specifically, descriptive relativism holds that cultures differ substantially from place to place. Methodological relativism holds that the ethnographer must set aside his or her own cultural norms in order to understand another culture and explain its worldview. Epistemological relativism holds that because our own culture so mediates our perceptions, it is often impossible to fully grasp another culture in an unmediated way. Prescriptive or moral relativism holds that because we are all formed in culture, there is no Archimedean point from which to evaluate objectively, and so we must not judge other cultures using our own cultural norms. Recently, cultural relativism has become a straw man term, defined pejoratively as the strongest form of moral relativism; namely, that we cannot make any kind of moral judgments at all regarding foreign cultural practices. At the turn of the 20th century, cultural relativism was a progressive anthropological theory and methodological practice that sought to valorize marginalized communities in an inequalitarian world. Now cultural relativism is criticized as doing precisely the opposite: allowing repressive and inequalitarian societies to hide behind the cloak of cultural difference.

On their face, human rights instruments (which in their treaty form impose legal obligations, and convert moral rules into legal rules) are surely on the ‘universalist’ side of this debate. The landmark instrument is the *Universal Declaration of Human Rights*, much of which has clearly become customary international law. The two Covenants, with states parties from all the world’s regions and covering a large percentage of the global population, also speak in universal terms: ‘everyone’ has the right to liberty, ‘all persons’ are entitled to equal protection, ‘no one’ shall be subjected to torture, ‘everyone’ has the right to an adequate standard of living. Neither in the definitions of rights nor in the limitation clauses (which permit states parties to restrict the enjoyment of rights because of public order, policy or health) does the text of these basic instruments make any explicit concession to cultural variation.

To the relativist, these instruments and their pretension to universality may suggest primarily the arrogance or ‘cultural imperialism’ of the West, given the West’s traditional urge — expressed, for example, in political ideology (liberalism) and in religious faith (Christianity) — to view its own forms and beliefs as universal, and to attempt to universalize them. Moreover, some relativists argue that the push to universalizing norms destroys the diversity of cultures and hence amounts to another path towards cultural homogenization in the modern world — itself a contradiction of the value of cultural survival stressed in, for example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR). But the debate between these two positions follows no simple route. It is open to a range of views and strategies.

During the Cold War, such debates (sometimes no more than highly politicized accusations and routine polemics) took place dominantly between the Communist world and its sympathizers on the one hand, and the Western democracies on the other. The Western democracies charged the Communist world with violating many basic rights, particularly those of a civil and political character. The latter replied both by charging the West with violations of the more important economic and

social rights, and by asserting that the political ideology of Communism pointed towards a different understanding of rights.

That particular debate died more-or-less together with the Soviet Union, though some of its themes survive in different form, such as in disagreements between China and the United States. Today the universal-relative debate takes place primarily across Global North-Global South lines, or in a religious (West-Islam) framework. It also includes non-state actors, such as indigenous peoples.

The principle that norms are universal, which permeates the main human rights instruments starting with the Universal Declaration, rests on a few basic postulates, beliefs and assumptions. Perhaps the fundamental one is equal human dignity. Denial of that principle, at least with respect to the regulation of action and behaviour, itself shatters universalism, without even reaching the divisive issues posed by cultural relativism. That denial has been a commonplace in world history, strikingly evident in the history of the twentieth century. Consider the following observations of a philosopher, Richard Rorty, in 'Human Rights, Rationality and Sentimentality', in Obrad Savić (ed.), *The Politics of Human Rights* (1999) 67, at 74:

... For most white people, until very recently, most Black people did not so count. For most Christians, up until the seventeenth century or so, most heathens did not so count. For the Nazis, Jews did not so count. For most males in countries in which the average annual income is under four thousand dollars, most females still do not so count. Whenever tribal and national rivalries become important, members of rival tribes and nations will not so count. Kant's account of the respect due to rational agents tells you that you should extend the respect you feel for people like yourself to all featherless bipeds. This is an excellent suggestion, a good formula for secularizing the Christian doctrine of the brotherhood of man. But it has never been backed up by an argument based on neutral premises, and it never will be. Outside the circle of post-Enlightenment European culture ... most people are simply unable to understand why membership in a biological species is supposed to suffice for membership in a moral community. This is not because they are insufficiently rational. It is, typically, because they live in a world in which it would be just too risky — indeed, would often be insanely dangerous — to let one's sense of moral community stretch beyond one's family, clan, or tribe.

To get whites to be nicer to Blacks, males to females, Serbs to Muslims, or straights to gays, to help our species link up into what Rabossi calls a 'planetary community' dominated by a culture of human rights, it is of no use whatever to say, with Kant: notice that what you have in common, your humanity, is more important than these trivial differences. For the people we are trying to convince will rejoin that they notice nothing of the sort. Such people are *morally* offended by the suggestion that they should treat someone who is not kin as if he were a brother. ... They are offended by the suggestion that they treat people whom they do not think of as human as if they were human. ...

... The identity of these people, the people whom we should like to convince to join our Eurocentric human rights culture, is bound up with their sense of who they are not. ...

The introductory readings below come out of the rich anthropological literature on culture and cultural relativism. Anthropologists have long had to wrestle with these issues, in the context of their ethnographic writings about diverse cultures whose practices and values depart radically from the West. Often those practices would be open to serious moral criticism from the perspectives of Western thought. The anthropological writings have sought primarily to describe, explain and understand the alien culture, within the framework of one or another theoretical perspective or methodology. They have not historically sought to pass judgement, to condemn or praise, the practices they describe.

Thus the role of the anthropologist has traditionally been very different from that of the human rights investigator who monitors and reports and the human rights advocate who works to arrest the described violations. To be sure, investigators and advocates may also seek to understand and to describe the cultural contexts in which they are operating. But those working with the large international human rights organizations characteristically combine their description with moral and legal assessment of a given state's conduct against international human rights standards. They will, in appropriate cases, condemn the state's conduct and urge the state or others to take corrective or coercive measures. Their work is inherently judgmental and normatively based. They seek to vindicate and advance respect for human rights.

Mark Goodale observes, in *Anthropology and Law: A Critical Introduction* (2017) 96, that the 'anthropology of human rights has developed innovative approaches in methodology, epistemology, and ethics such that an anthropological perspective is now a common presence within academic debates over human rights, within international institutional policy making, and among human rights practitioners.' This is all the more surprising given that the initial engagement between the two fields came in the form of the following statement issued in the name of the American Anthropological Association, which staked out a determinedly sceptical view. When reading it, keep in mind that the human rights regime addresses primarily states, whereas ethnographic writings involve primarily peoples or tribes or societies. The latter may be non-state entities, and in any event are objects of study distinct from the political organization and political acts of the state itself.

**AMERICAN ANTHROPOLOGICAL ASSOCIATION, STATEMENT ON HUMAN RIGHTS
49 AMER. ANTHROPOLOGIST (1947) 539**

[In 1947, the UN Commission on Human Rights had begun drafting what ultimately became the UDHR of 1948. The Statement below was submitted as a contribution to the debate by the Executive Board of the American Anthropological Association, although in fact it was written entirely by Melville Herskovits and not subjected to scrutiny or debate by the AAA membership.²⁵⁵ It uses several designations to refer to the pending document that became the UDHR.]

The problem faced by the Commission on Human Rights of the United Nations in preparing its Declaration on the Rights of Man must be approached from two points of view. The first, in terms of which the Declaration is ordinarily conceived, concerns the respect for the personality of the individual as such and his right to its fullest development as a member of his society. In a world order, however, respect for the cultures of differing human groups is equally important.

These are two facets of the same problem, since it is a truism that groups are composed of individuals, and human beings do not function outside the societies of which they form a part. The problem is thus to formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound.

... How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America? ...

If we begin, as we must, with the individual, we find that from the moment of his birth not only his behavior, but his very thought, his hopes, aspirations, the moral values which direct his action and justify and give meaning to his life in his own eyes and those of his fellows, are shaped by the body of custom of the group of which he becomes a member. ... [I]f the essence of the Declaration is to be, as it must, a statement in which the right of the individual to develop his personality to the fullest is

²⁵⁵ Goodale, at 99.

to be stressed, then this must be based on a recognition of the fact that the personality of the individual can develop only in terms of the culture of his society.

...

... Doctrines of the 'white man's burden' have been employed to implement economic exploitation and to deny the right to control their own affairs to millions of peoples over the world, where the expansion of Europe and America has not meant the literal extermination of whole populations. Rationalized in terms of ascribing cultural inferiority to these peoples, or in conceptions of their backwardness in development of their 'primitive mentality', that justified their being held in the tutelage of their superiors, the history of the expansion of the western world has been marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established.

The values of the ways of life of these peoples have been consistently misunderstood and decried. Religious beliefs that for untold ages have carried conviction and permitted adjustment to the Universe have been attacked as superstitious, immoral, untrue. And, since power carries its own conviction, this has furthered the process of demoralization begun by economic exploitation and the loss of political autonomy. ...

We thus come to the first proposition that the study of human psychology and culture dictates as essential in drawing up a Bill of Human Rights in terms of existing knowledge:

1. The individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences.

There can be no individual freedom, that is, when the group with which the individual identifies himself is not free. There can be no full development of the individual personality as long as the individual is told, by men who have the power to enforce their commands, that the way of life of his group is inferior to that of those who wield the power. ...

2. Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered.

This principle leads us to a further one, namely that the aims that guide the life of every people are self-evident in their significance to that people. ...

3. Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.

Ideas of right and wrong, good and evil, are found in all societies, though they differ in their expression among different peoples. What is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history. The saint of one epoch would at a later time be confined as a man not fitted to cope with reality. Even the nature of the physical world, the colors we see, the sounds we hear, are conditioned by the language we speak, which is part of the culture into which we are born.

The problem of drawing up a Declaration of Human Rights was relatively simple in the eighteenth century, because it was not a matter of *human* rights, but of the rights of men within the framework of the sanctions laid by a single society. ...

Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. ...

* * *

In the following reading, Sally Engle Merry provides a very different understanding of ‘culture’ and how it should be understood in the context of human rights. One question is: what is being asserted by the claim that a given state or region must be free to follow its own ‘cultural tradition’, even if thereby violating norms in universal treaties? Many meanings of the term appear and disappear in this debate; often ‘culture’ as a justification for difference is not referred to as such, but is implicit in a state’s argument. Or that broad term is disaggregated into some of its complex components, such as language, religion, traditions, rituals and other practices.

Meanings of culture may also differ across the divides of different languages. Consider some definitions for ‘culture’ in the *American Heritage Dictionary of the English Language* (1969):

... 4. Intellectual and social formation. 5. The totality of socially transmitted behavior patterns, arts, beliefs, characteristic of a community or population. 6. A style of social and artistic expression peculiar to a society or class. 7. Intellectual and artistic activity.

SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE (2006) 2

Chapter 1: Culture and Transnationalism

... Human rights ideas, embedded in cultural assumptions about the nature of the person, the community, and the state, do not translate easily from one setting to another. If human rights ideas are to have an impact, they need to become part of the consciousness of ordinary people around the world. Considerable research on law and everyday social life shows that law’s power to shape society depends not on punishment alone but on becoming embedded in everyday social practices, shaping the rules people carry in their heads. Yet, there is a great distance between the global sites where these ideas are formulated and the specific situations in which they are deployed. We know relatively little about how individuals in various social and cultural contexts come to see themselves in terms of human rights.

Nor do ideas and approaches move readily the other way from local to global settings. Global sites are a *bricolage* of issues and ideas brought to the table by national actors. But transnational actors, and even some national elites, are often uninterested in local social practices or too busy to understand them in their complicated contexts. ... Transnational reformers must adhere to a set of standards that apply to all societies if they are to gain legitimacy. ...

The division between transnational elites and local actors is based less on culture or tradition than on tensions between a transnational community that envisions a unified modernity and national and local actors for whom particular histories and contexts are important. Intermediaries such as NGO and social movement activists play a critical role in interpreting the cultural world of transnational modernity for local claimants. ... [T]hey take local stories and frame them in ... human rights language. ...

... [H]uman rights create a political space for reform using a language legitimated by a global consensus on standards. But this political space comes with a price. Human rights promote ideas of individual autonomy, equality, choice, and secularism even when these ideas differ from prevailing cultural norms and practices. Human rights ideas displace alternative visions of social justice that are less individualistic and more focused on communities and responsibilities, possibly contributing to the cultural homogenization of local communities. ...

There are several conundrums in applying human rights to local places. First, human rights law is committed to setting universal standards using legal rationality, yet this stance impedes adapting those

standards to the particulars of local context. This perspective explains why local conditions often seem irrelevant to global debates. Second, human rights ideas are more readily adopted if they are packaged in familiar terms, but they are more transformative if they challenge existing assumptions about power and relationships. Activists who use human rights for local social movements face a paradox. Rights need to be presented in local cultural terms in order to be persuasive, but they must challenge existing relations of power in order to be effective. Third, to have local impact, human rights ideas need to be framed in terms of local values and images, but in order to receive funding, a wider audience, and international legitimacy, they have to be framed in terms of transnational rights principles. ...

Theorizing the Global-Local Interface

The global-local divide is often conceptualized as the opposition between rights and culture, or even civilization and culture. Those who resist human rights often claim to be defending culture. For example, male lineage heads in the rural New Territories of Hong Kong claimed that giving women rights to inherit land would destroy the social fabric. ... [T]hese arguments depend on a very narrow understanding of culture and the political misuse of this concept. ...

Even as anthropologists and others have repudiated the idea of culture as a consensual, interconnected system of beliefs and values, the idea has taken on new life in the public sphere, particularly with reference to the global South. ...

Seeing culture as contested and as a mode of legitimating claims to power and authority dramatically shifts the way we understand the universalism-relativism debate. It undermines those who resist changes that would benefit weaker groups in the name of preserving “culture,” and it encourages human rights activists to pay attention to local cultural practices. This view of culture emphasizes that culture is hybrid and porous and that the pervasive struggles over cultural values within local communities are competitions over power. More recent anthropological scholarship explores processes by which human rights ideas are mobilized locally, adapted, and transformed and, in turn, how they shape local political struggles. As Cowan, Dembour, and Wilson point out, “Rather than seeing universalism and cultural relativism as alternatives which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms”. Culture in this sense does not serve as a barrier to human rights mobilization but as a context that defines relationships and meanings and constructs the possibilities of action.

Deconstructing Culture

Although culture is a term on everyone’s lips, people rarely talk about what they mean by it. The term has many meanings in the contemporary world. It is often seen as the basis of national, ethnic, or religious identities. Culture is sometimes romanticized as the opposite of globalization, resolutely local and distinct. ... In international human rights meetings, culture often refers to traditions and customs: ways of doing things that are justified by their roots in the past. There is a whiff of the notion of the primitive about this usage of the term culture. It is not what modern urbanites do but what governs life in the countryside. ... Culture was often juxtaposed to civilization during the civilizing mission of imperialism, and this history has left a legacy in contemporary thinking.

There is a critical need for conceptual clarification of culture in human rights practice. Insofar as human rights relies on an essentialized model of culture, it does not take advantage of the potential of local cultural practices for change. ...

... Cultures consist of repertoires of ideas and practices that are not homogeneous but continually changing because of contradictions among them or because new ideas and institutions are adopted by members. They typically incorporate contested values and practices. Cultures are not contained within stable borders but are open to new ideas and permeable to influences from other cultural systems,

although not all borders are equally porous. Cultural discourses legitimate or challenge authority and justify relations of power.

Of the myriad ways culture is imagined in transnational human rights discussions, two of the most common ones reflect an essentialized concept of culture. ...

[1] Culture as Tradition

Within the discourse of human rights activism, culture is often used as a synonym for tradition. Labeling a culture as traditional evokes an evolutionary vision of change from a primitive form to something like civilization. ... So-called traditional societies are at an earlier evolutionary stage than modern ones, which are more evolved and more civilized. Culture in this sense is not used to describe the affluent countries of the global North but the poor countries of the global South, particularly isolated and rural areas. ...

Although some human rights activists refer to “good” cultural practices and “harmful” cultural practices and a few feminist scholars examine cultural practices that protect women from violence, many who write about women’s right to protection from violence identify culture and tradition as the source of the problem. ... [T]he human rights process seeks to replace cultural practices that are discriminatory with other cultural practices rooted in modern ideas of gender equality. Thus, like the colonial state, they seek to move ethnically defined subjects into the realm of rights-bearing modernity. This effort sometimes demonizes culture as it seeks to save individuals from its oppressive effects.

Female genital cutting (also called female genital mutilation) is the poster child for this understanding of culture. ...

[2] Culture as National Essence

A second common understanding of culture is as national essence or identity. This concept of culture grows out of the German romantic tradition of the nineteenth century. Confronted with the claims to universal civilization of England and France, Germans began to draw a distinction between the external trappings of civilization and the inward, spiritual reality of culture. German romantics asserted the importance of a distinct culture, or *Kultur*, which formed the spiritual essence of their society. Each people, or *Volk*, has its own history and culture that expresses its genius. This includes its language, its laws, and its religion. The cosmopolitan elite corrupts it, while foreign technological and material values undermine it. ...

Culture as national essence is fundamental to claims to indigenous sovereignty and ethnonationalism, often in resistance to human rights. In 1993, when Lee Kuan Yew of Singapore claimed that human rights failed to incorporate Asian values, he drew on this understanding of culture. With support from several other Asian leaders, he argued that Asian values differed from Western conceptions of human rights. In some ways, the Asian values argument replays the German romantic resistance to French and English claims to civilization. Indeed, one critic of the Asian values argument notes that it falls into Orientalist notions of a communitarian East, with communal values, and an individualistic West.

Although the Asian values argument is less often articulated now, it represents one of many ways that leaders assert that human rights violate the fundamental cultural principles of a nation or a religion and therefore cannot be adopted.²⁵⁶ Women’s rights are often opposed by those who claim to defend culture. ...

²⁵⁶ For a more recent analysis, see M. Thompson, ‘What’s Asia Got to Do with It? “Asian Values” as Reactionary Culturalism’, in G. Facal, E. Lafaye de Micheaux, and A. Norén-Nilsson (eds.), *The Palgrave Handbook of Political Norms in Southeast Asia* (2024) 277.

Culture as Contentious

... Over the last two decades, anthropology has elaborated a conception of culture as unbounded, contested, and connected to relations of power, as the product of historical influences rather than evolutionary change. Cultural practices must be understood in context, so that their meaning and impact change as their context shifts. ... [Cultures] include institutional arrangements, political structures, and legal regulations. As institutions such as laws and policing change, so do beliefs, values, and practices. Cultures are not homogeneous and “pure” but produced through hybridization or creolization.

... These different perspectives on culture affect policies concerning women. For example, in Uruguay’s country report to the committee monitoring the Women’s Convention, the government expressed regret that more women were not involved in politics but blamed cultural traditions, women’s involvement in domestic tasks, and the differences in wages by gender. In contrast, facing the same absence of women politicians, Denmark offered funds to offset babysitting expenses when women attended meetings. In the first case, the barrier to change is theorized as cultural tradition; in the second case, as institutional arrangements of child care. The first model sees culture as fixed; the second assumes that the meanings of gender will change as institutional and legal arrangements change.

...

... [C]ulture is as important in shaping human rights conferences as it is in structuring village mortuary rituals. Thinking of those peoples formerly labeled “backward” as the only bearers of culture neglects the centrality of culture to the practice of human rights. UN meetings are deeply shaped by a culture of transnational modernity, one that specifies procedures for collaborative decision-making, conceptions of global social justice, and definitions of gender roles. Human rights law is itself primarily a cultural system. Its limited enforcement mechanisms mean that the impact of human rights law is a matter of persuasion rather than force, of cultural transformation rather than coercive change. Its documents create new cultural frameworks for conceptualizing social justice. It is ironic that the human rights system tends to promote its new cultural vision through a critique of culture.

Vernacularization

In 1999, the American Anthropological Association adopted a Declaration on Anthropology and Human Rights that marked a deep change from its earlier position:

As a professional organization of anthropologists, the AAA has long been, and should continue to be, concerned whenever human difference is made the basis for a denial of basic human rights, where “human” is understood in its full range of cultural, social, linguistic, psychological, and biological senses.

[The AAA, in its working definition of principles of respect for difference, ‘builds on’ the UDHR and other basic human rights covenants and conventions.] The AAA definition thus reflects a commitment to human rights consistent with international principles but not limited by them. Human rights is not a static concept. Our understanding of human rights is constantly evolving as we come to know more about the human condition. It is therefore incumbent on anthropologists to be involved in the debate on enlarging our understanding of human rights on the basis of anthropological knowledge and research.²⁵⁷

In the years since, the concept of ‘vernacularization’ has come to prominence in the anthropological literature.²⁵⁸ In the readings below, Sally Engle Merry and Peggy Levitt explain their understanding of

²⁵⁷ www.aaanet.org/stmts/humanrts.htm.

²⁵⁸ See generally, P. Alston (ed.), *Capturing the Complexity of Human Rights: From Vernacularization to Quantification* (2024).

the concept and how it works in practice. Harri Englund then describes the distortions introduced through linguistic translation in some African contexts.²⁵⁹

**SALLY ENGLE MERRY AND PEGGY LEVITT, THE VERNACULARIZATION OF WOMEN'S
HUMAN RIGHTS
STEPHEN HOPGOOD, JACK SNYDER AND LESLIE VINJAMURI (EDS.), HUMAN RIGHTS
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How do human rights travel around the world? They are created through diverse social movements in many parts of the world and crystallized into a form of symbolically universal law under the supervision of the UN and its human rights organizations. This law-like form is then reappropriated by myriad civil society organizations and translated into terms that make sense in their local communities. This is the process of vernacularization: the extraction of ideas and practices from the universal sphere of international organizations, and their translation into ideas and practices that resonate with the values and ways of doing things in local contexts. Local places are not empty, of course, but rich with other understandings of rights, the state, and justice. ...

The process of vernacularization converts universalistic human rights into local understandings of social justice. While considerable scholarship on human rights sees universalism and relativism as oppositional, vernacularization bridges this divide. A focus on this process follows the trend in the anthropology of law to examine human rights in practice, exploring how they circulate, how they are adopted and used, and what forms of resistance and opposition they encounter when they come into contact with other national or religious ideologies of social justice. In contrast to scholarship on the dissemination of human rights in other disciplines, anthropology offers insights into the transformation of meanings and practices within small social settings, highlighting aspects of its circulation and use that can be obscured by the focus on the state in international relations and legal scholarship. ...

...

Conclusions

... Human rights are only one set of ideas and approaches available to them. Some groups are deeply embedded in other justice ideologies, such as liberation theology or the feminist violence against women movement, and make only fleeting and indirect references to human rights. ...

... External funding, including international funding, offers more space to move into challenging issues and to engage in work that is relatively unsupported by local and national women's organizations and ideologies The funding allows them greater latitude ... [but] comes with strings attached.

...

What does the human rights framework offer in situations in which it does not have a strong resonance or a close fit with existing ideologies? It offers the legitimation of a transnational set of standards, the magic of a universal moral code, and technologies of building cases through reporting and documentation. But perhaps the most important contribution is access to allies outside the local community. By phrasing issues in the language of human rights, they become understandable to other organizations and individuals participating in this transnational ideological system. The human rights framework itself helps ideas travel. ...

...

Vernacularization is a process in which issues, communication technologies, and modes of organization and work are appropriated and translated, sometimes in fragmented and incoherent ways, at the interface of transnational, national, and local ideologies and practices. It is often a pragmatic strategy for mobilizing political, cultural, and financial resources. For some leaders, of course, human rights is a matter of faith and morality. Vernacularization is not a form of cultural homogenization

²⁵⁹ For an account of how the widely-used Chinese translation of the International Covenants changed the meaning of key terms by comparison with the original text, see J. Seymour and P. Yuk-tung Wong, 'China and the International Human Rights Covenants', 47 *Crit. Asian Stud.* (2015) 514.

since human rights ideas are substantially transformed by the organizations that use them. It is not a clash between universal principles and cultural relativist assertions of difference but a pragmatic process of negotiation and translation. When organizations talk little about human rights, this reflects a lack of political traction for human rights, not cultural relativist resistance. The process is a dimension of the partial, pragmatic, and unstable nature of the transnational circulation and adoption of ideas and practices that Tsing refers to as “friction,” shaped by the structural conditions under which adoption and resistance take place.

However, the need to vernacularize human rights in a way that is resonant with local cultural practices serves as a limitation on the transformative power of human rights. ...

... Understanding the role of vernacularization in the human rights process highlights two dilemmas for human rights practitioners: the process of vernacularization may so attenuate the core principles of human rights that they no longer carry the meaning that is embedded in the system as a whole. Moreover, human rights as a frame of reference can be appropriated in a variety of ways, including those that violate the core principles of the human rights system itself. Nevertheless, such active appropriation and redefinition of human rights is an inevitable dimension of the global circulation of ideas and practices.

HARRI ENGLUND, PRISONERS OF FREEDOM: HUMAN RIGHTS AND THE AFRICAN POOR (2006) 47

Translation in an African context presents a set of salient empirical problems, not least because the vast majority of Africans depend on national and vernacular languages for efficient communication. Human rights discourse, as a relatively recent phenomenon associated with the post-Cold War wave of democratization, has arrived through official languages inherited from colonial rulers. [M]ajor political and cultural issues are raised by the way in which the discourse is translated Of fundamental importance is that translation in [Malawi and Zambia] has taken place as a “top-down” exercise, with no evidence of attempts to consult a broad cross-section of native speakers before launching a translation for human rights. “[L]ocal cultures of human rights” have been allowed little space to develop and to influence the introduction of a new discourse. Instead, activists, politicians, journalists, and others spearheading the translation have taken their particular interest in democratization as a universal concern. They have, accordingly, translated rights as freedoms, with a particular emphasis on political and civil liberties.

... Contemporary discussions about human rights, whatever the country or society in which they are held, are remarkable for the extent to which they presuppose abstraction, the ability to apply the same notions and principles across a wide variety of actual situations. ...

[T]he introduction of legal language ... replaces relationships with rules; situational considerations, with abstract principles. The distinction between the jural and the moral in some African languages is subverted in the post-Cold War preoccupation with human rights. The preoccupation has assumed a decisively legalist content. In contrast to the Kiswahili and Luganda understandings of rights as things that are associated with moral authority, itself unevenly distributed in society, the legalist discourse on human rights asserts universal equality before the law. As the supreme arbiter of conflicts and disputes, the law is regarded as being above any actual political and cultural factor influencing those conflicts and disputes. Interestingly, a similar process of abstraction has been observed among those who seek to oppose human rights discourse by appealing to cultures and traditions. Rather than situating culture in shifting everyday practices, “culture talk” often revolves around an abstraction that is claimed to define a people’s essential characteristics. More often than not, and in postcolonial no less than in colonial Africa, such an abstraction serves elite privileges rather than the democratic expectations of rights talk.

[H]uman rights discourse even when asserting all individuals as equals can be deprived of its democratizing potential and made to serve particular interests in society. The problem, patently, is

intrinsic not to particular words themselves but to translation as a cultural and political process, its own situational characteristics obscured by human rights activists' commitment to abstraction and universalism. In Chichewa, which is the sole national language of Malawi and, known as Chinyanja, one of the seven national languages of Zambia, the established translation summons up rights as individual freedoms a highly consequential, albeit scarcely premeditated, move. *Ufulu wachibadwidwe* hinges on the meanings of *ufulu* as "freedom," "liberty," and "independence," defined by the recent Chichewa/Chinyanja monolingual dictionary as "an opportunity to live freely, happily and without fear." The adjectival *wachibadwidwe* uses the verb *kubadwa*, "to be born," to specify such freedom as the individual's birth right.

Pascal Kishindo, a Malawian linguist, has suggested that, despite being offered as a translation of "human rights," *ufulu wachibadwidwe* is actually a new coinage. As such, the way in which Malawians and Zambians arrived at this particular coinage offers insights into the politics of translation, as do its appearances in the Chichewa/Chinyanja versions of international human rights documents and national laws. While pursuing such insights, one must keep in mind that *ufulu*, like most lexical items, has multiple connotations and can be used to advance competing interests. Kishindo has analyzed the shift in its primary connotations from national independence to personal freedom and liberty. Although *ufulu* continues to be used for independence from colonial rule, the transition to multiparty politics in the early 1990s made freedom from postcolonial dictatorship a more urgent topic in political discourse, with the plural form *maufulu*, "freedoms," gaining wider currency. Its equivalent in Kiswahili, *uhuru*, has had a similar trajectory, evident in its application by some women for transformed gender relations. Later in this chapter I examine, however, how the emancipatory potential of *ufulu* is qualified by, among other things, another central concept in the Chichewa/Chinyanja discourse on human rights *udindo*, translating as "responsibility."

The idea of responsibility merits attention, because it has proven a convenient construct for human rights activists, politicians, and journalists to counter the criticisms of their excessive emphasis on individual freedoms. Just as the idea of freedom can be conjured up to advance different political agendas, so too is it necessary to ask what kind of responsibility a particular human rights discourse exhorts. Several generations of political philosophers have understood rights and responsibilities to be entwined, and liberal egalitarianism has not been confined to individual freedoms. It has involved a commitment to securing positive rights to economic justice. ...

...

Poor Translations for Poor People

... Translations into so-called local languages have provided one justification for many NGOs' existence, since the translations by government departments have generally been confined to very few documents. Translations have not, however, been a priority for most donors of aid, and the work of translation has often been linked to broader programs of civic education or, in the case of some organizations, abandoned in favor of other activities. One consequence of the lack of resources is the rather haphazard manner in which translations have been commissioned and carried out. ...

By granting to themselves the tasks of both translation and its quality control, activists and officers risked producing inaccurate translations. Their assumed expertise, moreover, mitigated fears of a backlash, because those who were expected to receive the translations were rarely in a position to voice public criticism. In Malawi and Zambia, no mechanism existed to ensure that the translations were not as poor as the people who were supposed to read them. ...

...

A comparison between different translations of the [UDHR] reveals even more clearly how Chichewa/Chinyanja speakers can be disempowered by inaccurate translation. In the absence of coordination, at least two very different translations of the declaration exist, one provided by the United Nations Information Centre in Zambia and the other by the Malawi Human Rights Resource Centre, an NGO. While somewhat abridged and simplified translations may be inevitable in a

document meant for wide circulation, interesting questions are what translators omit from the original and how inaccurate translations may compromise readers' capacity for emancipatory interpretations. For instance, the subsection 4 of Article 23 reads,

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

[The author's translation back into English of the Malawian translation is:]

Everyone has the freedom to start or to join an organization that represents workers.

[His translation of the Zambian version is:]

Every person has the opportunity to be a member of any organization that assists in his/her well-being.

...

[Article 22 UDHR reads:]

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

[The author's translation back into English of the Malawian translation is:]

Everyone has the freedom to get assistance from the state when well-being is undermined in accordance with the extent to which the state can assist, as well as the freedom of economic activity and of what helps him/her to foster respect, development in life and his/her humanity.

The Zambian version [translates as:]

Every person as a citizen of a country has the opportunity to receive protection in improving his/her life, and he/she must understand his/her freedom in the economy, entertainment and customs, a thing that is very important in the good-ness and development of his/her life.

...

Controlling Freedoms

...

For ruling politicians and human rights activists in democratic Malawi, nostalgia for the one-party era was not an option. Instead, and despite major differences among themselves, they sought to dominate the public discourse by educating the populace on the concept of human rights. When she launched the Malawi Human Rights Youth Network in 2002, the presidential adviser on NGOs and civil society instructed her audience that "where one's rights end is where another one's rights begin. There is a tendency among the people to claim rights while impinging on other people's rights." Responsibility, *udindo* in Chichewa, came to complement the emphasis on rights as freedoms. ...

...

... By establishing a discourse confined to rights as freedoms, activists, politicians, and other self-proclaimed experts made it extremely difficult to express and pursue alternatives to the current disempowerment of the majority. As a proposed limitation to excess freedom, the concept of responsibility failed to provide an alternative, because it made individuals the responsible partners. As in abstract legalism in general, solutions to structural inequalities were thought to lie in the particular encounters of two or more aggrieved parties, preferably in a court of law. The solutions were, in brief, piecemeal, however profound and widespread the abuses.

Political history is a key context for the preoccupation with rights as freedoms. A tacit alliance between politicians and politically independent activists, as improbable as it was real, was a consequence of this history, centered on a public discourse on freedoms. The discourse was introduced to the general public through inaccurate translations, sometimes omitting those notions and provisions that could qualify the single-minded focus on freedoms. This process of disempowerment was, at least for most human rights activists, entirely unforeseen. Activists' own interest in political and civil rights, understandable for historical reasons, was instrumental to the way in which freedoms came to dominate the public discourse, never quite qualified by the notion of responsibility.

... [A] further factor in the entrenchment of the new discourse [was] the thinly veiled patronizing approach that enabled self-proclaimed experts to discount popular responses to their interventions. ... [D]espite their personal frustrations with politics and the economy, young people were usually the ones who spread this disempowering discourse through so-called civic education. ... [An] important factor in the entrenchment of the new discourse [was] the avoidance of overtly political issues by those donor agencies that fund NGOs and programs of civic education.

* * *

The following materials explores cultural relativism from the perspective of Islam.²⁶⁰ An-Na'im argues that 'human rights advocates in the Muslim world must work within the framework of Islam to be effective ... [and] should struggle to have their interpretations of the relevant [Islamic] texts adopted as the new Islamic scriptural imperatives for the contemporary world.' Those interpretations would be broadly consistent with the norms of international human rights. An-Na'im is then attentive to the relation between the international system and a given religious tradition, and to the possibility of reconciliation through reinterpretation of the tradition, rather than through identification of cross-cultural values among different systems that in some sense transcend or trump aspects of the religious tradition that defy or are otherwise inconsistent with them. Adnan Zulfiqar, in 'Human Rights Norms from Below', 48 *Yale J. Int'l L.* (2023) 55, at 102, develops the link between Merry's approach and that of An-Na'im by suggesting that Islamic jurists use 'Islamic law as a local vernacular and ... indigenize human rights norms by giving them greater moral credibility with target societies.'

ABDULLAHI AHMED AN-NA'IM, HUMAN RIGHTS IN THE MUSLIM WORLD 3 HARV. HUM. RTS. J. (1990) 13

Introduction

Historical formulations of Islamic religious law, commonly known as Shari'a, include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of Shari'a to regulate the behavior of Muslims derives from its moral and religious authority as well as the formal enforcement of its legal norms. As such, Shari'a influences individual and collective behavior in Muslim countries through its role in the socialization processes of such nations regardless of its status in their formal legal systems. For example, the status and rights of women in the Muslim world have always been significantly influenced by Shari'a, regardless of the degree of Islamization in public life. Of course, Shari'a is not the sole determinant of human behavior nor the only formative force behind social and political institutions in Muslim countries.

...

I conclude that human rights advocates in the Muslim world must work within the framework of Islam to be effective. They need not be confined, however, to the particular historical interpretations of Islam known as Shari'a. Muslims are obliged, as a matter of faith, to conduct their private and public affairs in accordance with the dictates of Islam, but there is room for legitimate disagreement over the

²⁶⁰ See generally A. M. Ibrahim, 'A Not-So-Radical Approach to Human Rights in Islam', 96 *J. of Relig.* (2016) 346; and M. Bak McKenna, 'Feminism in Translation: Reframing Human Rights Law through Transnational Islamic Feminist Networks', in R. Gould and K. Tahmasebian (eds.), *The Routledge Handbook of Translation and Activism* (2020) 317.

precise nature of these dictates in the modern context. Religious texts, like all other texts, are open to a variety of interpretations. Human rights advocates in the Muslim world should struggle to have their interpretations of the relevant texts adopted as the new Islamic scriptural imperatives for the contemporary world.

A. Cultural Legitimacy for Human Rights

The basic premise of my approach is that human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society. Insofar as these standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance. While cultural legitimacy may not be the sole or even primary determinant of compliance with human rights standards, it is, in my view, an extremely significant one. Thus, the underlying causes of any lack or weakness of legitimacy of human rights standards must be addressed in order to enhance the promotion and protection of human rights in that society.

... This cultural illegitimacy, it is argued, derives from the historical conditions surrounding the creation of the particular human rights instruments. Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as victims of colonization, they were not members of the United Nations. When they did participate in the formulation of subsequent instruments, they did so on the basis of an established framework and philosophical assumptions adopted in their absence. For example, the pre-existing framework and assumptions favored individual civil and political rights over collective solidarity rights, such as a right to development, an outcome which remains problematic today. Some authors have gone so far as to argue that inherent differences exist between the Western notion of human rights as reflected in the international instruments and non-Western notions of human dignity. In the Muslim world, for instance, there are obvious conflicts between Shari'a and certain human rights, especially of women and non-Muslims.

... In this discussion, I focus on the principles of legal equality and nondiscrimination contained in many human rights instruments. These principles relating to gender and religion are particularly problematic in the Muslim world.

...

II. Islam, Shari'a and Human Rights

...

A. The Development and Current Application of Shari'a

To the over nine hundred million Muslims of the world, the Qur'an is the literal and final word of God and Muhammad is the final Prophet. During his mission, from 610 A.D. to his death in 632 A.D., the Prophet elaborated on the meaning of the Qur'an and supplemented its rulings through his statements and actions. This body of information came to be known as Sunna. He also established the first Islamic state in Medina around 622 A.D. which emerged later as the ideal model of an Islamic state. ...

While the Qur'an was collected and recorded soon after the Prophet Muhammad's death, it took almost two centuries to collect, verify, and record the Sunna. Because it remained an oral tradition for a long time during a period of exceptional turmoil in Muslim history, some Sunna reports are still controversial in terms of both their authenticity and relationship to the Qur'an.

Because Shari'a is derived from Sunna as well as the Qur'an, its development as a comprehensive legal and ethical system had to await the collection and authentication of Sunna. Shari'a was not developed until the second and third centuries of Islam. ...

...

Shari'a is not a formally enacted legal code. It consists of a vast body of jurisprudence in which individual jurists express their views on the meaning of the Qur'an and Sunna and the legal implications

of those views. Although most Muslims believe Shari'a to be a single logical whole, there is significant diversity of opinion not only among the various schools of thought, but also among the different jurists of a particular school. ...

Furthermore, Muslim jurists were primarily concerned with the formulation of principles of Shari'a in terms of moral duties sanctioned by religious consequences rather than with legal obligations and rights and specific temporal remedies. They categorized all fields of human activity as permissible or impermissible and recommended or reprehensible. In other words, Shari'a addresses the conscience of the individual Muslim, whether in a private, or public and official, capacity, and not the institutions and corporate entities of society and the state.

...
Whatever may have been the historical status of Shari'a as the legal system of Muslim countries, the scope of its application in the public domain has diminished significantly since the middle of the nineteenth century. Due to both internal factors and external influence, Shari'a principles had been replaced by European law governing commercial, criminal, and constitutional matters in almost all Muslim countries. Only family law and inheritance continued to be governed by Shari'a. ...

Recently, many Muslims have challenged the gradual weakening of Shari'a as the basis for their formal legal systems. Most Muslim countries have experienced mounting demands for the immediate application of Shari'a as the sole, or at least primary, legal system of the land. These movements have either succeeded in gaining complete control, as in Iran, or achieved significant success in having aspects of Shari'a introduced into the legal system, as in Pakistan and the Sudan. Governments of Muslim countries generally find it difficult to resist these demands out of fear of being condemned by their own populations as anti-Islamic. Therefore, it is likely that this so-called Islamic fundamentalism will achieve further successes in other Muslim countries.

The possibility of further Islamization may convince more people of the urgency of understanding and discussing the relationship between Shari'a and human rights, because Shari'a would have a direct impact on a wider range of human rights issues if it became the formal legal system of any country. ...

I believe that a modern version of Islamic law can and should be developed. Such a modern 'Shari'a' could be, in my view, entirely consistent with current standards of human rights. These views, however, are appreciated by only a tiny minority of contemporary Muslims. To the overwhelming majority of Muslims today, Shari'a is the sole valid interpretation of Islam, and as such *ought* to prevail over any human law or policy.

B. Shari'a and Human Rights

In this part, I illustrate with specific examples how Shari'a conflicts with international human rights standards. ...

...

The second example is the Shari'a law of apostasy. According to Shari'a, a Muslim who repudiates his faith in Islam, whether directly or indirectly, is guilty of a capital offense punishable by death. This aspect of Shari'a is in complete conflict with the fundamental human right of freedom of religion and conscience. The apostasy of a Muslim may be inferred by the court from the person's views or actions deemed by the court to contravene the basic tenets of Islam and therefore be tantamount to apostasy, regardless of the accused's personal belief that he or she is a Muslim.

The Shari'a law of apostasy can be used to restrict other human rights such as freedom of expression. A person may be liable to the death penalty for expressing views held by the authorities to contravene the official view of the tenets of Islam. Far from being an historical practice or a purely theoretical danger, this interpretation of the law of apostasy was applied in the Sudan as recently as 1985, when a Sudanese Muslim reformer was executed because the authorities deemed his views to be contrary to Islam.

A third and final example of conflict between Shari'a and human rights relates to the status and rights of non-Muslims. Shari'a classifies the subjects of an Islamic state in terms of their religious beliefs: Muslims, *ahl al-Kitab* or believers in a divinely revealed scripture (mainly Christian and Jews), and unbelievers. In modern terms, Muslims are the only full citizens of an Islamic state, enjoying all the rights and freedoms granted by Shari'a and subject only to the limitations and restrictions imposed on women. *Ahl al-Kitab* are entitled to the status of *dhimma*, a special compact with the Muslim state which guarantees them security of persons and property and a degree of communal autonomy to practice their own religion and conduct their private affairs in accordance with their customs and laws. In exchange for these limited rights, *dhimmis* undertake to pay *jizya* or poll tax and submit to Muslim sovereignty and authority in all public affairs. ...

According to this scheme, non-Muslim subjects of an Islamic state can aspire only to the status of *dhimma*, under which they would suffer serious violations of their human rights. *Dhimmis* are not entitled to equality with Muslims. [Economic and family law illustrations omitted.]

...

IV. A Case Study: The Islamic Dimension of the Status of Women ...

The present focus on Muslim violations of the human rights of women does not mean that these are peculiar to the Muslim world. As a Muslim, however, I am particularly concerned with the situation in the Muslim world and wish to contribute to its improvement.

The following discussion is organized in terms of the status and rights of Muslim women in the private sphere, particularly within the family, and in public fora, in relation to access to work and participation in public affairs. This classification is recommended for the Muslim context because the personal law aspects of Shari'a, family law and inheritance, have been applied much more consistently than the public law doctrines.²⁶¹ The status and rights of women in private life have always been significantly influenced by Shari'a regardless of the extent of Islamization of the public debate.

A. Shari'a and the Human Rights of Women

... The most important general principle of Shari'a influencing the status and rights of women is the notion of *qawama*. *Qawama* has its origin in verse 4:34 of the Qur'an: 'Men have *qawama* [guardianship and authority] over women because of the advantage they [men] have over them [women] and because they [men] spend their property in supporting them [women]'. According to Shari'a interpretations of this verse, men as a group are the guardians of and superior to women as a group, and the men of a particular family are the guardians of and superior to the women of that family.

... For example, Shari'a provides that women are disqualified from holding general public office, which involves the exercise of authority over men, because, in keeping with the verse 4:34 of the Qur'an, men are entitled to exercise authority over women and not the reverse.

Another general principle of Shari'a that has broad implications for the status and rights of Muslim women is the notion of *al-hijab*, the veil. This means more than requiring women to cover their bodies and faces in public. According to Shari'a interpretations of verses 24:31, 33:33,²⁶² 33:53, and 33:59²⁶³ of the Qur'an, women are supposed to stay at home and not leave it except when required to by urgent

²⁶¹ The private/public dichotomy, however, is an artificial distinction. The two spheres of life overlap and interact. The socialization and treatment of both men and women at home affect their role in public life and vice versa. While this classification can be used for analysis in the Muslim context, its limitations should be noted. It is advisable to look for both the private and public dimensions of a given Shari'a principle or rule rather than assume that it has only private or public implications.

²⁶² [O Consorts of the Prophet ...] And stay quietly in your houses, and make not a dazzling display, like that of the former Times of Ignorance; and establish regular prayer, and give regular charity; and obey God and His Apostle. And God only wishes to remove all abomination from you, ye Members of the Family, and to make you pure and spotless.

²⁶³ O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested. And God is Oft-Forgiving, Most Merciful.

necessity. When they are permitted to venture beyond the home, they must do so with their bodies and faces covered. *Al-hijab* tends to reinforce women's inability to hold public office and restricts their access to public life. They are not supposed to participate in public life, because they must not mix with men even in public places.

... In family law for example, men have the right to marry up to four wives and the power to exercise complete control over them during marriage, to the extent of punishing them for disobedience if the men deem that to be necessary.²⁶⁴ In contrast, the co-wives are supposed to submit to their husband's will and endure his punishments. While a husband is entitled to divorce any of his wives at will, a wife is not entitled to a divorce, except by judicial order on very specific and limited grounds. Another private law feature of discrimination is found in the law of inheritance, where the general rule is that women are entitled to half the share of men.

In addition to their general inferiority under the principle of *qawama* and lack of access to public life as a consequence of the notion of *al-hijab*, women are subjected to further specific limitations in the public domain. For instance, in the administration of justice, Shari'a holds women to be incompetent witnesses in serious criminal cases, regardless of their individual character and knowledge of the facts. In civil cases where a woman's testimony is accepted, it takes two women to make a single witness. *Djua*, monetary compensation to be paid to victims of violent crimes or to their surviving kin, is less for female victims than it is for male victims.

... These overlapping and interacting principles and rules play an extremely significant role in the socialization of both women and men. Notions of women's inferiority are deeply embedded in the character and attitudes of both women and men from early childhood.

...

C. Muslim Women in Public Life

A similar and perhaps more drastic conflict exists between reformist and conservative trends in relation to the status and rights of women in the public domain. Unlike personal law matters, where Shari'a was never displaced by secular law, in most Muslim countries, constitutional, criminal, and other public law matters have come to be based on secular, mainly Western, legal concepts and institutions. Consequently, the struggle over Islamization of public law has been concerned with the re-establishment of Shari'a where it has been absent for decades, or at least since the creation of the modern Muslim nation states in the first half of the twentieth century. In terms of women's rights, the struggle shall determine whether women can keep the degree of equality and rights in public life they have achieved under secular constitutions and laws.

...

... Educated women and other modernist segments of society may not be able to articulate their vision of an Islamic state in terms of Shari'a, because aspects of Shari'a are incompatible with certain concepts and institutions which these groups take for granted, including the protection of all human rights. To the extent that efforts for the protection and promotion of human rights in the Muslim world must take into account the Islamic dimension of the political and sociological situation in Muslim countries, a modernist conception of Islam is needed.

V. Islamic Reform and Human Rights

...

Islamic reform needs must be based on the Qur'an and Sunna, the primary sources of Islam. Although Muslims believe that the Qur'an is the literal and final word of God, and Sunna are the traditions of his final Prophet, they also appreciate that these sources have to be understood and applied through human interpretation and action. ...

²⁶⁴ Polygamy is based on verse 4:3 of the Qur'an. The husband's power to chastise his wife to the extent of beating her is based on verse 4:34 of the Qur'an.

A. An Adequate Reform Methodology

... The basic premise of my position, based on the work of the late Sudanese Muslim reformer *Ustadh* Mahmoud Mohamed Taha, is that the Shari'a reflects a historically-conditioned interpretation of Islamic scriptures in the sense that the founding jurists had to understand those sources in accordance with their own social, economic, and political circumstances. In relation to the status and rights of women, for example, equality between men and women in the eighth and ninth centuries in the Middle East, or anywhere else at the time, would have been inconceivable and impracticable. It was therefore natural and indeed inevitable that Muslim jurists would understand the relevant texts of the Qur'an and Sunna as confirming rather than repudiating the realities of the day.

In interpreting the primary sources of Islam in their historical context, the founding jurists of Shari'a tended not only to understand the Qur'an and Sunna as confirming existing social attitudes and institutions, but also to emphasize certain texts and 'enact' them into Shari'a while de-emphasizing other texts or interpreting them in ways consistent with what they believed to be the intent and purpose of the sources. Working with the same primary sources, modern Muslim jurists might shift emphasis from one class of texts to the other, and interpret the previously enacted texts in ways consistent with a new understanding of what is believed to be the intent and purpose of the sources. This new understanding would be informed by contemporary social, economic, and political circumstances in the same way that the 'old' understanding on which Shari'a jurists acted was informed by the then prevailing circumstances. The new understanding would qualify for Islamic legitimacy, in my view, if it is based on specific texts in opposing the application of other texts, and can be shown to be in accordance with the Qur'an and Sunna as a whole.

For example, the general principle of *qawama*, the guardianship and authority of men over women under Shari'a, is based on verse 4:34 of the Qur'an.

... This verse presents *qawama* as a consequence of two conditions: men's advantage over and financial support of women. The fact that men are generally physically stronger than most women is not relevant in modern times where the rule of law prevails over physical might. Moreover, modern circumstances are making the economic independence of women from men more readily realized and appreciated. In other words, neither of the conditions — advantages of physical might or earning power — set by verse 4:34 as the justification for the *qawama* of men over women is tenable today.

The fundamental position of the modern human rights movement is that all human beings are equal in worth and dignity, regardless of gender, religion, or race. This position can be substantiated by the Qur'an and other Islamic sources as understood under the radically transformed circumstances of today. For example, in numerous verses the Qur'an speaks of honor and dignity for 'humankind' and 'children of Adam', without distinction as to race, color, gender, or religion. By drawing on those sources and being willing to set aside archaic and dated interpretations of other sources, such as the one previously given to verse 4:34 of the Qur'an, we can provide Islamic legitimacy for the full range of human rights for women.

Similarly, numerous verses of the Qur'an provide for freedom of choice and non-compulsion in religious belief and conscience.²⁶⁵ These verses have been either de-emphasized as having been 'overruled' by other verses which were understood to legitimize coercion, or 'interpreted' in ways which permitted such coercion. For example, verse 9:29 of the Qur'an was taken as the foundation of the whole system of *dhimma*, and its consequent discrimination against non-Muslims. Relying on those verses which extoll freedom of religion rather than those that legitimize religious coercion, one can argue now that the *dhimma* system should no longer be part of Islamic law and that complete equality

²⁶⁵ See, for example, verse 2:256 of the Qur'an which provides: 'Let there be no compulsion in religion: Truth stands out clear from error ...'. In verse 18:29 God instructs the Prophet: 'Say, the Truth is from your Lord. Let him who will, believe, and let him who will, reject [it]'.

should be assured regardless of religion or belief. The same argument can be used to abolish all negative legal consequences of apostasy as inconsistent with the Islamic principle of freedom of religion. [Discussion omitted of mechanisms and methods within Islam for development and reform.]

... The ultimate test of legitimacy and efficacy is, of course, acceptance and implementation by Muslims throughout the world.

B. Prospects for Acceptance and Likely Impact of the Proposed Reform ...

... Governments of Muslim countries, like many other governments, formally subscribe to international human rights instruments because, in my view, they find the human rights idea an important legitimizing force both at home and abroad

Nevertheless, the proposed reform will probably be resisted because it challenges the vested interests of powerful forces in the Muslim world and may upset male-dominated traditional political and social institutions. These forces probably will try to restrict opportunities for a genuine consideration of this reform methodology. ...

Consequently, the acceptance and implementation of this reform methodology will involve a political struggle within Muslim nations as part of a larger general struggle for human rights. I would recommend this proposal to participants in that struggle who champion the cause of justice and equality for women and non-Muslims, and freedom of belief and expression in the Muslim world. Given the extreme importance of Islamic legitimacy in Muslim societies, I urge human rights advocates to claim the Islamic platform and not concede it to the traditionalist and fundamentalist forces in their societies. I would also invite outside supporters of Muslim human rights advocates to express their support with due sensitivity and genuine concern for Islamic legitimacy in the Muslim world.

...

* * *

In a recent comment, Mohammad Fadel, in 'Muslim Modernism, Islamic Law, and the Universality of Human Rights', 36 *Emory Int'l L. Rev.* (2022) 713 characterizes An-Na'im's work:

... as an attempt to reconcile one's specific commitments ... arising out of being a Sudanese, African-Arab Sunni male-with the universal commitments arising out of being a member of humanity. At different times, An-Na'im offered various strategies to accomplish this reconciliation. One strategy was to propose a radical inversion of those elements of Quranic and Islamic teachings that Muslims should deem universally authoritative [Another took] an institutional perspective: a secular state, committed to religious neutrality, could create the political space within which individual Muslims could work out freely for themselves different ways to reconcile their particular commitments with universal ones.

... [His] call for a cross-cultural approach to human rights remains salient more than a quarter century after he first articulated it. Muslims, in particular, find their human rights threatened by both non-Muslim states, whether authoritarian (e.g., China) or militantly secular/democratic (e.g., France), and authoritarian Muslim-majority states (e.g., Egypt). Despite the disparate political and economic systems of these different regimes, they are united by a profound hostility to assertions made by Muslims of rights that others take for granted; such hostility rests on the claim that by exercising their rights in a manner inconsistent with the state's wishes, Muslims are acting in a manner contrary to the public order. Some of this hostility could be mitigated by a clearer articulation of Islamic legal principles and their presentation in a language that does not make them seem incommensurate with the rules of international human rights law. ...

Abdullahi Ahmed An-Naim subsequently elaborated on his overall approach in *Decolonizing Human Rights* (2021) 123:

In conclusion, [my] core propositions ... can be summarized as follows. Any expectation of legal enforcement of universal human rights (not just those that happen to be protected under domestic law as the civil rights of citizens) by any nation-state is a ruthless mirage. Any outcome that can be expected of the legal protection of human rights by the state is unsustainable in practice unless it is accepted and internalized as an indigenous norm by the people concerned. Conversely, any human rights norms that are accepted and internalized by people in their communities will be predominantly upheld in their own daily practice, and states can enjoy the voluntary cooperation of their populations when enforcing the right in exceptional cases of violation. This is already happening for many human rights norms in the daily practice of communities everywhere, but the current international advocacy regime is exclusively focused on violations because the survival of the current system of institutionalized monitors is totally dependent on the existence of violations, not the reality of compliance.

The paradigm shift and strategy I am calling for is to focus on making compliance with human rights the constant daily norm in our interpersonal and intracommunal relations, the socialization of our children, and the organization of our social institutions. There is simply no alternative to reliance on habitual conformity if we are to have the human and material resources and political will to enforce human rights norms in the rare and exceptional instances of their violation. This strategy may sound difficult or time-consuming, but it is in fact the fastest, most effective, and most sustainable way of protecting human rights as the rights of every human being, everywhere, all the time. Whoever seeks to protect any human right among any people should immediately begin to work within that community to promote that norm through cultural transformation and political mobilization. That is how norms that can produce the spontaneous practice of gender equality and religious pluralism can be entrenched and expanded.

Comments on Cultural Relativism

Consider the following observations:

Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), at 96:

It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is

nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.

Louise Arbour, UN High Commissioner for Human Rights, Statement to the UN Commission on Human Rights (14 March 2005):

I am ... concerned that we have unduly embroiled our normative discourse in unnecessary clashes of vision, creating competing images, each incomplete and ineffective without the addition of the other. Are human rights universal or culturally specific? Are they collectively or individually held? Should we promote them, or protect them? Which is the more effective: technical cooperation or naming and shaming; country analysis or thematic debates? Which comes first: peace or justice; economic, social and cultural rights, or civil and political rights; development or democracy?

Such questions serve, in practice, as little more than a series of diversions to the real task in hand. They become the theoretical playground within which we demonstrate our irrelevance and justify our inaction, whether than inaction is borne of indifference, shrewd calculation, or despair.

Judge Bonello, Concurring Opinion in *Al-Skeini v. United Kingdom* (European Court of Human Rights, Grand Chamber, Application No. 55721/07 (7 July 2011)), which concerned the issue of whether UK obligations under the European Convention on Human Rights applied to certain actions of its troops in Iraq:

37. I confess to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to “human rights imperialism”. It ill behoves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human rights promotion.

38. Personally, I would have respected better these virginal blushes of some statesmen had they worn them the other way round. Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.

QUESTIONS

1. What are the advantages and risks of understanding human rights promotion as a process of vernacularization?
2. An-Na'im suggests an approach to the questions of how to understand divergences among cultures with respect to human rights issues and how to go about finding common ground. How would you describe that approach? Exogenous, endogenous, or some mix? Does it appear helpful in resolving contemporary disputes over, say, gender discrimination or capital

punishment? Do Merry's observations about culture and modes of cultural change support or call into question An-Na'im's project?

B. DISSONANCE AND CONFLICT: ILLUSTRATIONS

Against the background of Chapters 6 and 7(A), with their examination of rights discourse and presentation of different perspectives on universalism and cultural relativism, this Part explores four human rights issues now in contention and active debate among and within countries.

In the illustrations below, two different phenomena become central to the debate: (1) The asserted universal norm *itself* may be challenged, perhaps on the ground that it lacks universal validity, or that it conflicts with ultimate religious commands, or that it violates long-standing tradition that assures cultural integrity and survival. This chapter's illustrations contain examples of these kinds of arguments to further develop the theme of cultural relativism. (2) The second phenomenon involves a conflict among different rights that are each recognized to some extent in the leading human rights instruments. The dispute is sometimes related to cultural relativism and sometimes distinct, but is formally internal to the human rights corpus. What, for example, are the respective boundaries of rights that in given contexts squarely conflict with each other? Freedom of religious belief and practice may conflict with non-discrimination norms; freedom of speech may conflict with the protection of minority groups. As materials in Chapter 6(A) made clear, such types of conflict are endemic to rights discourse, as they are to law in general.

Several of the following illustrations concern family, gender and religion — interrelated topics that have characterized much discussion of the last decade about cultural relativism and that often involve conflicting rights. Thus the studies examine gender and family in relation to a state's or ethnic group's internal custom, or in relation to religion.

The problems discussed in this chapter have become acute within many developing countries. In recent decades, such countries experienced strong external and internal pressures to rethink and revise, sometimes radically, their traditional beliefs and practices. The relentless assault of the developed world on other cultures, the penetration of those cultures by trade, investment, high-tech media and tourism, as well as the universalization of ideas and values like human rights, have launched transformative processes that are often referred to under the broad rubric of globalization. The challenge to a state or region's traditional ways and to other state practices that depart from the universal human rights instruments increasingly comes from internal groups as well as from international advocates and organizations. The upheavals in Arab countries following the Arab Spring provide but one striking illustration in that regard. Women played an important part in the demonstrations that brought down the Mubarak government, but it has been estimated that 90 percent of married women in Egypt have been subjected to female genital mutilation. Virginity tests were applied to women arrested in the pro-democracy demonstrations, and the Egyptian Criminal Code (Section 60) states that 'no punitive damages can be obtained if the woman has been beaten by her husband with good intentions'. In 2019, the Grand Imam of al-Azhar, the highest religious law authority in Egypt ruled that 'beating a woman is permitted, but is not obligatory. It is permitted in order to confront the rebellious woman and to break her arrogance and in order to protect the family from loss and dissolution.'

1. Gender

The potential for conflict in a large number of states between the objectives of human rights treaties, on the one hand, and customary laws and practices as well as religious beliefs on the other, is a highly contested terrain. Gender-related issues are prominent here, as many traditional norms and much local custom that retain power and influence today impose different roles and duties on men and women. To some extent, such problems stem from the increasing power and prominence in recent years of

fundamentalist religious groups, many of which actively oppose the transformative impetus of human rights with respect to traditional gender roles.

Customary laws and practices may conflict with prohibitions in the text of the ICCPR and CEDAW or in action taken by the relevant treaty bodies. Recall Articles 2(f) and 5(a) of CEDAW that require states to take all appropriate measures to modify or abolish customs, practices and social and cultural patterns of conduct that constitute discrimination or that are based on the idea of inferiority or on stereotyped roles for women.

Writing almost three decades ago, Tracy Higgins, in ‘Anti-Essentialism, Relativism, and Human Rights’, 19 *Harvard Women’s L. J.* (1996) 89, concluded that:

Confronted with the challenge of cultural relativism, feminism faces divergent paths, neither of which seems to lead out of the woods of patriarchy. The first path, leading to simple tolerance of cultural difference, is too broad. To follow it would require feminists to ignore pervasive limits on women’s freedom in the name of an autonomy that exists for women in theory only.

The other path, leading to objective condemnation of cultural practices, is too narrow. To follow it would require feminists to dismiss the culturally distinct experiences of women as false consciousness. Yet to forge an alternative path is difficult, requiring feminists to confront the risks inherent in global strategies for change.

Building upon women’s shared experiences inevitably entails a risk of misdescription, or worse, cooptation but contains the promise of transforming and radicalizing women’s understanding of their own condition. Emphasizing difference threatens to splinter women politically, undermining hard-won progress, but may simultaneously uncover new possibilities for re-creating gender relations. Forging a combined strategy that respects both commonality and difference requires feminists to acknowledge that we cannot eliminate the risk of coercion altogether, but the risk of inaction is also ever present.

This section begins with two readings that consider the complexity of developing feminist perspectives on human rights related to gender, problems that bear on the following case studies. It then explores a practice that is variously referred to, with strikingly different political and moral innuendo and sometimes agendas, as female circumcision, female genital cutting, or female genital mutilation.

**SINDISO MNISI AND ANINKA CLAASSENS, RURAL WOMEN REDEFINING LAND RIGHTS IN
THE CONTEXT OF LIVING CUSTOMARY LAW
25 S. AF. J. HUM. RTS. 9 (2009) 491**

I Introduction

Women’s rights activists and lawyers in Africa have tended to treat the customary arena as inherently dangerous to women’s interests, pointing to the frequency and regularity with which the discourse of the customary is used to disempower women and bolster patriarchal interests. Anne Whitehead and Dzodzi Tsikata conclude that there are ‘simply too many examples of women losing out when modern African men talk of custom’. In this context, strategies to secure women’s land rights in Africa have tended to avoid the customary law arena in favour of formal legal initiatives such as the registration of joint land titles for both spouses.

However, these legal strategies have also proven to be problematic. Titling programmes are often captured by elites and used to entrench the position of those with formal rights (mostly men) at the

expense of overlapping ‘secondary’ entitlements vesting in women, especially unmarried women. Further, strategies that focus on attaining individual ownership for women have been criticised as relevant only to small numbers of middle class women and for failing to articulate with the concerns of women whose survival is embedded within a web of reciprocal family and community relationships, for whom the protection and preservation of the land rights vesting in the family or group may be a priority. Furthermore, legal strategies that focus exclusively on the creation of a ‘formal’ statutory property regime separate from the customary arena fail to come to grips with the fact that in South Africa many of the most serious land-related problems facing women exist at the interface between distorted custom and past colonial and apartheid statute law. Customary entitlements to land vesting in women are rendered invisible to the formal legal system even in instances where women continue to use and occupy the land in question. For many women living in rural areas, the only means of countering threatened evictions lies in asserting use and occupation rights derived from customary entitlements that are at odds with overlaid ‘formal’ legal rights held by men. Legal strategies that seek to avoid the customary arena may unwittingly remove the ground from under the feet of those women for whom customary entitlements are the best or only basis on which to assert or prove land rights. Moreover, they ignore the fact that the women concerned are entitled to have their rights recognised through a system of law that the Constitution recognises as legitimate, and to demand that they have a say in how this system of law develops.

To outline the shortcomings of statutory reforms that focus on providing land titles as the ‘solution’ is not to deny that the discourse of the customary is fraught with serious dangers for women. ...

...

II Challenging the Assumptions Underlying the ‘Rights’ and ‘Custom’ Dichotomy

The popular discourse counter-posing rights and culture is mirrored by an academic discourse that contrasts ‘universalism’ and ‘cultural relativism’. The two poles of universalism and cultural relativism have been debunked as false opposites which obscure more than they clarify ...

...

International political agendas coincide with these debates. At one extreme, liberal human rights agendas are used to justify invasion of other countries. At the other is the practice of countries refusing to endorse equality provisions on the basis that they conflict with local custom or group identity which must be protected from ‘western influence’.

[Based on relevant] studies, several critiques are particularly pertinent to our discussion of women’s land rights and customary law. First, the bounded group identities and closed ‘cultures’ posited by the cultural relativists have been subject to recurrent challenge. This characterisation of culture leads to essentialism and belies the ongoing processes of contestation, change and adaptation that occur within and between cultures. It ignores the fact that there are no longer (if ever there were) bounded cultures circumscribing people’s life experience. Cultural relativists tend to privilege static versions of custom that deny competing, internal constructs advanced by marginalised groups who often employ rights claims in their struggles for change.

Universalists, on the other hand, are critiqued for essentialising the content of human rights. The content of rights has been shown to be variable and subject to constant re-negotiation at all levels of society, including within the jurisprudence of different countries and international instruments. Once the content of rights is recognised as the outcome of context-specific processes, claims of universalism need to be tempered by the recognition of the context-specific processes in which rights are claimed, negotiated, adjudicated, developed and re-defined.

Perhaps the most pragmatic criticism of both universalism and relativism is couched in legal pluralism. The argument here is that both sides fail to take into account the plural legal contexts in which people invoke rights claims (whether to individual or cultural rights) in most societies, and in post-colonial and post-socialist societies in particular. In the context of overlapping international instruments, state law, informal local law and customary regimes, people tend to ‘mix and match’, drawing on whichever authority, law or ‘right’ best advances their specific interests in those instances. Implicit in the pluralist

position is that claims are forged at the interface between overlapping systems of law and custom which combine the ‘imported’ and the local, the formal and the informal. Hence, nowhere can ‘rights’ or custom be said to exist or operate in isolation from the other.

...

DIANNE OTTO, FEMINIST APPROACHES TO INTERNATIONAL LAW
ANNE ORFORD AND FLORIAN HOFFMANN (EDS.), THE OXFORD HANDBOOK OF THE
THEORY OF INTERNATIONAL LAW (2016) 488

...

2. Visions

... [F]or many feminists, the vision of women’s inclusion and equality in the existing social and legal order is inadequate. Their ambitions are more transformative, seeking to challenge the masculinist ways of thinking that are embedded in the underlying templates that determine what equality and inclusion look like, discursively and in practice. ... A well-worn method of representing [feminism’s multiple genealogies] is to identify various genres of feminist legal scholarship, in terms of their philosophical and political commitments. In international law, these taxonomies usually adopt ‘liberal’ feminism as their starting point, moving on to describe other genres generationally as, in various ways, responses to the limitations of liberalism like: ‘radical’ and ‘cultural’ feminisms which focus on women’s subordination (rather than inequality) as the foundational site of oppression; ‘Marxist’ and ‘socialist’ feminisms which centre attention on the exploitation of women’s economic and reproductive labour; ‘critical race’ and ‘postcolonial’ feminisms which position sex/gender as one of multiple intersecting axes of oppression in the larger context of imperial power; and ‘post-structural’ and ‘queer’ feminisms which understand the identities and practices associated with gender and sexuality as fluid and multiple, rather than naturally determined and dualistic.

Elements from several of these approaches are likely to be found in most feminist projects in international law; although there is no doubt that radical feminist ideas have been very influential in recent years. This influence has focused attention on women’s sexual subordination and victimhood, making many feminists uncomfortable because it has had the paradoxical effect of granting new legitimacy to long-standing protective gender tropes, rather than challenging them. While identifying the dominant strand(s) informing any particular feminist intervention is empowering and critical knowledge, it is often more useful to think of feminist ideas in international law as operating as a network, aspects of which are drawn upon depending on politics, history, context, strategy, and goals, rather than as parallel sets of ideas that function in isolation from or opposition to each other—although they can do this as well, and sometimes with paralyzing effects, as with opposing feminist views about whether prostitution should be regulated as work or criminalized as violence against women. While such internal feminist debates foster the critical self-reflection that is part of the life-blood of feminism, it is important to work against the stasis that understanding feminism in terms of competing strands installs. It is more useful, and apt, to think of feminist approaches to international law as a shifting and contested network of ideas and allegiances that, in seeking to make sex/ gender a central analytical category, draw on multiple and sometimes competing feminist perspectives and engage with other critical traditions in law. ...

My search for more detail about the feminist visions of the future—feminist utopias, if you like—that have informed feminists’ engagements with international law has not been very fruitful. While the starting point is usually the desire to change women’s disadvantaged position vis-à-vis men around the world, there are many ways that a feminist might go about promoting such change For some, the project is to realize the liberal humanist promises of universality and equality, while for others it is to struggle against neoliberal economic globalization and its deeply gendered inequitable effects. For some, the primary subject of feminist analysis is women, while for others the feminist subject includes women, men, and all other sex/gender identities, and for yet others she is an intersectionally constituted subject located in her specific history, especially her colonial history, and the many other vectors of disadvantage that have an influence on her situation, such as race, caste, indigeneity, sexuality, and economic status. However, even this does not exhaust the possible subjects of feminism,

as gender is also an analytical system that attributes value to objects and ideas that have little or no relationship at all with sexed bodies and identities. In this approach, the subject of feminism is the entire discursive framework of international law, and the task is to reveal its reliance on gendered signs to order ways of thinking that legitimate and normalize an inequitable world order and then to radically reconstruct its entire conceptual framework. ...

... In what ways sex/gender would matter in a reimagined feminist world is an open question. ...

Female Genital Mutilation/Cutting (FGM/C)

Since the late 1970s, when an American feminist, Fran P. Hosken, published *The Hosken Report: Genital and Sexual Mutilation of Females*, and began the process of replacing discussions of female circumcision with an uncompromising condemnation of female genital mutilation, efforts to eliminate this practice have been surrounded by controversy. In 1983, for example, the Association of African Women for Research and Development endorsed a fight against FGM, but roundly criticized the ‘crusade of the West’ that derived from ‘the moral and cultural prejudices of Judeo-Christian Western society’. ‘[T]he new crusaders have fallen back on sensationalism, and have become insensitive to the dignity of the very women they want to ‘save’. They are totally unconscious of the latent racism which such a campaign evokes in countries where ethnocentric prejudice is so deep-rooted.’²⁶⁶

In 2012, Nigerian-American writer Teju Cole raised a similar critique in response to the efforts of Invisible Children, an American NGO, to mobilize outrage at human rights violations committed by Joseph Kony’s Lord’s Resistance Army in Uganda. In a series of tweets that went viral, he observed that: ‘... the fastest growth industry in the US is the White Savior Industrial Complex’; and that ‘[t]he white savior supports brutal policies in the morning, founds charities in the afternoon, and receives awards in the evening’.²⁶⁷

FGM/C first emerged on the UN agenda in 1983, when the Sub-Commission on the Prevention of Discrimination and Protection of Minorities called for a study. In the same year the Sub-Commission set up a Working Group, including participants from UNICEF, UNESCO, and WHO, to study ‘traditional practices affecting the health of women and children’. In 1990, the Commission on Human Rights appointed a Special Rapporteur on traditional practices. Her final report was submitted only in 2005.²⁶⁸ In 1997, WHO, UNICEF, and the United Nations Population Fund (UNFPA) adopted a policy opposing FGM. The 2024 version of WHO’s policy (below) identifies four types of FGM, and this typology is now widely used around the world. The OHCHR has expressed concern that efforts to eliminate FGM have led to a major increase in instances of ‘cross-border and transnational’ FGM (UN Doc. A/HRC/56/29 (2024)).

UN human rights treaty bodies, and notably the Special Rapporteur on violence against women, have also taken a strong stand against FGM, as illustrated below in the report by the CEDAW Committee. For its part, the UN Human Rights Council first condemned the practice in 2013. In its Resolution 44/16 (2020), entitled ‘Elimination of female genital mutilation’, the Council:

...

2. Urges States to condemn all harmful practices that affect women and girls, in particular protect women and girls from this form of violence;
3. Also urges States to ensure the protection of and provision of support to women and girls subjected to, or at risk of, female genital mutilation and to

²⁶⁶ M. Davies (ed.), *Third World-Second Sex: Women’s Struggles and National Liberation* (1983), at 217.

²⁶⁷ See T. Cole, ‘The White-Savior Industrial Complex’, *The Atlantic* (21 March 2012).

²⁶⁸ See generally, J. Pace, *The United Nations Commission on Human Rights: ‘A Very Great Enterprise’* (2020) 205-9; and R. Khosla et al., ‘Gender Equality and Human Rights Approaches to Female Genital Mutilation: A Review of International Human Rights Norms and Standards,’ 14 *Reprod. Health* (2017) 59.

address the underlying systemic and structural causes in which the harmful practice is rooted ...;

4. Further urges States to ensure that national action plans and strategies on the prevention and elimination of female genital mutilation are adequately resourced and include projected timelines for goals and incorporate clear targets and indicators ... ;

5. Encourages States to put in place national coordination mechanisms to prevent and eliminate female genital mutilation ...;

...

WORLD HEALTH ORGANIZATION, FEMALE GENITAL MUTILATION – FACT SHEET, 5 FEBRUARY 2024

Female genital mutilation (FGM) comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. The practice has no health benefits for girls and women and cause severe bleeding and problems urinating, and later cysts, infections, as well as complications in childbirth and increased risk of newborn deaths.

The practice of FGM is recognized internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against girls and women. It is nearly always carried out by traditional practitioners on minors and is a violation of the rights of children. The practice also violates a person's rights to health, security and physical integrity; the right to be free from torture and cruel, inhuman or degrading treatment; and the right to life, in instances when the procedure results in death. In several settings, there is evidence suggesting greater involvement of health care providers in performing FGM due to the belief that the procedure is safer when medicalized. WHO strongly urges health care providers not to perform FGM and has developed a global strategy and specific materials to support health care providers against medicalization.

Types of FGM

Female genital mutilation is classified into 4 major types.

Type 1: ... the partial or total removal of the clitoral glans ..., and/or the prepuce/ clitoral hood ...

Type 2: ... the partial or total removal of the clitoral glans and the labia minora ..., with or without removal of the labia majora

Type 3: ...infibulation ... the narrowing of the vaginal opening through the creation of a covering seal. ...

Type 4: ... all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

No health benefits, only harm

FGM has no health benefits, and it harms girls and women in many ways. It involves removing and damaging healthy and normal female genital tissue, and it interferes with the natural functions of girls' and women's bodies. ...

Immediate complications can include: [severe pain; excessive bleeding (haemorrhage); genital tissue swelling; fever; infections, e.g. tetanus; urinary problems; wound healing problems; injury to surrounding genital tissue; shock; death].

Long-term complications can include: [urinary, vaginal, menstrual, and sexual problems; increased risk of childbirth complications and newborn deaths; need for later surgeries; psychological problems (depression, anxiety, post-traumatic stress disorder, low self-esteem, etc.)].

Who is at risk?

FGM is mostly carried out on young girls between infancy and adolescence, and occasionally on adult women. According to available data from 30 countries where FGM is practiced in the western, eastern, and north-eastern regions of Africa, and some countries in the Middle East and Asia, more than 200 million girls and women alive today have been subjected to the practice with more than 3 million girls estimated to be at risk of FGM annually. FGM is therefore of global concern.

...

INQUIRY CONCERNING MALI UNDER ARTICLE 8 OF THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

UN DOC. CEDAW/C/IR/MLI/1 (24 DECEMBER 2019)

[The 'sources' that requested the Committee to undertake an inquiry alleged that FGM was widespread in Mali. After the State Party consented to the inquiry, three members of the Committee visited Mali for 12 days in December 2018. That year, Mali was ranked 182nd out of 189 countries on the Human Development Index, had a literacy rate of 24.6 percent for women, compared with 44.8 percent for men. The country was also 'characterized by an upsurge in gender-based violence against women, low representation and participation of women in decision-making forums, and the absence of women from the peace process and the process of national reconciliation'.

In 2015 the prevalence of FGM stood 'at 82.7 per cent among women aged from 15 to 49 years and 76.4 per cent among girls aged from 0 to 14 years. ...The prevalence among girls was the highest in West Africa in 2017 and exceeded the subregional average of 25.4 per cent.' While there was considerable variation among ethnic groups and religions, there was little difference according to urban/rural location or socioeconomic status. The breakdown according to WHO's typology was: Type II: 48.9 percent of women aged from 15 to 49 years; Type IV, 14.6 percent; and Type III, 10.6 percent. 73 percent of women were subjected to genital mutilation in early childhood and only 0.4 percent at the age of 15 years or over.]

...

2. Sociocultural context and gender stereotyping

21. In the State party, 71 per cent of women and 66 per cent of men aged from 15 to 49 years state that female genital mutilation is a practice required by religion. Religious leaders, during a debate on the subject of female genital mutilation in Mopti in 2010, condemned the most severe forms of excision and affirmed their willingness to debate the issue further with stakeholders. [The government and] the National Human Rights Commission, however, emphasized the socioeconomic nature of the practice. Nonetheless, the Committee notes the persistence among religious leaders of a tendency to

defend female genital mutilation and assert the mandatory nature of the practice. It also notes that the lack of knowledge of religious texts has an impact on the belief in a link between the practice and religion.

22. In Mopti, religious leaders said that female genital mutilation was a way of controlling women's sexual activity. [Some] said that a girl who had not undergone genital mutilation was seen as bringing shame on the family, and there is a belief in some quarters that having sexual relations with a woman who has not undergone genital mutilation causes impotence in the man.

23. One victim ... explained that, once she had undergone genital mutilation, her family had welcomed her as a "woman". [Some] religious leaders ... said that genital mutilation was necessary in order to purify a woman in preparation for marriage. [An NGO] confirmed that families feared that their daughters would not find a husband if they had not undergone genital mutilation.

...

25. ... [T]he head of the extended family, usually a man, was the one who decided whether the girls were to be subjected to genital mutilation, highlighting the fact that his authority took precedence over that of the parents, who generally went along with the decision.

...

[The Committee concluded that the State party had made many efforts to prevent FGM, including implementing policies and programmes and establishing structures and bodies focused on prevention and awareness raising. But the results had been poor, insufficient resources had been made available, awareness-raising efforts had not been well targeted, and public awareness of FGM's harmful effects was very low. Attempts to legislate against FGM had been thwarted by religious leaders and political will was lacking.]

VIII. Legal findings

A. Obligations of the State party under the Convention in relation to female genital mutilation

53. Under the Convention and ... general recommendation No. 31 ... [FGM] is a harmful practice and a form of gender-based violence

...

56. Under articles 2 (f), 5 (a), and 16 (1) (a), read in conjunction with article 5 (a), States parties are required to eliminate prejudices, stereotypes and customs that subordinate women to men and create gender inequality, which are at the root of female genital mutilation. They are also required to protect all women, including those who have not been subjected to genital mutilation, from the gender bias and stereotypes that make such mutilation a condition for marriage, thus depriving them of equality with men in the enjoyment of the right to enter into marriage. In addition, under article 2 of the Convention, ... States parties must take measures to modify social and cultural patterns of conduct that are based on the idea of the inferiority of women and girls.

...

59. The Committee recalls that the obligations of States parties under the Convention do not cease in periods of armed conflict or in states of emergency resulting from political events. Consequently, the security crisis and the state of emergency that have been in place since 2015 do not relieve Mali of its obligations under the Convention.

...

D. Grave or systematic nature of the violations

...

80. The Committee finds that the State party is responsible for the following:

- (a) Grave violations of rights under the Convention, considering the discriminatory nature of female genital mutilation and the failure to fulfil its obligation to protect the majority of women and girls from female genital

... mutilation and ensure that they have appropriate access to health care and justice, thereby exposing them to severe physical and psychological suffering, impeding investigations and obstructing victims' access to remedies;

(b) Systematic violations of rights under the Convention, considering that the State party has knowingly omitted to take effective measures to:

- (i) Criminalize and prohibit female genital mutilation and ensure that the crime is punished by severe penalties;
- (ii) Provide for measures, including legislative measures, to protect, care for and rehabilitate victims of female genital mutilation;
- (iii) Counter negative cultural attitudes and social norms that legitimize female genital mutilation and the stigmatization of women and girls who do not agree to such mutilation.

...

* * *

A Kenyan Case Study

FGM/C has been litigated in a number of states. Here we consider a case from Kenya in which the court addresses various challenges seeking to prevent the implementation of that country's Prohibition of Female Genital Mutilation Act, 2011. The 2001 Children's Act had already criminalized the subjection of children to harmful cultural practices, and the 2015 Protection against Domestic Violence Act classified FGM as violence. In 2019, a Presidential Directive called for FGM's eradication by 2022, an effort that is promoted by a semi-autonomous Anti-FGM Board. The prevalence of the practice diminished from 32 percent in 2003, to 27 percent in 2009, and 21 percent in 2014.

According to UNICEF, FGM programmes have focused on consultations, observation, and open dialogue with community members so that programmes can be tailored to specific locations. Efforts have also been made to identify 'alternative rites of passage' that substitute for FGM but are considered meaningful to the individual and the community.²⁶⁹ Some authors have argued that adult women's consent to FGM should be recognized.²⁷⁰

***KAMAU V. ATTORNEY-GENERAL ET AL.,* HIGH COURT OF KENYA AT NAIROBI, CONSTITUTIONAL PETITION NO. 244 OF 2019 (17 MARCH 2021)**

JUDGES ACHODE, KIMONDO, AND MUIGAI,

Introduction

1. Dr. Tatu Kamau (hereafter the Petitioner) is a medical doctor. She challenged the constitutionality of the Prohibition of Female Genital Mutilation Act

...

3. The Petitioner pleaded that ... the Act contravenes ... the Constitution by limiting women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and, by discriminating between men and women. She opines that the Act is an "imperialist imposition from another culture that holds a different set of beliefs or norms".

²⁶⁹ UNICEF, 'Case Study on the End Female Genital Mutilation (FGM) Programme in the Republic of Kenya' (April 2021).

²⁷⁰ Matilda Lasseko-Phooko, 'Legislating against Adult Women's Consent to Female Genital Mutilation', 24 *African Hum. Rts. J.* (2024) 000.

4. She contended that ...the Act expressly forbids a qualified medical practitioner from performing female circumcision, thereby denying adult women access to the highest attainable standard of health, including the right to healthcare enshrined under Article 43 (1)(a) of the Constitution.

5. When the Petitioner testified, she claimed to speak on behalf of communities that practice female circumcision; and, for the women who have been jailed for carrying out the rite.

6. One of the main issues in the Petition is whether it is constitutional to prohibit an adult woman from freely choosing to undergo the rite under the hand of a trained and licensed medical practitioner. ...

Whether FGM is a harmful cultural practice

...
128. The Petitioner posited that no particular culture is superior to another. She submitted that the rights of willing women from communities that practiced the now prohibited cultural ritual of female circumcision have been violated by the Act. She was of the view that their consent has been disregarded ...

129. To answer these issues, it is necessary to examine FGM, its causes and consequences and whether they occasion harm. ...

...
131. ... Articles 53 and 55 of the Constitution refer to harmful cultural practices in protection of children and the youth. The Maputo Protocol [Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003] in Article 1 (g) defines Harmful Practices as: all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

...
133. Article 5 of the Maputo Protocol calls for the elimination of harmful practices, by prohibiting and condemning "all forms of harmful practices which negatively affect the human rights of women and which are contrary to international standards".

134. ... [T]he commitment to eliminate harmful practices is linked not only to promoting the health and well-being of women but also to women's human rights.

135. The assumption is that anyone above the age of 18 years undergoes FGM voluntarily. However, this hypothesis is far from reality, especially for women who belong to communities where the practice is strongly supported. The context within which FGM/C is practiced is relevant as there is social pressure and punitive sanctions. From the evidence, it is clear that those who undergo the cut are involved in a cycle of social pressure from the family, clan and community. They also suffer serious health complications while those who refuse to undergo it suffer the consequences of stigma. Women are thus as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.

136. From the evidence before us, it is clear that the rationale for FGM/C varies from one community to another. In some communities FGM/C is a rite of passage to adulthood or womanhood; it fosters virginity and modesty and makes for better marriage prospects. In other communities it is a measure to curb women's sexual desire while in others it confers social status in the community. In some cultures, if an uncircumcised woman marries into the community she is at risk of undergoing FGM/C upon being married or during her first pregnancy or labour.

137. All survivors disclosed devastating immediate, short-term and long-term effects [of] FGM/C. They underwent FGM/C at [the] young and tender age of 9 to 14 years. They told the court that they experienced excruciating pain during cutting and thereafter until the wound healed and on occasions that they undertook biological functions. They suffered bleeding, incontinence and in the long term psychological and even psychotic conditions from trauma. ...

...

139. In *Katet Nchoe & Ano v Republic*, High Court Nakuru, ... [2011] eKLR, the accused persons were charged with manslaughter arising out of FGM. ... The Court held:

In our case, FGM is certainly harmful to the physical and no doubt psychological and sound well-being of the victim. It may lead to child birth complications, in this case, it led to premature death of a teenager. That kind of custom could be truly well discarded and buried in the annals of history, just as we no longer remove our 2, 4 or 6 teeth from our lower jaw, or adorn our faces, cheeks with healed blisters.

140. The Petitioner contended that Section 19(1) of Act expressly forbids a qualified medical practitioner from performing female circumcision thereby denying willing adult women access to the highest attainable standard of health

141. Medicalization of FGM/C does not mitigate harm on the girl /woman as demonstrated by the FGM/C survivors who deposed affidavits and/or testified in Court were consistent and had similar experience after FGM/C. ...

142. ... Under Article 2 (4) [of the Constitution] any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

143. Some harmful cultural practices are nonetheless valued as ‘traditional cultural heritage’ in some communities. Cultural rights intertwine with human rights in certain social spaces, and are not easy to separate but the Constitution offers the first most important standard against which the relevance of all other laws, religions, customs, and practices are to be measured.

144. The Constitution also restricts customary law and religions through certain other provisions whose overall effect is to rid of harmful traditional practices. ...

148. The challenge is one of balancing the competing rights under Articles 26 (right to life), Article 27 (on equality and freedom from discrimination), Article 28 (on human dignity) Article 29 (on freedom and security of the person) and Article 43 (on the highest attainable standard of health and reproductive healthcare) against the rights in Articles 11, 32 and 44 (on culture, religion, belief and language).

149. Article 25 of the Constitution prescribes fundamental rights and freedoms that shall not be limited. The right to enjoy one’s culture religion and belief as envisaged in Articles 11, 32 and 44 are derogable.

150. Article 24 prescribes that the right and fundamental freedom may be limited to the extent the limitation is reasonable and justifiable based on human dignity equality and freedom. The limitation shall be proportionate to the legitimate aim.

153. [D]espite the rights enshrined in Articles 11, 32 and 44 of the Constitution relating to culture, religion, beliefs and language, the rights can be limited due to the nature of the harm resulting from FGM/C to the individual’s health and well-being.

154. We shall now comment briefly on the exclusion of Type IV FGM/C. Section 2 of the Act defines FGM/C Type I, II & III but excludes Type IV which the WHO includes as “unclassified”. The latter includes any other procedure involving, genital pricking, piercing with tongs or scissors including razor blades, incising and stretching of the clitoris/labia.

155. Section 19 of the Act criminalizes FGM/C except where it is a surgical operation for a person’s physical and mental health or at any stage of labour or birth. It further provides that culture, religion, custom or practice or consent shall not be a defence.

[Earlier in the judgment (at para. 106) the court had noted that practices omitted by the Act include cosmetic surgeries, labiaplasty, piercing and burning of female genitalia with corrosive substances and so forth. As a result, it noted (para. 107) that the Act favours a miniscule of the population who engage in such Type practices.]

156. We find that from the stand point of criminal law a lacuna is created that hampers the effective enforcement of the Act. The criminalization of the three types of FGM/C and not Type IV, which is unclassified, makes it difficult to effectively enforce the Act. There seems to be no objective or professional process to distinguish between the various types of FGM/C during investigation or prosecution.

Whether the enactment of the FGM Act violated the right of women to uphold culture and identity

157. Culture, and in particular the desire to preserve one's cultural identity, is the central plank of the Petitioner's case in support of FGM/C. ... [T]he preamble to the Constitution recognizes the culture and customs of the Kenyan people

...

159. According to the 4th Interested Party, the enactment of the Act was necessitated by the need to shield women in communities that advocate for FGM/C and who have no say or capacity to give the consent when it comes to FGM/C. The practice prior to the enactment of the Act was that the decision of when, where and who will perform the act was decided by men. It was urged that whereas Article 44(1) and (2) of the Constitution guarantees a person's right to participate in the cultural life of his or her choice and to enjoy his or her culture, sub-article (3) thereof prohibits a person from compelling another to perform, observe or undergo any cultural practice or rite.

160. The Petitioner however argued that consenting female adults should not be prevented or prohibited from undergoing female circumcision which she says is an age old valued tradition among certain communities. ...

161. ... [I]t is no defence to a charge under the [Act] that the person on whom the act involving female genital mutilation was performed consented to that act

...

167. From the evidence of the survivors S.S.H., F.A.S.A. and those who escaped the cut like R.J.K, they all confirmed the misinformation, deception and societal pressure they were subjected to, to undergo the cut. For instance, when F.A.S.A told her parents that she did not want to go through the cut, her mother told her that no one would marry her if she missed the cut. She threatened to report her mother to the Police. Nevertheless, her father took her and her sister to the doctor and they underwent the cut. R.J.K may have escaped the cut, but she suffered beatings from irate family members and was shunned by the community and prospective suitors. She finally relocated to Nairobi.

...

170. According to the 2nd respondent, the context in which FGM/C is practiced within the various communities is a conundrum affecting not only women from communities practicing FGM/C but also women married into communities practicing FGM/C who are forced to undergo the cut in order to fully participate in the lives of the community and gain 'respect and acceptance from their loved ones and elders' in the communities into which they have married.

...

181. On discrimination, the Petitioner contended that the impugned Act overtly favours the cultural practices of one gender against the cultural practices of the other gender in contravention of Article 27 of the Constitution which provides for equality and freedom from discrimination based on gender. It was urged that while men were free to undergo a similar surgical procedure, the Act showed open intolerance to adult women who wished to undergo female circumcision to uphold their culture.

[The court then reviewed the relevant Constitutional provisions, as well as those of the UDHR, the CEDAW Convention, and the African Charter on Human and Peoples' Rights.]

...

195. The second stage of analysis is to interrogate whether the prohibition of female circumcision while allowing male circumcision resulted in unfair discrimination. Indeed, the reality of our society is that men and women are treated differently with regard to cultural rites.

196. Whereas the evidence adduced hereto points to discrimination, we are not convinced that the said discrimination was unreasonable. ...

197. The 1st and 2nd Respondents argued that FGM/C was a harmful cultural practice and was not similar to male circumcision. It was their evidence that equating FGM/C to male circumcision was flawed stating that unlike male circumcision which boasts of health benefits, female circumcision was both harmful and with no health benefits. ...

...

202. After a careful examination of the provisions of the Act against those of Article 28 of the Constitution, we are of the considered view that the impugned Act does not violate the Constitution or women's right to dignity.

203. On the main issue of whether the right to culture has been violated, the Petitioner faulted the Act for condemning and misrepresenting the age old tradition as violent and dangerous. In particular, that the Act defines 'female circumcision' as 'mutilation' which connotes an intention to incapacitate and destroy. She took the view that female circumcision is part of the national heritage and history. This, the Petitioner argued, infringed upon women's right to practice the cultural life of their choice making the Act contra-constitution.

204. Article 11(1) of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Article 11(2)(a) obligates the state to promote all forms of national and cultural expression ...

...

207. Culture is dynamic and not static and will continue to grow responding to new factors. It is also fluid and changes from time to time. It is susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. But there are certain aspects of culture that identify a particular group, their history, ancestry and way of life and this diversity is recognized and protected by the Constitution. See *Mohamed Ali Baudi and others vs. Attorney General & 11 others* [2018] eKLR.

...

210. The Constitution grants the freedom to exercise one's culture. However, that freedom has to be carried out in line with the other constitutional provisions. From the law we observe that culture entails various modes of expression. Therefore, what is limited is any expression that will cause harm to a person or by a person to another person. FGM/C falls into the latter category.

211. It therefore follows that while our Constitution has a general underlying value of freedom, this value of freedom is subject to limitation which is reasonable and justifiable. Additionally, it has not inscribed the freedom to inflict harm on one's self in the exercise of these freedoms. ...

...

214. The evidence before us demonstrates that the practice of FGM/C implicates not only the right to practice cultural life but also the right to health, human dignity and in instances when it results in death, the right to life. The provisions of international treaties reproduced hereto are also clear that not all traditional practices are prohibited, but only those that undermine international human rights standards.

215. In sum there is no doubt that FGM/C was central to the culture of some communities in Kenya including the Kikuyu to which the petitioner belongs. However, from the medical evidence, and as discussed earlier, we are left in no doubt about the negative short term and long term effects of FGM/C on women's health. We have also discussed the absence of consent by victims who undergo the rite which violates Article 44 (3) of the Constitution. We are not persuaded that one can choose to undergo a harmful practice. From the medical and anecdotal evidence presented by the respondents,

we find that limiting this right is reasonable in an open and democratic society based on the dignity of women.

Disposition and Final Orders.

216. Our final orders shall be as follows:

- a) That the Amended Petition is devoid of merit and is hereby dismissed.
- b) That the Attorney General (1st Respondent) shall forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011) with a view to prohibiting all harmful practices of FGM as set out in this judgment.

...

* * *

Male Circumcision

In 2012, a German court held that the religious circumcision of male children constituted the criminal offence of causing bodily injury and that the child's right to self-determination should prevail over the parent's right to freedom of religion. The case involved the circumcision of a four-year-old Muslim boy who was taken to hospital suffering extensive bleeding.

While the doctor was ultimately acquitted, the court decided that a child's right to self-determination superseded his parents' right to freedom of religion. The decision prompted widespread uproar, particularly among Jewish and Muslim groups, and as far away as Turkey, Israel and the United States. Germany's Central Council of Jews called it "an unprecedented and dramatic intrusion on the right to self-determination of religious communities." Ali Demir, the chairman of the Islamic Religious Community, argued that circumcision is a "harmless procedure, a tradition that is thousands of years old and highly symbolic."

Ultimately, the Bundestag, Germany's parliament, passed a law allowing the religious procedure. According to the new rules, specially qualified members of religious communities can perform the operation in the first six months of a boy's life, after which it must be performed by a physician.

In 2013, the issue was addressed in a resolution adopted by the Parliamentary Assembly of the Council of Europe:

...

2. The Parliamentary Assembly is particularly worried about a category of violation of the physical integrity of children, which supporters of the procedures tend to present as beneficial to the children themselves despite clear evidence to the contrary. This includes, among others, female genital mutilation, the circumcision of young boys for religious reasons, early childhood medical interventions in the case of intersex children, and the submission to, or coercion of, children into piercings, tattoos or plastic surgery.

...

7. The Assembly therefore calls on member States to:

...

7.5.1. publicly condemn the most harmful practices, such as female genital mutilation, and pass legislation banning these, thus providing public authorities with the mechanisms to prevent and effectively fight these practices, including through the application of extraterritorial “legislative or other measures to establish jurisdiction” for cases where nationals are submitted to female genital mutilation abroad ...;

7.5.2. clearly define the medical, sanitary and other conditions to be ensured for practices which are today widely carried out in certain religious communities, such as the non-medically justified circumcision of young boys;²⁷¹

...

The characterization of male circumcision in this way drew concerted criticism from both the Jewish and Muslim communities, and the Assembly responded two years later with a new resolution:

9. As far as circumcision of young boys is concerned, the Assembly refers to its Resolution 1952 (2013) on children’s right to physical integrity and, out of a concern to protect children’s rights which the Jewish and Muslim communities surely share, recommends that member States provide for ritual circumcision of children not to be allowed unless practised by a person with the requisite training and skill, in appropriate medical and health conditions. Furthermore, the parents must be duly informed of any potential medical risk or possible contraindications and take these into account when deciding what is best for their child, bearing in mind that the child’s interest must be considered the first priority.

...

11. The Assembly is convinced that education is the key to combating ignorance, breaking down stereotypes, building trust and mutual respect and promoting sincere support for the shared values of living together.²⁷²

RE B AND G (CHILDREN) (CARE PROCEEDINGS) **[2015] EWFC 3**

SIR JAMES MUNBY, PRESIDENT OF THE FAMILY DIVISION:

[1] These are care proceedings in relation to two children, B, a boy, born in July 2010 and G, a girl, born in July 2011 [B]oth the father, F, and the mother, M, come from an African country The family are Muslims. ...

...

[4] The most important issue in the proceedings is whether G has been subjected to female genital mutilation (FGM) and, if she has, what the implications of that are in relation to planning for her and her brother’s future.

...

[55] ... FGM is a criminal offence under the Female Genital Mutilation Act 2003. It is an abuse of human rights. It has no basis in any religion. [As I said in 2004] it is a “barbarous” practice which is “beyond the pale.” [Other judges have described it as “an evil practice ...” and .. “a repulsive practice ... deleterious to women’s health.” I entirely agree.

...

²⁷¹ ‘Children’s right to physical integrity’, Resolution 1952 (2013).

²⁷² Parliamentary Assembly of the Council of Europe, ‘Freedom of religion and living together in a democratic society’, Resolution 2076 (2015).

[59] Circumcision of the male ... is the removal of some, or all, of the prepuce (foreskin) [It] involves the removal of a significant amount of tissue, creates an obvious alteration to the appearance of the genitals and leaves a more or less prominent scar

[60] It can readily be seen that although FGM of WHO Types I, II and III are all very much more invasive than male circumcision, at least some forms of Type IV, for example, pricking, piercing and incising, are on any view much less invasive than male circumcision.

[61] It is also important to recognise that comparatively few male circumcisions are performed for therapeutic reasons. Many are performed for religious reasons (as in Judaism and Islam). However, large numbers of circumcisions are performed for reasons which, as the particular prevalence of the practice in, for example, the English-speaking world and non-Muslim Africa suggests, are as much to do with social, societal, cultural, customary or conventional reasons as with anything else, and this notwithstanding the justifications sometimes put forward, that circumcision of the male is hygienic or has prophylactic benefits, for example, the belief that it reduces the incidence of penile cancer in the male, the incidence of cervical cancer in female partners and the incidence of HIV transmission.

[62] ... There is nothing in the case-law to suggest that male circumcision is, of itself, such as to justify care proceedings On the contrary, judges in the Family Division have on occasions made orders providing for non-therapeutic circumcision

[63] In the present case the point arises in striking form. The family, as I have said are Muslims. I assume, therefore, that B either has been or will in due course be circumcised. Yet ... this is not a matter that has been raised before me. There is no suggestion, nor could there be, that B's circumcision can or should give rise to care proceedings. ... G's FGM Type IV (had it been proved) would have been relied upon by the local authority, prior to its change of stance referred to above, as justifying the adoption of both children, even though on any objective view it might be thought that G would have subjected to a process much less invasive, no more traumatic (if, indeed, as traumatic) and with no greater long-term consequences, whether physical, emotional or psychological, than the process to which B has been or will be subjected.

[64] The explanation ... is simply that in 2015 the law generally, and family law in particular, is still prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms Certainly current judicial thinking seems to be that there is no equivalence between the two

[68] ... In my judgment, any form of FGM constitutes "significant harm" What then of male circumcision?

[69] ... Given the comparison between what is involved in male circumcision and FGM WHO Type IV, to dispute that the more invasive procedure involves the significant harm involved in the less invasive procedure would seem almost irrational. In my judgment, if FGM Type IV amounts to significant harm, as in my judgment it does, then the same must be so of male circumcision.

[70] I should add that my conclusions in relation to whether FGM, including FGM Type IV, constitutes "significant harm" for the purposes of family law, is quite separate from the question of whether particular examples of FGM Type IV involve the commission of criminal offences under the Female Genital Mutilation Act 2003. As I have already pointed out, FGM Type IV comes within the ambit of the criminal law only if it involves "mutilation". The question of whether a particular case of FGM Type IV – for example, the case as presented here by the local authority in relation to G – involves mutilation is, in my judgment, not a matter for determination by the family court, and certainly not a matter I need to determine in the present case. It is a matter properly for determination by a criminal court as and when the point arises for decision in a particular case.

[71] ... The fact that [FGM] may be a "cultural" practice does not make FGM reasonable; indeed, the proposition is specifically negated by section 1(5) of the 2003 Act. And, as I have already pointed

out, FGM has no religious justification. So ... it can never be reasonable parenting to inflict any form of FGM on a child. ...

[72] It is at this point in the analysis, as it seems to me, that the clear distinction between FGM and male circumcision appears. Whereas it can never be reasonable parenting to inflict any form of FGM on a child, the position is quite different with male circumcision. Society and the law, including family law, are prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms. There are, after all, at least two important distinctions between the two. FGM has no basis in any religion; male circumcision is often performed for religious reasons. FGM has no medical justification and confers no health benefits; male circumcision is seen by some (although opinions are divided) as providing hygienic or prophylactic benefits. Be that as it may, “reasonable” parenting is treated as permitting male circumcision.

[73] I conclude therefore that although both involve significant harm, there is a very clear distinction in family law between FGM and male circumcision. FGM in any form will suffice to establish ‘threshold’ in accordance with section 31 of the Children Act 1989; male circumcision without more will not.

...

[78] ... Plainly, given the nature of the evil, prevention is infinitely better than ‘cure’. Local authorities need to be pro-active and vigilant in taking appropriate protective measures to prevent girls being subjected to FGM. And ... the court must not hesitate to use every weapon in its protective arsenal if faced with a case of actual or anticipated FGM. ... Given ... the distressingly great prevalence of FGM in this country even today, some thirty years after FGM was first criminalised, ... the family courts [and] the criminal courts, ... have an important role to play and a very much greater role than they have hitherto been able to play.

...

* * *

Scholars have had a mixed reaction to the issue raised, but left unresolved, in the *Re B and G (children)* case. Kai Möller, in ‘Male and Female Genital Cutting: Between the Best Interest of the Child and Genital Mutilation’, 40 *Oxf. J. Leg. Stud.* (2020) 508, provides a justification for banning both male and female genital cutting.

... [T]he current discourse around female genital cutting has not provided a convincing foundation for the view that any interference with the female genitals is considered categorically impermissible. The reasons ... usually advanced ... – pointing to the harm, lack of religious motivation, absence of medical benefits, and existence of patriarchal power structures – are valid considerations, but they do not apply to all kinds of genital cutting and in particular not the less intrusive forms. [This article proposes] a different basis for the rejection of all forms of female genital cutting, namely girls’ right to physical integrity. ... [A] girl’s body is not a ‘resource’ that the parents are free to ‘trade in’ for some other benefit, such as a strengthening of her female identity or the bringing about of a conviction that no pain will overwhelm her; rather, the parents are obligated to respect and protect the integrity of their daughter’s body and in particular her genitals. A further advantage of this approach is that it justifies convincingly why all kinds of female genital cutting are wrong, including those that are considerably less invasive and harmful than male cutting, and it cuts off any discussion of whether some, milder, forms of genital cutting should be considered acceptable. [The author contends that] the current approach of the law, according to which male genital cutting is in principle permissible and can even be ordered by a court, is indefensible and must be changed. ... [T]he reasons commonly relied on to justify the differential treatment by the law of male and female genital cutting are unconvincing. We

cannot, therefore, maintain that female genital cutting is categorically unacceptable while endorsing a balancing approach to male cutting. Furthermore, the correct way to think about the wrongness of genital cutting is to regard it as intrinsically wrong because it violates the right to physical integrity of the child; thus, the conclusion that genital cutting is wrong as a matter of principle applies equally to boys and girls.

Brian D. Earp and Sara Johnsdotter, in 'Current Critiques of the WHO Policy on Female Genital Mutilation', 33 *Your Sexual Med. J.* (2021) 196 agree that there is an element of parallelism in the two cases, but propose a rather different approach. They begin with a survey of scholarly critiques that have been made of the terminology of FGM, including claims that it is imprecise, inaccurate, misleading, harmful, ethnocentric, and sexist:

... it is sometimes argued that women who support, manage, oversee, and even perform FGC in their communities must be victims of brainwashing or false consciousness, having internalized their inferior status to men. However, this argument is not as straightforward as it may seem.

To begin with, women from affected communities who endorse FGC (usually the majority), regularly report believing that modified genitalia—in both males and females—are more hygienic, more civilized/respectable, and more esthetically appealing. ...

...

...[I]t is typically assumed that support for FGC by affected women must be irrational, or, at best, a regrettable psychological adaptation to an unjust situation. However, this assumption has itself been argued to rest on a patriarchal stereotype that ignores, devalues, or denies women's agency despite robust evidence of its existence in the relevant spheres. ...

... [Other concerns raised] include the following:

1. The characterization seems to reflect longstanding racist and colonial stereotypes of "primitive" African societies, in which black and brown women, constructed as passive victims of male-oriented cultural practices, need to be rescued from the men in their own villages, who are believed to be brutal and barbaric.

This is in spite of the fact that:

2. Virtually all societies that practice medically unnecessary FGC also practice medically unnecessary MGC, usually in a parallel ceremony serving similar social functions. ...

3. Depending on the group, either the male or the female form of cutting may be more severe, risky, or potentially detrimental to sexual enjoyment. The most dangerous and deadly form of genital cutting anywhere in the world appears to be ... MGC as it is practiced ... among the Xhosa of South Africa.

4. When practiced as a rite of passage into adulthood (or as part of a Muslim religious initiation), neither MGC nor FGC is typically intended to undermine the initiate's capacity for sexual pleasure. ...

5. Almost invariably, where they occur together, men are in charge of the male rites and women are in charge of the female rites, often with little or no mutual knowledge or influence over the workings of the other. ...

...

As it stands, the WHO appears to be engaged in highly selective condemnation of only non-Western, female-only genital cutting, irrespective of harm, consent, or the comparability of the cutting to other medically unnecessary practices. ...

In 2022, the UN Secretary-General reported (UN Doc. A/77/312, para. 75) that ‘a girl is approximately one third less likely to have undergone [FGM] compared with three decades ago.’ But the report also acknowledged the steady presence of FGM ‘in many high-prevalence countries over several decades’. Successful interventions were said to include:

...health education and community dialogues with parents and religious leaders; advocacy and awareness-raising among key stakeholders, especially communities and the media; investment in the education of both girls and their mothers; legislation, together with political will and enforcement; and the involvement of health-care workers as key change agents in prevention.

QUESTIONS

1. In 2010 the American Academy of Pediatrics adopted a Policy Statement on ‘Ritual Genital Cutting of Female Minors’. While opposing all types of FGC that pose risks of physical or psychological harm, the statement also observed that ‘the ritual nick suggested by some pediatricians is not physically harmful and is much less extensive than routine newborn male genital cutting. There is reason to believe that offering such a compromise may build trust between hospitals and immigrant communities, save some girls from undergoing disfiguring and life threatening procedures in their native countries, and play a role in the eventual eradication of FGC. It might be more effective if federal and state laws enabled pediatricians to reach out to families by offering a ritual nick as a possible compromise to avoid greater harm.’ An alternative approach, proposed by Norway’s Children’s Ombudsman in 2011 is to set a minimum age of 15 or 16 for ritual male circumcision in order to respect ‘children’s best interests and their right to self-determination on religious and health matters’. Comment on these proposals in light of the materials above.
2. How convincing and/or useful do you find the WHO’s typology of FGM/C, noting the observations made by Earp and Johnsdotter above?
3. How would you apply a child’s right to physical integrity in the context of other common cultural practices, such as ear/nose piercing or male circumcision? How might it inform medical treatment of intersex and transgender children?
4. Condemnation of FGM/C by international human rights institutions and Western NGOs has led to pushback from some communities, who view the campaign as based in cultural imperialism and fear the ‘criminalisation of culture’.²⁷³ How would you respond?

2. Religion

No topic generates more controversy — or indeed more complex ideas — than relationships between (1) institutionalization of religion or religious belief or practice in the state and (2) human rights

²⁷³ B. Shell-Duncan et al., ‘Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal’, 47 *L. & Soc. Rev.* (2013) 803, 831.

norms.²⁷⁴ From one perspective, religious beliefs and human rights are complementary expressions of similar ideas, although religious texts invoke the language of duties rather than rights. Important aspects of the major religious traditions — canonical text, scholarly exegesis, ministries — provide the foundation or justification for, or reinforce, many basic human rights. Evident examples include rights to bodily security, or to economic and social provision for the needy. From another perspective, religious traditions may impinge on human rights, and religious leaders may assert the primacy of those traditions over rights. Recall the illustrations in An-Na'im's article, above. The banner of cultural relativism may here be held high. If notions of state sovereignty represent one powerful concept and force that challenges and seeks to limit the reach of the international human rights movement, religion can then represent another.

The topics in this section explore selected issues within this large theme. They involve the distinction sketched by some scholars between freedom *of* religion, and freedom *from* religion. The first freedom is threatened primarily by state conduct that prohibits public expression of religious belief and sharply restricts religious practice or ritual. Such conduct may stem from an ideologically secular state that seeks to limit the role of organized religions, or at the other extreme from fundamentalist states that will not tolerate other forms of religious expression. The second freedom *from* again is threatened primarily by the state, which may impose the beliefs or practices of an official or dominant religion on all citizens, whatever their religious community (if any, for some citizens will be secular or atheist). In such circumstances, human rights additional to the right to freedom of religion may also be implicated. Forms of gender discrimination enforced by the state may find roots in sacred religious texts. The state may repress certain speech that is widely viewed as offensive to the dominant religion. And so on.

These issues do not involve a simple dichotomy of the 'state' and 'citizens'. As the materials in Chapters 6 and 7 have illustrated, religion-based restraints or obligations may be rooted in a broad religious culture that is both closely related to and distinct from the state, and may be insisted on or enforced by a range of non-state actors. Religion and society will often be as apt a framework for discussion as religion and state. The state itself may adopt many attitudes and pursue many policies, ranging from support of the religious culture to neutrality, to active opposition to a religion's teachings and demands.

Before exploring some of the human rights dimensions, it is appropriate to note how significantly the general religious landscape is changing in the world. A 2015 report by the Pew Research Center, entitled *The Future of World Religions: Population Growth Projections, 2010-2050* provides an overview:

The religious profile of the world is rapidly changing, driven primarily by differences in fertility rates and the size of youth populations among the world's major religions, as well as by people switching faiths. ... If current trends continue, by 2050:

- The number of Muslims will nearly equal the number of Christians around the world.
- Atheists, agnostics and other people who do not affiliate with any religion – though increasing in countries such as the United States and France – will make up a declining share of the world's total population.
- The global Buddhist population will be about the same size it was in 2010, while the Hindu and Jewish populations will be larger than they are today.
- In Europe, Muslims will make up 10% of the overall population.

²⁷⁴ N. Bhuta (ed.), *Freedom of Religion, Secularism, and Human Rights* (2019).

- India will retain a Hindu majority but also will have the largest Muslim population of any country in the world, surpassing Indonesia.
- In the United States, Christians will decline from more than three-quarters of the population in 2010 to two-thirds in 2050, and Judaism will no longer be the largest non-Christian religion. Muslims will be more numerous in the U.S. than people who identify as Jewish on the basis of religion.
- Four out of every 10 Christians in the world will live in sub-Saharan Africa.

The following materials start with a comparative survey of questions of religion and state and freedom of religion. These comparisons among states highlight a vital issue that permeates this section: what are the links between religious communities, or one religious community, and the state? The spectrum is large, from notions of separation to the pervasive interrelationships in several countries between Islam and the state.

a. Comparative Perspectives among States

Consider the following examples of different national approaches to the relationship between the state and religious groups.

**W. COLE DURHAM, PATTERNS OF RELIGION STATE RELATIONS
JOHN WITTE AND M. CHRISTIAN GREEN (EDS.), RELIGION AND HUMAN RIGHTS: AN
INTRODUCTION (2011) 360**

The configurations of religion-state relations across the world's legal systems are remarkably diverse, reflecting differences of history, philosophy, religious demography, culture, constitutional and political systems, and numerous other factors. Moreover, religion-state relations in every country are in constant flux. ... Yet broad patterns or types of relationships are discernible

...

Theocratic States

In this pattern type, the linkage between state and religion is so close that it is virtually impossible to distinguish state from religious rule. ... [T]he theocratic state ... postulates total unity of religious and political institutions. Theocratic states typically seek to replicate their vision of what divine rule would be like or what this vision calls for The key ... factor ... is that they constitutionally subordinate all branches of government (legislative, executive and judicial) to a religious normative framework. In addition, they tend to institutionalize this subordination by providing strong linkages (if not outright merger) of religious institutions and state bodies.

The most obvious example of this type of regime is the Vatican City

Historically, there have been theocratic or religious states associated with many of the world's religions

The primary current examples of theocratic or religious states are found in the Muslim world. Countries that consider themselves to be Islamic states according to their constitutions or basic laws include Afghanistan, Bahrain, Brunei Darussalam, Iran, Maldives, Mauritania, Oman, Pakistan, Saudi Arabia, and Yemen. ... [T]hese countries ... affirm in various ways that the State is subordinate to Islamic law, and ... [give] religious leaders institutional supervision authority to assure compliance with Islamic law. Some go further and entrench the religious character of the State by giving it constitutionally irrevocable status. ... [T]he State itself is subordinated to a particular religious system

Established Religions

... [This category covers] systems in which there is an official state religion [that remains] in some sense distinct from and subordinate to the state In its ideal form, at least according to its Eastern Orthodox advocates, this type orchestrates a “symphony” of harmony between religion and the State. There is a broad range of possible “established religions,” stretching from systems in which the state religion is granted a strictly enforced monopoly in religious affairs to much more tolerant regimes such as those one finds in contemporary England, Norway, and Finland. Roman Catholicism has in the past been the state religion of a number of countries where it was predominant—most notably Spain and Italy and various Latin American countries. Evangelical Lutheranism remains the state church in Norway, Denmark, and Iceland Various branches of Eastern Orthodoxy constitute the established churches of Armenia and Greece.

Typically, though not always, established religions are declared to be the state religion in their constitutions. In the Muslim world, this is the case with respect to Algeria, Bangladesh, Djibouti, Egypt, Iraq, Jordan, Kuwait, Libya, Malaysia, Maldives, Morocco, Qatar, Tunisia, and the United Arab Emirates. ...

Religious Status Systems

In a number of countries ... the State recognizes the jurisdiction of a number of religious systems, typically in areas dealing with family law and inheritance. The legal system that applies typically depends on the religion of the individual. The European Court of Human Rights has held that such “plural legal systems” cannot be squared with the [ECHR]. But such systems clearly exist, including those in Israel, India, Lebanon, and a number of Muslim countries. One of the virtues of these systems is that they respect the autonomy of different religious communities and their right to administer their own religious law. [The risk is that they may] limit exit rights of those who wish to leave the community, or to interpret its norms in distinctive ways. There is also a risk that dominant groups can exploit such autonomy to justify second-class status for minorities ... and may use it to construct ghettos

... While marking an advance in their day, however, such systems typically fail to provide full equality of treatment when assessed from the perspective of contemporary human rights law.

Endorsed Religions

[While not] formally affirming that one particular religion is the official or state religion, [these systems] acknowledge that a particular religion has a special place in the country’s history and traditions. This is now quite typical in countries with a Roman Catholic heritage In a similar vein, Thailand, and Sri Lanka endorse Buddhism. ... The ... acknowledgement of a special historical and cultural role can take different forms ranging from financial to mere symbolic support. It may take the form of a general acknowledgement of religious heritage (e.g., Christian heritage in Poland and Fiji; Eastern Orthodoxy in Georgia and Russia); a recognition of the role of a particular religion in nation’s formation (e.g., Timor-Leste and Paraguay); the recognition of a predominant religion; or recognition of religious phenomena, such as the existence of God, specific characteristics of deity, creationism, God’s omnipotence, omniscience and omnipresence, trinitarianism, monotheism, reference to religious founders, or other notions of sanctity. ... [In some cases, this system] operates as a thinly disguised method of preserving the prerogatives of establishment and channeling significant aid to the favored religions.

Preferred Sets of Religions

This can be a variation of other forms of positive identification, except that multiple religions are favored. ...

Cooperationist Regimes

... [These regimes take] a neutral but positive and “cooperative” stance toward religions in society. [They include] most European systems Typical in such schemes is substantial cooperation in church finance, religious education, various humanitarian services, and so forth, though at least in theory such aid is provided on a non-discriminatory basis [But] it is easy to slip from cooperation to patterns of state preference, with a tendency to favor the major religions in a country.

Accommodationist Regimes

Accommodationism might be thought of as cooperation without any direct financial subsidies. Accommodation can be seen both in allowing certain types of indirect financial and other support for different religions and in protecting the freedom to act in accordance with distinctive religious beliefs. ... Accommodationist regimes protect freedom ... by not allowing statutes to carve out exceptions to constitutional and human rights guarantees of freedom of religion or belief. ...

Separation

... [A]pproximately one-third of the nations on earth have some type of separationist regime. Some ... view separation primarily as a method for protecting religion from the State; others see the “wall of separation” as a method of protecting the state and society from excessive religious power; many ... see it as [both]. At the “benign neutrality” end, separation differs relatively little from accommodation, except that it insists on a more rigorous separation of religious and state institutions [T]he mere reliance on religious premises in public argument may be deemed inconsistent with separationist principles.

Less benign forms of separationism make stronger attempts to cordon off religion from public life. ... [R]eligious differences are not viewed as an appropriate justification for differential treatment. Inadvertent insensitivity to religious needs can easily result. Regulations initially formulated without religious animus can have the incidental effect of imposing unnecessary or disproportionately heavy burdens on religious groups. ...

... From an accommodationist perspective, compulsory exclusion of religion from public life constitutes a form of discrimination. From a more rigorously separationist perspective, in contrast, separation treats all religions equally by relegating them all to the private sphere. Of course, this overlooks the fact that secular outlooks are not constrained in the same way. ... [If] the public sphere expands to fill a substantially larger share of total social space, the space available for religion can shrink substantially. ... Separation in its most objectionable guise demands that religion retreat from any domain that the State desires to occupy, but is untroubled by intrusive state regulation and intervention in religious affairs.

Laïcité

Laïcité is the specifically French model of separation, and has been retained in the legal systems of many of France’s former colonies. Thirty-four constitutions characterize the relationship of religion and the state in their respective systems not by proscribing establishment or by calling explicitly for separation, but by affirming that they are secular states. ... While there are a broad range of interpretations of the notion of laïcité, it tends in general to generate systems that are at the rigid separationist end of separationism.

Secular Control Regimes

Prior to the end of the Cold War, a number of communist states pursued a course of militant atheism which was actively hostile to religion [S]tates such as China, Cuba, Vietnam, and North Korea continue to assert such policies. ...

A control regime shares some surface similarities with established and historically favored religions, except that these regimes make a secular ideology the official worldview of the State, and seek to repress dissenters from that view (i.e., religious believers). ...

Abolitionist States

At the negative end of the identification continuum lie regimes with the overt goal of eliminating religion as a social factor [such as] Albania during the Soviet era

* * *

The complexity of the sort of classification that Durham undertakes in the preceding reading is illustrated by the following comment by the UN Special Rapporteur on freedom of religion and belief (UN Doc. A/HRC/37/49 (2018)):

12. Studies ... have produced myriad classification models for the relationships between State and religion. [One such approach is that used by Durham.] Others assess the role of constitutional stipulations in establishing and regulating the overall relationship between religious and State authorities.
13. A 2017 study, ... of all 193 [UN Member States], concluded that some 42 per cent of States either declared official support for one religion (21 per cent) or conferred favour onto one or more religions (21 per cent). Another 53 per cent ... did not identify with any faith or belief. A small number ... (5 per cent) exerted “a very high level of control over religious institutions in their countries or hold a negative view of religion in general”. An earlier study, on the other hand, ... produced 14 subcategories grouped into 4 overarching relationships between State and religion ... concluding that 41 States had official religions, 77 favoured one or more religions, 43 did not identify with any religion and 16 had a negative view of the role of religion in public life.
14. Given such complexities, there is no consensus as to either how the relationships between State and religion should be classified, or on the terminology for characterizing their nature. The Special Rapporteur does not endorse any conclusion or particular model for such relationships generated by the above-mentioned studies. ...

In other words, capturing the complexities involved is both very challenging and politically fraught. The following readings thus confine themselves to offering snapshots of how the relationship between the state and religion has operated in practice in four very different settings: Germany, the United States, Cambodia, and China.

**TOBIAS CREMER, NATIONS UNDER GOD:
HOW CHURCH–STATE RELATIONS SHAPE CHRISTIAN RESPONSES TO RIGHT-WING
POPULISM IN GERMANY AND THE UNITED STATES
12 RELIGIONS (2021) 254.**

1. Introduction

This paper compares the cases of Germany and the United States to investigate how a country's institutional settlement of Church–State relations can shape Christian communities' responses to right-wing populist politics. Germany and the United States are representative of many western countries in having recently experienced a surge of right-wing populist movements, which prominently display Christian symbols and use Christian language. Pro-Trump rioters parading oversized crosses and Jesus flags during the storming of the Capitol in January 2021, or Germany's far-[right] Alternative for Germany (AfD) styling itself as the defender of Germany's "Judeo-Christian heritage" are two ... recent examples [T]he reactions of German and American Christian communities to such references are strikingly different. In the US, White Christians supported Donald Trump's right-wing populist campaign at record-levels in the 2016 and 2020 elections and many American Christian leaders appeared at least tacitly supportive of the Trump administration. By contrast, German Protestants and Catholics were significantly less likely to vote for the AfD than irreligious voters, and Germany's churches have emerged as some of the far right's most outspoken public critics. ...

...

5. Conclusions

... First, that even though different settlements of Church–State relations may be designed with similar intentions—that is in the German and US cases with the aim to strengthen religion as a pillar of liberal democracy—they often exercise opposing incentives and pressure structures on Christian communities as they confront right-wing populist movements. Second, that the effects of these different and pressure structures are often most directly felt by faith leaders, whose response to right-wing populism in Germany and the US appeared importantly influenced by the institutional settlement of Church–State relations. Specifically, Germany's model of benevolent neutrality, which favours clear hierarchies, centralised structures and formally includes German faith leaders in the policymaking process, seemed to give clergy greater incentives to defend the status quo against populist attacks from the AfD, while also equipping them with the institutional basis and social prestige to do so without needing to fear major repercussions. By contrast, America's formal "Wall of Separation" and unregulated religious marketplace, which is more conducive to flat hierarchies, de-centralised churches and informal access to policymaking, appears not only to have facilitated the rise of siege and victimhood narratives among some Christian leaders, thus making them less likely to publicly defend the status quo. But by making faith leaders more depended on personal relations for political access, and on donors and congregants for their livelihood, it has also raised the potential risks for faith leaders to condemn Trumpism—especially at times when Donald Trump was in office and secularisation and de-institutionalisation already undermined deference to Christian leadership in the US. Third, this research suggests that by ways of shaping faith leaders' willingness and ability to create social taboos against the populist right Church–State relations can also importantly influence the voting behaviour of Christians in the pews. Thus, Germany's centralised system of benevolent neutrality appears not only to have encouraged the leadership of the Protestant and Catholic churches to be more outspoken against the AfD, but also to have boosted their ability to maintain social taboos against the AfD by enshrining their status as foremost representatives of Christianity in German society. By contrast, America's decentralised, non-hierarchical and pluralistic system, produces less deferential authority structures. Instead, the decentralised structure of denominations, as well as the prominence of non-denominational leaders, appeared to significantly undermine the traditional religious establishments' sway over voters and their ability to create and maintain taboos around Trumpism.

...

**BENJAMIN LAWRENCE, SAFFRON SUFFRAGE:
BUDDHIST MONKS AND CONSTITUTIONAL POLITICS IN CAMBODIA
37 J. L. & RELIG. (2022) 259**

Introduction

Shortly before the UN-administered elections that formed Cambodia's Constituent Assembly in 1993, ... the leaders of the country's two Buddhist sects, both approached Yasushi Akashi, the head of the United Nations Transitional Authority in Cambodia, known as UNTAC. Their request was ... that Buddhist monks be formally excluded from the vote. Akashi refused ... and instead insisted on adherence to the democratic norm of universal suffrage, thus ensuring that Cambodia's Buddhist monks would, for the first time in the country's history, participate in democratic elections. Meanwhile, ... [it was agreed] that the country's constitution would include provisions for democratic elections based on "universal and equal suffrage" [T]hese decisions created a fundamental source of constitutional contestation and debate that has rumbled on for decades, about the role of religion in Cambodian politics and the relationship between Buddhism and the state. ...

It was the express wish of the two leaders of the Cambodian Buddhist community, or *sangha* ... that Buddhist monks be precluded from voting. It is for this reason that Ian Harris, a scholar of Cambodian Buddhism, described the decision to allow monks to vote as an "imposition" and an act of "cultural insensitivity" by Akashi and UNTAC. ...

...

Conclusion

... [These decisions] produced in Cambodia a new constitutional status quo wherein monks could actively engage in electoral politics. This new status quo has brought to the surface an underlying societal ambivalence over the role that Buddhism, and Buddhist monks, should play in politics. ... [T]he country's monks and religious institutions have sought different ways of resolving this constitutional tension The result, at least with respect to Cambodia's otherwise largely authoritarian constitutional context, has been a peculiarly liberal compromise. Rather than overriding the precedent set by the UN-administered election of 1993, by introducing a religious exception ..., Cambodia's political leaders have largely left it to the country's Buddhist *sangha* to resolve the issues of constitutional practice surrounding monkish politics on its own. ... [While] Cambodia's various opposition parties have undoubtedly been more vociferous in their support of monks seeking to register to vote (perhaps reflecting their belief that they have the sympathy of much of the *sangha*, at least in its more populous lower ranks), the ruling Cambodian People's Party has nonetheless rebuffed calls for government intervention.

For their part, Cambodia's *sangha* authorities have clearly and repeatedly attempted to discourage and inhibit monks from voting or engaging in politics. Yet, they have largely refrained from formally preventing them from doing so. In the process, members of the Buddhist clergy have publicly contested the meaning of the Constitution, and actively employed constitutional arguments, as a way to further their cause. Of course, opposition to monks being allowed the right to vote has been explained in terms of religious doctrine, wherein political engagements are seen to risk corrupting the monks who are supposed to have assumed the role of "world renouncer" and delegitimizing the *sangha* as a set of supposedly politically neutral institutions. However, calls from the Supreme Patriarchs of both sects of the Cambodian *sangha* for state intervention to introduce and enforce a prohibition through constitutional or legislative amendments have also been articulated in constitutional terms, with clear reference frequently being made to Buddhism's special status and the implicit responsibility this is considered to bestow on the government to protect the state religion. This has been countered by Buddhist monks, meanwhile, who have similarly insisted on their engagement in electoral politics, justifying it on both religious and constitutional grounds. As such, monks assert a sense of dual-identity ... in which they can be both a secular, right-bearing citizen on the one hand, and a religious figure on the other. For some, the latter identity extends so far as to supplement the constitutionally grounded right to vote with an additional duty to do so in the interest of religiously infused conceptions of justice and goodness. The decision to vote need not always be part of a more general commitment to the

pursuit of justice in the secular world through the practice of engaged Buddhism. Nonetheless, it is clear that—at least for some Cambodian monks—the philosophical foundations and ultimate aims of the two (the decision to go to the polls and the adoption of engaged Buddhism) often intersect.

SONGFENG LI, FREEDOM IN HANDCUFFS: RELIGIOUS FREEDOM IN THE CONSTITUTION OF CHINA
35 J. L. & RELIG. (2020) 113

[This analysis focuses mainly on Article 36 of the Constitution of China, which states:

Citizens of the People's Republic of China enjoy freedom of religious belief.

No State organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.

The State protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the State.

Religious bodies and religious affairs are not subject to any foreign domination.]

...

The question arises as to why the Chinese Constitution says that freedom of religion is protected when, in reality, it does not allow people to enjoy this right. It is easy to conclude that China's constitution is not enforced and plays little role in China's legal system, being only a symbolic document.

...

Taking the Chinese Constitution Seriously

... Why enshrine constitutional guarantees for the right to religious freedom, among others, when the CCP [Chinese Communist Party] obviously opposes such rights? Actually, the Chinese government attaches great importance to what the Constitution does and does not provide. ...

Second, both the Chinese Constitution and the CCP's constitution require the CCP to abide by the Constitution. ...

Third, Chinese leaders have come to realize the importance of the Constitution and have increasingly stressed the importance of implementing it.

Fourth, China has recently organized a Constitution Day, and established a constitutional oath system to promote respect for and implementation of the Constitution. ... Both the setting up of a National Constitution Day and the establishing of a constitutional oath system are aimed at promoting the rule of law and highlighting the importance of upholding China's Constitution.

Unlike the US Constitution, the Chinese Constitution is not a social contract that limits the power of government. Rather, it was formulated under the leadership of the CCP and represents the institutionalization and legalization of the party's position and policies. ... In short, the Chinese Constitution does not so much protect the fundamental rights and freedoms of every citizen as define the future direction of the whole country. ... [T]he CCP and the Chinese government are under increasing pressure to implement the Constitution. Returning to the initial question, since the Constitution purports to protect freedom of religion and the Chinese government has stressed the implementation of the Constitution, why are there a large number of cases in which religious freedom has been violated? The answer is that the Chinese Constitution provides only a very limited protection for religious practice. Article 36 of the Constitution protects freedom of religious belief and "normal" religious activities. The government has the power to decide which activities are "normal" and which

are “abnormal.” This leaves open the possibility that the government can deem various religious practices “abnormal” and thus outside the sphere of legal protection. ...

...

Conclusion

... On the basis of the Chinese Constitution, citizens are free to believe what they want, but the government reserves the right to set the boundaries as to how the beliefs are practiced. And, more importantly, the limitations the government sets are dependent upon the Chinese Constitution. The Constitution establishes multiple limitations on religious freedom. First, [it] establishes state atheism as an official ideology, rather than remaining secular and neutral. All Chinese citizens, whether religious believers or not, are required to be educated by the atheistic government and under the leadership of the CCP. Second, religious freedom ... is a legal right, rather than a fundamental right, which means that these so-called rights and freedom are vested by the Constitution, and since they are not inalienable, they are subject to legal restrictions. The NPC [National People’s Congress] can and does pass legislation, to a certain extent, limiting individuals’ religious freedom. Third, the Chinese Constitution stipulates basic obligations of citizens that limit religious freedom. Fourth, Article 36 ... protects only the inner freedom of religious belief, not the freedom of religious practice. And the second half of Article 36 places restrictions on religious freedom. In sum, religious freedom in the Chinese Constitution is an exceedingly limited form of freedom.

...

b. International Law Perspectives

Here we turn to the universal human rights instruments. Note the limited degree to which those instruments have developed ideas about religion and state or religion and human rights, at least in relation to their far greater development of human rights ideas in fields like race, gender or democratic participation. But, as in many other areas of human rights, the space left open increases the importance of the role played by other actors such as treaty bodies and UN Special Rapporteurs. Indeed, the first major UN survey of the field was Arcot Krishnaswami’s 1960 *Study of Discrimination in the Matter of Religious Rights and Practices* (UN Doc. E/CN.4/Sub.2/200/Rev.1). He proposed 16 ‘basic rules’ to guide practice, and recommended their adoption by the UN. But, since the ICCPR was then only in draft form and the United States was still blocking progress on it, nothing was done.

A starting point is Article 18 of the ICCPR, adopted in 1966:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

For the most part, with the exception of paragraph 4, the ICCPR followed the relevant content of the UDHR on this issue. It was widely assumed that a separate treaty on religious intolerance, as called for

by the UN General Assembly in 1960, would later be drafted.²⁷⁵ But this soon became politically contentious and it took nine years of drafting before a non-binding declaration could be adopted:

**DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF
DISCRIMINATION BASED ON RELIGION OR BELIEF
GA RES. 36/55 (1981)**

The General Assembly

...

Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief ...,

...

Proclaims this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.

2. For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal

²⁷⁵ C. Evans, 'Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination', 2007 *BYU L. Rev.* 617.

Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

...

Article 6

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

...

(d) To write, issue and disseminate relevant publications in these areas;

(e) To teach a religion or belief in places suitable for these purposes;

(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Article 7

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

...

Article 8

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

* * *

The Declaration has been criticized for its lack of ambition and failure to address key issues, but in the absence of the political will or a propitious international environment for agreement on religious issues, it has been generally acknowledged as the best available platform:

We need to work on it as the basis (albeit an incomplete basis) of activism in an arena where few international platforms and standards actually exist. The Declaration makes a tenuous but welcome start in a field where much progress remains necessary – in elaborating legal standards, focusing on implementation of protected rights, and acknowledging the need to respond effectively to violations.²⁷⁶

Commenting on the Declaration, Donna Sullivan, in ‘Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’, 82 *Am. J. Int. L.* (1988) 487 noted some of its shortcomings. The Declaration is directed at governments, so that ‘[i]nteractions among members of the same religious groups are ... not easily analyzed under the Declaration.’ It is also premised upon a typical ‘Western model of religion, in which religious institutions and authority are structurally separable from political and other social institutions’. Sullivan observes that the Declaration omitted explicit reference to the freedom to change one’s religion or belief in order ‘to avoid the implicit approval of proselytizing’. But, in her view, that freedom remains implicit in the right to have a religion or belief, and that the ‘savings clause’ in Article 8 ensures that the standards in the UDHR and the ICCPR cannot be diminished. In relation to the concept of ‘intolerance’, she notes two views that have been taken of its meaning and significance in the Declaration:

... The view that intolerance describes the emotional, psychological, philosophical and religious attitudes that may prompt acts of discrimination or violations of religious freedoms is persuasive. Where intolerance fuels such conduct as killing or the destruction of property, these acts constitute violations of substantive international human rights, such as the right to life, and, in most cases, violations of national law. If intolerance motivates deprivations of the freedom to manifest religion or belief, these acts again constitute violations of substantive rights protected by the Declaration itself.

...

A second approach to combating intolerance, which was proposed during drafting but rejected, is to prohibit the expression of ideas based on religious hatred and the incitement of hatred and discrimination based on religion or belief. [See Article 20 of the ICCPR.] ...

In the absence of a treaty in this area, two other sources of elaboration of the content of the right have assumed particular importance. The first is a General Comment by the UN Human Rights Committee, established under the ICCPR, which adopts such documents to reflect its understanding and interpretation of the Covenant’s provisions. See Ch. 9A 3, below for a discussion of the nature and purpose of General Comments. The second are reports issued by the UN Human Rights Council’s Special Rapporteur on freedom of religion or belief, a mandate first created in 1986 to focus on ‘religious intolerance’ and changed in 2000 to its current title.

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 22: THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (1993)

...

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited

²⁷⁶ N. Ghana, ‘The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Some Observations’, in *ibid* (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (2003) 30.

in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions

3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally

4. The freedom to manifest religion or belief may be exercised 'either individually or in community with others and in public or private'. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts 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.

5. The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert

6. The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

7. In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence

8. Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses ... limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated

9. The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

...

REPORTS OF THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF

Individual experts appointed to this office can serve for a maximum of six years. Since 1986, there have been six different mandate-holders. The following two reports were prepared by Ahmed Shaheed, Special Rapporteur from 2016 to 2022.

i. Antisemitism (UN Doc. A/74/358 (2019))²⁷⁷

...

II. Combating antisemitism ...

4. ... [A]ntisemitism [has] received scant attention as a human rights issue. Overall, data collection worldwide is limited, and in many States antisemitic harassment is significantly underreported. Nevertheless, reports of hostility, discrimination and violence motivated by antisemitism have increased in many parts of the world. ...

...

IV. Key findings

11. The Jewish population was estimated at 14,606,000 worldwide in 2018, with 15 countries in the Americas and Western and Eastern Europe being home to the largest populations outside of Israel.

...

12. Aptly termed “the oldest hatred”, prejudice against or hatred of Jews, known as antisemitism, draws on various theories and conspiracies, articulated through myriad tropes and stereotypes and manifested in manifold ways, even in places where few or no Jewish persons live. This includes ancient narratives promoted by religious doctrine and pseudoscientific theories offered in the latter half of the second millennium to legitimize bigotry, discrimination and genocide of Jews. More contemporary forms of antisemitism employ narratives about the role of Jews in society, frequently informing or intersecting with other forms of bigotry, misogyny and discrimination.

A. Historical narratives and tropes

13. Some of the oldest antisemitic narratives can be traced back to theologies that attributed collective guilt for the murder of Jesus to Jews, treating them as “malicious” and “evil”. Such tropes, which identify Jews as descendants of Judas or Satan and depict them as “cunning, controlling and powerful”, have been promoted through religious teachings and depicted in art, and they have sometimes motivated contemporary antisemitic acts. Other tropes reflect contempt for the Jewish religion, including the recurring false allegation that Jews engage in the ritual murder of non-Jews (the “blood libel”), and continue to pervade contemporary discourse.

14. Antisemitism is also often expressed in racialized terms, with Jewish people characterized as subhumans who must be excluded from “normal” human civilization. This pseudoscientific approach was used to justify the persecution of Jews in Nazi Germany and the subsequent acts of genocide committed by the Nazis and their accomplices against the European Jewish population, while antisemitic expressions of Holocaust denial seek to repudiate or minimize the harrowing historical facts of that systematic murder of 6 million Jews.

²⁷⁷ See generally G. Quer, ‘Antisemitism and the UN’, in A. Lange et al. (eds.), *Confronting Antisemitism in Modern Media, the Legal and Political Worlds* (2021) 413; and N. Gordon, ‘Between Human Rights and Civil Society: The Case of Israel’s Apartheid Enablers’, 48 *L. and Soc. Inquiry* (2023) 1.

15. Assertions that Jews are a “wandering” people without a land or nation, whose members conspire to advance their collective interests to the detriment of their “host” countries, or that Jews constitute a “powerful, global cabal” that manipulates governments, the media, banks, the entertainment industry and other institutions for malevolent purposes, are also expressions of antisemitic attitudes. Many of those negative stereotypes were promulgated in the Protocols of the Elders of Zion, a discredited forgery published in the early twentieth century and widely disseminated in the Middle East, alleging a secret Jewish plan for world domination. Those stereotypes often underpin modern conspiracy theories attributing responsibility to Jews for everything from immigration to terrorist attacks.

B. Trends in contemporary rhetoric

16. The Special Rapporteur is alarmed by the growing use of antisemitic tropes by white supremacists, including neo-Nazis and members of radical Islamist groups, in slogans, images, stereotypes and conspiracy theories meant to incite and justify hostility, discrimination and violence against Jews.

17. The Special Rapporteur also takes note of numerous reports of an increase in many countries of what is sometimes called “left-wing” antisemitism, in which individuals claiming to hold anti-racist and anti-imperialist views employ antisemitic narratives or tropes in the course of expressing anger at the policies or practices of the Government of Israel. ... [I]t is never acceptable to render Jews as proxies for the Government of Israel.

18. The Special Rapporteur further notes the claims that the objectives, activities and effects of the Boycott, Divestment and Sanctions movement are fundamentally antisemitic. The movement promotes boycotts and stockholder divestment initiatives against Israeli or international corporations and institutions that supporters of the movement maintain are “complicit” in violations of the human rights of Palestinians by the Government of Israel. He recalls that international law recognizes boycotts as legitimate forms of political expression and that non-violent expressions of support for boycotts are, as a general matter, legitimate speech that should be protected. However, he also stresses that expression that draws on antisemitic tropes or stereotypes, rejects the right of Israel to exist or advocates discrimination against Jewish individuals because of their religion, should be condemned.

...

E. Online manifestations of antisemitism

35. Antisemitic hate speech is particularly prevalent online. Unanimous concern raised by all those engaged for this report noted that platforms like Gab (a Twitter-like platform that permits hate speech), 4chan and Twitter provide a forum for people ... to create networks in which they are able to share extreme antisemitic views. A study of online antisemitic hate speech found on Twitter in English revealed 4.2 million antisemitic tweets in one year alone, not including tweets of images or emojis. Publicly prominent Jewish individuals and organizations are also specifically targeted with antisemitic comments online.

...

39. Antisemitism online includes far-right tropes that Jews spearhead feminist, lesbian, gay, bisexual, transgender and intersex movements and immigration movements as a method of perpetrating a “white genocide”, conspiracy theories that have been repeated in the online manifestos posted by far-right terrorists prior to mass shootings in synagogues.

...

VI. Recommendations

...

A. States and political actors

...

76. Governments must also acknowledge that antisemitism poses a threat to stability and security and that antisemitic incidents require prompt, unequivocal responses from leaders. ... [T]he commission of antisemitic hate crimes engages the obligation of the State under international human rights law to protect Jews against the violation of their fundamental rights. States must also invest in preventive

security measures, compliant with international human rights law, to deter antisemitic hate crimes. They ... [also] have an affirmative responsibility to address online antisemitism, as the digital sphere is now the primary public forum and marketplace for ideas.

77. States should enact and enforce hate crime legislation that recognizes antisemitism as a prohibited bias motivation and that is clear, concrete and easy to understand. ...

ii. Islamophobia (UN Doc. A/HRC/46/30 (2021))

...

A. Key findings and conceptual framework

12. ... Islamophobia [may be characterized] as a pool of ideas or ideologies that includes two overlapping processes whereby Islam and Muslims are essentialized and “othered”. While the precise character is context-specific, in its most prevalent form, the Islamophobic mindset treats Islam – a global religion with widely diverse interpretations and practices worldwide – as a monolithic and fundamentalist creed that advocates violence, sexism and homophobia. Denying Islam of its status as a religion, the Islamophobic mindset considers Islam a fixed political ideology that endangers “Western civilization” and other nations where Muslims are a minority population. In parallel, as followers of Islam, Muslims are demonized as disloyal “others” who are intent upon imposing their values on non-believers through violence, “overbreeding” and the radicalization of “good” Muslims.

13. Scholars have explored how this latter process functions as a form of “racialization”, instilling the idea that Muslim identity is a fixed marker of cultural – not just religious – difference, characterizing Muslims as a foreign “other”. Simultaneously drawing upon Muslims’ religion, race and culture, Muslims are differentiated as a social group apart from the majority and treated as inferior on the basis of such perceived differences. As such, some recognize Islamophobia as a form of anti-Muslim racism. Scholars and human rights experts also underscore the gendered forms of the phenomenon whereby Muslim women – particularly Muslim women who wear a head covering – are cast as subordinates without agency, while Muslim men and those who look Muslim by virtue of their skin colour and facial hair, are deemed to be intrinsically violent. ...

...

B. Dissemination of intolerant narratives

Harmful stereotypes and tropes about Muslims and Islam are chronically reinforced by those working in the mainstream media, powerful politicians, influencers of popular culture and academics. Muslims are generally underrepresented and are often misrepresented in the media. In one study, the European Commission against Racism and Intolerance (ECRI) reported that in over 600,000 news items published in 2016 and 2017 in the Netherlands, the adjectives most used to describe Muslims were “radical”, “extremist” and “terrorist”; in contrast, people from the Netherlands were often described as “known”, “average” and “beautiful”. Other studies have shown that media outlets in several countries disproportionately focus on negative angles for news stories involving Muslims such as reporting on their perceived failure to integrate, and more media attention is often paid to terrorist attacks committed by Muslims than to terrorist attacks committed by far-right extremists. ...

16. ... [M]any films depict Muslims negatively and play into harmful stereotypes, with some even claiming that the “Muslim-as-terrorist” film has become a legitimate genre (or subgenre) in its own right. ...

...

C. Discrimination

Securitization

23. ... Over the past two decades, Muslim individuals and communities have borne the brunt of the use and abuse of counter-terrorism measures. ...

24. States have reportedly incorporated their essential services, including education and health care, within their national security apparatus in a way that disproportionately heightens surveillance of Muslims and potentially compounds existing inequalities, including educational and health outcomes. Doctors and other health personnel, social workers and educators are co-opted as enablers of the State's securitization apparatus by being mandated to report who is ostensibly at risk of radicalization.

...
...

V. Conclusions

70. Both conscious and unconscious bias against Muslims perpetuated by individuals, politicians, social influencers, the media and hate groups, among others, play a significant role in dehumanizing Muslims, motivating hate crimes, promoting discrimination and exacerbating socioeconomic exclusion. Scholars and rights monitors emphasize that Islamophobic attitudes often perpetuate a vicious circle whereby State policies validate private Islamophobic attitudes and actions, and the prevalence of such attitudes can propel State policies that penalize Muslims.

71. Collective blame cast on Muslims for terrorist acts purportedly carried out in the name of Islam, alongside Islamophobic attitudes that draw on negative overgeneralizations about Islam and essentializations of Muslims – which depict them as threatening and centre on constructions of irreconcilable cultural differences between Muslims and the values of majority populations – have fuelled acts of discrimination, hostility and violence against Muslim individuals and communities.

...

73. The Special Rapporteur emphasizes that international human rights law protects individuals, not religions. Nothing in the present report suggests that criticism of the ideas, leaders, symbols or practices of Islam is something that should be prohibited or criminally sanctioned. Rather, the Special Rapporteur emphasizes that the discrimination and intolerance that emanate from the ideologies of Islamophobia present a significant challenge to States' aspirations to foster democratic pluralism and respect, protect and promote all human rights. Peaceful, inclusive, pluralistic societies that endeavour to respect the human rights of all persons regardless of religious or belief identity must oppose religious bigotry and racism, but they must also avoid censoring purely discursive speech.

74. ... [I]t is essential to identify and evaluate how State structures perpetuate and legitimize Islamophobia and actively discriminate against Muslim individuals and communities.

...

DEFINING ANTISEMITISM

In 2016, the International Holocaust Remembrance Alliance (IHRA), an NGO, adopted a definition of antisemitism as a 'non-legal tool' to facilitate monitoring of relevant practices. It defines antisemitism as "a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities".

The definition offers some illustrations:

- (a) Manifestations might include the targeting of the State of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic. ...;
- (b) Contemporary examples of antisemitism ... could, taking into account the overall context, include ...:
 - (i) Calling for, aiding or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion;

- (ii) Making mendacious, dehumanizing, demonizing or stereotypical allegations about Jews ...;
- (iii) Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews;
- (iv) Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the ... the Holocaust;
- (v) Accusing the Jews as a people, or Israel as a State, of inventing or exaggerating the Holocaust;
- (vi) Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations;
- (vii) Denying the Jewish people their right to self-determination, e.g. by claiming that the existence of a State of Israel is a racist endeavour;
- (viii) Applying double standards by requiring of Israel a behaviour not expected or demanded of any other democratic nation;
- (ix) Using the symbols and images associated with classic antisemitism (e.g. claims of Jews killing Jesus or “blood libel”) to characterize Israel or Israelis;
- (x) Drawing comparisons of contemporary Israeli policy to that of the Nazis;
- (xi) Holding Jews collectively responsible for actions of the State of Israel.

The scope of the definition became a matter of considerable controversy. In response, the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed (UN Doc. A/74/358 (2019)) provided this analysis:

- 53. The definition has been ... endorsed by the European Parliament... and by the Secretary-General of the Organization of American States. It is used by a number of [NGOs] that monitor antisemitism and was recognized by the [UN] Secretary-General ... in 2018.
- 54. ... [Critics] have expressed concern that it can be applied in ways that could effectively restrict legitimate political expression, including criticism of policies and practices being promoted by the Government of Israel that violate the rights of Palestinians. Such concerns are focused on three of the illustrative examples ... namely [vii, viii and x, above]. The Special Rapporteur notes that the definition ... does not designate them as examples of speech that are ipso facto antisemitic and further observes that a contextual assessment is required Nevertheless, the potential chilling effects ... on speech that is critical of policies and practices of the Government of Israel must be taken seriously Therefore, the use of the definition, as a non-legal educational tool, could minimize such chilling effects and contribute usefully to efforts to combat antisemitism. When public bodies use the definition in any regulatory context, due diligence must be exercised to ensure that freedom of expression within the law is protected for all. ...

In 2022, the Special Rapporteur on racism, E. Tendayi Achiume (UN Doc. A/77/512) offered a different response:

71. The Special Rapporteur ... calls attention to the politically motivated instrumentalization of the fight against antisemitism, which is increasingly linked to the [IHRA definition] While reiterating the urgent need for Member States to remain committed to fighting antisemitism in all its manifestations, she urges greater attention and care regarding the implications of tools used in that context. ...

72. ... [The IHRA definition] has become highly controversial and divisive owing to its susceptibility to being politically instrumentalized and the [resulting] harm done to human rights [The rapporteur] cautions against reliance on the working definition as a guiding instrument for and at the [UN].

73. ... About 350 leading scholars support an alternative definition of antisemitism established in the Jerusalem Declaration on Antisemitism ²⁷⁸

...

75. Although the [IHRA] working definition is promoted as being “non-legally binding”, its de facto influence on the policy and practice of governments and private actors has contributed to violations of the human rights of freedom of expression, assembly and political participation, among others. ... [I]t is precisely the “soft law” status of the working definition that effectively helps to undermine certain co-existent rights, without offering any remedy or means to legally challenge such violations. ...

76. The [definition and examples] are wielded to prevent or suppress legitimate criticisms of the State of Israel, a State that must, like any other in the [UN] system, be accountable for human rights violations that it perpetrates. ...

...

79. Precisely because the scourge of antisemitism remains an urgent issue ..., the Special Rapporteur urges the United Nations system and Member States urgently to launch an open and inclusive process to identify an enhanced response to antisemitism ... consistently rooted in and supportive of human rights. ...

QUESTIONS

1. In what respects does the General Comment of the Human Rights Committee appear to go beyond Article 18 itself with respect to notions of religious freedom, and beyond the 1981 Declaration? What implications have Article 18 and the 1981 Declaration for the issue of ‘establishment’?
2. Does the Declaration reach beyond action by the state to cover conduct (that is, to require or prohibit certain conduct) by private (non-state) actors? If so, under what provisions and with respect to what kinds of conduct?
3. How do you assess the value of the reports on antisemitism and islamophobia? What role should Special Rapporteurs play in resolving the controversy over examples of antisemitism?

²⁷⁸ <https://jerusalemdeclaration.org/>

c. Proselytism

KOKKINAKIS V. GREECE

EUROPEAN COURT OF HUMAN RIGHTS, 1993, SER. A, NO. 260-A (15 DECEMBER 1997)

[Minos Kokkinakis, a Greek national, was born in 1919 into an Orthodox Christian family. In 1936, he became a Jehovah's Witnesses, a Christian sect originating in the nineteenth century, and known for intense door-to-door canvassing by its members. He was arrested more than 60 times for proselytism, and on several occasions imprisoned for a period of months. In 1986, he and his wife called at the home of a Mrs Kyriakaki to engage her in discussion about religion. Her husband, cantor at a local Orthodox church, informed the police who arrested him. Kokkinakis was convicted under Law No. 1363/1938 of the crime of engaging in proselytism and was sentenced to four months' imprisonment. The Court of Appeal upheld the conviction. The Court of Cassation dismissed an appeal, rejecting the plea that the law violated Article 13 of the Greek Constitution and hence could not be applied.

Kokkinakis then brought a case against Greece before the European Commission of Human Rights, claiming that his conviction violated provisions of the European Convention on Human Rights. Greece, a party to that Convention, had accepted the jurisdiction of the Commission to hear individual complaints. The Commission found that Greece had violated Article 9 of the Convention. It then referred the case to the European Court of Human Rights, whose jurisdiction Greece had also accepted. (The jurisdiction and work of this Court are examined in Ch. 11A, below).

Section 4 of Law No.1363/1938, as later amended, made 'engaging in proselytism' a crime, and further provided:

2. By 'proselytism' is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.

The Greek Constitution of 1975 stated in Article 3 that the 'dominant religion in Greece is that of the Christian Eastern Orthodox Church'. ...

Article 13 of the Constitution provided:

1. Freedom of conscience in religious matters is inviolable. The enjoyment of personal and political rights shall not depend on an individual's religious beliefs.
2. There shall be freedom to practise any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. Proselytism is prohibited.

Several accounts appeared in the opinions of the Greek courts of the interaction between Kokkinakis and Kyriakaki. The trial court stated that the defendant:

attempted to proselytise and, directly or indirectly, to intrude on the religious beliefs of Orthodox Christians, with the intention of undermining those beliefs, by taking advantage of their inexperience, their low intellect and their naïvety. In particular, they went to the home of [Mrs Kyriakaki] ... and told her that they brought good news; by insisting in a pressing manner, they gained admittance to the house and began to read from a book on the Scriptures which they interpreted with reference to a king of heaven, to events which had not yet

occurred but would occur, etc., encouraging her by means of their judicious, skilful explanations ... to change her Orthodox Christian beliefs.

The Court of Appeal repeated this account, and added that Kokkinakis began to read out passages from Holy Scripture, which he:

skillfully analysed in a manner that the Christian woman, for want of adequate grounding in doctrine, could not challenge, and at the same time offered her various similar books and importunately tried, directly and indirectly, to undermine her religious beliefs. He must consequently be declared guilty of the above-mentioned offence.

One appeal judge dissented, asserting that no evidence showed that Kyriakaki was particularly inexperienced in Orthodox Christian belief or was of particularly low intellect or naïve.

There follow excerpts from the opinion of the European Court:]

[A 1953 judgment of the Greek Supreme Administrative Court had stated, with respect to the meaning of the prohibition of proselytism, that the Constitutional ban:]

means that purely spiritual teaching does not amount to proselytism, even if it demonstrates the errors of other religions and entices possible disciples away from them, who abandon their original religions of their own free will; this is because spiritual teaching is in the nature of a rite of worship performed freely and without hindrance. Outside such spiritual teaching, which may be freely given, any determined, importunate attempt to entice disciples away from the dominant religion by means that are unlawful or morally reprehensible constitutes proselytism as prohibited by the aforementioned provision of the Constitution.

18. The Greek courts have held that persons were guilty of proselytism who ... offered a scholarship for study abroad; ... distributed 'so-called religious' books and booklets free to 'illiterate peasants' or to 'young schoolchildren'; or promised a young seamstress an improvement in her position if she left the Orthodox Church, whose priests were alleged to be 'exploiters of society'.

[The opinion noted that the Jehovah's Witnesses movement had been present in Greece for about a century, and that its membership in Greece was estimated to be between 25,000 and 70,000. Between 1975 and 1992, 4,400 members had been arrested, 1,233 committed to trial and 208 convicted, some for other offences than proselytism. It then turned to Kokinnakis's claim that Article 9 of the European Convention had been violated.]

28. The applicant's complaints mainly concerned a restriction on the exercise of his freedom of religion. The Court will accordingly begin by looking at the issues relating to Article 9, which provides:

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

29. The applicant did not only challenge what he claimed to be the wrongful application to him of section 4 of Law no. 1363/1938. His submission concentrated on the broader problem of whether that enactment was compatible with the right enshrined in Article 9 of the Convention ... He pointed to the logical and legal difficulty of drawing any even remotely clear dividing-line between proselytism

and freedom to change one's religion or belief and, either alone or in community with others, in public and in private, to manifest it, which encompassed all forms of teaching, publication and preaching between people.

...

Mr Kokkinakis complained, lastly, of the selective application of this Law by the administrative and judicial authorities; it would surpass 'even the wildest academic hypothesis' to imagine, for example, the possibility ... that an Orthodox Christian would be prosecuted for proselytising on behalf of the 'dominant religion'.

...

31. ... [F]reedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

...

According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter.

...

33. ... [The limitations clause in Article 9(2)] refers only to 'freedom to manifest one's religion or belief'. In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

...

36. The sentence passed by the [criminal court and the court of appeal] amounts to an interference with the exercise of Mr Kokkinakis's right to 'freedom to manifest [his] religion or belief'. Such an interference is contrary to Article 9 unless it is 'prescribed by law', directed at one or more of the legitimate aims in paragraph 2 and 'necessary in a democratic society' for achieving them.

...

[Kokkinakis claimed that the requirement that a prohibition be 'prescribed by law' had not been met by Section 4 of the Greek Law; and that the definition of proselytism had no 'objective' base, perhaps a deliberate decision 'to make it possible for any kind of religious conversation or communication to be caught by the provision'. He referred to the risk of extension 'by the police and often by the courts too of the vague terms of the section, such as ... "indirect attempt" to intrude on the religious beliefs of others.' And he added that '[p]unishing a non-Orthodox Christian even when he was offering "moral support or material assistance" was tantamount to punishing an act that any religion would prescribe and that the Criminal Code required in certain emergencies.'

The Court noted that it was essential to avoid 'excessive rigidity' in legislation in order to keep pace with changing circumstances. Many criminal statutes 'to a greater or lesser extent are vague'. Practice under the proselytism statute and a 'body of settled national case-law' interpreting the Law were such as to 'enable Mr. Kokkinakis to regulate his conduct in the matter'. Hence the Law was 'prescribed by law' within the meaning of Article 9(2).

The Court next inquired into whether there had been a 'legitimate aim' for the Law within the meaning of Article 9(2).]

43. In the applicant's submission, religion was part of the 'constantly renewable flow of human thought' and it was impossible to conceive of its being excluded from public debate. A fair balance of personal rights made it necessary to accept that others' thought should be subject to a minimum of influence, otherwise the result would be a 'strange society of silent animals that [would] think but ... not express themselves, that [would] talk but ... not communicate, and that [would] exist but ... not coexist'.

44. Having regard to the circumstances of the case and the actual terms of the relevant courts' decisions, the Court considers that the impugned measure was in pursuit of a legitimate aim under Article 9 para. 2, namely the protection of the rights and freedoms of others, relied on by the Government.

[The Court turned to the requirement that a restrictive measure be 'necessary in a democratic society.']

45. Mr Kokkinakis did not consider it necessary in a democratic society to prohibit a fellow citizen's right to speak when he came to discuss religion with his neighbour. He was curious to know how a discourse delivered with conviction and based on holy books common to all Christians could infringe the rights of others. Mrs Kyriakaki was an experienced adult woman with intellectual abilities; it was not possible, without flouting fundamental human rights, to make it a criminal offence for a Jehovah's Witness to have a conversation with a cantor's wife. Moreover, the Crete Court of Appeal, although the facts before it were precise and absolutely clear, had not managed to determine the direct or indirect nature of the applicant's attempt to intrude on the complainant's religious beliefs; its reasoning showed that it had convicted the applicant 'not for something he had done but for what he was'. ...

46. The Government ... pointed out that if the State remained indifferent to attacks on freedom of religious belief, major unrest would be caused that would probably disturb the social peace.

47. The Court has consistently held that a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate. ...

48. First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.

Scrutiny of section 4 of Law no. 1363/1938 shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case.

49. The Court notes, however, that in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of section 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding.

That being so, it has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, 'necessary in a democratic society ... for the protection of the rights and freedoms of others'.

50. In conclusion, there has been a breach of Article 9 of the Convention.

...

PARTLY CONCURRING OPINION OF JUDGE PETITTI

...

The expression “proselytism that is not respectable”, which is a criterion used by the Greek courts when applying the Law, is sufficient for the enactment and the case-law applying it to be regarded as contrary to Article 9.

...

... [T]he haziness of the definition leaves too wide a margin of interpretation for determining criminal penalties.

...

Proselytism is linked to freedom of religion; a believer must be able to communicate his faith and his beliefs in the religious sphere as in the philosophical sphere. Freedom of religion and conscience is a fundamental right and this freedom must be able to be exercised for the benefit of all religions and not for the benefit of a single Church, even if this has traditionally been the established Church or ‘dominant religion’.

Freedom of religion and conscience certainly entails accepting proselytism, even where it is ‘not respectable’. Believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing.

The only limits on the exercise of this right are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques.

The other types of unacceptable behaviour — such as brainwashing, breaches of labour law, endangering of public health and incitement to immorality, which are found in the practices of certain pseudo-religious groups — must be punished in positive law as ordinary criminal offences. Proselytism cannot be forbidden under cover of punishing such activities.

...

The wording adopted by the majority of the Court in finding a breach, namely that the applicant’s conviction was not justified in the circumstances of the case, leaves too much room for a repressive interpretation by the Greek courts in the future, whereas public prosecution must likewise be monitored. In my view, it would have been possible to define impropriety, coercion and duress more clearly and to describe more satisfactorily, in the abstract, the full scope of religious freedom and bearing witness.

...

Let us look now at the facts of the case. On the one hand, we have a militant Jehovah’s Witness, a hardbitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy, and, on the other hand, the ideal victim, a naïve woman, the wife of a cantor in the Orthodox Church (if he manages to convert her, what a triumph!). He swoops on her, trumpets that he has good news for her (the play on words is obvious, but no doubt not to her), manages to get himself let in and, as an experienced commercial traveller and cunning purveyor of a faith he wants to spread, expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness. Who, indeed, would not like peace and happiness? But is this the mere exposition of Mr Kokkinakis’s beliefs or is it not rather an attempt to beguile the simple soul of the cantor’s wife? Does the Convention afford its protection to such undertakings? Certainly not.

...

I should certainly be inclined to recommend the Government to give instructions that prosecutions should be avoided where harmless conversations are involved, but not in the case of systematic, persistent campaigns entailing actions bordering on unlawful entry.

That having been said, I do not consider in any way that there has been a breach of the Convention.

...

Comments on Kokkinakis

Kokkinakis remains the landmark judgment in this area for the European human rights regime. But it has been widely criticized, and its lack of clarity is considered by many commentators to have facilitated

the complex and confusing jurisprudence followed by the European Court of Human Rights in the cases considered later in this chapter. Consider these comments:

Malcolm Evans, “The Freedom of Religion or Belief in the European Court of Human Rights since the *Kokkinakis* case. Or “Quoting *Kokkinakis*”, in Jeroen Temperman, T. Jeremy Gunn, and Malcolm D. Evans (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* (2019) 33:

... In *Eweida* v. UK [2013] it was said that ‘[r]eligious freedom is primarily a matter of individual thought and conscience. ...

Six months later, in *Sindicatul “Păstorul cel Bun” v. Romania* [2013] the Grand Chamber said that ‘[t]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected by Article 9, all other aspects of the individual’s freedom of religion would become vulnerable’.

Whereas the quote from *Eweida* emphasises the individual nature of the right, the *Sindicatul* case highlights its collective nature. Both draw on the *Kokkinakis* statement; *Eweida* quoting it expressly, *Sindicatul* by using its language, although not directly acknowledging it. This tension lies at the heart of much of the controversy surrounding the practical application of Article 9: is it focussed on the individual, the religious or belief communities or the broader community as a whole? Is it about the individual versus the community? Or is it about the individual in community? And if so, which community? Both cases raised precisely such questions. The problem with the *Kokkinakis* approach is that it can support outcomes based on any of these approaches – or on none.

Brett G. Scharffs, ‘*Kokkinakis* and the Narratives of Proper and Improper Proselytizing’, in *ibid*, 153:

Two things are worth noting. First, the Court imposes a distinction between “proper” proselytizing and “improper” proselytism upon the Greek statute and Constitution, a distinction that does not exist in these laws. This has the effect of preserving a criminal law that is overbroad, vague, and leaves too much discretion to prosecutors and judges, while holding that the application of the law in this case was a violation of Article 9.

Second, the Court compounds this imposition by failing to define clearly the difference between what is proper and improper. In the various accounts of the facts of the case, we see wildly diverging versions of what actually happened as well as of the significance of those facts. Thus, the case stands as a cautionary tale not only of the hazards of judicial storytelling, but also of the power of judicial law-making. It is not surprising that with such a shaky foundation, the Court prepares the way for subsequent jurisprudence on proselytizing that is unstable, unprincipled, and inconsistent.

MAKAU MUTUA, HUMAN RIGHTS, RELIGION, AND PROSELYTISM HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002) 94

... With the African theater as the basic laboratory, I intend to unpack the meaning of religious freedom at the point of contact between the messianic faiths and African religions and illustrate how that meeting resulted in a phenomenon akin to cultural genocide. The main purpose here is not merely to defend forms of religion or belief but rather to problematize the concept of the right to the free exercise of messianic faiths, which includes the right to proselytize in the marketplace of religions. In societies such as those in Africa where religion is woven into virtually every aspect of life, its

delegitimation can eventually lead to the collapse of social norms and cultural identities. The result, as has been the case in most of sub-Saharan Africa, is a culturally disconnected people, neither themselves nor the outsiders in Europe, North America, and the Arab world that they seek to imitate. In other words, I argue that imperial religions have necessarily violated the individual conscience and the communal expressions of Africans and their communities by subverting African religions. In so doing, they have robbed Africans of essential elements of their humanity

Since the right to religious freedom includes the right to be left alone — to choose freely whether to believe and what to believe in — the rights regime by requiring that African religions compete in the marketplace of ideas incorrectly assumes a level playing field. The rights corpus not only forcibly imposes on African religions the obligation to compete — a task for which as nonproselytizing, noncompetitive creeds they are not historically fashioned — but also protects evangelizing religions in their march toward universalization. In the context of religious freedom, the privileging by the rights regime of the competition of ideas over the right against cultural invasion, in a skewed contest, amounts to condoning the dismantling of African religions.

I also argue that the playing field, the one crucial and necessary ingredient in a fair fight, is heavily weighted against Africans. Messianic religions have been forcibly imposed or their introduction was accomplished as part of the cultural package borne by colonialism. Missionaries did not simply offer Jesus Christ as the savior of benighted souls, his salvation was frequently a precondition for services in education and health, which were quite often the exclusive domain of the Church and the colonial state... . [I]n most cases, the embrace of indigenous societies by the European imperial powers was so violent and total that conformity was the only immediate option....

...

A discussion about limitations on religious rights at first blush appears to frustrate some of the major ideals of the human rights movement. It raises the question about the tension between the restriction of the right to evangelize or advocate a point of view and one of the central ideals of the human rights movement, the promotion of diversity and the right to advocate ideas or creeds. An exploration of the manner in which the human rights corpus ought to view religious rights — whether to further limit or to expand the protections they currently enjoy — raises a fundamental tension: how does a body of principles that promotes diversity and difference protect the establishment and manifestation of religious orders that seek to destroy difference and forcibly impose an orthodoxy in Africa — as both Christianity and Islam, the two major proselytizing religions, attempted, and in many cases successfully did? Precisely because of the ethos of universalization common to both, the messianic faiths sought to eradicate, with the help of the state, all other forms of religious expression and belief and close off any avenues through which other competing faiths could be introduced or sustained

...

The challenge for the human rights movement is to move beyond the singular obsession with wrongs committed directly by the state — although it remains the most important obligee of the discourse — and confront nonstate actors in order to contain and control human rights violations in the private sphere. To do so, the movement has to take on powerful private institutions in the private realm, including established religion. It is my argument that although religious human rights must be defined, secured, and protected, there is a correlative duty on the part of religions to respect the human rights of nonbelievers and adherents of other religions or faiths and not to seek their coerced conversion either directly or through the manipulation and destruction of other cultures.

...

The two most geographically diverse religions — Christianity and Islam — are also the most imperial; they are proselytizing and universalist in their attempts to convert into their faith the entire human race. Although these religions are not spread through physical violence today, they have historically been forcibly introduced. ... But central to them is the belief in the racial superiority of the proselytizers It does not require a profound knowledge of history to prove that both Arab and European perceptions of Africa have been decidedly racist over the centuries

...

Although human rights law amply protects the right to proselytize through the principles of free speech, assembly, and association, the pecking order of rights problematizes the right to evangelize where the result is the destruction of other cultures or the closure of avenues for other religions. It is

my argument that the most fundamental of all human rights is that of self-determination and that no other right overrides it. Without this fundamental group or individual right, no other human right could be secured, since the group would be unable to determine for its individual members under what political, social, cultural, economic, and legal order they would live. Any right which directly conflicts with this right ought to be void to the extent of that conflict.

...

... Although many of the rights enumerated in human rights law attach to individuals, they only make sense in a collective, social perspective. This is the case because the creation or development of a culture or a religion are societal, not individual, endeavors. I make this point to underline the importance of culture or religion to individuals and groups. An individual's morals, attitudes toward life and death, and identity come from this collective construction of reality through history.

No one culture or religion is sovereign in relationship to any other culture or religion. Proper human rights ought to assume that all cultures are equal. This view rejects the notion that there is a hierarchy of cultures or religions; that some cultures are superior to others even though they may be more technologically advanced. Belief in the contrary has led to military invasions to "civilize," colonize, and enslave, as was the case with Christianity in Africa. Cultures, however, have always interacted throughout history; there are no pure cultures, as such, although many traditions retain their distinctive personality. In many cases, the voluntary, unforced commingling of cultures has led to a more vital and creative existence. Several lessons can be drawn from this premise. The human rights movement should encourage the crossbreeding of cultures and tolerance for diversity. But it should frown upon homogenization and the imposition of uniformity.

...

Perhaps there is nothing that can be done today to reverse the negative effects of forced or coerced religious proselytization during the era of colonialism in Africa. Nor is it possible to reclaim wholly the African past as though history has stood still. This does not mean, however, that we should simply forget the past and go on as if nothing happened. The anguish and deprivation caused by that historical experience is with me and millions of other Africans today. We bear the marks of that terrible period. For those Africans who choose not to be Christians or Muslims, the past is not really an option: it was so effectively destroyed and delegitimized that it is practically impossible to retrieve as a coherent scheme of values. It is this loss that I mourn and for which I blame Christianity and Islam. The human rights corpus should outlaw those forms of proselytization used in Africa, because their purpose and effect have been the dehumanization of an entire race of people. It could do so by elaborating a treaty that addresses religious human rights but provides for the protection and mechanisms of redress for forms of proselytization that seek to unfairly assimilate or impose dominant cultures on indigenous religions.

Proselytism in India

In 1999, during a visit to India, Pope John Paul II stated that '[r]eligious freedom constitutes the very heart of human rights. ... Its inviolability is such that individuals must be recognized as having the right even to change their religion, if their conscience so demands.' Alessandra Stanley, in 'Pope Tells India His Church Has Right to Evangelize', *New York Times*, 8 November 1999, reported that this was:

... an argument that many religious leaders in India accept only with difficulty. Christian conversions are at the heart of a political and religious dispute that has made the ... pope's visit a tense one. Christian proselytizing is fuel for Muslim fundamentalists, but it is also a source of uneasiness between the pope and some of his more moderate and like-minded religious peers.

**MUKESH KUMAR AND GARIMA YADAV, ANXIETIES OF THE DOMINANT:
LEGAL, SOCIAL, AND RELIGIOUS IN THE POLITICS OF RELIGIOUS CONVERSION IN INDIA
11 OXFORD J. L. & RELIG. (2022) 4**

Currently, 10 out of 28 Indian states and 8 union territories have anti-conversion laws that prohibit religious conversions on grounds of marriage, force, allurement, and fraud. The present-day anti-

conversion laws identify the decision to change one's faith as a criminal offence until and unless prior permission is sought from the state asserting that:

No person shall convert or attempt to convert, either directly or otherwise, any other person from one religion to another, by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage nor shall any person abet, convince or conspire such conversion.

All the recent anti-conversion laws are similar in their content, structure, and wording. ... These laws are held by many as contradicting constitutional values of the liberty of thought, expression, belief, and faith The definition of allurement, force, and fraud in anti-conversion laws is ambiguous that gives an edge to the police and self-styled Hindu-vigilante groups to interpret any public activity of non-Hindus, including the constitutionally allowed legitimate methods of proselytizing such as peaceful public preaching, as per their political convenience. Similarly, the broad and vague definition of force impinges on all meaningful religious interactions between individuals of different denominations. Many charitable acts which are fundamental part of religions like Islam and Christianity may also be framed as tactics of religious conversion. Education offered by missionary institutions to poor children and orphans is nowadays interpreted as a sinister design of conversion.

Presently, Hindu vigilante groups encouraged and re-energized by these laws regularly attack individuals belonging to the minority, target their worship spaces, and harass Muslim and Christian clerics under the pretext of exposing ploys of 'unlawful conversions'. ...

...

Conclusion

... [R]eligious conversion is prominent in public debates because it simultaneously intersects the imagined boundaries of nation, caste, religion, and gender. Consequently, any associated legal change concerning religious conversion brings discussions on nationality, identity, community, belonging, individual rights, and the issue of freedom face to face with one another.

...

Religious conversion is not a monolithic process. Scholars have shown that various factors direct an individual towards changing one's religious belief and identification. Historically, if one thinks from the perspective of converts, religious conversion has also served as terrain of multiple possibilities of social mobility and emancipation from oppression. However, Hindu fundamentalists frame all religious conversions as achieved by exerting political pressure externally. Making constitutional provisions for religious conversion through ambiguously defined terms such as force, fraud, and allurement in response to some bogus theories of Hindu right activists is also an instance of an impending conservative pressure on the legal fabrics of Indian democracy.

Although the legality of anti-conversion laws, especially regarding interfaith marriages, is questioned from time to time by the Supreme Court, individuals, particularly Muslim youths, undergo suppression by the state. Religious conversion is totally banned under the new legal provisions in various Indian states. Any violation of these provisions is met with hostility by police forces and Hindu vigilante groups. Overall, the legality of religious conversion politics yields political benefits because it can effectively tie itself with the discourse of nation, religion, community, identity, and multiple other narratives of public significance to perpetually maintain fissures between religions to reap benefits from such divides.

QUESTIONS

1. How do you assess the Kokkinakis opinion? Do you find justification for any restriction on proselytizing other than those related to coercion, undue imposition on the listener, and similar matters?
2. How do you assess Mutua's views? Can they be limited to matters of religion, or would his arguments apply equally to other attributes of a culture, such as discrimination, or extreme forms of punishment, or authoritarian rule by priests or by elders of a community? How would you seek to resolve the tensions that Mutua underscores, such as through arguments in favour of cultural variety and survival as opposed to arguments for universal norms?

3. Dress and Symbols, Migration and Multiculturalism

The larger flows of immigrants in recent decades from developing countries to Europe and the United States have led to more complex and sometimes abrasive cultural mixes. Migrants carry cultural and religious beliefs and practices with them; many immigrants continue to adhere to those beliefs and seek to continue the practices accompanying them, as well as the beliefs' manifestations in routine daily behaviour. Sometimes, as in the case of female genital cutting, the practices grow out of deeply rooted culture and traditions. Sometimes, as in the issue of headscarves discussed below, they have at least in part a religious foundation. In either case, in the increasingly multicultural states of the developed world, newcomers' practices and routine behaviour — one or another form of dress is frequently at issue — stir discomfort, concern and even intense hostility in the host state. That concern and hostility will often continue after the immigrants or their children have become citizens. The issue is starkly posed: whether the immigrants or new citizens should be allowed to continue their practices, or whether they should be required to follow laws and practices of the developed country that effectively require their abolition. Severe sanctions, including expulsion from schools and criminal proceedings, may await those who refuse to surrender their beliefs and ways.

Of course, such conflicts raise serious human rights issues. The opening materials concern immigrant communities, while the later materials examine similar issues that arise in national settings among groups of citizens. The main focus is on Europe and the treatment of Muslims. In a 2017 report, the Pew Research Center noted that, from mid-2010 to mid-2016 alone, the share of Muslims in Europe rose more than 1 percentage point, from 3.8 percent to 4.9 percent (from 19.5 million to 25.8 million). By 2050, the share of the continent's population that is Muslim could more than double, rising to 11.2 percent or more, depending on how much migration is allowed into Europe.

In a 2021 report (UN Doc. A/HRC/46/30, para. 26), the UN Special Rapporteur on freedom of religion or belief noted that:

Despite the fact that some women regard it as integral to their faith or identity, at least 11 States in Europe, Africa and South Asia impose public restrictions or bans on Muslim head coverings – predominantly worn by women – on the grounds that this type of religious dress is incompatible with a secular public space, violates the rights of Muslim women or poses a security risk. Other States reportedly permit certain institutions (e.g., schools, places of work or the courts) to exercise discretion on whether to permit Muslim dress.

Although the following analysis was written some years ago, it remains highly relevant and lays the foundation for the court cases that follow, which involve disputes arising out of the large societal changes that the author describes.

TIMOTHY SAVAGE, EUROPE AND ISLAM: CRESCENT WAXING, CULTURES CLASHING
27 WASH. Q. (2004) 25

... As the MENA [Middle East and North Africa] population doubles in the next three decades and Europe's shrinks, increased migratory flows from south to north appear unavoidable — a trend augmented by Europe's graying population, as opposed to the youthful MENA average.

...

The growing Muslim presence in Europe has tended to cluster geographically within individual states, particularly in industrialized, urban areas within clearly defined, if not self-encapsulated, poorer neighborhoods such as Berlin's Kreuzberg district, London's Tower Hamlets, and the *banlieues* (suburbs) of major French cities, further augmenting its visibility and impact yet circumscribing day-to-day contact with the general population

...

The nature of the Muslim presence in Europe is also changing. No longer "temporary guest workers," Muslims are now a permanent part of western European national landscapes, as they have been for centuries in southeastern Europe. The institutionalization of Islam in Europe has begun, as has a "re-Islamization" of Muslims in Europe.

... Like European Christians and Jews, European Muslims are not a monolithic group. Nonetheless, Muslims increasingly identify first with Islam rather than with either their family's country of origin or the European country in which they now reside. Moreover, this phenomenon is significantly more pronounced among younger Muslims.

... The current generation is also modernizing and acculturating to aspects of contemporary European society at a faster rate than the first waves of Muslim immigrants did. Younger Muslims are adopting attributes of the European societies in which they were born and raised, such as language; socialization through schooling; and, in many cases, some of the secular perspectives of the country in which they reside. Yet, generally they do not feel part of the larger society nor that they have a stake in it. Conversely, even though they may be third-generation citizens, they often are not viewed as fellow citizens by the general public but are still identified as foreigners and immigrants instead.

...

Despite these trends in citizenship, younger Muslims are resisting assimilation into secular European societies even more steadfastly than the older generation did. Europe's Muslims, including the younger generation, are willing to integrate and respect national norms and institutions as long as they can, at the same time, maintain their distinct Islamic identity and practices. They fear that assimilation, that is, total immersion into European society, will strip them of this identity. Yet, this is the price many Muslims increasingly see European governments and publics demanding: to have Europe become a melting pot without accommodation by or modifications of the existing culture. Studies in France and Germany find that second- and particularly third-generation Muslims are less integrated into European societies than their parents or grandparents were. The recent headscarf affairs in France and Germany underscore and further exacerbate this basic clash.

Perceived discrimination in European societies affecting employment, education, housing, and religious practices is compelling many second- and third-generation Muslims to embrace Islam as their badge of identity. Indeed, the unemployment rate among Muslims is generally double that of non-Muslims, and it is worse than that of non-Muslim immigrants. Educational achievement and skill levels are relatively low, participation by Muslim women in the workforce is minimal, opportunities for advancement are limited, and biases against Muslims are strong. Such factors contribute to the isolation — and self-encapsulation — of Muslim communities in Europe

...

The rapidly growing Muslim populations seem to be overwhelming the ability of European governments to draw the lines of tolerance rationally, consistently, and convincingly. Europeans see Muslims as a direct challenge to the collective identity, traditional values, and public policies of their societies, as demonstrated by the heated controversies over the hijab [scarf], Muslim food (*halal*), the construction of mosques, the teaching of Islam in schools, and Muslim burial rites. This attitude is also reflected in intense debates over women's rights, church-state relations, and Islam's compatibility with democracy. Politicians, pundits, and ordinary citizens are all seized with the "Islamic challenge."

... The threat is framed in terms of security (terrorism) and economics (jobs); yet, the core issue is identity and the perceived cultural threat Islam poses to the European way of life. Europeans have even coined a name for it: Islamophobia. Conversely, this tendency to see Muslims as a monolith has its reverse image in Muslim allegiance to the umma, which transcends other loyalties; tends to reinforce the "we/them" perspective; and is part of the reason why Muslims resist assimilation — the total loss of identity-related indicators of existing differences from European societies — and insist on integration — a reconstituted identity that stresses remaining differences — or, in some cases, re-communalization — a physical presence in Europe but no accommodation with European society

...

[T]he challenge for Europe seems more daunting [than that of the United States with respect to racial hostility and tolerance] because it involves not only integration and tolerance but also redefining both parties' identities. Each side will have to change and move toward the other. Europe's Muslims will need to accept the norms, customs, and cultures of the states in which they live and reject efforts to establish a parallel society, while the general European population will need to broaden its horizons to embrace and accommodate diversity, accepting integration and not just complete assimilation as a valid relationship to society.

... For their part, Muslims in Europe, who must confront poverty, bigotry, de facto segregation, and limited social mobility, are likely to find it difficult to embrace Europe's liberal democratic views on gender equality; sexual liberalization; and the principles of compromise, egalitarianism, and identification with the state. These are all issues that challenge the traditional views not only of Muslims but also of individuals with an Arab, Turkish, or South Asian heritage, as the vast majority of Europe's Muslims are. These cultural backgrounds have not included the Enlightenment as a central pillar, and the idea of a secular society is for the most part alien. Moreover, as Mustafa Malik notes, in these societies, "[Resistance] to liberalism was heightened by hatred for European colonialists, who represented liberal values." Lack of organization and political standing, diversity of views and interests, economic weakness, and the absence of clear leadership pose major complicating hurdles, all of which Europe's Muslims will need to address if they are to contribute their part to Europe's transformation.

... Although the situation in Europe is not quite there, the tipping point may be closer than is generally realized. As intolerance toward Muslim communities grows in Europe, European Muslims are growing more self-confident but also more dissatisfied, particularly as Europe's economy continues to sputter. The percentage of Muslims in France is rapidly approaching that of African-Americans in the United States in 1950 (10 percent), and the percentage of Muslims in Europe as a whole will pass that benchmark within the next decade...

... Conversely, however, a success in dealing with the building clash of cultures and identities, which results in a shift of both Muslim and non-Muslim European mind-sets, and crafts a societal framework that encourages integration and respects individual as well as national identities would negate Huntington's thesis of the inevitable incompatibility of Islam and the West. It would require change in European society, to be sure. As with all change, there would be winners and losers. Yet, success holds out the hope of reinvigorating and redefining Europe, proffering a possible corrective to its projected political, economic, and demographic decline as well as moving European integration to a new level and giving it new meaning.

...

* * *

Bans on headscarves have now been considered by a range of international bodies, and the materials that follow reproduce some of the key decisions. A useful starting point is the judgment of the European Court of Human Rights in *Dahlab v. Switzerland*, Application No. 42393/98 (2001). The applicant, a Catholic woman, was a primary school teacher in the secular public school system in Geneva. She converted to Islam and soon began to ‘observe a precept laid down in the Koran whereby women were enjoined to draw their veils over themselves in the presence of men.’ She refused the request of the Director General of Primary Education to stop wearing a headscarf to class, and was soon dismissed. She was not given relief by the Swiss authorities, and thus brought an action before the European Court on the ground that the prohibition of the headscarf infringed her freedom to manifest her religion pursuant to Article 9 of the European Convention. The Court agreed with the conclusions of the Swiss administrative and judicial authorities, and declared the application inadmissible. It stated in part:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children [between 4 and 8] [T]he wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which ... is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils [H]aving regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and ... the measure they took was therefore not unreasonable.

In the year before the Grand Chamber decision, a French law came into force effectively banning from state primary and secondary schools the headscarf worn by many Muslim girls as well as ‘conspicuous’, or ‘overtly manifest’, clothing or symbols of other religions such as large crosses for Christians and large skullcaps for Jewish boys. Other states in Europe allowed schools to prohibit headscarves in certain cases. These developments across the European landscape were understood by the court when it issued the following judgment:

LEYLA ŞAHİN V. TURKEY

EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 44774/98 (10 NOVEMBER 2005)

[The applicant, a Turkish citizen, came from a traditional family of practising Muslims, and considered it her religious duty to wear the Islamic headscarf. She did so during her four years studying medicine in a Turkish university. She then transferred to Istanbul University to continue her studies. In a series of episodes beginning in 1998 she was censured by university authorities for refusing to comply with university circulars based on legislation banning students wearing headscarves from lectures and courses. After being denied enrolment and admission to lectures, she sought relief from Turkish courts, but was unsuccessful. Ultimately, the applicant abandoned her studies in Turkey and pursued her medical education at Vienna University. After failing to secure judicial relief in Turkey, she initiated proceedings against Turkey under the European Convention on Human Rights. In a 2004 judgment, a Chamber of the European Court of Human Rights held unanimously that there had been no violation of the Convention. The applicant’s request that the case be referred to the Court’s Grand Chamber was accepted. In its 2005 judgment, the Grand Chamber also ruled against the applicant.]

30. The Turkish Republic was founded on the principle that the State should be secular (*laik*). ...

32. The defining feature of the Republican ideal was the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious

constraints and that society should be modernised had a common origin. ... [W]omen obtained equal political rights with men.

...

35. In Turkey wearing the Islamic headscarf to school and university is a recent phenomenon which only really began to emerge in the 1980s ... Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism ... see the Islamic headscarf as a symbol of a political Islam ...

[In the Turkish Constitutional Court's opinion upholding the university's position, the judges stated that secularism had achieved so important a position among constitutional values because of the country's historical experience and the particularities of Islam compared to other religions; secularism was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law. Students must be allowed to work in a tolerant atmosphere without being deflected from their goals by signs of religious affiliation such as the headscarf.

The ECtHR opinion included a comparative survey about laws about headscarves across different European countries. The survey indicated that state legislation varied on many details — for example, how, if at all, the headscarf was regulated, and the level of school/university that was covered by any regulation.]

Alleged violation of Article 9 of the convention

70. The applicant submitted that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion. She relied on Article 9 of the Convention ...

...

104. The Court reiterates that as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” ...

105. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. ...

106. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. ...

107. The Court ... also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed ...

...

109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. ...

110. This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate. ...

...

115. After examining the parties' arguments, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber [in its 2004 judgment]:

... The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women

... In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted, the issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years.

... The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience. The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.

...

117. The Court must now determine whether in the instant case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.

118. Like the Chamber ..., the Grand Chamber notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, the resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire are also forbidden on the university premises.

...

121. ... By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course. ...

122. In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.

123. Consequently, there has been no breach of Article 9 of the Convention.

II. Alleged violation of Article 2 of Protocol No. 1

[The Applicant also argued that Article 2 of Protocol No. 1 of the European Convention should be interpreted to uphold her right to wear a headscarf while attending the university. That article provides:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.]

The Grand Chamber relied heavily on its reasoning with respect to freedom of religion in concluding that there had been no violation of Article 2 of Protocol No. 1....

...

DISSENTING OPINION OF JUDGE TULKENS

...

2. ... Underlying the majority's approach is the *margin of appreciation* which the national authorities are recognised as possessing and which reflects, *inter alia*, the notion that they are "better placed" to decide how best to discharge their Convention obligations in what is a sensitive area. The Court's jurisdiction is, of course, subsidiary and its role is not to impose uniform solutions, especially "with regard to establishment of the delicate relations between the Churches and the State"

3. I would perhaps have been able to follow the margin-of-appreciation approach had not two factors drastically reduced its relevance in the instant case. The first concerns the argument the majority use to justify the width of the margin, namely ... the lack of a European consensus in this sphere. The comparative-law materials do not allow of such a conclusion, as in none of the member States has the ban on wearing religious symbols extended to university education The second factor concerns the European supervision that must accompany the margin of appreciation [O]ther than in connection with Turkey's specific historical background, European supervision seems quite simply to be absent from the judgment. ...

4. On what grounds was the interference with the applicant's right to freedom of religion through the ban on wearing the headscarf based? In the present case, ... [there were] two main arguments: secularism and equality... . In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.

...

7. ... The majority ... consider that wearing the headscarf contravenes the principle of secularism. ...

... [A] generalised assessment of that type gives rise to at least three difficulties. Firstly, the judgment does not address the applicant's argument — which the Government did not dispute — that she had no intention of calling the principle of secularism ... into doubt. Secondly, there is no evidence to show that the applicant, through her attitude, conduct or acts, contravened that principle Lastly, the judgment makes no distinction between teachers and students, [contrary to] *Dahlab v. Switzerland* ... which concerned a teacher [T]he position of pupils and students seems to me to be different.

8. Freedom to manifest a religion entails everyone being allowed to exercise that right, whether individually or collectively, in public or in private, subject to the dual condition that they do not infringe the rights and freedoms of others and do not prejudice public order.

As regards the first condition, this could have been satisfied if the headscarf the applicant wore as a religious symbol had been ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytise or to spread propaganda and undermined — or was liable to undermine — the convictions of others. However, the Government did not argue that this was the case and there was no evidence before the Court to suggest that Ms Şahin had any such intention. As to the second condition, it has been neither suggested nor demonstrated that there was any disruption in teaching or in everyday life at the University

9. ... [T]he possible effect which wearing the headscarf, which is presented as a symbol, may have on those who do not wear it does not appear to me, in the light of the Court's case-law, to satisfy the requirement of a pressing social need

10. In fact, it is the threat posed by "extremist political movements" seeking to "impose on society as a whole their religious symbols and conception of a society founded on religious precepts" which, in the Court's view, serves to justify the regulations in issue, which constitute "a measure intended ... to preserve pluralism in the university"

While everyone agrees on the need to prevent radical Islamism, a serious objection may nevertheless be made to such reasoning. Merely wearing the headscarf cannot be associated with fundamentalism

and it is vital to distinguish between those who wear the headscarf and “extremists” who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views [T]he judgment fails to provide any concrete example of the type of pressure concerned

11. Turning to *equality*, the majority focus on the protection of women’s rights and the principle of sexual equality By converse implication, wearing the headscarf is considered synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say [W]earing the headscarf has no single meaning; it is a practise that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.

12. ... The applicant, ... [said] that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted

13. ... In these circumstances, there has been a violation of the applicant’s right to freedom of religion, as guaranteed by the Convention.

...

[The dissenting opinion also disagreed on several grounds with the majority’s disposition of applicant’s claim based on Article 2 of Protocol No. 1.]

...

* * *

In 2008, under the leadership of Prime Minister Recep Tayyip Erdoğan and his Justice and Development Party (the *Adalet ve Kalkınma Partisi*), Turkey’s Parliament passed a constitutional amendment, by an overwhelming majority, allowing women to wear headscarves on university campuses. The amendment was challenged in a case brought before the Constitutional Court. The Court invalidated the measure reasoning, in part, that it violated the Turkish Constitution’s foundational commitment to secularism. In 2013 the ban was lifted, with some exceptions for the military, police force and judiciary. At the 2023 election both the re-elected government and the opposition announced strong support for official legal steps to enshrine women’s right to wear Islamic headscarves.

a. Headscarves in France

The background to the developments traced below is well captured by this analysis by Roger Cohen, in ‘An Embattled Public Servant in a Fractured France’, *New York Times* (1 January 2021):

France is in theory a nondiscriminatory society where the state upholds strict religious neutrality and people are free to believe, or not, in any God they wish. It is a nation, in its self image, that through education dissolves differences of faith and ethnicity in a shared commitment to the rights and responsibilities of French citizenship.

This model, known as *laïcité*, often inadequately translated as secularism, is embraced by a majority of French people. They or their forebears became French in this way. No politician here would utter the words “In God we trust.” The Roman Catholic Church was removed more than a century ago from French public life. The country’s lay model supplants any deity.

But, in a country with an uneasy relationship to Islam, *laïcité* is also contested as the shield behind which France discriminates against its large Muslim population and avoids confronting its prejudices. ...

France enacted a national law in 2004 categorically prohibiting any student attending an elementary or secondary state school from wearing ‘conspicuous’ religious garb and symbols, including the headscarf.²⁷⁹ Previously, French law had provided state schools with discretion to prohibit Muslim girls from wearing the headscarf under certain conditions. Those conditions included a determination by school authorities that ‘inherently, in the circumstances in which [religious signs] are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public service.’ The law also designated local disciplinary authorities to determine whether an individual’s breach of a dress code would result in suspension from school.

In 2008, a chamber of the European Court of Human Rights issued a judgment addressing the pre-2004 French legal regime. The case, *Dogru v. France* (Application No. 27058/05), involved an 11-year-old Muslim girl who was expelled from a state school due to her failure to obey a school rule prohibiting headscarves in physical education classes. The Court applied the Grand Chamber’s framework in *Sabin* and concluded that the school’s actions were consistent with the Convention:

73. ... [T]he Court considers that the conclusion reached by the national authorities that the wearing of a veil, such as the Islamic headscarf, was incompatible with sports classes for reasons of health or safety is not unreasonable

74. The Court also notes that the disciplinary proceedings against the applicant fully satisfied the duty to undertake a balancing exercise of the various interests at stake [T]he authorities concerned made many unsuccessful attempts over a long period of time to enter into dialogue with the applicant and a period of reflection was granted her and subsequently extended. Furthermore, the ban was limited to the physical education class, so cannot be regarded as a ban in the strict sense of the term. Moreover, ... these events had led to a general atmosphere of tension within the school

...

76. The Court considers ... that the penalty of expulsion does not appear disproportionate, and notes that the applicant was able to continue her schooling by correspondence classes

Following the judgment by the ECtHR, France enacted new legislation which came into force in 2011. The law specifically addresses full-face coverings such as burqas and niqabs.²⁸⁰ Women are forbidden from wearing such garments in public spaces, defined very broadly to include streets, markets, private stores, government buildings, train stations and public transit. Belgium adopted a very similar prohibition which also came into force in 2011. Unlike the French law, Belgium’s included the possibility of imprisonment (up to seven days) for women who violate the law. Some municipalities in other European countries (e.g., Italy and Spain) have also enacted laws prohibiting burqas and niqabs in public institutions or have interpreted existing law to effectuate such a prohibition.

²⁷⁹ S. Henneville-Vauchez, ‘Religious Neutrality, *Laïcité* and Colorblindness: A Comparative Analysis’, 42 *Cardozo L. Rev.* (2021) 539.

²⁸⁰ The burqa is a full-body garment that hides a woman’s face by a mesh screen. The niqab is a garment that includes a veil covering the entirety of a woman’s hair and face except for her eyes.

Belgium has been second only to France in enacting restrictive legislation in this area. Consider the following case, which has been subjected to considerable criticism.²⁸¹

SAMIRA ACHBITA V. G4S SECURE SOLUTIONS NV
COURT OF JUSTICE OF THE EUROPEAN UNION, C-157/15 (14 MARCH 2017)

Facts

G4S is an undertaking that provides reception services. G4S employees are not permitted to wear any religious, political or philosophical symbols while on duty. On 12 February 2003, Ms Achbita joined G4S as a receptionist without objecting to that company rule. However, in April 2006, she announced that, in future, she intended to wear a headscarf during working hours as well, for religious reasons. On 12 June 2006, on account of her firm intention to wear the Islamic headscarf, Ms Achbita was dismissed.

Procedural history

[Between 2007 and 2010, the Antwerpen Labour Court and an appeals court both dismissed a claim by Ms Achbita on the grounds that there had been no discrimination.]

Judgment

29. It is necessary... to determine whether the internal rule at issue in the main proceedings gives rise to a difference in treatment of workers on the basis of their religion or their belief and, if so, whether that difference in treatment constitutes direct discrimination within the meaning of Article 2(2)(a) of [European Council] Directive 2000/78.

30. ... [T]he internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs.

[Based on the evidence, the Court found that the internal rule had not been applied differently to Ms Achbita as compared to any other worker, and that there was thus no difference of treatment that is directly based on religion or belief.]

...

34. ... [The] difference of treatment [might be considered to be] indirectly based on religion or belief ... [thus putting] persons adhering to a particular religion or belief ... at a particular disadvantage.

35. ... [The question is whether the] difference of treatment ... is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

...

37. ... [T]he desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.

38. An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers.

...

40. ... [T]he fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner.

41. In that respect, it is for the referring court to ascertain whether G4S had, prior to Ms Achbita's dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs

²⁸¹ See, for example, J. Weiler, 'Je Suis Achbita!', 28 *Eur. J. Int'l L.* (2017) 989.

of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers.

42. As regards ... the question whether the prohibition ... was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.

...

44. Having regard to all of the foregoing considerations, the answer to the question put by the referring court is as follows:

– Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive.

– By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

* * *

In a subsequent case, also from Belgium, *OP v. Commune d'Ans* (Case C-148/22, 28 November 2023), the CJEU considered a claim to wear a headscarf from a municipal worker who had no contact with the public. It held that:

an internal rule of a municipal authority prohibiting, in a general and indiscriminate manner, the members of that authority's staff from visibly wearing in the workplace any sign revealing, in particular, philosophical or religious beliefs may be justified by the desire of the said authority to establish, having regard to the context in which it operates, an entirely neutral administrative environment provided that that rule is appropriate, necessary and proportionate in the light of that context and taking into account the various rights and interests at stake.

S.A.S. v. FRANCE

EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 43835/11 (1 JULY 2014)

The Facts

I. The Circumstances of the Case

...

10. The applicant is a French national who was born in 1990 and lives in France.

11. In the applicant's submission, she is a devout Muslim and she wears the burqa and niqab in accordance with her religious faith, culture and personal convictions. According to her explanation, the burqa is a full-body covering including a mesh over the face, and the niqab is a full-face veil leaving an opening only for the eyes. The applicant emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner.

12. The applicant added that she wore the niqab in public and in private, but not systematically: she might not wear it, for example, when she visited the doctor, when meeting friends in a public place, or when she wanted to socialise in public. She was thus content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself.

13. The applicant did not claim that she should be able to keep the niqab on when undergoing a security check, at the bank or in airports, and she agreed to show her face when requested to do so for necessary identity checks.

14. Since 11 April 2011, the date of entry into force of Law no. 2010-1192 of 11 October 2010 throughout France, it has been prohibited for anyone to conceal their face in public places.

The Law

...

3. The Court's assessment

(a) *Alleged violation of Articles 8 and 9 of the Convention*

106. The ban on wearing, in public places, clothing designed to conceal the face raises questions in terms of the right to respect for private life (Article 8...) of women who wish to wear the full-face veil for reasons related to their beliefs, and in terms of their freedom to manifest those beliefs (Article 9 ...).

107. ... [P]ersonal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life.
...

108. [I]n so far as that ban is criticised by individuals who, like the applicant, complain that they are consequently prevented from wearing in public places clothing that the practice of their religion requires them to wear, it mainly raises an issue with regard to the freedom to manifest one's religion or beliefs
...

(i) *Whether there has been a "limitation" or an "interference"*

110. ... [T]he Law of 11 October 2010 confronts the applicant with a dilemma ...: either she complies with the ban and thus refrains from dressing in accordance with her approach to religion; or she refuses to comply and faces criminal sanctions. ... There has therefore been ... an "interference" with or a "limitation" of the exercise of the rights protected by Articles 8 and 9
...

(iii) *Whether there is a legitimate aim*

[The Court focused on whether the measure was justified by reference to "protection of the rights and freedoms of others".]

118. Firstly, the Court is not convinced by the Government's submission in so far as it concerns respect for equality between men and women.

119. ... [A] State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. ...

120. Secondly, ... respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy....

121. Thirdly, the Court finds, by contrast, that under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government – or of “living together” ... – can be linked to the legitimate aim of the “protection of the rights and freedoms of others”.

122. The Court ... [is] able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.

...
(iv) Whether the measure is necessary in a democratic society
(a) General principles concerning Article 9 of the Convention
 ...

124. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. ...

125. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one’s religion or beliefs

126. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected

127. The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. ...

128. Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail

129. It is also important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight

...
 131. This margin of appreciation, however, goes hand in hand with a European supervision
 ...

(v) Application of those principles to the present case
 ...

139. As regards the question of necessity ..., the Court understands that a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. It has thus found no violation of Article 9 ... in cases concerning the obligation to remove clothing with a religious connotation in the context of security checks and the obligation to appear bareheaded on identity photos for use on official documents. However, in view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket

ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. The Government have not shown that the ban ... falls into such a context. ...

...

141. The Court observes that [the aim of ensuring the observance of the minimum requirements of life in society as part of the “protection of the rights and freedoms of others”] is an aim to which the authorities have given much weight. ... [T]he explanatory memorandum accompanying the bill ... indicates that “[t]he voluntary and systematic concealment of the face ... is quite simply incompatible with the fundamental requirements of ‘living together’ in French society” and that “[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity, ... falls short of the minimum requirement of civility that is necessary for social interaction”. It indeed falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity. Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places.

142. Consequently, the Court finds that the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of “living together”.

143. It remains to be ascertained whether the ban is proportionate to that aim.

144. Some of the arguments put forward by the applicant and the intervening non-governmental organisations warrant particular attention.

145. Firstly, it is true that only a small number of women are affected. ... [A]bout 1,900 women wore the Islamic full-face veil in France at the end of 2009 It may thus seem excessive to respond to such a situation by imposing a blanket ban.

146. In addition, there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs. ... [T]he ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. ... [T]he women concerned may perceive the ban as a threat to their identity.

147. ... [A] large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate

...

149. ... [T]he Court is very concerned ... that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010. It is admittedly not for the Court to rule on whether legislation is desirable in such matters. ... [R]emarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination

150. The other arguments put forward in support of the application must, however, be qualified.

151. Thus, while ... the scope of the ban is broad, [the Law] does not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which does not have the effect of concealing the face. ... [T]he ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face. ...

152. As to the ... criminal sanctions ... attached to the ban, ... [they] are among the lightest that could be envisaged, since they consist of a fine at the rate applying to second-class petty offences (currently EUR 150 maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.

153. ... [T]he ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for ... the Government ... it was a question of responding to a practice that the State deemed incompatible ... [with] the requirements of “living together”. From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society. It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.

154. In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. ... [I]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.

155. In other words, France had a wide margin of appreciation in the present case.

156. This is particularly true as there is little common ground among the member States of the Council of Europe as to the question of the wearing of the full-face veil in public. ... [T]here is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State of the Council of Europe has, to date, opted for such a measure. ... [H]owever, ... the question ... is or has been a subject of debate in a number of European States. ...

157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed ... can be regarded as proportionate to the aim pursued

...

(b) Alleged violation of Article 14 of the Convention taken in conjunction with Article 8 or Article 9

160. The Court notes that the applicant complained of indirect discrimination. It observes in this connection that, as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a category of individuals who are particularly exposed to the ban in question and to the sanctions for which it provides.

161. ... [W]hile it may be considered that the ban imposed by the Law of 11 October 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, this measure has an objective and reasonable justification for the reasons indicated previously

162. Accordingly, there has been no violation of Article 14 of the Convention taken in conjunction with Article 8 or Article 9.

...

[The Court, by 15-2, found no violation of Article 8, and also by 15-2, no violation of Article 9.]

JOINT PARTLY DISSENTING OPINION OF JUDGES NUSSBERGER AND JÄDERBLOM

A. Sacrificing of individual rights to abstract principles

...

2. ... [T]he opinion of the majority ... sacrifices concrete individual rights guaranteed by the Convention to abstract principles. ...

B. No legitimate aim under the Convention

...

4. [T]he majority see a legitimate aim in ensuring “living together” We have strong reservations about this approach.

5. ... The very general concept of “living together” does not fall directly under any of the rights and freedoms guaranteed within the Convention. ... [T]he concept seems far-fetched and vague.

6. It is essential to understand what is at the core of the wish to protect people against encounters with others wearing full-face veils. The majority speak of “practices or attitudes ... which would fundamentally call into question the possibility of open interpersonal relationships”. ... It seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself, ... but by the philosophy that is presumed to be linked to it. Thus the recurring motives for not tolerating the full-face veil are based on interpretations of its symbolic meaning. ... [A] French parliamentary commission ... saw in the veil “a symbol of a form of subservience”. The explanatory memorandum to the French bill referred to its “symbolic and dehumanising violence”. The full-face veil was also linked to the “self-confinement of any individual who cuts himself off from others whilst living among them”. Women who wear such clothing have been described as “effaced” from the public space.

7. All these interpretations have been called into question by the applicant, who claims to wear the full-face veil depending only on her spiritual feelings and does not consider it an insurmountable barrier to communication or integration. ... [T]here is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European lifestyle. In the context of freedom of expression, the Court has repeatedly observed that the Convention protects not only those opinions “that are favourably received or regarded as inoffensive or as a matter of indifference, but also ... those that offend, shock or disturb”, pointing out that “[s]uch are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”. The same must be true for dress codes demonstrating radical opinions.

8. ... [T]he right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider.

9. It is true that “living together” requires the possibility of interpersonal exchange. It is also true that the face plays an important role in human interaction. But this idea cannot be turned around, to lead to the conclusion that human interaction is impossible if the full face is not shown. This is evidenced by examples that are perfectly rooted in European culture, such as the activities of skiing and motorcycling with full-face helmets and the wearing of costumes in carnivals. Nobody would claim that in such situations (which form part of the exceptions provided for in the French Law) the minimum requirements of life in society are not respected. People can socialise without necessarily looking into each other’s eyes.

...

12. [I]t is doubtful that the French Law pursues any legitimate aim under ... the Convention.

C. Proportionality of a blanket ban on the full-face veil

1. Different approaches to pluralism, tolerance and broadmindedness

13. ... [I]t is difficult to argue that the rights protected outweigh the rights infringed. This is especially true as the Government have not explained or given any examples of how the impact on others of this particular attire differs from other accepted practices of concealing the face, such as excessive hairstyles or the wearing of dark glasses or hats. In the legislative process, the supporters of a blanket ban on the full-face veil mainly advanced “the values of the Republic, as expressed in the maxim ‘liberty, equality, fraternity’”. The Court refers to “pluralism”, “tolerance” and “broadmindedness” ...

14. However, all those values could be regarded as justifying ... on the contrary, the acceptance of such a religious dress-code and the adoption of an integrationist approach. In our view, the applicant is right to claim that the French legislature has restricted pluralism... . In its jurisprudence the Court has clearly elaborated on the State’s duty to ensure mutual tolerance between opposing groups

and has stated that “the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other”. By banning the full-face veil, the French legislature has done the opposite. ...

2. Disproportionate interference

15. ... [W]e cannot ... agree with the majority that the ban is proportionate to the aim pursued.

(a) Margin of appreciation

16. ... [W]e are unable to conclude that in this particular situation the respondent State should be accorded a broad margin of appreciation.

17. Firstly, the prohibition targets a dress-code closely linked to religious faith, culture and personal convictions and thus, undoubtedly, an intimate right related to one’s personality.

18. Secondly, it is not convincing to draw a parallel between the present case and cases concerning the relationship between State and religion. ... [T]he Law was deliberately worded in a much broader manner, generally targeting “clothing that is designed to conceal the face” and thus going far beyond the religious context

19. Thirdly, it is difficult to understand why the majority are not prepared to accept the existence of a European consensus The fact that forty-five out of forty-seven member States of the Council of Europe, and thus an overwhelming majority, have not deemed it necessary to legislate in this area is a very strong indicator for a European consensus. ...

20. The arguments drawn from comparative and international law militate against the acceptance of a broad margin of appreciation and in favour of close supervision by the Court. ... [I]t still remains the task of the Court to protect small minorities against disproportionate interferences.

(b) Consequences for the women concerned

21. ... In our view, the restrictive measure cannot be expected to have the desired effect of liberating women presumed to be oppressed, but will further exclude them from society and aggravate their situation.

22. With regard to the majority’s assumption that the punishment consists of mild sanctions only, ... the multiple effect of successive penalties has to be taken into account.

23. ... [O]nly a small number of women ... are affected by the ban. That means that it is only on rare occasions that the average person would encounter a woman in a full-face veil

(c) Less restrictive measures

24. Furthermore, the Government have not explained why it would have been impossible to apply less restrictive measures, instead of criminalising the concealment of the face in all public places. No account has been given as to whether or to what extent any efforts have been made to discourage the relatively recent phenomenon of the use of full-face veils, by means, for example, of awareness-raising and education. ...

D. Conclusion

25. ... [W]e find that the criminalisation of the wearing of a full-face veil is a measure which is disproportionate to the aim of protecting the idea of “living together” – an aim which cannot readily be reconciled with the Convention’s restrictive catalogue of grounds for interference with basic human rights.

...

YAKER V. FRANCE**HUMAN RIGHTS COMMITTEE, COMMUNICATION NO. 2747/2016, FINAL VIEWS (17 JULY 2018)****The facts as submitted by the author**

2.1 The author is a Muslim and wears a niqab (full face veil). On 6 October 2011, she was stopped for an identity check while wearing her niqab on the street in Nantes. She was then prosecuted and convicted of the minor offence of wearing a garment to conceal her face in public.

2.2 Consequently, the author was convicted on 26 March 2012 and was ordered by the community court in Nantes to pay a fine of 150 euros, the maximum penalty for the offence in question, which was established by Act No. 2010-1192 of 11 October 2010. ...

...

2.4 The author is challenging, on the basis of article 18 of the Covenant, the prohibition against concealing the face in public areas, which deprives those wishing to wear a full-face veil of the possibility to do so.

...

Issues and proceedings before the Committee*Consideration of the merits*

8.2 ... The Committee notes the State party's argument that ... the Act does not specially treat religious clothing. The Committee notes, however, that article 2 (II) broadly exempts from the Act clothing worn for "health reasons" or on "professional grounds", or that is "part of sporting, artistic or traditional festivities or events", including "religious processions", or clothing that is prescribed or legally authorized by legislative or regulatory provisions. The Committee further notes ... that fewer than 2,000 women wear the full-face veil in France, and that the vast majority of checks under the Act have been performed on women wearing the full-face veil.

8.3 The Committee ... considers that the ban introduced under the Act constitutes a restriction or limitation of the author's freedom to manifest her beliefs or religion — by wearing her niqab — within the meaning of article 18 (1) of the Covenant.

...

8.5 ... It is therefore incumbent upon the Committee to assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory.

8.6 The Committee notes that the State party has indicated two objectives that the Act is intended to pursue, namely the protection of public order and safety, and the protection of the rights and freedoms of others.

8.7 With respect to protection of public order and safety, the State party contends that it must be possible to identify all individuals when necessary to avert threats to the security of persons or property and to combat identity fraud. ... [H]owever, ... the Act is not limited to such contexts, but comprehensively prohibits the wearing of certain face coverings in public at all times, and that the State party has failed to demonstrate how wearing the full-face veil in itself represents a threat to public safety or order that would justify such an absolute ban. Nor has the State party provided any public safety justification or explanation for why covering the face for certain religious purposes — i.e., the niqab — is prohibited, while covering the face for numerous other purposes, including sporting, artistic, and other traditional and religious purposes, is allowed. ...

8.8 Even if the State party could demonstrate the existence of a specific and significant threat to public safety and order in principle, it has failed to demonstrate that the prohibition contained in Act No. 2010-1192 is proportionate to that objective, in view of its considerable impact on the author as a woman wearing the full-face veil. Nor has it attempted to demonstrate that the ban was the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.

8.9 With regard to the second objective presented by the State party, understood as the protection of the fundamental rights and freedoms of others under article 18 (3), the Committee notes the State party's argument based on the concept of "living together"

8.10 ... [T]he Committee observes that the concept of "living together" is very vague and abstract. The State party has not identified any specific fundamental rights or freedoms of others that are affected by the fact that some people present in the public space have their face covered, including fully veiled women. Nor has the State party explained why such rights would be "unfairly" obstructed by wearing the full-face veil, but not by covering the face in public through the numerous other means that are exempted from the Act. The right to interact with any individual in public and the right not to be disturbed by other people wearing the full-face veil are not protected by the Covenant and therefore cannot provide the basis for permissible restrictions within the meaning of article 18 (3).

8.11 Even assuming that the concept of living together could be considered a "legitimate objective" ... the State party has failed to demonstrate that the criminal ban ... is proportionate to that aim, or that it is the least restrictive means that is protective of religion or belief.

8.12 ... The Committee ... concludes that the ban ... and the conviction ... violated the author's rights under article 18 of the Covenant.

8.13 As to the author's claims under article 26 of the Covenant, namely that the law in question had the effect of indirectly discriminating against the minority of Muslim women who wear the full-face veil, the Committee notes the State party's argument that the prohibition introduced by the Act is not based on the religious connotation of the clothes in question, but on the fact that they conceal the face. ... [F]rom the text of the Act, the debate preceding its adoption and its implementation in practice, the Committee observes that the Act is applied mainly to the full-face Islamic veil, which is a form of religious observance and identification for a minority of Muslim women.

...
8.15 The Committee notes that the State party has provided no explanation why the blanket prohibition on the author's veil is reasonable or justified, in contrast to the exceptions allowable under the Act. The Committee further notes that the blanket ban on the full-face veil introduced by the Act appears to be based on the assumption that the full veil is inherently discriminatory and that women who wear it are forced to do so. While acknowledging that some women may be subject to family or social pressures to cover their faces, the Committee observes that the wearing of the full veil may also be a choice — or even a means of staking a claim — based on religious belief, as in the author's case. The Committee further considers that the prohibition, rather than protecting fully veiled women, could have the opposite effect of confining them to their homes, impeding their access to public services and exposing them to abuse and marginalization. ...

8.16 Finally, although the State party contends that the sanctions imposed on women who decide to wear the full veil in public are "measured", the Committee notes that the penalties have a criminal nature and have been applied against some women, including the author, on multiple occasions. Such sanctions necessarily negatively impact the author's right to manifest her religion through wearing the veil and potentially other rights.

8.17 ... [T]he Committee considers that the criminal ban ... disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil, and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable. The Committee hence concludes that this

provision and its application to the author constitutes a form of intersectional discrimination based on gender and religion, in violation of article 26 of the Covenant.

* * *

A 2022 report by the Open Society Justice Initiative, entitled *Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom*, traced the evolution of these policies:

Such restrictions were considered unacceptable for most of the post-World War II era in Europe, where respect for the religious liberties of minorities formed an essential component of European liberal democracy. Things started to change in the 1980s and 1990s, as Muslim youth came of age and expected to participate in European societies on equal footing. Geopolitical developments in the Middle East accelerated the change and gave rise to the bogeyman of the suspicious Muslim. After 9/11, policymakers declared a global war on terror premised on this stereotype. A popular narrative proclaimed the discordance of Islam and the West, with Muslim women's religious dress—allegedly always imposed by Muslim men—rising as the ultimate symbol of incompatibility. The burqa forced on Afghan women by the Taliban served as the dominant reference. The idea that Muslims as a group were the new “enemy within,” with beliefs and practices reflecting values and norms inferior to those of Europe, acquired legitimacy across the political spectrum. Echoing Orientalist prejudices and stereotypes about Muslims already prevalent in Europe, it served to justify banning the visible presence of Muslim women and Islam from various spaces.²⁸²

The report found that only twelve of the 28 states had ‘no legal bans, or cases or reports about institutional or private bans.’ It notes that ‘in most cases it was mainstream political parties that actually enacted religious dress restrictions’, although these had also been supported by far-right political parties. It notes that, although the ECHR and the CJEU had ‘given states and private actors more leeway in instituting bans’, litigation at the national level had been more successful in achieving rulings against bans.

QUESTIONS

1. Turkey's situation showed some similarities to the French situation and some dramatic differences. Do you believe that, as a matter of policy or law, the ban of headscarves in public educational institutions was equally justified or unjustified in France and Turkey or more justified in one country than the other?
2. How might we account for the very different approaches taken by the European Court and the Human Rights Committee in these cases?

b. Crucifixes in Italian Classrooms

In a major controversy involving religious symbolism, the ECtHR decided *Lautsi v. Italy*, which concerned the presence of crucifixes in state school classrooms in Italy. In a unanimous opinion, a chamber of seven judges held that the practice was incompatible with the freedom of religion. Relying in part on *Dahlab*, the Court reasoned:

²⁸² Open Society Justice Initiative, ‘Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom: Policy Report’, (March 2022) 5.

Ms Lautsi's convictions also concern the impact of the display of the crucifix on her children, who at the material time were aged 11 and 13. The Court acknowledges that, as submitted, it is impossible not to notice crucifixes in the classrooms. In the context of public education they are necessarily perceived as an integral part of the school environment and may therefore be considered "powerful external symbols" (see *Dahlab v. Switzerland* (2001)).

The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion ... extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice.

Dominic McGoldrick, below, called the political response to the Chamber's judgment in *Lautsi* 'without precedent in European human rights terms', and noted widespread opposition, including from 20 countries that supported 'Italy in the defence of the crucifix'. The judgment continues to resonate in Italy many years later.²⁸³

LAUTSI V. ITALY
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 30814/06 (18 MARCH 2011)

[T]he second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind

... [I]t requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed.

...
 There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.

However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.

The Government ... explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised the principles and

²⁸³ Sebastián Guidi, 'Law Over Legalism: International Court Legitimacy in *Lautsi v. Italy*', 33 *Duke J. Comp. & Int'l L.* (2023) 45

values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.

The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.

...

... [T]he decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools speaks in favour of that approach.

This margin of appreciation, however, goes hand in hand with European supervision

In that connection, it is true that by prescribing the presence of crucifixes in State-school classrooms — a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity — the regulations confer on the country's majority religion preponderant visibility in the school environment.

That is not in itself sufficient, however, to denote a process of indoctrination

...

... [A] crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.

[The Grand Chamber next describes the passages of the ECtHR's lower chamber opinion (reproduced above) relying on *Dahlab*, but determined that that case] cannot serve as a basis in this case because the facts of the two cases are entirely different.

... *Dahlab* concerned the measure prohibiting the applicant from wearing the Islamic headscarf while teaching, which was intended to protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law. After observing that the authorities had duly weighed the competing interests involved, the Court held, having regard above all to the tender age of the children for whom the applicant was responsible, that the authorities had not exceeded their margin of appreciation.

Moreover, the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of the following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity. Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in schools; and optional religious education could be organised in schools for "all recognised religious creeds". Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency

* * *

Consider the following reactions to *Lautsi*.

Joseph Weiler, who represented eight intervening states before the Grand Chamber, argues in ‘State and Nation; Church, Mosque and Synagogue’, 8 *Int’l. J. Con. L.* 157 (2010):

... There are those who truly believe that *laïcité* is a primordial condition — *sine qua non* for a good liberal democracy and that, at least implicitly, the non-*laïque* position is sub-optimal at best and aberrational at worst. Consequently, it is morally imperative for good democrats and liberal pluralists to attempt to clip the wings of religious manifestations of the non-*laïque* state as far as possible — a principled and consistent position.

There are others (myself included) who hold the view that, even more in today’s world than before, the European version of the non-*laïque* state is hugely important in the lesson of tolerance it forces on such states and its citizens towards those who do not share the “official” religions and in the example it gives the rest of the world of a principled mediation between a collective self-understanding rooted in a religious sensibility, or religious history, or religiously-inspired values and the imperative exigencies of liberal democracy. That there is something inspiring and optimistic by the fact that even though the Queen is the Titular Head of the Church of England, the many Catholics, Muslims and Jews, not to mention the majority of atheists and agnostics, can genuinely consider her as “their Queen” too, and equal citizens of England and the UK. I think there is intrinsic value of incalculable worth in the European pluralism which validates both a France and UK as acceptable models in which the individual right to and from religion may take place.

...

... [S]urely Freedom FROM Religion is not absolute, and its vindication has to be so balanced, and the principle collective good against which it should be balanced would, in my view, be the aforementioned collective freedom of a self-understanding, self-definition and determination of the collective self as having some measure of religious reference. Freedom OF Religion surely requires that no school kid be obligated to chant God’s name, even in, say, God Save the Queen. But does Freedom FROM Religion entitle such to demand that others not so chant, to have another national anthem? How does one negotiate the individual and the collective rights at issue here?

... [B]oth to understand the new debates and to arrive at meaningful, ethical, deontological, identitarian and pragmatic results may profit by this reframing.

Stanley Fish, in ‘Crucifixes and Diversity: The Odd Couple’, *New York Times* (28 March 2011):

The question is not what can a crucifix possibly mean in all the settings the world might offer, but what does it mean in this setting, hanging on the wall of every classroom with a state imprimatur? What is a non-Christian student likely to think — “Aha, a symbol of pluralism and universal acceptance” or “I get it; this is a Catholic space and I’m here on sufferance?” ...

...

Exclusion would be the result, we are told, if the students had been the objects of indoctrination, but because the crucifixes just hang there without saying anything, they were not: “[A] crucifix on a wall is an essentially passive symbol” and “it cannot be deemed to have an influence on pupils comparable to that of didactic speech.” Judge Bonello [in concurrence] glosses and drives home the point: “The mere display of a voiceless testimonial of a historical symbol ... in no way amounts to teaching.” Actually, it does: the lesson (of official authority)

is enhanced by not being voiced; the absence of didactic speech itself says “you don’t have to be told what this means; you know.” The effect is the one produced in a country where a king or leader-for-life has his picture hung everywhere. Nothing need be said.

Julie Ringelheim, in ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’, 6 *Oxford J. L. and Relig.* (2017) 24:

... [D]etermining what state denominational neutrality means exactly and what it entails in specific contexts raises special challenges for the Court. First of all, neutrality is not a straightforward concept. It can be subject to different interpretations. Second, when elaborating this principle, the Court must take into consideration the diversity of existing state–religion arrangements across Europe. ...

...

... As references to neutrality have multiplied, the meaning afforded to this notion has become blurred. It has come to mean different things in different rulings. And there are clear tensions between some of these interpretations. This ambiguity is problematic. ...

...

... In effect, the Court balances between three different understandings of the concept that need to be disentangled. They are characterized here as ‘neutrality as absence of coercion’, ‘neutrality as absence of preference’, and ‘neutrality as exclusion of religion from the public sphere’. *Lautsi and Others v Italy* (2011), *Folgerø and Others v Norway* (2007), and *Ebrahimian v France* (2015) exemplify each of these models of neutrality. It will be argued that ‘neutrality as absence of preference’ provides the most adequate model for an ECHR-based concept of state religious neutrality.

...

... [T]he Court’s approach to the principle of state neutrality has become increasingly blurred and fragmented. Where religious instruction at school is at stake, it sticks to the second model of neutrality, that is, respect for conscientious and religious freedom implies that the state should not manifest a preference for a religion. But where the display of religious symbols by the state at school is concerned, the Court retreats to a lower standard of protection. Neutrality here merely means ‘absence of coercion’. At the same time, where states officially opt for the ‘neutrality as exclusion of religion’ model, the Court allows them a wide margin of appreciation to impose restrictions on an individual’s right to manifest their religion when they are in a public institution. ... [A]lthough they are very different, the latter two visions of neutrality both entail a weakening of the protection of the individual’s rights if compared with the ‘neutrality as absence of preference’ approach.

Malcolm Evans, in ‘State Neutrality and Religion in Europe: What’s the Prospect?’, 11 *Oxford J. L. and Relig.* (2022) 4, at 16:

... [T]he tensions inherent in the developing jurisprudence are best exemplified in the judgments of the Chamber and Grand Chamber [in *Lautsi*]. ... [F]or the Chamber, the presence of the cross ... embodied the State endorsement of Roman Catholicism and so its presence breached the rights of the applicant; for the Grand Chamber the cross was just ‘there’, passively doing nothing other than just being there, and so its presence did not amount to a violation of the

applicant's rights. ... [I]t was in fact doing both. It literally depends on who was looking at it. Ultimately, the Grand Chamber is telling the applicant that it does not see what they are seeing. And like it or not, that is taking sides.

...

The problem with the Chamber decision in *Lautsi* was that it seemed to suggest that neutrality and impartiality involved cleansing the public space of the trappings of religion on the grounds that those trappings might cause offense. This has only to be stated to be seen to be untenable. There is no right to be insulated from things which cause offence; indeed, the Court has made it very clear for very many years that there is freedom to say things which may cause offense. If causing offense alone is not sufficient to require someone not to speak, how can it be sufficient alone to justify the removal of a cross, or of a statue? One cannot have a classroom in which there both is and is not a cross; a plinth on which there both is and is not a statue. There must be a choice as to which it is to be. ...

Dominic McGoldrick, in 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?', 11 *Hum. Rts. L. Rev.* 451 (2011), at 487:

There was no evidence before the GC [Grand Chamber] that the display of a religious symbol on classroom walls might have an influence on pupils The GC's reliance on the lack of evidence is particularly interesting. In previous religious clothing cases the Court either ignored evidence that the wearing had not actually caused any problems or made its own assertions about their possible effects (*Dahlab, Şahin*).

...

Even engaging in a relative approach to the assessment of symbols was inevitably going to leave the GC open to criticism. Islamic headscarves, worn by a minority, may be powerful external symbols that challenge neutrality. However, Christian crucifixes, a symbol of the majority religion, are somehow merely passive and do not challenge neutrality. It may have been better for the GC to have simply accepted that the assessment of the meaning and effect of religious symbols was complex and would be left to the national authorities to assess within the normal bounds of the margin of appreciation.

...

As noted, the GC's view was that the decision whether or not to perpetuate a tradition fell in principle within the margin of appreciation of the State. Historically, those traditions have been dominated by Christianity. The inevitable consequence is that non-dominant traditions (i.e. minority, non-Christian ones) will not be equally represented or perpetuated in the public reasoning and public visual squares. Added to that, the ECtHR has accepted that, in the defence of a secular order, a state can prohibit the wearing of Islamic headscarves in schools, and even in universities

It has been suggested that Christianity and Christian values have been defended even at the expense of trampling on fundamental individual freedoms, because the ECtHR does not perceive them as conflicting with the core values of the Convention system. Islam, on the other hand, even when it is the vast majority's religion (as with Turkey), has been restrictively regulated on the ground that it threatens the democratic basis of the State. Assessing the value of the ECHR to Muslims is a complex task. However, the problem is also one of public and political perception It has been argued that the GC's decision in *Lautsi*,

‘confirms the Christian-centric outlook of European institutions and it will confirm many Turks’ perceptions that as Muslims, they are inevitably viewed with suspicion’.

QUESTIONS

1. Is the logic of the ECtHR ruling in Dahlab consistent with the Chamber’s or the Grand Chamber’s decision in Lautsi?

2. Does the presence of the crucifix in Italian classrooms constitute, in itself, an injury to minority groups that is incompatible with the freedom of religion or is the real threat the prospective risk of a slippery slope?

3. Are you persuaded by Weiler that all citizens of England see the Queen as ‘their Queen’? Do you agree with Weiler’s framing of that claim:

[I]t is this special combination of private and public liberties, reflecting a particular spirit of tolerance, which explains how in countries such as, say, Britain or Denmark to give but two examples, where there is an established state church no less — Anglican and Lutheran, respectively — Catholics, Jews, Muslims and, of course, the many citizens who profess no religious faith, can be entirely ‘at home,’ play a full role in public life including the holding of the highest office, and feel it is ‘their country’ no less than those belonging to the established church.

4. McGoldrick states that the Grand Chamber perhaps should have ‘simply accepted that the assessment of the meaning and effect of religious symbols was complex and would be left to the national authorities to assess within the normal bounds of the margin of appreciation.’ Would applying his criticism result in a different outcome in the Lautsi case or simply a different rationale for the same holding?

5. Neville Cox, in ‘Pejorative Assertions, Human Rights Evaluation, and European Veiling Laws’, 71 *Am. J. Comp. L.* (2023) 1, reinforces McGoldrick’s emphasis on the importance of actual evidence. He argues that the European Court, in contrast to the UN Human Rights Committee, ‘accepts assertions of facts from states as to why their laws are justified in the absence of any demonstrable supporting evidence’ and characterizes this as ‘an irresponsible abdication of responsibility’. How might a more demanding approach in requiring evidence to support governments’ assertions about impact, affect the outcome in such cases?

4. Freedom of Speech

Freedom of speech forms one of the obvious boundary lines between relatively open and closed societies, between liberal democracies and different types of authoritarian states. Whatever the form of authoritarian regime, a liberal value like speech and its related rights such as assembly and association will bow to one or another degree to censorship and other repressive controls. In some instances, the explanations for different understandings of this human right would stress factors like an authoritarian regime’s guiding ideology and its rulers’ concern about resistance or subversion. Relatively free speech may pose too great a danger for the survival of the existing political system. In other cases, different conceptions of free speech and its relation to other rights and state interests may reflect religious beliefs, cultural patterns or long-standing traditions and practices.

But free speech is not only at risk in authoritarian states. Even states with strong human rights traditions might struggle to find an appropriate balance between robust free speech protections and

respect for the rights of others. In recent years, the boundaries of the right to free speech in a liberal society have been tested by hate speech in its many different forms, as well as calls to prohibit speech (including offensive texts and cartoons) deemed blasphemous or defaming of a religion. It is these latter issues that are examined below.

Hate Speech

The heterogeneity generated within many countries by large-scale migration has led to increased racial, religious and cultural tensions and backlash, which have in turn been exploited and exacerbated by populist and nationalist political responses. The ubiquity of social media and other novel forms of communication has enabled hate speech to proliferate, made it harder to define and regulate, and given it a greater international reach and salience.

The ICCPR Committee's views in the 1996 *Faurisson* case below concern a 'Holocaust-denial law' that has a close affinity with laws making 'hate speech' a criminal offence (that may also be subject to civil sanctions). While the subsequent materials emphasize the definitional challenges involved, the term covers abusive, denigrating, or harassing speech based on a group or individual's national, religious, racial or ethnic identity. In some but not all definitions, such speech must incite violence or discrimination.²⁸⁴

The laws imposing criminal and other sanctions on hate speech clearly impinge on freedom of speech, a core value protected under the major universal and regional human rights instruments:

Article 19, UDHR: Everyone has the right to freedom of opinion and expression; this right includes freedom to ... impart information and ideas through any media and regardless of frontiers.

Article 19, ICCPR: ...

- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to ... impart information and ideas of all kinds, regardless of frontiers ...
- (3) The exercise of the right provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Note also the following ICCPR articles, each of which has a comparable UDHR article: (1) the equal protection clause in Article 26; (2) the provision in ICCPR Article 5 that nothing in the Covenant should be interpreted as implying 'for any group or person any right to engage in any activity ... aimed at the destruction of any of the rights and freedom recognized herein ...'; and (3) the provision in Article 17 that no one shall be subject to 'arbitrary or unlawful interference with his privacy ... nor to unlawful attacks on his honour and reputation'.

The arguments in favour of free speech are broadly familiar, for example: its contribution to the full realization of the individual human personality; the challenge to existing beliefs (the 'marketplace of ideas') and the related stimulus to inquiry, debate and development of knowledge; its relation to principles of democratic government and pluralism; and its close functional association with other human rights like freedoms of belief, religion and association. But are these arguments sufficient to justify the protection of hate speech directed at particular racial, ethnic, religious, gender identity or

²⁸⁴ J. Waldron, *The Harm in Hate Speech* (2012).

other groups or their members? Such speech itself attacks basic premises of the human rights system, premises as deep as equal human dignity, respect for others and equal protection. Hate speech may deny that the targeted group is entitled to benefit together with the rest of the population from human rights protections. It may advocate, indeed passionately urge, discriminatory or even violent action against members of the targeted group. It may pose threats of a greater or lesser immediacy of such violence.

The quoted provisions above of the ICCPR include qualifications to free speech that bear generally on these types of restrictive laws. Several human rights instruments are more explicit on these issues — for example, Article 20(2) of the ICCPR: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Manfred Nowak, in *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn. 2005), observes (at 474–5) that the ‘legal formulation of this provision is not entirely clear’. The wording of paragraph (2):

literally means that incitement to discrimination without violence must also be prohibited Particularly inexplicable is the insertion of the word ‘discrimination’... .

... It is most difficult to conceive of an advocacy of national, racial or religious hatred that does not simultaneously incite discrimination Art. 20(2) ... may be sensibly interpreted only in light of its object and purpose, i.e., taking into consideration its *responsive character* with regard to the Nazi racial hatred campaigns Thus, despite its unclear formulation, Art 20(2) does not require States parties to prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination. What the delegates ... had in mind was to ... prevent the public incitement of racial hatred and violence within a State or against other States and peoples.

Some states have forbidden political groups or parties that are based on racism, and hence employ hate speech, from participating in elections. In Israel, for example, Amendment No. 9 to the Basic Law on the Knesset (Parliament) provides: ‘A candidate’s list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: ... (3) incitement to racism’. In late 2022, the newly elected coalition government announced its intention to eliminate that provision.

THE *JERSILD* AND *JALLOW* DECISIONS

Consider the approach of the European Court of Human Rights in *Jersild v. Denmark*, (Application No. 15890/89) (1994). The question was whether Jersild, a Danish journalist, was criminally liable for aiding and abetting three youths who made racist remarks on interviews conducted by Jersild on a television programme on matters of public interest. The youths were members of the Greenjackets, a group that engaged in hate speech, in this case against Danish residents of African descent. In the course of the interview, which had been sharply edited by Jersild from an initial length of hours to a few minutes, the men made numerous ugly and denigrating remarks about black people. There was no allegation that Jersild or the broadcasting station shared those views. On the other hand, since the point of the programme was to convey information to the Danish public about atypical, small racist groups, there was no effort by Jersild or the broadcasting station to challenge or oppose the racist views expressed.

A Danish penal statute, responsive to obligations of Denmark under the Convention on the Elimination of All Forms of Racial Discrimination, imposed a fine or imprisonment on ‘[a]ny person who, publicly or with the intention of disseminating it to a wide circle of people, makes a statement, or other communication, threatening insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief ...’. The three youths were found guilty of violating the statute, and did not appeal. Jersild was found guilty of aiding and abetting the three youths. His conviction was affirmed by the Danish appellate courts, and he then instituted proceedings before the European Court of Human Rights.

The Court decided that the conviction — that is, not the hate-speech statute abstractly, but the statute as here applied to Jersild for aiding and abetting — violated the free expression provisions (including freedom of media) of Article 10 of the ECHR. Its opinion stressed the need to protect freedom of the press, and that news reporting through interviews was an important means of informing the public. Conviction of a journalist in these circumstances could hamper discussion of matters of public interest. It concluded that the limitation on Jersild's freedom of expression was not 'necessary in a democratic society', a requirement of Article 10. The prosecution and conviction were disproportionate to the state's interest, also expressed in Article 10, of protecting the reputation or rights of others.

A joint dissenting opinion by Judges Ryssdal, Bernhardt, Spielmann and Loizou observed:

... The applicant has cut the entire interview down to a few minutes, probably with the consequence or even the intention of retaining the most crude remarks. That being so, it was absolutely necessary to add at least a clear statement of disapproval. The majority of the Court sees such disapproval in the context of the interview, but this is an interpretation of cryptic remarks. Nobody can exclude that certain parts of the public found in the television spot support for their racist prejudices.

And what must be the feelings of those whose human dignity has been attacked, or even denied, by the Greenjackets? Can they get the impression that seen in context the television broadcast contributes to their protection? A journalist's good intentions are not enough in such a situation, especially in a case in which he has himself provoked the racist statements.

Another dissenting opinion by Judges Gölcüklü, Russo and Valticos noted:

While appreciating that some judges attach particular importance to freedom of expression, the more so as their countries have largely been deprived of it in quite recent times, we cannot accept that this freedom should extend to encouraging racial hatred, contempt for races other than the one to which we belong, and defending violence against those who belong to the races in question. It has been sought to defend the broadcast on the ground that it would provoke a healthy reaction of rejection among the viewers. That is to display an optimism, which to say the least, is belied by experience. Large numbers of young people today, and even of the population at large, finding themselves overwhelmed by the difficulties of life, unemployment and poverty, are only too willing to seek scapegoats who are held up to them without any real word of caution; for — and this is an important point — the journalist responsible for the broadcast in question made no real attempt to challenge the points of view he was presenting, which was necessary if their impact was to be counterbalanced, at least for the viewers.

Consider also a 2022 Opinion by the UN Committee on the Elimination of All Forms of Racial Discrimination in a case involving Denmark:

JALLOW V. DENMARK
COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, OPINION ADOPTED
REGARDING COMMUNICATION NO. 62/2018, UN DOC. CERD/C/108/D/62/2018 (1
DECEMBER 2022)

1. The author... is Momodou Jallow, born in 1977. He is a Swedish national, former spokesman for the National Association of Afro-Swedes and national coordinator for the European Network Against Racism in Sweden. ...

Factual background

2.1 On 23 October 2014, an exhibition of pictures by the controversial Swedish artist D.P. was held on the premises of the Danish Parliament in Copenhagen, under the auspices of the Danish People's Party. ...

2.2 The pictures exhibited included the following:

- (a) An image of Adolf Hitler with the text: "NOT ONLY [N*****S] HAVE DREAMS";
- (b) An image of the author, in which he is hung by the neck from a bridge, along with two other black persons, with the text: "HANG ON, Afrofobians";
- (c) An image of the author, in which he appears as a slave who runs away from his owner, with the text: ... (Our negro slave has run away) [and] (He disappeared / last Saturday 16 April and goes by the name of Mamadou Jallow ...;
- (d) A cartoon showing a black person with a liquorish pipe in his or her mouth, with the text: "this is not a crack[N****R] or is it?";
- (e) A picture of two Roma community leaders, including their names, with the text: ... (Gypsy crime is a good thing).

2.3 The artist D.P. has been convicted in Sweden of defamation and inciting hatred against an ethnic group, for creating and exhibiting those images. In Copenhagen, the images were exhibited with an explanatory text based on interviews given by the artist, explaining the content of the relevant picture, its background and purpose, and the decisions by the Swedish courts concerning each of them.

2.4 The explanatory text presented with the picture described in paragraph 2.2 (a) above indicated that, given the media attention given to the fiftieth anniversary of Martin Luther King Junior's "I have a dream" speech, D.P. made the work to draw attention to the fact that Hitler also had a dream and that not all dreams deserved being celebrated. The explanatory text presented with the picture in paragraph 2.2 (b) above indicated that the artwork was related to an incident that had occurred in 2013, when a black man had been ill-treated and almost pushed off a bridge in Sweden. The author, who was at that time the spokesman for the National Association of Afro-Swedes, had indicated that the incident was related to "white Swedish racism". However, it was later determined that the perpetrators of the attack were of Kurdish origin. ... The explanatory text displayed with the picture described in paragraph 2.2 (d) above indicated that the artwork had been in response to the attempt by the European Union to prohibit liquorish pipes. In addition, it was indicated that the picture was related to the decision of a liquorice manufacturer to stop using a black face as a logo, to avoid stereotyping black people. The artist, emulating René Magritte's painting *The Treachery of Images*, in which the text under the image of a pipe reads "Ceci n'est pas une pipe" (This is not a pipe), "drew a liquorice pipe, as it was not a 'crack[n****r]', but only a liquorice pipe". ...

...

Complaint

3.1 The author alleges that the State party has violated his rights under articles 4 (a) and (c) and 6 of the International Convention on the Elimination of Racial Discrimination [ICERD], by allowing the exhibitions to take place and by refusing to prosecute the organizers.

3.2 According to the author, the decision to stop the investigation constitutes a violation of article 4 (a), because it reveals that, in practice, the authorities prevent the effective investigation of hate crimes falling under article 266 of the Criminal Code. ...

...

Consideration of the merits

7.5 ... In order to qualify as racist hate speech as encompassed by article 4 (a) of the Convention, ... it does not suffice ... that the expressions in question contain a racist content. ... [T]he Convention requires, in addition, that the speech act in question amounts to the dissemination of ideas based on racial or ethnic superiority or hatred, incitement to hatred, contempt or discrimination, threats or incitement to violence and expressions of insults, ridicule or slander or justification of hatred, contempt or discrimination, when it clearly amounts to incitement to hatred or discrimination. The racist content of a speech act must be accompanied by one of these additional factors

...

7.7 ... [T]he Committee concludes that the five pictures referred to in the communication fall within the scope of article 4 (a) of the Convention. The Committee notes the racist depictions and wording that, in different ways, express ideas of racial superiority. They compare the Civil Rights Movement with the ideology of National Socialism, use racial slurs and depict images of slavery to degrade a person. Some of the pictures do not only display a racist content, but also depict individual persons and portray them in a degrading manner, reproducing racist stereotypes in a way that can incite racial hatred, discrimination and violence. ...

7.8 The Committee takes note of the State party's assertion that the exhibition ... [was intended] to start an essential social debate about the limits of the freedom of expression in a democratic society.

...

7.9 ... [T]he expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial. ... The Committee notes that the context of an exhibition cannot be used as a pretext in order to display pictures which would otherwise be understood as racist hate speech. The ... explanatory texts of the pictures did not show that the organizers of the exhibitions distanced themselves from the racist content of the pictures. ... [R]eprints of the pictures were sold in the exhibition hall, thereby facilitating [their] dissemination Against this background, the Committee does not agree that the purpose of the exhibitions was solely to start a debate ... but that it also served the purpose to disseminate the pictures and their racist content. ...

...

7.12 ... The Committee takes note of the decision of the State Prosecutor, in which she analysed each picture and the text accompanying it ... [and of the fact that] the Director of Public Prosecutions confirmed this assessment.

7.13 The Committee notes with appreciation that the Prosecution Service of the State party took the allegations of racist hate speech seriously and conducted a thorough analysis The mere conduct of an investigation does not suffice. In this context, the Committee also recalls its recommendation that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. In the light of the qualification of the pictures as racist hate speech, however, the Convention required an appropriate and proportional response from the State party in an effort to combat this incident of racial discrimination. The absence of an effective response by the State party to the incident that qualifies as racist hate speech was not in conformity with the requirements of the Convention.

8. The ... facts ... disclose a violation of article 4 (a), read in conjunction with article 6, of the Convention.

...

* * *

Betül Durmuş, in 'The CERD stands firm against racist hate speech: *Jallow v. Denmark*', *EJIL: Talk!*, (2 June 2023) criticized the decision for not having engaged sufficiently with the role of satire:

... [T]he ECtHR famously held that “satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate” and “any interference with an artist’s right to such expression must be examined with particular care”. ... [T]he ECtHR also noted later that satire is not always a mitigating factor: “the blatant display of a hateful and anti-Semitic position disguised as an artistic production is as dangerous as a fully-fledged and sharp attack”. It is unfortunate that the Committee did not provide further guidance as to how it understands the role of satirical art under Article 4.

QUESTION

What criteria would enable the CERD Committee or any other human rights body to assess whether the conduct in the Jallow case should be classified as satire deserving of more leeway?

HATE SPEECH IN CONFLICT SITUATIONS

Recall the 1946 Judgment of the International Military Tribunal at Nuremberg (Ch. 2D, above), which makes sparse reference to the Holocaust but includes the following observation:

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, Chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union testified as to the methods employed in the extermination of the Jews When the witness Bach Zelewski was asked how Ohlendorf could admit the murder of 90,000 people, he replied: ‘I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable’ The Nazi Party preached these doctrines throughout its history, *Der Stürmer* and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt

Consider the following observations about Rwanda by Bill Berkeley, ‘Radio in Rwanda: The Sounds of Silence’, *San Diego Union-Tribune* (18 August 1994):

... Human rights groups, the United Nations and even, reluctantly, the U.S. State Department have described [the] systematic slaughter [in Rwanda] as ‘genocide’, yet no one has explained how thousands of peasants who say they had never killed before could have been lured, incited or coerced into participating in mass murder on par with this century’s worst massacres. One answer ... lies in the sinister propaganda broadcast by radio stations affiliated with the now-deposed Rwandan government. This was the match that started the fire

...

... The Tutsis were demonized ... Radio Rwanda and a station owned by members of [the former Hutu President] Habyarimana’s inner circle, Radio Milles Collines, had been terrorizing the Hutus with warnings about the evil

Tutsi-led RPF and Hutu oppositionists, who were labeled ‘enemies’ or ‘traitors’ and who ‘deserved to die’. Endless speeches, songs and slogans demonized the Tutsis

Throughout the terror, Radio Rwanda and Radio Mille Collines have systematically blurred the distinction between rebel soldiers and Tutsi civilians. On May 23, for example, Radio Rwanda warned its listeners of what it called the ‘means and clues that the Inyenzi [cockroaches] use to infiltrate in a given zone’. It said RPF soldiers ‘change their clothing appearance most of the time, trying to be confused with ordinary people who till the soil and go to the market’.

Hutus were urged to ‘guard seriously the roadblock’, a reference to the checkpoints where Tutsis were selected for slaughter. On June 1 Radio Mille Collines described the rebels as ‘criminals’ responsible for a series of harrowing massacres, a fact it claimed had been ‘confirmed by international sources’... . [T]he broadcast concluded: ‘This is the real face of the RPF. These people are not Rwandans, they are revengeful Ugandans. We hate them; we are disgusted with them, and nobody will accept that they take power’

...

‘All the Westerners who come here ask us this question’, says Sixbert Musangamfura, a Hutu journalist. ‘They forget the evil of Hitler’s propaganda. The propaganda heard here resembles the propaganda made by Joseph Goebbels. People received this propaganda all day long. It is the propaganda that is at the base of this tragedy.’ ...

In relation to the mass killings and displacement in Myanmar, noted in Ch. 2D above, Jenifer Whitten-Woodring et al., in ‘Poison If You Don’t Know How to Use It: Facebook, Democracy, and Human Rights in Myanmar’, 25 *Int’l J. Press/Pol.* (2020) 407 describe the role of social media:²⁸⁵

... In 2014, the price of SIM cards dropped to about \$1. By 2015, mobile phone penetration reached 56 percent ...

... Facebook became synonymous with the Internet and an important source for news ... in part due to Facebook’s ... “free basics” program, which ... allowed many cellphone customers to sign up for a free, albeit limited, version of Facebook ... By 2017 ... more than 30 percent of the population had Internet access. ... [T]he government mostly does not regulate the Internet.

Violence toward the Rohingya coincided with a proliferation in extreme speech and disinformation appearing on Facebook, much of it targeting Muslims and the Rohingya in particular. Fink argues that Facebook’s wide reach, its interactivity, and viral potential created an atmosphere of “heightened anxiety” and that “in at least one case,” a Facebook post appeared to connect directly to mob violence directed at the Rohingya. ...

The conflict escalated in August 2017. At that time, there were more than 150 highly influential accounts, pages, and groups that routinely spread hateful messages against Muslims and the Rohingya, available on Facebook. ... [T]he military’s] “clearance operations” ... prompted more than 750,000 Rohingya to flee. [In 2018,] the U.N. Fact-Finding Mission called ... for an investigation into the military’s use of Facebook in the spread of hate speech and disinformation.

...

²⁸⁵ See also N. Morada’ ‘Hate Speech and Incitement in Myanmar before and after the February 2021 Coup’, 15 *Global Responsibility to Protect* (2023)107.

... Facebook gained influence at a time when government publications seemed to condone extreme speech and when trust in foreign media was declining. ... [C]onditions ... were ripe for online extreme speech to occur and for disinformation to remain unchallenged. ...

SEXUAL ORIENTATION HATE SPEECH

In *Vejdeland & Ors v. Sweden* (Application No. 1813/07) (2012) the four applicants were convicted for distributing some 100 leaflets left in or on pupils' lockers in an upper secondary school. They contained anti-homosexual messages that the Swedish Supreme Court found to constitute agitation against a national or ethnic group, defined at the time to include contempt for a group of people with reference to their sexual orientation.

Having found that the convictions did interfere with the applicants' Article 10(1) freedom of expression, the European Court examined whether that interference was 'necessary in a democratic society', in terms of Article 10(2). It reiterated its long-standing jurisprudence according to which freedom of expression protects ideas, even if they offend, shock or disturb, but that necessary restrictions can be imposed.

54. The Court notes that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools [E]ven if this is an acceptable purpose, regard must be paid to the wording of the leaflets. [A]ccording to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society" [and] was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down paedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.
55. [I]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner [D]iscrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"
56. The Court also takes into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.
57. ... The Supreme Court acknowledged the applicants' right to express their ideas while at the same time stressing that along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights. [It] ... found that the statements in the leaflets had been unnecessarily offensive. It also emphasised that the applicants had left the leaflets in or on the pupils' lockers, thereby imposing them on the pupils. Having balanced the relevant considerations, [it] found no reason not to apply the relevant Article of the Penal Code.

58. Finally, ... [the] Court notes that the applicants were not sentenced to imprisonment ... [but instead] three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2,000, and the fourth applicant was sentenced to probation. The Court does not find these penalties excessive in the circumstances.
59. ... [T]he Court considers that the conviction ... and the sentences ... were not disproportionate to the legitimate aim pursued and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.
60. ... [T]he application does not reveal a violation of Article 10 of the Convention.

CONCURRING OPINION OF JUDGE SPIELMANN, JOINED BY JUDGE NUSSBERGER:

1. ... [I]t is with the greatest hesitation that I voted in favour of finding no violation
2. As my colleague, Judge András Sajó, pointed out [in dissent] in *Féret v. Belgium* [16 July 2009]:

“Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go “against the spirit” of the Convention. But “spirits” do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.”

...

4. ... [The Swedish Supreme Court relied, inter alia, on an obligation] “to avoid, as far as possible, statements that are unwarrantably offensive to others, constituting an assault on their rights”... .
5. It is submitted that this is a rather vague test which seems to me to be inconsistent with the traditional and well-established case-law of our Court
6. Still, I agreed, albeit very reluctantly, to find no violation because the distribution of the leaflets took place at a school ... in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept the leaflets. ...
7. It should also not be forgotten that a real problem of homophobic and transphobic bullying and discrimination in educational settings may justify a restriction of freedom of expression under [Article 10(2)]

...

CONCURRING OPINION OF JUDGE BOŠTJAN M. ZUPANČIČ:

1. It was with some hesitation that I voted for no violation of Article 10
- ...
3. [T]he American Supreme Court takes a very liberal position concerning the contents of the controversial messages. That the statement is arguably of inappropriate or controversial character “...

is irrelevant to the question of whether it deals with a matter of public concern” ... “Speech on public issues occupies the highest rank of the hierarchy of First Amendment values, and is entitled to special protection”.

4. Moreover, the American Supreme Court has set a higher standard for the applicable law in such cases to be facially constitutional. First, it must avoid *content* discrimination (i.e., the State cannot forbid or prosecute inflammatory speech only on *some* “disfavoured” subjects) and, second, it must avoid *viewpoint* discrimination (i.e., forbidding or prosecuting inflammatory speech that expresses one particular view on the subject) [I]f this American double test were applied to the present case, the [Swedish law] would not pass muster on either count, especially the second: had the applicants defended homosexuality and railed against “wicked homophobes” in their leaflets, they would probably not have been convicted.

5. In our case we have relied on a different kind of logic as did the Swedish Supreme Court

...

9. ... School grounds [are] a non-public place, requiring an intrusion in order to distribute any information of whatever kind that has not been previously approved by the school’s authorities. Coming back to the [US] Supreme Court ..., it has held that “*the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior*”.

...

12. ... [W]e seem to go too far in the present case — on the grounds of proportionality and considerations of hate speech — in limiting freedom of speech by over-estimating the importance of what is being said. In other words, if exactly the same words and phrases were to be used in public newspapers ..., they would probably not be considered as a matter for criminal prosecution and condemnation.

GENDERED HATE SPEECH

Gendered hate speech has been voluminous in recent years, especially on social media. Consider the following response by Irene Khan, UN Special Rapporteur on the right to freedom of opinion and expression (UN Doc. A/76/258 (2021)):

68. As misogyny proliferates on social media platforms, there are increasing calls to prohibit or criminalize gendered hate speech. ...

...

70. Although gender and sex are not mentioned in [ICCPR] article 20 (2), they can and should be considered grounds for protection in view of the gender equality clauses elsewhere in the Covenant and the broader intersectional approach to non-discrimination In addition ... the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,²⁸⁶ six elements are proposed as a threshold test for hate speech: the context; the speaker; the intent; the content and form of the speech; the extent of the speech act; and the likelihood, including the imminence, of harm. Providing all these elements are satisfied, gendered hate speech can be prohibited under international law. However, it should not be criminalized except in the most egregious cases of real and imminent danger with a clear intention to cause serious harm.

71. The Rabat Plan of Action ... sets out three categories: harmful speech that constitutes a crime because it presents real and imminent danger; harmful speech that does not reach that threshold but may justify civil action; and offensive speech that raises concerns in terms of tolerance, hostility or

²⁸⁶ UN Doc. A/HRC/22/17/Add.4 (2013), Appendix.

discrimination and should be addressed through non-legal measures, such as condemnation, awareness-raising and education.

72. Such a graduated approach could provide an international benchmark for defining gender-based hate speech in a way that protects both women's safety and freedom of expression.

REGULATION OF HATE SPEECH

The broader question of how to respond to online hate speech was considered by a previous Special Rapporteur on freedom of opinion and expression, David Kaye (UN Doc. A/74/486 (2019)). He emphasized that approaches in international law to 'hate speech' involve a 'double ambiguity'. On one hand, many governments use it in a similar manner to the 'way in which they use "fake news", to attack political enemies, non-believers, dissenters and critics.' But, on the other hand, the perception that it is 'just speech' 'seems to inhibit Governments and companies from addressing genuine harms. He concluded that all companies in the ICT sector should:

- (a) Evaluate how their products and services affect the human rights of their users and the public, through periodic and publicly available human rights impact assessments;
- (b) Adopt content policies that tie their hate speech rules directly to international human rights law, indicating that the rules will be enforced according to the standards of international human rights law, including the relevant United Nations treaties and interpretations of the treaty bodies and special procedure mandate holders and other experts, including the Rabat Plan of Action;
- (c) Define the category of content that they consider to be hate speech with reasoned explanations for users and the public and approaches that are consistent across jurisdictions;
- (d) Ensure that any enforcement of hate speech rules involves an evaluation of context and the harm that the content imposes on users and the public, including by ensuring that any use of automation or artificial intelligence tools involve human-in-the-loop;
- (e) Ensure that contextual analysis involves communities most affected ...;
- (f) As part of an overall effort to address hate speech, develop tools that promote individual autonomy, security and free expression, and involve de-amplification, de-monetization, education, counter-speech, reporting and training as alternatives, when appropriate, to the banning of accounts and the removal of content.

In light of Kaye's recommendations, consider Facebook's Community Standards on Hate Speech (June 2023):²⁸⁷

We believe that people use their voice and connect more freely when they don't feel attacked on the basis of who they are. That is why we don't allow hate speech on Facebook. It creates an environment of intimidation and exclusion, and in some cases may promote offline violence.

We define hate speech as a direct attack against people — rather than concepts or institutions— on the basis of what we call protected characteristics: race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation,

²⁸⁷ <https://transparency.fb.com/policies/community-standards/hate-speech/>

sex, gender identity and serious disease. We define attacks as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing and calls for exclusion or segregation. We also prohibit the use of harmful stereotypes, which we define as dehumanizing comparisons that have historically been used to attack, intimidate, or exclude specific groups, and that are often linked with offline violence. We consider age a protected characteristic when referenced along with another protected characteristic. We also protect refugees, migrants, immigrants and asylum seekers from the most severe attacks, though we do allow commentary and criticism of immigration policies. Similarly, we provide some protections for characteristics like occupation, when they're referenced along with a protected characteristic. Sometimes, based on local nuance, we consider certain words or phrases as frequently used proxies for PC groups.

We also prohibit the usage of slurs that are used to attack people on the basis of their protected characteristics. However, we recognize that people sometimes share content that includes slurs or someone else's hate speech to condemn it or raise awareness. In other cases, speech, including slurs, that might otherwise violate our standards can be used self-referentially or in an empowering way. Our policies are designed to allow room for these types of speech, but we require people to clearly indicate their intent. If the intention is unclear, we may remove content.

The *Faurisson* opinion that follows deals with 'Holocaust denial laws' that have been enacted by many states.²⁸⁸ As noted in Dominic McGoldrick and Thérèse O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law', 18 *Leg. Stud.* 453 (1997), at 457, these laws vary a great deal:

The essential feature of the laws which attracts the label of holocaust denial is that they make it a criminal offence to deny certain things in a certain way [F]or the French law it is 'crimes against humanity as defined by the Nuremberg International Military Tribunal'. The German law is wider, as it refers to 'persecution under National Socialism or any other form of despotism or tyranny'. The Israeli law is even wider again: 'acts committed in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity'. The Austrian law extends to denial of the 'nationalist socialist genocide or other national socialist crimes against humanity'. The Austrian law extends to cover the gross trivialisation, approval or justification of the same. The German law is similar.

In a twist on such laws, Poland adopted an Amendment to the Act on the Institute of National Remembrance of 2018 that criminalized public speech attributing responsibility for the Holocaust to Poland or the Polish nation. Following international criticism of the impact on freedom of speech, academic freedom, and the capacity to debate alleged Polish collaboration with the Nazi authorities, the relevant provisions were repealed in less than a year.

The following excerpts from Frederick Schauer, 'The Exceptional First Amendment', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (2005), at 32, underscore the breadth of the concept.

... Although the label "hate speech" tends to be applied capaciously, the phrase can be understood as encompassing four distinct but interrelated freedom of speech issues. First, there is the question of the legitimacy of prohibiting various racial, ethnic, and religious epithets — [*n******], *wog*, *kike*, *paki*, *kaffir*, and the like

²⁸⁸ See generally L. Hennebel and T. Hochmann (eds.), *Genocide Denials and the Law* (2011); G. Lewy, *Outlawing Genocide Denial: The Dilemmas of Official Historical Truth* (2014); and R. Bilali, Y. Iqbal and S. Freil, 'Understanding and Counteracting Genocide Denial', in L. Newman (ed.), *Confronting Humanity at its Worst: Social Psychological Perspectives on Genocide* (2019) 284.

— words whose use, except as ironic self-reference by members of those groups, is invariably intended to harm, to offend, and to marginalize. Second, the question of hate speech sometimes involves the issue of restrictions on circulating certain demonstrably false factual propositions about various racial or religious groups, with prohibitions on Holocaust denial being the most common example. A third hate speech issue arises with respect to laws prohibiting the advocacy of or incitement to racial or religious intolerance, hatred, or violence, as with explicit calls to race-based violence, explicit appeals for racial exclusion, and explicit calls for repatriation of members of racial or religious minorities to the countries of their ancestry. Finally, hate speech questions are presented, especially in the context of gender when it is argued that epithets, and occasionally pictures, create a hostile, and therefore marginalizing or excluding, workplace or educational or cultural environment.

... The precise form of attempting to control hate speech by law varies considerably among the nations of the world. Germany and Israel, among other countries, ban the Nazi Party and its descendants, as well as prohibiting other political parties whose programs include racial hatred, racial separation, and racial superiority.’ ... Germany, Israel, and France are among the nations that prohibit the sale and distribution of various Nazi items, including swastikas, Nazi flags, and, on occasion, images of Adolph Hitler and copies of *Mein Kampf*.’ ... Canada, Germany, and France, along with others, permit sanctions against those who would deny the existence of the Holocaust.’ ... The Netherlands outlaws public insults based on race, religion, or sexual preference.” ... And South Africa, New Zealand, Australia, Canada, the United Kingdom, and all of the Scandinavian countries, among many others, follow the mandates of Article 20(2) of the [ICCPR], and Articles 4(a) and 4(b) of the [ICERD], by making it a crime to engage in the incitement to racial, religious, or ethnic hatred or hostility.

FAURISSON V. FRANCE

VIEWS OF THE HUMAN RIGHTS COMMITTEE, COMMUNICATION NO. 550/1993, UN DOC. CCPR/C/58/D/550/1993 (8 NOVEMBER 1996)

[Robert Faurisson, author of the communication and a former professor of literature, was removed from his university chair in 1991. He had expressed doubt about or denial of the accuracy of conventional accounts of the Holocaust, including (1) his conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps, (2) his doubts over the number of people killed, and (3) his disbelief in the records and evidence of the Nuremberg trial that were used to convict Nazis.

In 1990, the French legislature passed the so-called ‘Gayssot Act’. It amended the 1881 law on Freedom of the Press by adding Article 24 *bis*, which made it an offence to contest (*contestation*) the existence of the category of crimes against humanity as defined in the London Charter of 1945, on the basis of which Nazi leaders were convicted by the International Military Tribunal at Nuremberg in 1945–1946. For the relevant provision of the Charter and excerpts from the Nuremberg judgment, see Ch. 2D, above.

Faurisson attacked the 1990 law as a threat to academic freedom, including freedom of research and expression. He claimed that the Gayssot Act raised to the rank of infallible dogma the proceedings and verdict at Nuremberg, and endorsed forever the orthodox Jewish version of the Second World War. Arguing that the Nuremberg records could not be treated as infallible, he cited examples of historical revision such as the Katyn massacre in Poland of Polish army officers that was initially attributed to Germans but that was later shown to be of Soviet responsibility. Faurisson described as ‘exorbitant’ the ‘privilege of censorship’ from which the representatives of the Jewish community in France benefitted.

The state party noted that anti-racism legislation adopted by France in the 1980s was considered insufficient to bring legal action against the trivialization of Nazi crimes. There was governmental concern over ‘revisionism’ by individuals justifying their writing through their status as historians. The French Government viewed these revisionist theses as a ‘subtle form of contemporary anti-semitism’. The Gayssot Act was meant to fill a legal vacuum while defining the new criminal conduct as precisely as possible.

Associations of French resistance fighters and of deportees to German concentration camps filed a private criminal action against Faurisson, who was convicted in 1991 of violating the Gayssot Act. The Court of Appeal of Paris upheld the conviction and imposed a fine. Faurisson took the position that further appeal to the Court of Cassation would be futile and filed the present communication. He argued that the Act violated the ICCPR, although his communication did not invoke specific provisions.

In addition to the Final Views of the ICCPR Committee itself, there were five individual opinions signed by seven Committee members.]

9.4 Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3(a) and (b) of article 19, and must be necessary to achieve a legitimate purpose.

9.5 ... [T]he Committee concludes ... that the finding of the author’s guilt [in the French proceedings] was based on his following two statements: ‘... I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication’. His conviction therefore did not encroach upon his right to hold and express an opinion in general. Rather the court convicted Mr. Faurisson for having violated the rights and reputation of others. For these reasons the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author’s case by the French courts, is in compliance with the provisions of the Covenant.

9.6 To assess whether the restrictions ... were applied for the purposes provided for by the Covenant, the Committee ... [notes that permissible] restrictions ... may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served [sic] the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. [They were therefore permissible.]

9.7 Lastly the Committee needs to consider whether the restriction of the author’s freedom of expression was necessary. The Committee noted the State party’s argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-semitism. It also noted the statement of ... the then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-semitism [T]he Committee is satisfied that the restriction of Mr. Faurisson’s freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant.

10. [The Committee found there had been no violation by France of Article 19(3).]

STATEMENT OF THOMAS BUERGENTHAL

As a survivor of the concentration camps of Auschwitz and Sachsenhausen whose father, maternal grandparents and many other family members were killed in the Nazi Holocaust, I have no choice but to recuse myself from participating in the decision of this case.

INDIVIDUAL OPINION BY NISUKE ANDO (CONCURRING)

... In my view the term ‘negation’ (‘contestation’), if loosely interpreted, could comprise various forms of expression of opinions and thus has a possibility of threatening or encroaching the right to freedom of expression, which constitutes an indispensable prerequisite for the proper functioning of a democratic society. In order to eliminate this possibility it would probably be better to replace the Act with a specific legislation prohibiting well-defined acts of anti-semitism or with a provision of the criminal code protecting the rights or reputations of others in general.

INDIVIDUAL OPINION BY ELIZABETH EVATT AND DAVID KRETZMER, CO-SIGNED BY ECKART KLEIN (CONCURRING)

...

3 While we entertain no doubt whatsoever that the author’s statements are highly offensive both to Holocaust survivors and to descendants of Holocaust victims (as well as to many others), the question under the Covenant is whether a restriction on freedom of expression in order to achieve this purpose may be regarded as a restriction necessary for the respect of the rights of others.

...

7. The Committee correctly points out, as it did in its General Comment 10, that the right for the protection of which restrictions on freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of a community as a whole. This is especially the case in which the right protected is the right to be free from racial, national or religious incitement It appears ... that the restriction on the author’s freedom of expression served to protect the right of the Jewish community in France to live free from fear of incitement to anti-semitism

8. The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3(a) or (b) (the rights or reputations of others, national security, *ordre public*, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect

9. The Gayssot Act is phrased in the widest language and would seem to prohibit publication of bona fide research connected with matters decided by the Nuremberg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-semitism. Furthermore, the legitimate object of the law could certainly have been achieved by a less drastic provision that would not imply that the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences. In the present case we are not concerned, however, with the Gayssot Act, *in abstracto*, but only with the restriction placed on the freedom of expression of the author by his conviction for his statements in the interview in *Le Choc du Mois*. Does this restriction meet the proportionality test?

10. The French courts examined the author’s statements in great detail. Their decisions, and the interview itself, refute the author’s argument that he is only driven by his interest in historical research. ... While there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction. The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research It is for these reasons that we joined the Committee

* * *

In a 2015 ECtHR Grand Chamber case, *Perinçek v. Switzerland* (Application No. 27510/08, Judgment of 15 October 2015), a Turkish politician had been convicted in Switzerland for publicly asserting that the mass deportations and massacres of Armenians in the Ottoman Empire in 1915 had not amounted to genocide.²⁸⁹ The Swiss courts held that Perinçek's motives were racist and nationalistic and that his statements did not contribute to the historical debate. The European Court found that freedom of expression (Article 10) had been violated. It found that the dignity of the victims and the dignity and identity of modern-day Armenians were protected by the right to respect for private life (Article 8), but that a balance had to be struck with Article 10, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved. It concluded that it had not been necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the case. In particular, the Court took into account that: the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalise such statements; the Swiss courts appeared to have censured the applicant simply for voicing an opinion that diverged from the established ones in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

In *Pastörs v. Germany* (Application No. 55225/14, Judgment of 3 October 2019) the ECtHR considered a case brought by a Member of Parliament in Mecklenburg-Western Pomerania against his criminal conviction in Germany for a speech he gave in parliament on 28 January 2010, one day after Holocaust Remembrance Day. He said, *inter alia*:

"... [P]eople can sense that the so-called Holocaust is being used for political and commercial purposes ... Since the end of the Second World War, Germans have been exposed to an endless barrage of criticism and propagandistic lies – cultivated in a dishonest manner primarily by representatives of the so-called democratic parties ... Also, the event that you organised here in the castle yesterday was nothing more than you imposing your Auschwitz projections onto the German people in a manner that is both cunning and brutal. You are hoping ... for the triumph of lies over truth."

The European Court upheld the conviction:

46. The Court attaches fundamental importance to the fact that the applicant planned his speech in advance, deliberately choosing his words and resorting to obfuscation to get his message across: a qualified Holocaust denial showing disdain towards the victims of the Holocaust and running counter to established historical facts
47. While interferences with the right to freedom of expression call for the closest scrutiny when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system. ...
48. ... [T]he applicant intentionally stated untruths in order to defame the Jews and the persecution that they had suffered during the Second World War. Reiterating that it has always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there exists a pressing social need for interference with rights under the Convention and that, in the light of their historical role and

²⁸⁹ See generally, M. D. Baer, *Sultan's Saviors and Tolerant Turks: Writing Ottoman Jewish History, Denying the Armenian Genocide* (2020).

experience, States that have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis, the Court therefore considers that the applicant's impugned statements affected the dignity of the Jews to the point that they justified a criminal-law response. Even though the applicant's sentence of eight months' imprisonment, suspended on probation, was not insignificant, the Court considers that the domestic authorities adduced relevant and sufficient reasons and did not overstep their margin of appreciation. The interference was therefore proportionate to the legitimate aim pursued and was thus "necessary in a democratic society".

In response to the *Faurisson* case, consider the following views of Christopher Caldwell, in 'Historical Truth Speaks for Itself', *Financial Times* (18 February 2006):

Madeleine Reberieux, the late leftist historian, warned of the biggest danger of the Gayssot law as soon as it was passed. "One day", she wrote, "it's going to lead into other areas besides the genocide against the Jews — other genocides and other assaults on what will be called 'historical truth'." She was right. A law declaring the Turkish killings of Armenians early last century to be a "genocide" was passed in 2001; later that year, another law defined the slave trade as a "crime against humanity"; a year ago, legislation mandated that teachers stress the "positive role" of the French presence in North Africa. Each new officialisation of remembrance calls into being more "moral lobbies", which press their claims with ever more insistence in ever more obscure corners of political life and with ever more legal clout.

...

Mr Dworkin's case [below] for abolishing laws against Holocaust denial on grounds of political legitimacy is the right one. Of course, no one should be under the illusion that being able to go out and deny the Holocaust will add much to any "debate". The official truth of western governments about the Holocaust happens to be the truth. Allowing delusions or anti-Semitic propaganda to masquerade as "opinions" will not change that. So those western countries with laws against Holocaust denial are now in a tricky position. They must undo laws that have proved unworkable and counterproductive — and at a moment when some of those laws' most vocal detractors are violent people of ill will.

The difficulty of developing international standards in this area has been analysed in terms of five internal features of the right:

**MONA ELBAHTIMY, THE RIGHT TO BE FREE FROM THE HARM OF HATE SPEECH
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... [The first is an 'emotive' component. The] right obliges states to make their national laws intolerant of an extreme emotion — *hatred* — if its advocacy incites, inter alia, the emotional harm of *hostility* towards targeted groups. In this sense, the key terms 'hatred' and 'hostility' construct the meaning of the right. However, both terms are unrelated to concrete practice, being concerned instead with intangible states of mind, attitudes, and psychological states of abhorrence, detestation, and enmity. ...

The right's second feature relates to the nature of the causal or likelihood-based relationship between advocacy of hatred and its alleged harms, which is indirect, cumulative, and mentally and emotionally mediated. ... [P]roving the inciting nature of hate advocacy [is complex], given the difficulties in precisely or empirically establishing and measuring incitement

[Third,] ... a very delicate balance [must] be struck between the equality and liberty rights of speakers and members of targeted groups The interaction of the two values ... is multifaceted and complex. The right takes effect by restricting speakers' freedom of expression. Yet liberty as a value is not enhanced only through the protection of a wider range of expressions; liberty can be at risk for members of targeted groups if they are not provided with protection against the harms of hate speech, as this can have a 'silencing effect' on them. ...

[The fourth feature] is its 'group identity' aspect. ... The right is integral to the promotion of collective goals, the prevention of communal harms, and the protection of group identities. It therefore adds another source of tension between individual and group rights. Drawing a sharp dividing line between the two categories of protection (the individualized and the collective) is inherently difficult, given that hate speech targets individuals based on their group-defining characteristics or identity. ...

The ... fifth feature [is the religion component. A] delicate, and often very difficult, balance has to be struck between freedom of religious expression, on the one hand, and protection for targeted religious adherents, on the other. This further complicates the precise determination of the threshold beyond which advocacy of religious hatred should be prohibited

...

... The way ahead

... It does not appear possible to secure broad agreement on an approach that moves beyond the current level of abstraction by adding specificity to the content and effects of proscribed advocacy of hatred. ...

... [T]o overcome such paralysis, one strategy is [to focus on procedures] ... This approach would not answer the difficult question of *what* the precise legal threshold of Article 20(2) is; rather, it would address *how* to determine such threshold within different national contexts. National authorities need sufficient guidance in implementing their obligations under IHRL to prohibit incitement to hatred. Such guidance is an important factor in the avoidance of excessively prohibitive laws that suppress legitimate speech, inconsistent implementation of laws, and restrictive interpretations of laws in ways that thwart the obligation's preventive function – its central value from a policy perspective. Rather than legal or textual development, the efforts of the international community might instead be directed towards the provision of such guidance to states in the form of a *procedural manual* for enforcement of the right to protection from incitement to hatred. This would allow states to take into consideration their own national contexts when seeking to resolve the threshold dilemmas and inherent tensions underlying the five internal features of the right.

Procedural development ... provides a jurisdiction-specific response to that phenomenon. This can best be described as *regulatory relativism*, in which the means of achieving protection of the right is best determined in accordance with the particular context involved.

[Relativist challenges arise in relation to each of the five internal features of the right.]

Accordingly, despite the fact that hate speech is generally recognized as a universal problem, it is a problem in which particularized political, cultural, and historical national contexts play a crucial role. The hate speech phenomenon is not a static problem, but one which needs to be seen as a dynamic social process involving context. ...

There are striking variations, even among liberal democracies, when it comes to the hate speech legal landscape. Different criteria are applied to define the threshold between free speech and hate speech. The legislative patterns and judicial practices related to the resolution of the hate speech problem are predicated upon different conceptions of the content of prohibited expressions, the scope of recognized harms of hate speech, the extension of protection to groups and to group-defining characteristics, the range of groups protected, and the standards of causality between advocacy of

hatred and its alleged harms. The prohibition of hate advocacy that constitutes clear and unambiguous incitement to immediate violence or illegal acts is the aspect of the norm that enjoys most transnational resonance, since it easily crosses cultural and ideological boundaries. However, legal regulation of hate advocacy that falls short of incitement to violence but creates a social climate conducive to hostility and discrimination does not enjoy the same universal resonance. ...

QUESTIONS

1. Two of the concurring opinions in *Vejdeland* acknowledge hesitation in agreeing with the Court's opinion. How convincing do you find the Court's analysis? Is it a major victory for the rights of the LGBTIQI community or a slippery slope for inroads against freedom of expression in relation to contested issues?
2. As a legislator, would you have voted for the Gayssot Act? How would you have reacted to the following argument in general, or as applied to the passage of that Act?

... [I]f there is any right which enjoys primacy among rights, it is arguably the principle of equality and non-discrimination The goal of hate mongers is to convince others that the members of the target group are not entitled to equal protection of the law; the hate mongers seek a society of discrimination They should not be entitled to claim protection under the right to freedom of expression for their abuse of speech rights to achieve that goal.²⁹⁰
3. Would a conviction by French courts be likely to be upheld under the Committee's approach? Under the concurring opinion by Elizabeth Evatt and David Kretzmer? How do these opinions differ, and which do you view as the better one?
4. Does Elbahtimy's 'regulatory relativism' approach provide an appropriate solution, or might it risk the proliferation of contextually justified bans that would undermine aspirations to achieve a common approach internationally?

NOTE ON THE UNITED STATES

The United States ratified the ICCPR in 1992. In giving its consent to ratification, and acting consistently with proposals made to it by the Bush Administration, the Senate entered a reservation: 'Article 20 does not authorize or require legislation or other action by the United States that would restrict the right to free speech and association protected by the Constitution and laws of the United States.'

Compare with Article 20 an equivalent provision, Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). In that article, the states parties 'condemn all propaganda ... based on ideas or theories of superiority of one race or group of persons or one colour or ethnic origin'. They undertake to declare a punishable offence 'all dissemination of ideas based on racial superiority or hatred, incitement of racial discrimination, as well as all acts of violence' against such a race or group. Article 1 defines 'racial discrimination' to mean any distinction based on 'race, colour, descent, or national or ethnic origin' that has the purpose or effect of impairing equal enjoyment of rights 'in the political, economic, social, cultural or any other field of public life'. When the United States ratified the CERD Convention, it reserved as to Article 4.

²⁹⁰ S. Farrior, 'Moulding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech', 14 *Berkeley J. Int'l. L.* 1 (1996), at 6, 98.

The primary constitutional provision referred to in these two reservations by the United States is the First Amendment: ‘Congress shall make no law ... abridging the freedom of speech ...’ Consider the following analysis by Fredrick Schauer, in ‘The Exceptional First Amendment’, in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (2005), at 29:

... [A]lthough a constitutional or quasi-constitutional right to freedom of expression is the international norm, the contours of that right vary widely even among ... liberal democracies [T]he American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails. In numerous dimensions, the American approach is *exceptional*

...

... [T]he American understanding is that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the point of view espoused. Specifically, this prohibition on what is technically called “viewpoint discrimination” extends to the point of view that certain races or religions are inferior, to the point of view that hatred of members of minority races and religions is desirable, and to the point of view that violent or otherwise illegal action is justified against people because of their race, their ethnicity, or their religious beliefs. ... [The government may not] prohibit public denials of the factuality of the Holocaust just because of the demonstrable falsity of that proposition and the harm that would ensue from its public articulation.

... [*Brandenburg v. Ohio*, 395 U.S. 444 (1969)] stands for the proposition that in the United States restrictions on the incitement of racial hatred can be countenanced under the First Amendment only when they are incitements to *violent* racial hatred, and even then only under the rare circumstances in which the incitements unmistakably call for immediate violent action, and even then only under the more rare still circumstances in which members of the listening audience are in fact likely immediately to act upon the speaker’s suggestion... . Jean Le Pen could not be sanctioned in the United States, as he was in France, for accusing Jews of exaggerating the Holocaust

...

... Where in the rest of the world freedom of expression appears to be understood as an important value to be considered along with other important values of fairness, equality, dignity, health, privacy, safety and respect, among others, in the United States the freedom of expression occupies pride of place, prevailing with remarkable consistency in its conflicts with even the most profound of other values and the most important of other interests.

BLASPHEMY

In *Otto-Preminger-Institut v. Austria*, Ser. A, No. 295-A (20 September 1994), the European Court of Human Rights decided 6-3 that the seizure and forfeiture of a blasphemous film did not violate the freedom of expression guaranteed by Article 10. The applicant association had advertised the screening of the film, *Das Liebeskonzil*, based on an 1894 play, which:

... portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the devil with whom he exchanges a deep kiss and calling the devil his friend Other scenes show the Virgin Mary permitting an obscene story to be read to her and the

manifestation of a degree of erotic tension between the Virgin Mary and the devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting.

The film was presented by the association as a 'satirical tragedy'. 'Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated.' The Innsbruck Regional Court in Austria ordered seizure and forfeiture of the film under Section 188 of the Austrian Penal Code for the criminal offence of 'disparaging religious precepts'. The criminal proceedings against the association were eventually dropped.

Since there was no dispute that the seizure constituted an interference with the association's freedom of expression, the European Court considered whether the seizure was permissible under the conditions set by of Article 10, paragraph 2. The Court concluded that the interference had the 'legitimate aim' of protecting the rights of others to freedom of religion. Interpreting Article 9 of the Convention to include the right to respect for one's religious feelings, the Court found that such considerations outweighed the film's contribution to public debate. The Court reasoned:

The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention [T]he Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2, namely 'the protection of the rights of others'.

The Court stressed that freedom of expression applies not only to ideas that are favourably received, but also to those 'that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."' Nonetheless, people exercising their rights under Article 10 were subject to duties, among which could legitimately be included 'an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of further progress in human affairs'.

The Court determined that the seizure could be considered 'necessary in a democratic society'. There was no 'uniform conception of the significance of religion in society' throughout Europe, 'even within a single country'. A 'certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference'. It is 'for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally'. Given that the Tyrolean population was 87 percent Roman Catholic, the Court found that the Austrian authorities had acted within their margin of appreciation 'to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.'

Three judges dissented. Given the precautions against offence to viewers taken by the association through a warning announcement, the showing of the film to a paid audience only, and the restriction of viewing to those over 17 years of age, the dissent found the seizure and forfeiture to be disproportionate to the aim pursued, and thus not necessary in a democratic society.

* * *

In *Wingrove v. United Kingdom*, European Court of Human Rights (Application No. 17419/90, Judgment of 25 November 1996), a film director who was a British national alleged that the United Kingdom had violated Article 10 by interfering with the director's freedom of expression through refusing to

grant a distribution certificate for his 18-minute video work, *Visions of Ecstasy*. The work involved visions of St Teresa about the crucified Christ, and in the view of the British Board of Film Classification, drew Christ graphically into the erotic desire of St Teresa. The refusal to grant the certificate was based on the Board's conclusion that the video constituted blasphemy, defined in a recent case as 'any contemptuous, reviling, scurrilous or ludicrous matter related to God, Jesus Christ or the Bible'. The decision was upheld by the Video Appeals Committee.

The European Commission voted 14–2 that there had been a violation of Article 10. The Commission and the United Kingdom brought the case before the European Court, which concluded by a 7–2 vote that there had been no violation of Article 10. Some of its observations about the requirement in Article 10 that a restriction be 'necessary in a democratic society' follow:

57. The Court observes that the refusal to grant *Visions of Ecstasy* a distribution certificate was intended to protect 'the rights of others', and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians

... [B]lasphe my legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention

58. ... [A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, ... there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended

This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material Moreover the fact that the present case involves prior restraint calls for special scrutiny by the Court

The Court (para. 50) also considered the fact that the English law of blasphemy 'only extends to the Christian faith'. It was not, however, for the European Court 'to rule *in abstracto*' about the compatibility of British law with the Convention. 'The extent to which English law protects other beliefs is not in issue before the Court which must confine its attention to the case before it The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practised in the United Kingdom does not detract from the legitimacy of the aim pursued in the

present context.’ A concurring opinion of Judge Pettiti observed that the Convention left ‘scope for review under Article 14. In the present case no complaint had been made to the European Court under that article.’

A dissenting opinion of Judge Lohmus noted that the law of blasphemy ‘only protects the Christian religion and, more specifically, the established Church of England ...’. This in itself raises the question whether the interference was (in the language of Article 10) “necessary in a democratic society”.’

QUESTION

Do these opinions resolve the question of who in the liberal state must show tolerance to whom? Must the majority put up with the minority’s views and modes of expression (at least where those views and expressions are not ‘forced’ on the majority through unavoidable public acts)? Or is it the minority that must take account of the majority’s sensibility and refrain from offending it?

THE DANISH CARTOONS AND DEFAMATION OF RELIGION

In 2005, a Danish newspaper named *Jyllands-Posten* published cartoons that proved to be offensive to many Muslims. They consisted of unflattering and mocking notions about Muslims and caricatures of the Prophet Mohammed, including a cartoon portraying Mohammed wearing a turban in the shape of a bomb ready to explode — an obvious reference to terrorist acts committed in the name of Islam. The controversy led to widespread protests and riots, the severing of diplomatic relations between an Arab state and Denmark, death threats against the cartoonists and others involved and far-reaching trade boycotts by some states of Danish goods. The cartoons were republished by newspapers in several European countries, including France, Germany, Italy, the Netherlands, Spain and Switzerland. By contrast, most major newspapers in the United States, Canada and the United Kingdom refrained from republication, although the cartoons were rapidly available on the internet.

The protests were the stronger because many Muslims understand that Islam bans any image, let alone caricature, of the Prophet; such images are often viewed as blasphemous. As Ruti Teitel noted at the time:

Many people saw the cartoons as ... exhibiting intolerance toward those whose religion is Islam To understand why so many Muslims were so gravely offended, it is important to see that the cartoons don’t stand alone, but rather were published against a backdrop of political and legislative action that, to many Muslims, reflects a repeated pattern of disparagement of Islam in the public sphere. At present, Europe is struggling with issues of identity The crisis arises because of new demographics, at the same time as new regionalism. Many Muslims feel they are being relegated to second-class citizenship in Europe. And they relate the publication of the cartoons — by a newspaper they feel would not consider publishing anti-Christian or anti-Jewish cartoons — to this wrongful sense that they are not full citizens.²⁹¹

In the wake of the diplomatic outcry the Danish Prime Minister refused to meet with a group of eleven ambassadors from Muslim-majority countries. The government responded that ‘freedom of expression has a wide scope and the Danish government has no means of influencing the press.’ It added that blasphemy was, however, prohibited under Danish law and that offended parties could

²⁹¹ R. G. Teitel, ‘No Laughing Matter: The Controversial Danish Cartoons Depicting the Prophet Mohammed, and Their Broader Meaning for the Europe’s Public Square’, *New York Law School Digital Commons* (15 February 2006).

bring suit if they wished. A subsequent complaint was dismissed by the public prosecutor. The Egyptian Minister of Foreign Affairs called for ‘an official Danish statement underlining the need for and the obligation of respecting all religions and desisting from offending their devotees to prevent an escalation which would have serious and far-reaching consequences.’ No such statement was forthcoming. The following year, the Organization of the Islamic Conference (OIC), representing 57 states with significant Muslim populations, established an OIC Observatory on Islamophobia. It tracked developments worldwide including, for example, the 2008 movie, *Fitna*, in which a Dutch politician, Geert Wilders, interspersed excerpts from the Qur’an with media images of acts of hatred or violence attributed to Muslims, and the March 2011 burning by a Florida pastor of a Qur’an. The Observatory’s 2011 report stated that ‘[t]he scourge of Islamophobia continued unabated, despite all efforts to raise awareness of its dangers and the need to contain it’ and concluded that ‘Islamophobia remains a matter of transcendental priority for the OIC.’

The OIC’s principal response to the problem at the international level took the form of a campaign begun in 1999 to combat the ‘defamation of religions’. Over a number of years, resolutions were adopted by contested votes in the UN Human Rights Council and the General Assembly. GA Resolution 62/154 (18 December 2007), adopted by a vote of 108 in favour, 51 against and 25 abstentions, is representative:

The General Assembly,

...

2. Expresses its deep concern about the negative stereotyping of religions and manifestations of intolerance and discrimination in matters of religion or belief still in evidence in the world;
3. Strongly deplores physical attacks and assaults on businesses, cultural centres and places of worship of all religions as well as targeting of religious symbols;
4. Expresses its deep concern about programmes and agendas pursued by extremist organizations and groups aimed at the defamation of religions and incitement to religious hatred, in particular when condoned by Governments;
5. Also expresses its deep concern that Islam is frequently and wrongly associated with human rights violations and terrorism;
6. Notes with deep concern the intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001;
7. Recognizes that, in the context of the fight against terrorism and the reaction to counter-terrorism measures, defamation of religions and incitement to religious hatred becomes an aggravating factor that contributes to the denial of fundamental rights and freedoms of members of target groups, as well as their economic and social exclusion;
8. Deplores the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination against Islam or any other religion, as well as targeting of religious symbols;
9. Stresses the need to effectively combat defamation of all religions and incitement to religious hatred, against Islam and Muslims in particular;

10. Emphasizes that everyone has the right to hold opinions without interference and the right to freedom of expression, and that the exercise of these rights carries with it special duties and responsibilities and may therefore be subject to limitations as are provided for by law and are necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs;
11. Urges States to take action to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;
12. Also urges States to provide, within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from defamation of religions, to take all possible measures to promote tolerance and respect for all religions and beliefs and the understanding of their value systems and to complement legal systems with intellectual and moral strategies to combat religious hatred and intolerance;
13. Urges all States to ensure that all public officials, including members of law enforcement bodies, the military, civil servants and educators, in the course of their official duties, respect people regardless of their different religions and beliefs and do not discriminate against persons on the grounds of their religion or belief, and that any necessary and appropriate education or training is provided;
14. Underscores the need to combat defamation of religions and incitement to religious hatred by strategizing and harmonizing actions at the local, national, regional and international levels through education and awareness-raising; ...

The concept that a religion could be defamed was subsequently hotly debated in various UN fora. In April 2009, for example, three UN Special Rapporteurs (dealing with racism, freedom of religion and freedom of expression) issued a joint statement:

We have repeated time and again that all human rights are universal, indivisible and interdependent and interrelated. Yet nowhere is this interdependence more obvious than in the discussion of freedom of expression and incitement to racial or religious hatred. The right to freedom of expression constitutes an essential aspect of the right to freedom of religion or belief and therefore needs to be adequately protected in domestic legislation. Freedom of expression is essential to creating an environment in which a critical discussion about religion can be held. While the exercise of freedom of expression could in some extreme cases affect the right to manifest the religion or belief of certain identified individuals, it is conceptually inaccurate to present “defamation of religions” *in abstracto* as a conflict between the right to freedom of religion or belief and the right to freedom of opinion or expression.

In recent years, there have been challenges with regard to the dissemination of expressions which offend certain believers [A] clear distinction shall be made between three types of expression: (1) expressions that constitute an offence under international law; (2) expressions that are not criminally punishable but may justify a civil suit; and (3) expressions that do not give rise to criminal or civil sanctions but still raise a concern in terms of tolerance, civility and respect for the religion or beliefs of others

Whereas the debate concerning the dissemination of expressions which may offend certain believers has throughout the last ten years evolved around the notion of “defamation of religions”, we welcome the fact that the debate seems to be shifting to the concept of “incitement to racial or religious hatred”, sometimes also referred to as “hate speech”.

Indeed, the difficulties in providing an objective definition of the term “defamation of religions” at the international level make the whole concept open to abuse. At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that are fairly neutral.

Whereas some have argued that “defamation of religions” could be equated to racism, we would like to caution against confusion between a racist statement and an act of “defamation of religion”. We fully concur with the affirmation from the ICERD that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous. However, there is not necessarily an analogy to be drawn with regard to religious issues. Indeed, several religions are characterized by truth claims — or even by superiority claims — which have been traditionally accepted as part of their theological grounds. Consequently, the elements that constitute a racist statement may not be the same as those that constitute a statement “defaming a religion” as such. To this extent, the legal measures, and in particular the criminal measures, adopted by national legal systems to fight racism may not necessarily be applicable to “defamation of religions” ...²⁹²

In 2010, the Special Rapporteur on freedom of religion welcomed the fact that the United Kingdom had recently abolished the offences of blasphemy and blasphemous libel, but also noted that the Indonesian Constitutional Court had upheld an anti-blasphemy law ‘which imposes criminal penalties of up to five years imprisonment on individuals who deviate from the basic teachings of the official religions.’²⁹³

In 2011, the UN Human Rights Committee adopted General Comment No. 34 on Article 19: Freedoms of opinion and expression, in which it observed (in para. 48) that:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

In response to these debates, in 2011 the UN Human Rights Council adopted by consensus a resolution (Res. 16/18 of 24 March 2011) that omitted all references to defamation and drew directly upon proposals put forward by the OIC. It called on states ‘to foster a domestic environment of religious tolerance, peace and respect, by’:

²⁹² http://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf.

²⁹³ UN Doc. A/65/207 (29 July 2010), para. 44.

- (a) Encouraging the creation of collaborative networks to build mutual understanding, promoting dialogue and inspiring constructive action towards shared policy goals and the pursuit of tangible outcomes ...;
- (b) Creating an appropriate mechanism within Governments to, inter alia, identify and address potential areas of tension between members of different religious communities, and assisting with conflict prevention and mediation;
- (c) Encouraging training of Government officials in effective outreach strategies;
- (d) Encouraging the efforts of leaders to discuss within their communities the causes of discrimination, and evolving strategies to counter these causes;
- (e) Speaking out against intolerance, including advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence;
- (f) Adopting measures to criminalize incitement to imminent violence based on religion or belief;
- (g) Understanding the need to combat denigration and negative religious stereotyping of persons, as well as incitement to religious hatred, by strategizing and harmonizing actions at the local, national, regional and international levels through, inter alia, education and awareness-building;
- (h) Recognizing that the open, constructive and respectful debate of ideas, as well as interfaith and intercultural dialogue at the local, national and international levels, can play a positive role in combating religious hatred, incitement and violence;

...

In Ireland, a common law offence of blasphemous libel was reflected in the 1937 Constitution. It was applicable only to Christianity and in 1999 the Irish Supreme Court found it incompatible with the guarantee of religious equality. New legislation, the Defamation Act of 2009, sought to amend the approach but was never enforced. The prohibition of blasphemy was repealed in 2020 following a referendum in 2018 which was supported by 65 percent of those who voted.

**RONALD DWORKIN, EVEN BIGOTS AND HOLOCAUST DENIERS MUST HAVE THEIR SAY
THE GUARDIAN (14 FEBRUARY 2006)**

The British media were right, on balance, not to republish the Danish cartoons that millions of furious Muslims protested against in violent and terrible destruction around the world. Reprinting would very likely have meant more people killed and more property destroyed. It would have caused many British Muslims great pain [T]he public does not have a right to read or see whatever it wants no matter what the cost, and the cartoons are in any case widely available on the internet.

There is a real danger, however, that the decision of British media not to publish, though wise, will be wrongly taken as an endorsement of the widely held opinion that freedom of speech has limits, that it must be balanced against the virtues of multiculturalism, and that the government was right after all to propose that it be made a crime to publish anything “abusive or insulting” to a religious group. Freedom of speech is not just a special and distinctive emblem of western culture that might be generously abridged or qualified as a measure of respect for other cultures that reject it, the way a crescent or menorah might be added to a Christian religious display. Free speech is a condition of

legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be. Ridicule is a distinct kind of expression; its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended. That is why cartoons and other forms of ridicule have for centuries, even when illegal, been among the most important weapons of both noble and wicked political movements.

So in a democracy no one, however powerful or impotent, can have a right not to be insulted or offended. That principle is of particular importance in a nation that strives for racial and ethnic fairness. If weak or unpopular minorities wish to be protected from economic or legal discrimination by law — if they wish laws enacted that prohibit discrimination against them in employment, for instance — then they must be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insult may legitimately adopt such laws. If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to respect. Whatever multiculturalism means — whatever it means to call for increased “respect” for all citizens and groups — these virtues would be self-defeating if they were thought to justify official censorship.

Muslims who are outraged by the Danish cartoons point out that in several European countries it is a crime publicly to deny, as the president of Iran has denied, that the Holocaust ever took place. They say that western concern for free speech is therefore only self-serving hypocrisy, and they have a point. But of course the remedy is not to make the compromise of democratic legitimacy even greater than it already is but to work toward a new understanding of the European convention on human rights that would strike down the Holocaust-denial law and similar laws across Europe for what they are: violations of the freedom of speech that that convention demands.

It is often said that religion is special, because people’s religious convictions are so central to their personalities that they should not be asked to tolerate ridicule in that dimension, and because they might feel a religious duty to strike back at what they take to be sacrilege. Britain has apparently embraced that view because it retains the crime of blasphemy, though only for insults to Christianity. But we cannot make an exception for religious insult if we want to use law to protect the free exercise of religion in other ways. If we want to forbid the police from profiling people who look or dress like Muslims for special searches, for example, we cannot also forbid people from opposing that policy by claiming, in cartoons or otherwise, that Islam is committed to terrorism, however silly we think that opinion is. Religion must be tailored to democracy, not the other way around. No religion can be permitted to legislate for everyone about what can or cannot be drawn any more than it can legislate about what may or may not be eaten. No one’s religious convictions can be thought to trump the freedom that makes democracy possible.

QUESTIONS

1. What provisions of the ICCPR could you have relied on to seek relief for the publication in a European country of the cartoons? Would it be relevant if you were a resident Muslim in such a country or were a national and resident of a Middle Eastern country?

2. Consider the following critique of General Comment No. 34:

... Article 19(3) expressly permits freedom of expression to be restricted in the name of public morals ...

No doubt, blasphemy laws do not sit easily with a secular public moral vision. But the reality is that for millions of people (and dozens of countries), religion, and religious devotion is at the heart of their moral compass. Insofar as the public moralities of these countries is concerned, unacceptable irreverence (blasphemy) may be as morally unsayable as hate speech or the “n-word” is in Western Europe or as Holocaust denial is in Germany. De facto then, in these countries, blasphemous speech does offend, in a unique way, against public morality.²⁹⁴

Do you agree with the views expressed by Dworkin?

²⁹⁴ N. Cox, ‘Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law’, 35 *J. L. and Relig.* (2020) 33, at 58.

**PART D: INTERNATIONAL AND REGIONAL
HUMAN RIGHTS ORGANIZATIONS**

Chapter 8. The United Nations Human Rights System

This chapter explores the complex and often confusing set of institutional arrangements that make up the United Nations human rights system. It places particular emphasis on the role played by the UN Human Rights Council, set up in 2006 as the direct successor to the UN Commission on Human Rights which first met in 1946. Other UN organs of major importance include the Security Council and the General Assembly. Individual office-holders, such as the UN Secretary-General and the UN High Commissioner for Human Rights, also play central roles.

The chapter starts with a brief overview of the different UN organs, before considering how the Human Rights Council performs its principal functions: responding to violations, setting human rights standards, dealing with complaints against states, and monitoring states' compliance with their obligations. It then looks at the roles played by the High Commissioner and the Security Council.

In considering the work of these institutions, it is necessary to keep in mind two crucial sets of issues that are implicated, in different ways, at almost every turn. The doctrinal issues concern the relationship between notions of state sovereignty and human rights, and the closely related challenge of determining the extent of a state's domestic jurisdiction. The policy-related issues concern the extent to which we would like to see the international community 'enforcing' human rights in concrete situations.

SOVEREIGNTY AND DOMESTIC JURISDICTION

The complex and unresolved relationship between the sovereignty of states and their obligations to respect human rights is nowhere better exemplified than in the UN Charter. Article 1(3) lists one of the purposes of the UN as being 'to achieve international cooperation ... in promoting and encouraging respect for human rights'. And Article 55(c) tasks the UN with promoting 'universal respect for, and observance of, human rights'. Article 2(7), on the other hand, reassures governments that nothing in the Charter 'shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State', with the sole exception of binding measures prescribed by the Security Council. While the two sets of provisions are not directly contradictory, they clearly raise and leave unresolved the question of how far the UN and other states can go in insisting upon respect for human rights, while respecting sovereignty and not interfering in the internal affairs of a state.

The past three decades have seen dramatic changes in the weight attached to sovereignty by governments. In 1991, at the end of the Cold War, 35 states from eastern and western Europe as well as North America, adopted a statement in which they 'categorically and irrevocably declare[d] that the commitments undertaken [in relation to human rights, democracy and the rule of law] are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.'²⁹⁵ This was followed by efforts in the early 2000s to promote the doctrine of the 'responsibility to protect' (R2P) which is discussed in Sec. D, below.

But, in recent years, the pendulum has swung in the opposite direction with major states proclaiming the centrality of sovereignty. On 25 June 2016, Russia and China adopted a joint Declaration on the Promotion of International Law stating that 'the principle of sovereign equality is crucial' and affirming their full support for 'the principle of non-intervention in the internal or external affairs of States'. And when foreign governments criticized China's suppression of the Hong Kong democracy movement in March 2021, the Chinese Ambassador in Geneva characterized their approach as a 'plot', 'in the name of human rights ... to interfere in China's internal affairs'. U.S. President, Donald Trump, told the UN General Assembly on 25 September 2019:

²⁹⁵ 30 *Int'l Leg. Mat.* (1991) 1670, at 1672.

If you want freedom, take pride in your country. If you want democracy, hold on to your sovereignty. And if you want peace, love your nation. Wise leaders always put the good of their own people and their own country first. The future does not belong to globalists. The future belongs to patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbors, and honor the differences that make each country special and unique.

These issues arise throughout the book. The introduction to international law considered the clash between international regulation and national governments' internal control of their polity — cases like *Chattin or Minority Schools in Albania*, for example. States' arguments based on sovereignty provided a counterpoint in Chapter 3 to the description of the growth of the human rights regime. States' claims based on notions of cultural relativism in Chapters 6 and 7 often spoke the language of autonomy and sovereign independence. And subsequent chapters, whether addressing the limits of the reach of the European Court of Human Rights, or the international community's response to massive tragedies, also raise the same themes.

Consider at the outset brief comments of several scholars about the meaning of this notion in contemporary international law and argument. James Crawford considers the category of domestic jurisdiction to be primarily 'a source of confusion'.²⁹⁶ Similarly, Martti Koskenniemi²⁹⁷ observes that it is 'notoriously difficult to pin down the meaning of sovereignty', but that nonetheless the literature characteristically starts with a definition. Usually the concept is connected with ideas of independence (external sovereignty) and self-determination (internal sovereignty). He quotes a classic definition in an arbitral decision to the effect that sovereignty 'in the relations between States signifies independence: independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of a State.' Sovereignty thus implies freedom of action by a state.

If, argues Koskenniemi, this or any agreed-on definition of sovereignty had a clear, ascertainable meaning, then 'whether an act falls within the State's legitimate sphere of action could always be solved by simply applying [that definition] to the case'. But '[t]here simply is no fixed meaning, no natural extent to sovereignty at all'. Thus in disputes between two states, each may base its argument on its own sovereignty.

Some see sovereignty as particularly important for Global South states. Margaret Keck and Kathryn Sikkink, observed in *Activists Beyond Borders: Advocacy Networks in International Politics* (1998), at 215 that for many Global South actors, sovereignty and non-intervention are 'the main line of defense against foreign efforts to limit domestic and international choices that third world states (and their citizens) can make.' Similarly, Benedict Kingsbury has warned that 'discarding sovereignty in favour of a functional approach will intensify inequality, weakening restraints on coercive intervention, diminishing critical roles of the state as a locus of identity and an autonomous zone of politics and re-dividing the world into zones.'²⁹⁸

Others see it differently. Consider Lukas Schmid, in 'Saving Migrants' Basic Human Rights from Sovereign Rule', 116 *Am. Pol. Sci. Rev.* (2022) 954:

"Sovereignty" is a discursive construction laden with difficult histories and prone to functional appropriation by all sorts of political projects. In political theory, it is most prominently known to have developed both in association with the social contract theories and as a quasi-theological notion of total dominion in, among others, Bodin and Schmitt. In political practice and international law, we commonly understand sovereignty as a state's "supreme authority within a territory," a bulwark against external encroachment. However, ... the narrative of absolute authority has become largely fictitious in a globalized post-World War II order of

²⁹⁶ J. Crawford, *Brownlie's Principles of Public International Law* (9th edn., 2019), at 437.

²⁹⁷ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), Ch. 4.

²⁹⁸ B. Kingsbury, 'Sovereignty and Inequality', 9 *Eur. J. Int'l. L.* 599 (1998).

multidimensional realignments of powers and jurisdictions. What is less often foregrounded is that the legal and political practice of state sovereignty developed (also) as an instrument of colonial subordination, granting inviolability of territory and peoplehood only to racially defined “civilized” populations, and thereby enabled rather than precluded imperial impositions in the colonial era. ... “Sovereignty,” ... is a concept in flux, with its manifold meanings and purposes constructed in response to concrete political practice and social struggles. ...

... [O]ngoing, postcolonial power differentials between states [let] some states enjoy not only unquestionable sovereignty over their own development but also dominance over many of the resources that other states require to fulfil their sovereign aspirations. In practice, sovereign power is unevenly distributed, with some states enjoying supersovereignty, and others left unable to translate formal sovereignty into meaningful self-determination. Nevertheless, the understanding of state sovereignty as the universal prerogative of states to (largely) self-determine matters of territory and population without imposed external interference remains hegemonic in international law and politics, exerting “normative dominance” over the ways in which state entitlements are constructed and state behavior is judged. ...

Indeed, some philosophers, such as John Rawls and Joseph Raz, have suggested that one possible criterion for something being a human right is that its violation can be seen as warranting armed intervention by another state or an international organization in order to remedy the situation. Few, however, go that far.²⁹⁹ And while legal doctrines such as the responsibility to protect might raise these concerns, most commentators do not see human rights obligations *per se* as posing any serious challenge to sovereignty. James Crawford notes that while the human rights movement has clearly eroded the domestic domain, sovereignty ‘is not exhausted by the concession or recognition of rights’. ‘Human rights standards qualify, but do not displace, the sovereignty of states. Indeed in subtle ways they reinforce it: the more we look to the state for human rights compliance, the more we seem to concede to a state domain.’³⁰⁰

Within the UN context, these theoretical debates about the status of sovereignty and its relationship to the human rights agenda have played out largely in relation to Article 2(7) of the Charter, which safeguards the ‘domestic jurisdiction’ of states. The main questions are what constitutes a domestic matter for this purpose and who decides. Most commentators consider that (1) the General Assembly must have the power to interpret its own mandate, including the implications of Article 2(7); (2) a teleological approach should be applied in interpreting Article 2(7) in light of the (developing) purposes of the Organization (Art. 1); (3) the resolutions of the UN and other bodies have made clear that a narrow interpretation is to be given to Article 2(7); and (4) as legitimate matters of international concern, human rights cannot reasonably be characterized as being exclusively an internal matter.

Since the 1940s, UN organs have systematically reduced the scope claimed for the domestic jurisdiction ‘defence’. The early case of South Africa was critical. A special Commission on the Racial Situation in the Union of South Africa appointed by the General Assembly in 1952 concluded that Article 2(7) prohibited only ‘dictatorial interference’, a phrase interpreted as implying ‘a peremptory demand for positive conduct or abstention — a demand which, if not complied with, involves a threat of or recourse to compulsion ...’. Article 2(7) referred ‘only to direct intervention in the domestic economy, social structure, or cultural arrangements of the State concerned but does not in any way preclude recommendations, or even inquiries conducted outside the territory of such State.’³⁰¹ The Commission’s report gave rise to extensive debate, in which South Africa took the position that the General Assembly could not even discuss the subject of race relations in that country. Only rarely today does one hear even distant echoes of that extreme position. The domestic jurisdiction defence

²⁹⁹ J. Waldron, ‘Human Rights: A Critique of the Raz/Rawls Approach’, in A. Etinson (ed.), *Human Rights: Moral or Political?* (2018) 117.

³⁰⁰ J. Crawford, ‘Sovereignty as a Legal Value’, in J. Crawford & M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (2012) 117, at 122.

³⁰¹ UN Doc. A/2505 (1953), 16–22.

continues to be regularly invoked, but it rarely prevails. J. Samuel Barkin concludes in his book *The Sovereignty Cartel* (2021) at 182, that sovereignty is ‘a claim that needs to be continually maintained through political action. Looking at this political action, at how these claims are made and reinforced, rather than arguing about what sovereignty might mean in the abstract, is how the concept of sovereignty can be of most use to us in understanding contemporary international relations.’

An insightful metaphor for sovereignty in today’s world is provided by Eyal Benvenisti, in ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *Am. J. Int’l. L.* (2013) 295. He suggests that past conceptions envisaged it as being ‘akin to owning a large estate separated from other properties by rivers or deserts.’ But today, the ‘reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families. The sense of interdependency is heightened when we recognize the absence of any alternative to this shared home, of any exit from this global high-rise. The privilege of bygone days of opting out, of retreating into splendid isolation, of adopting mercantilist policies or erecting iron curtains is no longer realistically available.’

CONCEPTIONS OF ENFORCEMENT

Many observers would assume that the effectiveness of the UN human rights system should generally be judged by its ability to ‘enforce’ respect for the legal norms that originated within it. But, for most governments, the very concept of international ‘enforcement’ is controversial, leading some to oppose it overtly, and others to invoke more subtle arguments to preclude or undermine such measures. It is therefore not surprising that the UN’s efforts have focused mostly on setting and monitoring human rights standards and trying to mobilize pressure on states to comply, rather than seeking to secure enforcement.

Evaluating the UN’s performance will largely depend on the observer’s starting point or perspective on world order. For example:

- (1) Do we assume that the ‘globalization’ of issues such as human rights is desirable, even unavoidable, so that a nation’s treatment of its own nationals is a legitimate concern of all others (an *erga omnes* approach)? Or do we hold to a more traditional image of the sovereign state that emphasizes the inviolability of national boundaries for at least some human rights issues as well as many other purposes?
- (2) Even if the former, do we envisage a world in which an effective multilateral organization such as the UN should be able to act against the will of the government(s) concerned to enforce universal norms? Or do we believe that despite the pressures towards harmonization of international standards, the actual implementation by individual governments of human rights norms, each in its own way, remains the most effective, desirable or realistic approach?
- (3) Are we prepared to accept that the measures that we would happily support against another country might, in a different context, be applied against our own? Do we assume that international enforcement actions must be applied equally to powerful nations and to smaller states, so that we should only adopt policies that can be applied across the board, consistently? Or are there legitimate differences in the ways in which the international community should respond to human rights violations in different types of states (democratic/non-democratic, large/small, developed/developing, etc.)?

The answers to such questions depend partly on the definition of enforcement. Should it be defined only to include peacekeeping, policing or military action that involves the presence in a state of UN or other foreign forces? The only use of the term ‘enforcement’ in the UN Charter is in Chapter VII relating to the powers of the Security Council (Article 45). This has led some international lawyers to equate enforcement with the use of, or threat to use, economic or other sanctions or armed force. Although most dictionary definitions of enforcement include an element of coercion, it is nonetheless

true that coercion may be moral as well as physical. It is also true that the use of force for human rights purposes has won some support in recent years in response to mass atrocities, but this is surely not what is meant by calls for the UN to ‘enforce’, routinely, universal human rights norms.

At the other extreme from the use of sanctions or armed force, enforcement has been defined as ‘comprising all measures intended and proper to induce respect for human rights’.³⁰² That definition could encompass even the softest forms of UN action such as debates or recommendatory resolutions of the Human Rights Council or the General Assembly. But such a definition is so open-ended that it provides no criteria against which to evaluate the UN’s performance. It puts the emphasis on intentions rather than on results achieved, and suggests that ‘enforcement’ measures might be confined to the adoption of resolutions and other such hortatory activities of the UN.

QUESTION

Is the term ‘enforcement’ the right term to use to describe what you would like the UN to be able to do in response to a finding that major human rights violations, or perhaps mass atrocities, have occurred, or seem likely to? Are there other powers, stopping short of this sense of ‘enforcement’, that you would wish to vest in the UN or any other international organization to respond to gross violations?

A. OVERVIEW OF THE UN HUMAN RIGHTS MACHINERY

The UN’s human rights regime reflects a ‘two-track’ approach:

- (1) *UN Charter-based bodies* including those
 - a. whose creation is directly mandated by the UN Charter, such as the General Assembly and the Human Rights Council (as the successor to the Commission on Human Rights),
 - b. subsidiary bodies created by one of the principal organs, such as the Commission on the Status of Women or the Human Rights Council Advisory Committee, and
 - c. groups or individuals accorded specific mandates by those organs to monitor, draft standards or for other purposes.
- (2) *Treaty-based bodies* such as the Human Rights Committee established under the ICCPR, to monitor compliance by states with their obligations under those treaties. Such treaty bodies include the CEDAW Committee (dealt with in Chapter 3), the ESCR Committee (Chapter 4) and the ICCPR Committee (Chapter 9).

The focus of this Chapter is on Charter-based bodies. While the Human Rights Council is of particular importance, other UN organs also play significant roles. The UN Charter of 1945 establishes several ‘principal organs’: the Security Council, the General Assembly, the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice. One of these organs is now virtually defunct — the highly successful postwar decolonization processes overseen by the UN rendered the *Trusteeship Council* superfluous and it suspended its work in 1994. Although the *Economic and Social Council* (ECOSOC) once played a major role as an intermediary between the Assembly and the Commission on Human Rights, and still has a theoretically important role of coordination within an increasingly disparate UN system, its substantive contributions to the human rights debate since the 1970s have been extremely limited and its coordination efforts have had little practical impact. One of the aims of creating the Human Rights Council in 2006 was to bypass ECOSOC and enable the new Council to report directly to the General Assembly. As a result, the main human rights-

³⁰² R. Bernhardt, ‘General Report’, in R. Bernhardt and J. A. Jolowicz (eds.), *International Enforcement of Human Rights* (1985), at 5.

relevant role played today by ECOSOC concerns the granting of ‘consultative status’ with the UN to nongovernmental organizations (see Ch. 14C, below).

We turn now to the organs whose work is examined in this Chapter. Until the mid-1990s, the *Security Council* was reluctant to become involved in human rights matters. Since that time, its role in the field has varied considerably (see Sec. D, below). Similarly, the *International Court of Justice* (ICJ) exerted a relatively marginal influence over the understanding and interpretation of international human rights law until the mid-1990s, despite its consideration of a handful of important cases focusing on issues such as self-determination and genocide. Over the past two decades, however, the ICJ has adopted a series of judgments of major importance in terms of their contribution to an understanding of aspects of the international human rights regime.

The *Secretariat* is led by the *Secretary-General*, who is appointed for five years by the General Assembly on the recommendation of the Security Council. A nominee may thus be vetoed by any of the five permanent members of the Council (China, France, Russia, the United Kingdom and the United States). The Secretary-General is the chief administrative officer of the UN and also exerts important moral authority within the wider international system. For decades, successive Secretaries-General were very reluctant to embrace human rights concerns actively for fear of offending governments and jeopardizing their wider role in the promotion of international peace and security. Two examples illustrate this reluctance. In the 1950s, Dag Hammarskjöld (Sweden) was said to have directed that the UN human rights programme should cruise at no more than ‘minimum flying speed’. In 1993, the proposal that led to the creation of the post of High Commissioner for Human Rights in December 1993 was strongly opposed by then Secretary-General Boutros Boutros-Ghali (Egypt). In contrast, Kofi Annan (Ghana), Secretary-General from 1997 to 2006, took a much more active human rights stance than any of his predecessors and appointed a series of strong High Commissioners. He also oversaw a process of ‘mainstreaming’ human rights throughout the organization, which meant that bodies dealing with issues such as development, peacekeeping and environment were encouraged to address systematically the human rights dimensions of their work. His successor, from 2007 to 2016, was Ban Ki-moon (South Korea). He generally favoured ‘quiet diplomacy’ and engaged only minimally with human rights, although he took a strong stand on issues such as sexual orientation, and the Responsibility to Protect. The notion that the UN and its staff should ‘take a principled stance’ and ‘act with moral courage’ in the face of serious and large-scale human rights violations (the Human Rights Up Front policy) was adopted on his watch, but effectively mothballed by his successor, António Guterres (Portugal, 2017-2026). He too has generally avoided engaging directly with controversial human rights challenges.

Under the Secretary-General, the *High Commissioner for Human Rights* (HCHR) is the UN official with principal responsibility for human rights. In formal terms the HCHR is subject to the direction and authority of the Secretary-General and acts within the mandate given by the policy organs. In practice the HCHR and the Office (the OHCHR) are now viewed as central players in their own right (see Sec. C, below).

The *General Assembly* is empowered by the UN Charter to ‘discuss any questions or any matters within the scope of the . . . Charter’ (Art. 10) and to ‘initiate studies and make recommendations for the purpose of . . . [inter alia] assisting in the realization of human rights’ (Art. 13). The Assembly’s principal significance derives from the fact that it is composed of all UN member states, each of which has one vote regardless of population, wealth or other factors. While most issues are decided by a simple majority vote, decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority. Nevertheless, much of its work is carried out on a consensus basis, thus avoiding the need for a vote. The Assembly meets intensively from September to December each year and at other times as required. Its resolutions are not *per se* legally binding but they are an important reflection of the will of the world community. Much of the debate and drafting occurs in six Main Committees, three of which are of particular relevance to human rights: the Third (Social, Humanitarian and Cultural issues); the Fifth (Administrative and Budgetary issues); and the Sixth (Legal issues).

In 2006, the *Human Rights Council* replaced the *Commission on Human Rights* which had functioned since 1946. We examine these two bodies in some depth in Section B below.

The *Commission on the Status of Women* was established in 1946 and reports to ECOSOC in relation to policies to promote women's rights in the political, economic, civil, social and educational fields. It consists of 45 governmental representatives, and meets for only ten days each year. It drafted many of the key treaties dealing with women's rights ranging from the 1952 Convention on the Political Rights of Women to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Its mandate includes follow-up to the four UN Women's Conferences held since 1975, and especially that held in Beijing in 1995. Its importance has been enhanced by the creation in 2010 of the UN Entity for Gender Equality and the Empowerment of Women, known as 'UN Women', one of whose roles is to assist the Commission in formulating relevant policies, global standards and norms.

In contrast with the treaty-based bodies discussed earlier, most of the Charter-based bodies are political organs, which have a much broader mandate to promote awareness, to foster respect and to respond to violations. They derive their legitimacy and their mandate, in the broadest sense, from the human rights provisions of the Charter. Consider the following contrasts between the two types of organs.

Treaty-based organs are distinguished by: a limited clientele consisting only of states parties to the treaty in question; a limited mandate reflecting the terms of the treaty; a limited range of procedural options for responding to violations; consensus-based decision-making as far as possible; a preference for a non-adversarial relationship with states parties (particularly with respect to state reports) based on the concept of a 'constructive dialogue'; and a particular concern with addressing issues in ways that contribute to developing the normative understanding of the relevant rights.

By contrast, the political organs such as the General Assembly and the Human Rights Council generally: focus on a diverse range of issues; insist that every state is an actual or potential client (or respondent), regardless of its specific treaty obligations; work on the basis of a flexible and expanding mandate designed to respond to crises as they emerge; engage, as a last resort, in adversarial actions vis-à-vis states; rely more heavily upon NGO inputs and public opinion generally to ensure the effectiveness of their work; take decisions by often strongly contested majority voting; pay less attention to normative issues *per se*; and are very wary about establishing specific procedural frameworks within which to work, preferring a more *ad hoc* approach in most situations.

B. THE UN HUMAN RIGHTS COUNCIL³⁰³

Rather than including an international bill of rights in the UN Charter in 1945, it was agreed instead to create a Commission on Human Rights whose primary function would be to draft such a bill. In late 1945, the UN appointed a Preparatory Commission to make provisional arrangements for institutional competences. It envisaged a Commission directed towards: a) formulation of an international bill of rights; b) formulation of recommendations for an international declaration or convention on such matters as civil liberties, status of women, freedom of information; c) protection of minorities; d) prevention of discrimination on grounds of race, sex, language, or religion; and e) any matters within the field of human rights considered likely to impair the general welfare or friendly relations among nations.³⁰⁴

The Commission was, however, set up as a subsidiary body of ECOSOC. The Council deleted paragraph (e) from the terms of reference it gave to the so-called Nuclear Commission, which was to make detailed suggestions for the shape of the new Commission. The Nuclear Commission's nine

³⁰³ See generally, B. Ramcharan, *The Protection Role and Jurisprudence of the United Nations Human Rights Council* (2022); E. Tistoune, *The UN Human Rights Council: A Practical Anatomy* (2020); J. Pace, *The United Nations Commission on Human Rights: 'A Very Great Enterprise'* (2020); and R. Freedman, 'The Human Rights Council', in F. Mégret and P. Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2nd. ed., 2020) 181.

³⁰⁴ Report of the Preparatory Commission of the United Nations (1945), PC/20, Ch. III, Sec. 4, paras. 14–16.

members, chaired by Eleanor Roosevelt, proposed a body consisting solely of independent experts with an open-ended mandate including the role of aiding ‘the Security Council in the task entrusted to it by Article 39 of the Charter, by pointing to cases where a violation of human rights committed in one country may, by its gravity, its frequency, or its systematic nature, constitute a threat to the peace’ (E/38/Rev.1 (1946), p. 7). But this conception was rejected by ECOSOC which insisted that the Commission would be an intergovernmental rather than an expert body and would focus primarily on standards, studies and recommendations. It did, however, insert a new paragraph (e), giving the Commission a role with respect to ‘any other matter concerning human rights not covered by items (a) (b) (c) and (d)’. In its later years, the Commission was able to build upon this open-ended provision to expand its range of activities.

For the first 20 years of its existence, the Commission devoted itself largely to standard-setting, and particularly to the drafting of the UDHR and the two Covenants. Meanwhile, the Cold War and the decolonization movement dominated much of the action in the General Assembly and the Security Council, and most of the ‘real’ action on human rights took place in the Assembly.

The Commission’s response to violations went through three distinct phases. The first (1946–1966) began with a statement that the Commission had ‘no power to take any action in regard to any complaints concerning human rights’ (ESC Res. 75 (V) (1947)). UN officials warned at the time that this approach would ‘lower the prestige and the authority’ of both the Commission and the UN as a whole. Hersch Lauterpacht called it an ‘extraordinary . . . abdication’ of the UN’s proper functions. During a second phase (1967–1978) the Commission’s composition was changed dramatically as a result of decolonization and the new members demanded responses to the problems associated with racism and colonialism. New procedures were adopted (the so-called 1235 and 1503 Procedures, named after ECOSOC’s authorizing resolutions) and strong measures were taken against apartheid in particular. At the same time, it failed to act in response to horrendous violations in Pol Pot’s Democratic Kampuchea (Cambodia), Amin’s Uganda, Bokassa’s Central African Empire, Macias’s Equatorial Guinea, the military’s Argentina and Uruguay and several other situations. As the human rights movement grew, public opinion began to assert itself, and the Carter Administration became more engaged, the Commission entered a third phase (1979–2005) in which it evolved more effective procedures and tackled a growing range of state violators. All of these procedures were passed on to the new Council in 2006.

While the Commission’s achievements were actually considerable, its demise resulted from the disenchantment of all of its key constituencies, often for directly contradictory reasons. The United States was mostly frustrated in its efforts to condemn China’s violations in the wake of the Tiananmen Square uprising of 1989, and irked by the active role of Cuba, Libya, Sudan and others. Its failure to win re-election in 2001 was the last straw. China, on the other hand, led a large number of developing countries in criticizing the Commission as a forum in which the North put countries of the South in the dock. They called instead for dialogue and consensus. And human rights NGOs considered the Commission to be unresponsive on key issues. By the end, all groups were accusing it of being ‘politicized’, albeit in very different ways. The resolution creating its successor body was a compromise among strongly competing visions.

GENERAL ASSEMBLY RESOLUTION 60/251 (2006)

The General Assembly,

...

Reaffirming further that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis,

Reaffirming that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms,

...

Affirming the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, ...

...

1. *Decides* to establish the Human Rights Council ... as a subsidiary organ of the General Assembly ...;
2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;
3. *Decides also* that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;
4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation ...;
5. *Decides* that the Council shall, inter alia:
 - (a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building ...;
 - (b) Serve as a forum for dialogue on thematic issues on all human rights;
 - (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
 - (d) Promote the full implementation of human rights obligations undertaken by States ...;
 - (e) Undertake a universal periodic review ...;
 - (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
 - (g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the [OHCHR];
 - (h) Work in close cooperation ... with Governments, regional organizations, national human rights institutions and civil society;
 - (i) Make recommendations with regard to the promotion and protection of human rights;
 - (j) Submit an annual report to the General Assembly;

...

12. *Decides also* that the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms;

...

1. Structure

Membership: Where the Commission on Human Rights (CHR) had 54 members, the Council has 47. General Assembly Resolution 60/251 diluted the proportion of European states and maintained the strong emphasis on regional blocs that had dogged the Commission. The Council thus consists of

13 states from Africa, 13 from Asia, six from Eastern Europe, eight from Latin American and the Caribbean, and seven from Western Europe and Other states (which includes the United States, Australia, Canada, New Zealand and Israel).

GA Res. 60/251 (2006), para. 8, authorizes the General Assembly, by a two-thirds majority of the members present and voting, to suspend the membership rights of a country 'that commits gross and systematic violations of human rights.' In 2011, Libya was suspended after a violent government crackdown on unarmed protesters. In 2022, Russia was suspended (by a vote of 93-24-58) in response to its aggression against Ukraine.

In 2018, the United States withdrew from Council membership, criticizing entrenched bias against Israel, and arguing that because it had not addressed 'the massive abuses in Venezuela and Iran' but had welcomed the Democratic Republic of Congo as a new member, it had 'cease[d] to be worthy of its name' (Ambassador Haley). Secretary of State Pompeo called it 'a hypocritical and self-serving organization that makes a mockery of human rights'. Under the Biden administration, the U.S. was re-elected in October 2021. On 3 February 2025, President Trump, in an Executive Order, included the Human Rights Council among UN bodies that had acted 'contrary to the interests of the United States while attacking our allies and propagating anti-Semitism'. The Council had also 'protected human rights abusers by allowing them to use the organization to shield themselves from scrutiny'. Accordingly, the US announced that it will neither fund the Council nor pay outstanding arrears or 2025 assessments.

Term: States are elected for three-year terms and are not eligible for immediate re-election after two consecutive terms. The big powers, such as the United States and the USSR/Russia, had served almost continuously on the CHR.

Elections: One of the major issues that led to the disbanding of the Commission was the criticism that its members included governments which were major violators of human rights. As the U.S. Ambassador put it in 2005, the members of the Commission 'must be the firefighters of the world, not the arsonists'. The United States had previously urged that only democratic and human rights-respecting states should be elected to the Commission. In 2003, Human Rights Watch put forward a much modified set of criteria proposing that potential members 'should have ratified core human rights treaties, complied with their reporting obligations, issued open invitations to U.N. human rights experts and not have been condemned recently by the Commission for human rights violations.' But all too few states, the United States included, could meet such criteria.³⁰⁵ The innovation in relation to the Council was to urge that those voting for states 'shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments'. Once elected a state 'shall uphold the highest [human rights] standards'. In the first round of elections many states took the pledge seriously; few have done so subsequently. Civil society campaigns have, however, succeeded in dissuading some states from nominating, and have contributed to the defeat of some candidacies.

Sessions: The CHR met for a single six-week annual session, with very occasional special (emergency sessions). The Council's *regular* sessions are held for four weeks in March, three in June and three in September. *Special* sessions 'to address human rights violations and emergencies' can be convened upon the request of one-third of the Council's members. Recent special sessions have addressed the human rights situation in: the Democratic Republic of the Congo (February 2025), Sudan (May 2023); Iran (November 2022), Ukraine (May 2022); Ethiopia (December 2021); the Sudan (November 2021); Afghanistan (August 2021); the Occupied Palestinian Territory (May 2021); and Myanmar (February 2021).

Presidency: The Council's presidency rotates annually among the regional groups, but the office is considerably more powerful than was the case under the CHR. The President has a full-time personal staff to provide 'support ... and to enhance efficiency and institutional memory'.

³⁰⁵ P. Alston, 'Promoting the Accountability of Members of the New UN Human Rights Council', 15 *J. Transnat'l. L. & Pol'y.* (2005) 49.

Apart from states – both members and non-members – the main actors in the Council are the High Commissioner and the OHCHR, independent experts, NGOs and national human rights institutions (NHRIs).

OHCHR: We consider the role of the High Commissioner (HC) in Sec. C, below. One of the HC's principal roles is to direct the OHCHR, which provides the secretariat to the Council and is charged with implementing the great majority of the Council's decisions. In the formal institutional hierarchy, however, the HC is answerable to the General Assembly rather than the Council. It is the Assembly's Fifth Committee that exercises direct oversight of the Office's budget and administration. In 2010, Cuba and allied states proposed that the HC would answer first to the Council, but this was strongly resisted by the HC and the majority of states. The compromise (PRST 18/2 of 30 Sept. 2011) was to 'invite' the HC to include a detailed budgetary breakdown in an annual report to the Council.

Experts: The Commission and the Council have both accorded important and diverse roles to 'independent experts', although their efforts remain almost entirely advisory rather than determinative. The most important group are those holding specific 'mandates' under the Special Procedures system, which we examine below. In addition, a range of other expert bodies report regularly to the Council. The largest, and the one with the deepest roots in the system, is the *Human Rights Council Advisory Committee*. Consisting of 18 independent experts, it is officially described as the Council's 'think-tank' and 'work[s] at its direction' rather than on its own initiative. It generates studies and 'research-based advice' and meets in two sessions for a total of ten days per year. It replaced the *Sub-Commission on the Promotion and Protection of Human Rights* that advised the Commission on Human Rights from 1947 to 2006 and produced some 73 studies, starting in 1956, on issues such as the rights of indigenous populations, contemporary forms of slavery, minorities, transnational corporations, the administration of justice and the right to food. Whereas the Sub-Commission adopted resolutions on a wide range of issues, including violations in specific countries, the Advisory Committee is prohibited from doing so and must limit itself to providing 'advice' on thematic issues.

Other expert bodies include the *Expert Mechanism on the Rights of Indigenous Peoples* (established in 2007) which consists of five experts who meet annually and undertakes studies relating to the rights of indigenous peoples. It is separate from the Council's Special Rapporteur on the rights of indigenous peoples and ECOSOC's *Permanent Forum on Indigenous Issues* (established in 2000). The latter consists of 16 independent experts, half of whom are nominated by governments and half by indigenous organizations. It meets annually in New York for two weeks.

The *Forum on Minority Issues* (2007) meets for two days and brings together experts to advise the Council's Independent Expert on minority issues in relation to national, ethnic, religious and linguistic minorities. The *Social Forum* (2002) meets for two or three days annually and brings together civil society, experts and governments to discuss pressing social issues. The most recent additions are the *Forum on Human Rights, Democracy and the Rule of Law* (2015) and the *Permanent Forum on People of African Descent* (2021).

NGOs and NHRIs: NGOs and the representatives of those NHRIs that are accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) are entitled to attend Council meetings, to submit written statements and to speak in debates. The 'space' that is in fact made available to these groups is a matter of significant contention, with many governments being more committed in theory than in practice to supporting such participation.

QUESTIONS

1. A major debate in establishing the Council concerned its optimum size. The Commission had 53 members and the United States proposed that the Council should have only 20, or a maximum of 30. After an examination of the issue, a High-Level Panel reporting to the UN Secretary-General in 2004 (UN Doc. A/59/565 (2004), 282) concluded that efforts to identify membership criteria would have little chance of changing the negative dynamics in the Commission and only risked 'further politicizing the issue'. It advocated membership for all UN member states. This was rejected and the compromise chosen was 47. What are the arguments for and against a universal or a very selective membership for the Council?
2. UN Watch, an NGO that describes its role as 'combating racism, antisemitism, and anti-Israel prejudice at the UN' has consistently argued that states with poor human rights records should not be elected to the Council. In October 2020, its Executive Director argued that electing 'dictatorships' such as China, Cuba, Russia, Saudi Arabia, Pakistan and Uzbekistan to the Council was 'like making a gang of arsonists into the fire brigade'. Do you agree?

2. The Council at Work

The work of the Council and its offshoots appears in many different contexts throughout this book, including sections dealing with violence against women, fact-finding, business and human rights, counter-terrorism, and climate change. In the materials that follow, consideration is first given to two case studies showing the Council at work, then to its Special Procedures system, and then to its Universal Periodic Review. The picture that emerges is one of a body that performs a wide range of functions, albeit with varying degrees of effectiveness.

For all of the reliance on arduously negotiated procedures and the routine invocation of legal norms, political considerations are almost always uppermost in the minds of states. Virtually every issue is viewed, at least partly and too often entirely, through the lens of national interests. This is especially obvious in the case of the largest states such as China, India, the United States, and Russia, but it applies across the board. Consider the case of Indonesia, the fourth most populous and the largest Muslim-majority country in the world. Moch Faisal Karim, in 'The Limits of Global Human Rights Promotion: Indonesia's Ambivalent Roles in the UN Human Rights Council', 26 *Contemp. Pol.* (2020) 351, asks why, given its ready embrace of the UN's normative regime, and its strong promotion of human rights at the sub-regional level within ASEAN, Indonesia has been 'reluctant to play a constructive role in strengthening global human rights mechanisms.' He concludes that the key considerations are its 'historical memory' of the criticism it faced over human rights abuses in East Timor, and its concern not to expose itself to more scrutiny in relation to its response to the ongoing separatist movement in Papua.

When Australia votes, it is mindful of its history of abuses relating to its indigenous population and asylum-seekers. When India votes, the contested status of Kashmir and the plight of the Dalits are never irrelevant. When the United States votes, its history of racial segregation and its global economic and security interests are foremost. When China votes, it thinks of criticism directed at the situations in Tibet, Hong Kong, and Xinjiang, its historical memories of humiliation at the hands of Western imperialism, and its newfound global economic interests through its Belt and Road Initiative. And so on, for every country. But the system works, nonetheless, because these pre-occupations are sometimes trumped by other factors, such as geopolitical interests and rivalries, a reluctance to be shamed, domestic pressures to support progressive initiatives, and aspirations to show international 'leadership'.

The Council's functions include acting as a forum which brings states together and facilitates consultation on a vast array of human rights issues within and among the different geopolitical and other groupings. It also provides a setting in which co-operative solutions to problems can be sought, despite the fact that the public perception of its role is dominated by its grappling with intractable issues. It provides a focus and a gathering place for civil society actors seeking to ensure that issues of deep concern that are not being resolved elsewhere can become the focus of concerted attention. It can act as a catalyst to action by various actors, whether because they are asked to submit their views, to respond to requests, or challenged to provide explanations. It is a source of empowerment for experts and groups that act in its name and with a mandate from it. It can be a protector of rights when it mobilizes media attention, puts pressure on governments, and reinforces the legitimacy of a cause. It can also, of course, fall short of all of these aspirations, both in general and in particular cases, and it can be the conduit for backsliding.

Two other functions involve the consideration of complaints and the drafting of standards.

Complaints

Ever since the Magna Carta, a right to petition has been an important aspect of human rights, although it was not included in the UDHR. As noted earlier, the Commission was deprived almost from the outset of the ability to examine the many petitions that poured in from all over the world. This changed only in 1970, when ECOSOC Resolution 1503 (XLVIII) established a confidential process for examining communications which appeared 'to reveal a consistent pattern of gross and reliably attested violations of human rights'. It involved a cumbersome procedure and yielded very few known results. It nevertheless had its supporters among those who felt that any procedure that put governments under pressure to account must be a step forward.

When the Council replaced the Commission, it effectively 'inherited' the 1503 procedure. HRC Res. 5/1 of 18 June 2007 established two bodies to manage the procedure. The Working Group on Communications (WGC) consists of five independent expert members of the Council's Advisory Committee. It determines whether complaints are admissible and forwards those, along with its recommendations, to the Council's Working Group on Situations (WGS) which consists of one state representative designated by each of the five regional groups. The latter makes recommendations to the Council, which may or may not decide to take any action. Because the procedure is confidential, almost nothing is known about its impact.

Standard-setting

In historical terms it might well be considered that the single most important contribution made by the Charter-based bodies, and especially by the Commission and now the Council, has been the elaboration of an ever-growing body of standards designed to flesh out the meaning and implications of the relatively barebones norms enunciated in the UDHR. Although the Commission's 1946 terms of reference included a general mandate to address any human rights matter, it spent most of its first 20 years engaged almost exclusively in standard-setting. This included the preparation of the first draft of the UDHR and the two Covenants, as well as a range of other instruments.

Since the entry into force of the two Covenants in 1976, the need for additional standards has often been questioned. Even when new treaties on discrimination against women, or torture, or the rights of the child, or the rights of people with disabilities, were first mooted there were those who observed that the issues were already dealt with in the Covenants and who urged that the focus should instead be on better implementing existing standards and developing their content through interpretation. Such suggestions, as we know, proved unpersuasive. When the Human Rights Council was created, there were again suggestions that new standards were not a high priority. Diverse reasons have been suggested: new standards are often duplicative; the process is too time-consuming; priority should go to implementing existing standards; and states are already over-burdened with reporting and other

obligations.³⁰⁶ It has also been suggested that formal standard-setting processes disadvantage delegations from the Global South, because they lack the capacity and resources to engage fully.³⁰⁷

In fact, the Council has continued to draft new standards at a steady pace, including the International Convention for the Protection of All Persons from Enforced Disappearances, the Declaration on the Rights of Indigenous Peoples, and optional complaints protocols for the ICESCR and the CRC. It has also adopted declarations on the Right to Peace (GA Res. 71/189 (2016) and the Rights of Peasants (GA Res. 73/165 (2018)), as well as recognizing ‘the right to a clean, healthy and sustainable environment as a human right’ (Ch. 15A, below). Various other standard-setting activities relating to racism, an instrument on private security companies, a draft treaty on the right to development, a draft treaty on business and human rights, and an optional protocol to the Convention on the Rights of the Child on the rights to early childhood education, free pre-primary education and free secondary education, are all ongoing as of 2025.

Impact

For various reasons, systematically evaluating the Council’s impact is an almost impossible task. It consists of a great many different bodies and mechanisms and their impact varies greatly. In addition, governments will almost never acknowledge the extent to which Council-generated pressures to change course have had any influence, even when they end up doing precisely what was requested. But some formal indicia are relevant, including the extent of competition to be elected to the Council, the level of participation in its activities by heads of state, foreign ministers, and other prominent figures, the amount of effort invested by civil society in trying to influence governments, and making elaborate proposals, and the intensity of governmental lobbying designed to influence the outcome of Council deliberations.

Racism Case Study

The following materials provide an overview of the Council’s engagement with racism. The goal is to shed light on the issue itself, but also to provide insights into the strengths and weaknesses of its action in response to an issue of central and enduring importance.

Recent scholarship has drawn attention to two very different perspectives on efforts within the human rights regime to fight racism. On the one side is the prohibition of racial discrimination in the UN Charter and the UDHR, along with an impressive history of initiatives to abolish slavery and the slave trade, to condemn racial discrimination, to vanquish apartheid, and to establish mechanisms such as a treaty body, a Special Rapporteur, a Working Group, a Forum, a Group of Independent Eminent Experts, and other bodies described below. On the other side is a growing volume of critical literature calling attention to deep underlying racism within the regime itself and exposing the denial or downplaying of the links between imperialism/colonialism and racism. Critics also point to determined efforts by states to avoid confronting racist structures or the political economy underpinning them, and the refusal to take reparations claims seriously.

The human rights field is, of course, not alone. Antony Anghie concluded in his path-breaking study, *Imperialism, Sovereignty and the Making of International Law* (2005) at 312, that ‘international law continuously disempowers the non-European world, even while sanctioning intervention within it’. Building on such analyses, and as detailed below, the Third World Approaches to International Law (TWAIL) group of scholars has developed an extensive critique of international law in general,³⁰⁸ and other studies have exposed the corrosive effects of racism in relation to international humanitarian

³⁰⁶ International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience* (2006).

³⁰⁷ M. Mutua, ‘Standard Setting in Human Rights: Critique and Prognosis’, 29 *Hum. Rts. Q.* (2007) 547, at 606.

³⁰⁸ A. Anghie, ‘Rethinking International Law: A TWAIL Retrospective’, 34 *Eur. J. Int’l L.* (2023) 7; and J.T. Gathii, ‘The Promise of International Law: A Third World View’, 36 *Am. U. L. Rev.* (2021) 377.

law,³⁰⁹ international refugee law,³¹⁰ international criminal law,³¹¹ and international relations in general.³¹²

The materials that follow focus extensively, although not exclusively, on the United States. Amitav Acharya, in ‘Race and Racism in the Founding of the Modern World Order’, 98 *Int’l Aff.* (2022) 22, after surveying the role of race as a topic in the academic discipline of International Relations (IR), argues that ‘as the United States became both the leading world power and the centre of gravity for IR as a field of study after 1945, race was (and continues to be) swept under the carpet, and racism even legitimized, by mainstream scholarship and policy discourses about international affairs and world order.’

It should also be acknowledged that the materials present a critical perspective that could be faulted for not giving equal attention to the many positive UN contributions towards the elimination of racial discrimination. Some of those are documented by John Pace, in *The United Nations Commission on Human Rights: ‘A Very Great Enterprise’* (2020) 57, and include:

- a series of important studies on discrimination carried out by the Human Rights Sub-Commission;
- a long-running focus on apartheid in southern Africa that involved the establishment of several important committees and working groups as well as various forms of Security Council-imposed sanctions;
- the proclamation of Decades to Combat Racism and Racial Discrimination (1973, 1983, 1993, and 2003) followed by an International Decade for People of African Descent 2015–2024;
- the holding of World Conferences to Combat Racism and Racial Discrimination (1973, 1983, and 2001);³¹³ and
- the adoption of the Convention on the Elimination of All Forms of Racial Discrimination, leading to the creation of the CERD Committee and the generation of an extensive jurisprudence documented in Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016).

But perhaps the most important part of the story is the extent to which all of these initiatives were heavily contested, watered down, poorly implemented, and systematically underfunded. The following snapshots of the engagement of various United States actors provide both a historical overview and a picture of the current state of the art.

A. THE 1920S

Perhaps surprisingly, African Americans and their supporters in the U.S. have viewed the international stage as a vitally important one for airing their grievances since at least the early twentieth century.

³⁰⁹ For an overview, see B. van Dijk, ‘What Is IHL History Now?’, 104 *Int’l Rev. Red Cross* (2022) 1621; and F. Mégret, ‘From “Savages” to “Unlawful Combatants”: A Postcolonial Look at International Humanitarian Law’s “Other”’, in A. Orford (ed.), *International Law and Its Others* (2006) 265.

³¹⁰ M. Jackson Sow, ‘Ukrainian Refugees, Race, and International Law’s Choice Between Order and Justice’, 116 *Am. J. Int’l L.* (2022) 698; and T. Achiume, ‘Migration as Decolonization’, 71 *Stan. L. Rev.* (2019) 1509.

³¹¹ R. DeFalco and F. Mégret, ‘The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System’, 7 *London Rev. Int’l L.* (2019) 55.

³¹² B. Freeman, D. Kim and D. Lake, ‘Race in International Relations: Beyond the “Norm Against Noticing”’, 25 *Ann. Rev. Pol. Sci.* (2022) 175.

³¹³ D. Petrova, ‘“Smoke and Mirrors”: The Durban Review Conference and Human Rights Politics at the United Nations’, 10 *Hum. Rts. L. Rev.* (2010) 129.

UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (UNIA), DECLARATION OF THE RIGHTS OF THE NEGRO PEOPLES OF THE WORLD, 1920³¹⁴

Be It Resolved, That the Negro people of the world, through their chosen representatives in convention assembled in Liberty Hall [in New York City, in August 2020] protest against the wrongs and injustices they are suffering at the hands of their white brethren

... [W]e demand and insist on the following Declaration of Rights:

...

3. That we believe the Negro, like any other race, should be governed by the ethics of civilization, and therefore should not be deprived of any of those rights or privileges common to other human beings.

4. We declare that Negroes, wheresoever they form a community among themselves should be given the right to elect their own representatives to represent them in Legislatures, courts of law, or such institutions as may exercise control over that particular community.

5. We assert that the Negro is entitled to even-handed justice before all courts of law

...

7. We believe that any law or practice that tends to deprive any African of his land or the privileges of free citizenship within his country is unjust and immoral, and no native should respect any such law or practice.

8. We declare taxation without representation unjust and tyrannous, and there should be no obligation on the part of the Negro to obey the levy of a tax by any law-making body from which he is excluded and denied representation on account of his race and color.

9. We believe that any law especially directed against the Negro to his detriment and singling him out because of his race or color is unfair and immoral, and should not be respected.

...

15. We strongly condemn the cupidity of those nations of the world who, by open aggression or secret schemes, have seized the territories and inexhaustible natural wealth of Africa

...

18. We protest against the atrocious crime of whipping, flogging and overworking of the native tribes of Africa and Negroes everywhere. These are methods that should be abolished and all means should be taken to prevent a continuance of such brutal practices.

...

Outcome

The Declaration consisted of 54 demands in total. In 1922, it formed the basis of a petition by the UNIA to the League of Nations. Arnulf Becker Lorca, in 'Petitioning the International: A 'Pre-history' of Self-determination', 25 *Eur. J. Int'l L.* (2014) 497, recounts how the Secretary-General of the League rebuffed efforts to hold a hearing on the petition, and declined to meet with its drafters in Geneva. Eventually, the Iranian ambassador agreed to submit the petition, but nothing came of the efforts.

B. THE LATE 1940S AND EARLY 1950S

1947: AN APPEAL TO THE WORLD: A STATEMENT ON THE DENIAL OF HUMAN RIGHTS TO MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS (NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE)

Introduction by W. E. Burghardt Du Bois

³¹⁴ Reprinted in J. Dixon et al. (eds.) *The Marcus Garvey and Universal Negro Improvement Association Papers*, (Vol XII, 2014) 32.

There were in the United States of America, 1940, 12,865,518 citizens and residents, something less than a tenth of the nation, who form largely a segregated caste, with restricted legal rights, and many illegal disabilities. They are descendants of the Africans brought to America ... and reduced to slave labor. This group has no complete biological unity, but varies in color from white to black, and comprises a great variety of physical characteristics

The so-called American Negro group, therefore, while it is in no sense absolutely set off physically from its fellow American, has nevertheless a strong, hereditary cultural unity, born of slavery, of common suffering, prolonged proscription and curtailment of political and civil rights; and especially because of economic and social disabilities.

...

... Poverty, ignorance, disease and crime have been forced on these unfortunate victims of greed to an extent far beyond any social necessity; and a great nation, which today ought to be in the forefront of the march toward peace and democracy, finds itself continuously making common cause with race-hate, prejudiced exploitation and oppression of the common man. Its high and noble words are turned against it, because they are contradicted in every syllable by the treatment of the American Negro for [368 years].

Slavery in America is a strange and contradictory story. It ... evidently was a matter of economics, a question of income and labor, rather than a problem of right and wrong, or of the physical differences in men. Once slavery began to be the source of vast income for men and nations, there followed frantic search for moral and racial justifications. Such excuses were found and men did not inquire too carefully into either their logic or truth.

...

... [D]iscrimination practiced in the United States against her own citizens and to a large extent a contravention of her own laws, cannot be persisted in, without infringing upon the rights of the peoples of the world and especially upon the ideals and the work of the United Nations.

This question then, which is without doubt primarily an internal and national question, becomes inevitably an international question ...; it is therefore, fitting and proper that the thirteen million American citizens of Negro descent should appeal to the United Nations and ask that organization in the proper way to take cognizance of a situation which deprives this group of their rights as men and citizens

1951: CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE³¹⁵

Out of the inhuman black ghettos of American cities, out of the cotton plantations of the South, comes this record of mass slayings on the basis of race, of lives deliberately warped and distorted by the willful creation of conditions making for premature death, poverty and disease., ...

...

... [T]he oppressed Negro citizens of the United States, segregated, discriminated against and long the target of violence, suffer from genocide as the result of the consistent, conscious, unified policies of every branch of government.

The Civil Rights Congress has prepared and submits this petition to the General Assembly of the United Nations on behalf of the Negro people in the interest of peace and democracy, charging the Government of the United States of America with violation of the Charter of the United Nations and the Convention on the Prevention and Punishment of the Crime of Genocide.

...

³¹⁵ Presented to the UN General Assembly in Paris by William Patterson and to the UN Secretariat in New York by Paul Robeson. See J. Pope, 'El-Hajj Malik El-Shabazz: The Continuity and Legacy of a Critical African Human Rights Consciousness', 24 *J. Afr. Stud.* (2020) 357.

According to international law, and according to our own law, the Genocide Convention, as well as the provisions of the United Nations Charter, supersedes, negates and displaces all discriminatory racist law on the books of the United States and the several states.

...

We, Negro petitioners whose communities have been laid waste, whose homes have been burned and looted, whose children have been killed, whose women have been raped, have noted with peculiar horror that the genocidal doctrines and actions of the American white supremacists have already been exported to the colored peoples of Asia. We solemnly warn that a nation which practices genocide against its own nationals may not be long deterred, if it has the power, from genocide elsewhere. White supremacy at home makes for colored massacres abroad. ...

Outcome

The immediate response to the 1947 petition was for the UN's Economic and Social Council, with full U.S. support, to declare that the Commission on Human Rights had 'no power to take any action in regard to any complaints concerning human rights' (ESC Res. 75(V) 1947). That move quickly put an end to the consideration of the NAACP petition, or any other such complaint. The Chair of the Commission during this period was Eleanor Roosevelt. Carol Anderson, in *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (2003), at 2, describes how the NAACP formed alliances with President Harry Truman and Eleanor Roosevelt in an effort to secure support for a helpful response from the United Nations. But she quotes Truman as saying that 'Negroes want justice, not social equality.' As for Roosevelt:

... in her role as chair of the UN Commission on Human Rights, although she sympathized with the plight of the African Americans, she was even more responsive to the public relations exigencies of the Cold War, which called for sanitizing and camouflaging the reality of America's Jim Crow democracy. She, therefore, joined with Texas Senator Tom Connally and others in an attempt to thwart a complaint to the UN charging South Africa with racial discrimination and systematic human rights violations. Roosevelt, Connally, and the other members of the U.S. delegation voiced strong concerns that, if the complaint succeeded, it would set a dangerous precedent that could ultimately lead to the United Nations investigating the condition of "negroes in Alabama."

Roosevelt also used her chairmanship and influence to manipulate the human rights treaties in ways that would shield the United States from UN scrutiny and assuage the powerful Southern Democrats, who "were afraid" that the UN's treaties just "might affect the Colored question." After all, the senators from Georgia and Texas railed, those treaties were nothing more than a "back-door method of enacting federal anti-lynching legislation." Mrs. Roosevelt, therefore, fought for the insertion of a clause in the Covenant on Human Rights that would allow states that were in a federal system, such as Georgia, to disregard the treaty completely. ... In essence [she] had just assured the Dixiecrats [a pro-segregation political party named the States' Rights Democratic Party] that the sacred troika of lynching, Southern Justice, and Jim Crow schools would remain untouched, even with an international treaty to safeguard human rights. Obviously, then, although the United States was willing to use the rhetoric of human rights to bludgeon the Soviet Union and play the politics of moral outrage that the Holocaust engendered, the federal government, even the liberals, steadfastly refused to make human rights a viable force in the United States or in international practice.

Indeed, the President of the American Bar Association, Frank Holman, waged war against the UDHR before its final adoption in December 1948. Motivated primarily by a concern to uphold states' rights, especially to maintain racial segregation and to avoid the imposition of 'world-wide socialism, he warned 'the American people [of] the revolutionary nature of the proposals and the dangerous implications with respect to our form of government.'³¹⁶ While Holman was unable to prevent the

³¹⁶ F. Holman, 'Human Rights on Pink Paper', *American Affairs* (January 1949) 18, at 24.

adoption of the UDHR, he played a crucial behind the scenes role in supporting Senator Bricker, whose unsuccessful efforts to secure a constitutional amendment nevertheless provoked the U.S. to undertake not to submit the Genocide Convention (Holman had warned that a White driver who accidentally ran over a Black child could be charged with genocide under the Convention) or the draft Covenants to the Senate for its advice and consent. In 1956, the Supreme Court held in *Reid v. Covert* (354 U.S. 1) that no treaty could confer powers on the federal government ‘free from the restraints of the Constitution’, thus assuaging concerns that domestic race policies might be jeopardized.³¹⁷

Starting in 1950, the U.S. and its allies launched a process to review the operations of the ECOSOC and its commissions. Steven L. B. Jensen, in ‘Inequality and Post-War International Organization: Discrimination, the World Social Situation and the United Nations, 1948–1957’, in C. Christiansen and S. Jensen (eds.), *Histories of Global Inequality* (2019) at 131 observes that ‘[t]he process ... became a concerted attempt by major Western countries to close down key UN Commissions and Committees that were focusing on social and humanitarian issues, including human rights. ... [T]his attempt at closures by the United States and the United Kingdom was about sanitizing the normative and political food chain of UN diplomacy in the field of human rights and anti-discrimination. It thereby represented a battle over the type of international organization that the UN should be. Should it focus solely on security politics and technically oriented economic development or should it also include various dimensions of “the social” and human rights?’ The effort failed in the end, but a clear message had been sent. Similarly, Jensen notes that the UN’s first World Social Situation Report, issued in 1952, ‘highlighted economic inequality within and between countries, inequalities in income distribution between people as well as global and national inequalities in food and nutrition, mortality rates, inequalities in access to and quality of primary and secondary education, in land ownership, in the impact of taxation (progressive vs. regressive).’ The follow up report, published five years later made no substantive mention of inequality. In this instance, the message had been received.

C. THE 1960S: MALCOLM X AND MARTIN LUTHER KING, JR.

In a speech at the Founding Rally of his Organization of Afro-American Unity, in Washington Heights, New York, on 28 June 1964, (available at www.blackpast.org) Malcolm X, an American Muslim minister and civil rights activist who was assassinated in 1965, proclaimed that his new organization would ‘work with every leader and other organization in this country interested in a program designed to bring your and my problem before the United Nations.’ Since the U.S. government was not ‘capable of even hearing our problem’, the solution was to ‘internationalize’ the issue, take advantage of the UN and its UDHR, and bring US racism ‘into the UN before a world body wherein we can indict Uncle Sam for the continued criminal injustices that our people experience in this government.’

Malcolm X also attended a meeting of the Organization of African Unity (OAU) in Cairo in July 1964, where he was given ‘observer’ status. The *New York Times* (‘Malcolm X Seeks U.N. Negro Debate; He Asks African States to Cite U.S. Over Rights’, (13 August 1964)) reported that he told the OAU that ‘The American Government is either unable or unwilling to protect the lives and property of your 22 million African-American brothers and sisters. We stand defenseless, at the mercy of American racists who murder us at will for no reason other than we are black and of African descent.’ He told the African leaders that ‘Your problems will never be fully solved until and unless ours are solved. You will never be fully respected until and unless we are also respected.’

Malcolm X frequently compared the situation in the United States with that in countries which were being discussed at the United Nations. The *New York Times* article reported him as saying that ‘If [U.S.] Supreme Court Justice Arthur Goldberg [then U.S. Ambassador to the UN] ... could find legal grounds to threaten to bring Russia before the United Nations and charge her with violating the human rights of less than three million Russian Jews—what makes our African brothers hesitate to bring the United States Government before the United Nations and charge her with violating the human rights of 22 million African-Americans?’

³¹⁷ See generally, E. Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (2005).

A recent biography by Les Payne and Tamara Payne, *The Dead Are Arising: The Life of Malcolm X* (2020), at 449, suggests a different analogy, quoting him as saying: ‘South Africa is like a vicious wolf, openly hostile towards black humanity. But America is cunning like a fox, friendly and smiling, but even more vicious and deadly than the wolf. And if South African racism is not a domestic issue, then American racism also is not a *domestic* issue.’

While Martin Luther King, Jr., did not petition or appear before the United Nations human rights bodies, his transnational advocacy helped elevate the Black American Civil Rights Movement and globalized the international human rights movement against racism, apartheid, colonization, and war. In fact, as Henry J. Richardson III observes,³¹⁸ King was the first “modern black leader, subsequent to DuBois to most prominently embody” the unity of the civil rights and international human rights discourses and movements.³¹⁹ On 10 December 1962, King joined the African National Congress leader, Chief Albert J. Lutuli, in a ‘Call for an International Boycott of *Apartheid* South Africa’:

... In South Africa today, all opposition to white supremacy is condemned as communism, and in its name, due process is destroyed; a medieval segregation is organized with twentieth century efficiency and drive; a sophisticated form of slavery is imposed by a minority upon a majority which is kept in grinding poverty; the dignity of human personality is defiled; and world opinion is arrogantly defied.

...

... [When the United States concluded] that our interests were threatened in the Dominican Republic [we] inundated that small nation with overwhelming force, shocking the world with our zealotry and naked power. With respect to South Africa, however, our protest is so muted and peripheral it merely mildly disturbs the sensibilities of the segregationists, while our trade and investments substantially stimulate their economy to greater heights. ...

Outcome

Advocacy by U.S. civil rights leaders vis-à-vis the UN contributed to the ferment that was generated by the emergence from colonial status to independence of dozens of new states in the 1950s and early 1960s. The result was a decision by the UN General Assembly in 1963 to develop an anti-racism treaty.³²⁰ Archival research by H. Timothy Lovelace, Jr., in ‘Civil Rights as Human Rights’, 71 *Duke L. J.* (2022) 1850 has revealed an important part of the U.S. response. The UN’s human rights Sub-Commission was requested to draft what would become the Convention on the Elimination of All Forms of Racial Discrimination:

The Sub-Commission was well-positioned to [do so because, as a body of independent experts, it] ... was designed to advance the idea that human rights were to be above politics, neutral, and universal in application. The [UN] hoped the arrangement would minimize power politics and ... provide ... global solutions [But, in practice, many experts] operated as state agents. ...

...

Thus, ... the Sub-Commission often transformed into a forum where foreign officials shamed the body’s U.S. members for proclaiming the United States’ commitment to democracy abroad while denying Black Americans democracy at home. Such outward criticism harmed U.S. foreign policy interests because U.S. policymakers understood the United States’ position in the Cold War increasingly depended upon its ability to influence decolonizing and newly independent

³¹⁸ H.J. Richardson III, ‘Dr. Martin Luther King, Jr. as an International Human Rights Leader’, 52 *Villanova L. Rev.* (2007) 471.

³¹⁹ J. I. Levitt, ‘Beloved Pan-Africanism: Martin Luther King’s Stride Toward Africa, International Human Rights, and the Black International Tradition’, in Z. Yihdego et al. (eds.), *Ethiopian Yearbook of International Law* 2019, 163.

³²⁰ See generally H. T. Lovelace, *The World is on Our Side: America and the Race for Human Rights under Law* (2023).

countries. The persistence of U.S. racism thus proved to be a liability in the international arena. ...

However, when the U.N. General Assembly requested that the Sub-Commission draft the Convention, State Department officials saw an opportunity and seized the moment. Those officials charged two of the United States' foremost civil rights lawyers, Morris Abram and Clyde Ferguson, to help develop a U.S. draft of the Convention for the Sub-Commission's debates. ...

These two were celebrated civil rights advocates. Abram, born in Georgia, was the son of a Jewish immigrant, who served with distinction in World War II, became a staff lawyer at the Nuremberg Trial, and was later an attorney for Martin Luther King, Jr. Ferguson, an African-American from North Carolina, also had a very distinguished service record, graduated from Harvard Law School, became prominent in both the civil rights and human rights fields, and Dean of Howard Law School in 1963. Lovelace describes the task assigned to them:

... [T]he State Department[s] drafting instructions for Abram and Ferguson ... were resoundingly clear: "... the approach should be along [the] lines of the 'equal protection' concept in our 14th Amendment." For the State Department, incorporating U.S. constitutional principles into the U.N. Convention presented many benefits. First, if the Convention mirrored the principles in constitutional law, the United States could credibly argue that it was at the vanguard of racial progress. Second, State Department officials hoped to persuade newly independent countries and the Sub-Commission to embrace U.S. constitutional values more broadly. Moreover, the closer the Convention's language was to the Constitution, the fewer conflicting obligations the United States would encounter if it were to adopt the Convention. ...

However, for Abram and Ferguson, the goal of transplanting U.S. law into the Convention created a paradox. Abram and Ferguson were cold warriors and firmly believed in America's democratic potential. Yet, exporting U.S. democracy abroad would also mean exporting American problems. Despite the Fourteenth Amendment's great promise, if Abram and Ferguson were successful in grafting the Equal Protection Clause onto the Convention, they would also saddle the Convention with the state action doctrine. That doctrine limited the application of the clause only to government entities and, in turn, put private discrimination beyond constitutional reach. The doctrine had long stymied racial progress in the United States. ...

The two experts subsequently submitted to the Sub-Commission a draft of the treaty that had emerged from consultations within the State Department. It formed the basis of the UN negotiations. The key issue was whether private discrimination, which was rampant in the United States, the United Kingdom and other Western countries, would also be prohibited. In the final version of the treaty, the definition of racial discrimination applies to 'the political, economic, social, cultural or any other field of public life.' Proponents of a comprehensive approach, especially those from Eastern Europe, believed that this covered both the public and private sphere but Western governments consistently made clear during the drafting that they believed that the word 'public' was synonymous with the U.S. notion of 'state action'. Lovelace observes that 'Abram and Ferguson's strategy worked brilliantly'.

The U.S. then doubled down on that interpretation by lodging a reservation to its ratification of the CERD Convention, which happened on 21 October 1994, almost 30 years after the treaty's adoption:

... The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of 'public life' reflects a ... distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the

United States does not accept any obligation under this Convention to enact legislation or take other measures ...

In 2021, reporting on a country that had undergone relentless privatization of previously public functions since the 1980s, the U.S. government reported to the CERD Committee that it still considers it has no obligation to ‘prohibit and punish purely private conduct’ (UN Doc. CERD/C/USA/10-12, para. 11). In response, the Committee plaintively reiterated ‘its recommendation that the State party consider withdrawing or narrowing the scope of its reservation to article 2 of the Convention and broaden the protection afforded by law against all discriminatory acts perpetrated by private individuals, groups or organizations’ (UN Doc. CERD/C/USA/CO/10-12 (2022), para. 7).

D. THE 2020S

On 25 May 2020, as the COVID-19 pandemic raged, George Floyd was brutally murdered by officers of the Minneapolis Police Department, setting off large-scale riots, initially in the United States, and soon worldwide, against police brutality, especially directed at people of African descent. On 8 June 2020, the American Civil Liberties Union, on behalf of the family members of four recent victims of police violence in the U.S. (George Floyd, Breonna Taylor, Philando Castile, and Michael Brown) and 660 human rights organizations worldwide, petitioned the Council ‘to urgently convene a Special Session on the situation of human rights in the United States in order to respond to the unfolding grave human rights crisis borne out of the repression of nationwide protests.’ The petition noted, *inter alia*, that:

[P]olice departments across the United States, backed by federal government agencies ..., are escalating the situation with further militarization and excessive use of force against protesters. We note with particular concern the deployment of at least 62,000 National Guard soldiers in two dozen states, the encouragement of the use of violence and mass arrests by President Donald Trump on social media, and his labeling of the protesters as “terrorists.” Several cities around the country have imposed sweeping night curfews ...

On 15 June 2020, the Group of African States requested the Council to convene an ‘urgent debate on racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protest.’ In this context, the Group, along with other sponsors, submitted a draft resolution for the consideration of Council members in the following terms:

[The Human Rights Council]

1. Strongly condemns the continuing racially discriminatory and violent practices perpetrated by law enforcement agencies against Africans and people of African descent, and the structural racism endemic to the criminal justice system in the United States of America and other parts of the world recently affected;
2. Expresses alarm at the recent incidents of police brutality against peaceful demonstrators defending the rights of Africans and of people of African descent;
3. Decides to establish an independent international commission of inquiry ... to establish the facts and circumstances relating to the systemic racism, alleged violations of international human rights law and abuses against Africans and people of African descent in the United States of America and other parts of the world ...;

...

Many speakers addressed the Council over two days on 16-17 June 2020, including the following:

Philonise Floyd

[In the widely-watched video of George Floyd’s murder] [y]ou watched my brother die. That could have been me. I am my brother’s keeper. You in the United Nations

are your brothers and sisters' keepers in America, and you have the power to help us get justice for my brother George Floyd. I am asking you to help him. I am asking you to help me. I am asking you to help us - Black people in America. ...

Michelle Bachelet, UN High Commissioner for Human Rights

... Today's protests are the culmination of many generations of pain, and long struggles for equality. Too little has changed, over too many years. We owe it to those who have gone before, as well as those to come, to seize the moment – at long last – to demand fundamental change and insist upon it.

As 20 of my fellow senior UN leaders, each of African origin or descent, jointly wrote this week, “to merely condemn expressions and acts of racism is not enough. We must go beyond and do more.”

...

Black lives matter. Indigenous lives matter. The lives of people of colour matter. All human beings are born equal in dignity and rights: that is what this Council, like my Office, stands for. I thank the African Group of States for initiating this debate, and this Council for holding it. I trust it will be followed by swift and decisive reforms.

Representative of Australia

... Australia supports all efforts to address and eliminate racial discrimination in all its forms, wherever it occurs. ...

We deplore the tragic death of George Floyd. And we support the United States' recent steps to address racism, police brutality and violent responses to peaceful demonstrations. We note, for example, the charging of officers over George Floyd's death, the removal of others responsible for excessive force, as well as moves towards police reform.

The United States is an open, liberal democracy, governed by the rule of law and we have confidence in their transparent justice system to address these issues appropriately. ...

On behalf of the European Union, Ambassador of Croatia, Vesna Batistić Kos

The European Union expresses its deepest sympathy ...

...

The EU supports the African Group and the calls from civil society and relatives of victims for the need to discuss these matters at the Human Rights Council. Incidents of racially motivated violence and hatred take place in all regions of the world, and we need to look into our own souls. ...

...

All societies must remain vigilant against the excessive use of force and ensure that all such situations are addressed safely, effectively and in full respect for the rule of law and human rights. The EU will continue calling on all States to uphold the rights to participate in public affairs, freedom of peaceful assembly and association, including for human rights defenders and peaceful protesters, as well as freedom of opinion and expression online and offline with particular emphasis on the safety of journalists, bloggers and other media workers.

...

Tendayi Achiume, Special Rapporteur on [Racism]

...

For people of African descent in the United States, the domestic legal system has utterly failed to acknowledge and confront racial injustice and discrimination. ...

... The situation in the United States requires an international response that can help ensure that people of African descent in that country are no longer subject to the routine but egregious violations that prompted this Urgent Debate in the first place. It is for this reason that any resolution adopted by the Council at the conclusion of this debate must provide for an international commission of inquiry with the necessary authority to investigate systemic racism in law enforcement in the United States. Failure to do so would be to deny people of African descent in the United States the opportunity to draw on the global human rights system to challenge entrenched racial injustice. Failure to establish an international commission of inquiry would signal that Black lives do not matter, or that if they do, they do not matter enough to mobilize the Human Rights Council to intervene where it should. People of all racial and ethnic groups have been taking to the streets, risking their lives day after day to protest systemic racism in the face of global health pandemic.

...

The truth is that there has been a steady erosion within the United Nations of commitment to the anti-racism human rights framework

...

We are aware that some member states have argued that a Commission of Inquiry should be reserved for more serious human rights violations. We disagree. If the national and global uprisings we are witnessing are not sufficient evidence of the gravity of the issues before you, it is difficult to imagine ... what might convince you to demonstrate the equal worth of people of African descent. ...

American Civil Liberties Union (on behalf of a group of NGOs)

... The protesters in the streets across the United States and around the world are demanding radical change; now is the time for accountability, for reimagining public safety and the role of police in a democratic society. It's time to dismantle structural racism and invest in people and communities of color. We urge the Council to respond rapidly and effectively, and mandate an independent investigation into U.S. racist policing practices and suppression of peaceful protests. We cannot remain complicit in the oppression of Black Americans and must take immediate action to end this legacy of state-sanctioned violence.

Outcome

The result was Human Rights Council Resolution 43/1, of 19 June 2020, which was adopted unanimously.

The Human Rights Council,

...

1. Strongly condemns the continuing racially discriminatory and violent practices perpetrated by law enforcement agencies against Africans and people of African descent, in particular which led to the death of George Floyd on 25 May 2020 in

Minnesota ... and the deaths of other people of African descent, and also condemns the structural racism in the criminal justice system;

2. Deplores the recent incidents of excessive use of force and other human rights violations by law enforcement officers against peaceful demonstrators defending the rights of Africans and of people of African descent;

3. Requests the United Nations High Commissioner for Human Rights ... to prepare a report on systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, especially those incidents that resulted in the death of George Floyd and other Africans and people of African descent, to contribute to accountability and redress for victims; ...

An insight into the process that led to this outcome is provided by Sejal Parmar, in 'The Internationalisation of Black Lives Matter at the Human Rights Council', *EJIL: Talk!* (26 June 2020):

... The reason for the weakened text was behind-the-scenes influence, 'extreme pressure', and even 'bullying' of Council member states – particularly from many members of the Western [Group] ... towards ensuring that the outcome resolution was generic rather than focused upon the US, and did not provide for a commission of inquiry. The US, which had memorably withdrawn from the Council exactly two years previously, was thus able to rely on others to ensure that the resolution was diluted, even though its ambassador had stated that his country 'was not above scrutiny' on the very day of the debate.

In various ways, through their public rhetoric during the debate, the majority of states displayed a worrying aversion to ensuring global human rights accountability for the US. First, the reality of the ultimate, shocking trigger for the urgent debate seemed often hidden, even denied, in states' comments. Whilst many states referred to the killing of George Floyd, it was almost always as a 'tragedy' or 'tragic death', as if it were an accident or misfortune. Similarly, the outrage and calls for action of protestors globally were reduced to passive expressions of 'sadness' by the diplomats of their states (e.g. Croatia on behalf of the EU). Second, the US seemed to be the elephant in the Assembly Hall for much of the debate, with the vast majority of states managing to avoid any direct mention of the US at all. When the US was cited by [Western] states, it was often with approval, to indicate 'confidence' in the US ... and only exceptionally to express '[concern] ...' (Switzerland). The strongest statements for the original draft resolution came from South Africa, Botswana, and Namibia, and also, predictably, Cuba, Venezuela, the Democratic People's Republic of Korea, Iran, and Russia, states marked by serious human rights records. Third, many states argued that, since racism is a 'global scourge' or 'problem' (e.g. UK, Brazil, Germany), 'no country should be singled out' (e.g. Brazil, Australia), and that a 'collaborative' and 'constructive' approach (e.g. UK, Japan) that is unifying rather than divisive ought to be embraced – a claim that justified the deflection of the Council's attention away from the US.

The official response, by US Secretary of State Michael R. Pompeo, was entitled 'On the Hypocrisy of UN Human Rights Council' (20 June 2020):

The United Nations Human Rights Council, now comprised of Venezuela and recently, Cuba and China, has long been and remains a haven for dictators and democracies that indulge them. It is a grave disappointment to those genuinely seeking to advance human dignity. Even so, the Council's decision to vote yesterday on a resolution focusing on policing and race in the United States marks a new low.

The ongoing civic discourse about the tragic death of George Floyd in the United States is a sign of our democracy's strength and maturity. Americans work through

difficult societal problems openly, knowing their freedoms are protected by the Constitution and a strong rule of law. ...

Unfortunately, the Council has once again reaffirmed the wisdom of our decision to withdraw in 2018. If the Council were serious about protecting human rights, there are plenty of legitimate needs for its attention, such as the systemic racial disparities in places like Cuba, China, and Iran. If the Council were honest, it would recognize the strengths of American democracy and urge authoritarian regimes around the world to model American democracy and to hold their nations to the same high standards of accountability and transparency that we Americans apply to ourselves.

The High Commissioner engaged in wide-ranging consultations in preparing the report requested by the Council. She observed in introducing the report (UN Doc. A/HRC/47/53 (2021) para. 10) that:

[P]eople of African descent face interconnected, intersectional and compounded forms of racial discrimination, marginalization and exclusion that are shaped by historical legacies and mutually reinforced through cycles of structural inequalities that have lasted for generations, affecting the enjoyment of human rights in every part of life. Systemic racism persists, in large part, due to misconceptions that the abolition of slavery, the end of the transatlantic trade in enslaved Africans and colonialism, and measures taken by States to date, have removed the racially discriminatory structures built by those practices and created equal societies.

The report concluded with a detailed ‘Four-point Agenda Towards Transformative Change for Racial Justice and Equality’, summed up in these terms in the longer version of the report (UN Doc. A/HRC/47/CRP/1 (2021), para. 313):

- (a) Reverse the cultures of denial, dismantle systemic racism and accelerate the pace of action;
- (b) End impunity for human rights violations by law enforcement officials and close trust deficits;
- (c) Ensure that the voices of people of African descent and those who stand up against racism are heard and that their concerns are acted upon;
- (d) Confront legacies, including through accountability and redress.

In some respects, the most revealing sentence in the report came in paragraph 314, in which the High Commissioner ‘calls upon all States to translate the agenda into action plans and concrete measures developed through national dialogues.’ In other words, while the UN itself could document the extent of systemic racism, help to galvanize and perhaps add legitimacy and credibility to local efforts, and undertake ongoing monitoring, real redress could only happen at the national level. But the enormity of that challenge was confirmed in a follow-up report one year later (UN Doc. A/HRC/51/53 (2022)) which surveyed states’ responses to the report and concluded that ‘for the most part these initiatives fall short of comprehensive evidence-based approaches ... that address systemic racism ...’

The other part of the Council’s response was to establish an International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement (Res. 47/21 (2021)). It was instructed to function in close collaboration with other existing actors such as the Working Group of Experts on People of African Descent and the Special Rapporteur on racism. The Expert Mechanism’s mandate called for it:

- 11. ... to advance racial justice and equality in the context of law enforcement in all parts of the world by ...;

- (a) Examining systemic racism, including as it relates to structural and institutional racism ...;
 - (b) Examining the root causes of systemic racism in law enforcement and the criminal justice system ...;
 - (c) Making recommendations regarding how domestic legal regimes on the use of force by law enforcement officials can be brought into line with the applicable human rights standards ...;
 - (d) Making recommendations on the collection and publication of data ... to drive and assess responses to systemic racism;
- ...

Structural Approaches

The Expert Mechanism's first report (UN Doc. A/HRC/51/55 (2022)) focused on 'the collection, publication and analysis of data disaggregated by race or ethnic origin with regard to interactions of Africans and people of African descent with law enforcement authorities and the criminal justice system'. In 2024 it reported on the 'excessive use of force and other human rights violations by law enforcement officers' (UN Doc. A/HRC/57/71). One challenge facing the group is whether to focus narrowly on the criminal justice system or to expand to consider the structural and systemic dimensions emphasized in the report of the High Commissioner.

An example of such an approach is provided by a report by the Working Group of Experts on People of African Descent on an official visit to Portugal in late 2021 (UN Doc. A/HRC/51/54/Add.2 (2022)). The Group begins by recognizing the significance of the government's adoption of a National Plan to Combat Racism and Discrimination 2021–2025, making it the first European Union member to do so. For the Group, it constitutes 'political recognition that there is racism in Portugal, in both interpersonal and structural dimensions, which results from historical processes and perpetuates structural discrimination models [para. 9].' But a brief excerpt of its focus indicates the potential relevance of wider structural issues:

24. Language is an important reflection and expression of culture. Portuguese is proudly claimed as the fifth most spoken language in the world, but an insistence on maintaining the purity of the European dialect does reflect hierarchy and operates as a de facto limit to the human rights of people of African descent. The Working Group was consistently informed that the Portuguese language is a site of persistent racial profiling, with serious impacts on people of African descent in terms of education and employment, as a result of ongoing linguistic supremacy as a pervasive form of white supremacy, whereby European-inflected Portuguese created access and African-inflected Portuguese created barriers in a hierarchy that could be defined precisely by region or nation. Language variety was reported as a basis for filtering students, downgrading performance and prejudging intellectual aptitude.

25. ... [C]hildren of African descent who are native speakers of Portuguese are categorized as "Portuguese second language speakers", depriving such children of appropriate intellectual education and classmates if their Portuguese contained markers of Brazil or Portuguese-speaking African countries. ... [W]hite Portuguese children, whose speech was influenced by Brazilian media content, faced corrective or remedial speech interventions to regain the purity of their language. ... Portuguese speakers of African descent faced barriers to accessing health services and other public services because their Portuguese did not sound European.

We conclude this case study of the Council's response to racism by exploring the implications of some of the strongest critiques by scholars focused on structural approaches.

**E. TENDAYI ACHIUME AND DEVON CARBADO, CRITICAL RACE THEORY MEETS THIRD
WORLD APPROACHES TO INTERNATIONAL LAW
67 UCLA L. REV. (2021) 1462**

Introduction

This Article articulates six important parallel thematic developments in Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL). ... [W]e are interested in both the critical moves through which CRT and TWAIL are articulated and the resistance, obfuscation, or delegitimization of those moves, especially in scholarly arenas. For simplicity, we frame international law as the site of concern for TWAIL scholars and constitutional law as the site of concern for Critical Race Theorists.

... [T]his Article is a critique of neither CRT nor TWAIL. One might, for example, reasonably ask the colonization question vis-à-vis CRT (why are the problems of empire, imperialism, and colonization largely absent from CRT?). In a similar vein, one might reasonably ask the racialization question vis-à-vis TWAIL (why are problems of racialization--particularly of nations, global power, and international law and relations--not a more central part of TWAIL?). ...

...

I. Parallel Moments of Inequality and Interventions

A. Moment I: Foundational Racial Capitalism

The first moment we describe implicates what Cedric Robinson calls “racial capitalism.” Which is to say, here, both international law, on the TWAIL side, and constitutional law, on the CRT side, operate as regimes of power and violence that implicate racism, capitalism, and colonialism. ... [In] Moment I, there are social meaning attributions to nations and peoples (and nations of peoples) that facilitate, legitimize, and entrench global and domestic orderings of white supremacy, whose entailments have included conquest, expansionism, militarism, economic extraction, slavery, and genocide. ...

...

TWAIL’s racial critique of sovereignty specifically and the international legal order more generally pays particularly close attention to positivism, the methodological means through which the racialization of sovereignty was achieved. ... TWAIL scholars have long argued that non-European nations did not, a priori, lack sovereignty. Positivist jurisprudence produced that “lack” through ostensibly objective facts about racially inferior people, uncivilized cultures, and dysfunctional and backward governments. ... By effectively defining sovereignty as Europeanness, international law underwrote a white-dominated global order in which European nations exploited, dominated, and, in some instances, facilitated the genocide of Third World people.

...

B. Moment II: Formal Equality and Racial Inclusion

In Moment II, CRT and TWAIL foreground the problem of racial inclusion, albeit at different scales. ... TWAIL scholars focus on the formal inclusion of nonwhite peoples into the international society of sovereign nation states (under First World and white dominated international terms and norms) and CRT scholars focus on the formal inclusion of nonwhite peoples into citizenship (under white dominated domestic terms and norms). ... [These] acts of inclusion ... are not a fundamental reconfiguration of power but rather a particular technology through which to maintain, manage, and legitimize the prior hierarchical domestic and global racial orderings. ...

...

... [TWAIL sees] formal decolonization of the Third World ... as inclusion on terms that have ultimately ensured neocolonial domination, not substantive sovereignty for the former colonial nations. ... [T]he former colonial powers ... [promoted] international law and policy doctrines that were designed to maintain not only the subordinate status of Third World nations, but also the control First World nations had over the international legal system. The former colonies organized in various attempts to disrupt this reassertion of colonial power. But their efforts largely failed. ...

... [T]he postcolonial world was not a departure from the racial hierarchy on which colonialism was based but rather a rearticulation of that hierarchy on neocolonial terms. Antony Anghie and Siba N’zatioula Grovogui’s scholarship have advanced a version of this claim, extending the analysis of neocolonial scholars, such as Kwame Nkrumah and Walter Rodney, to demonstrate how, following formal decolonization, First World nations deployed multiple dimensions of the international system, including sovereignty doctrine and international institutional arrangements, to reproduce the economic and political domination of the First World over the Third. ...

The story we are telling about the inclusion of Third World nations into sovereignty on racially hierarchical terms transcends the boundaries of formal sovereignty doctrines. Neocolonial assertions of the international legal system implicate development doctrines, international economic law, international humanitarian law, and domestic legal regimes. ...

...

C. Moment III: Colorblindness

In Moment III, CRT and TWAIL expose and contest various iterations of colorblindness, including the idea that race no longer matters in structuring society and lived experience. In this moment, the analytical and normative fight is about both the speakability of race and racism and whether the real and pressing issues of inequality are somewhere (anywhere) beyond the boundaries of race and racism—think class, think religion, think nationalism, think culture. ...

...

... TWAIL scholars have analyzed ... the reliance of international legal doctrine on purported cultural differences that Europeans used to establish themselves as morally and legally superior to non-European peoples they colonized, exploited, and exterminated, cloaking imperial projects of racial subordination in the language of distinctions between the “civilized” and the “uncivilized.”

... [S]ome scholars in the field have been unwilling to name and confront the ways in which race has operated on the international landscape. Other scholars insufficiently distinguish between (and sometimes conflate) racial and cultural difference in ways that obfuscates how race has structured the global order and the treatment of nations and peoples within it. Still other scholars “in effect, minimize the role that race plays in international law,” elide the “sociopolitical system of Global White Supremacy,” and reduce their conceptualization of racism to the individual prejudices of a small number of aberrant international law scholars and practitioners. Each of the preceding scholarly approaches reflects a particular technique of colorblindness in the sense of avoiding or marginalizing concerns about race and racism or disappearing them altogether.

...

D. Moment IV: Social Responsibility and Agency

In Moment IV, CRT and TWAIL scholars engage and repudiate neoliberal claims about social responsibility and agency. Often expressed in the form of rhetorical questions, those claims look something like this: What’s wrong with Africa? What’s wrong with Black people? Why are Black people always rioting in their own communities? Why are they always killing themselves? Why are African nations always at war? Why are they so corrupt? Why are they so violent? Fundamentally, these questions are ... ways of rearticulating concerns about Black people’s fitness for citizenship and non-white nations’ fitness for sovereignty, to wit: Why can’t Black people properly manage the citizenship they have been given (by white people) and why can’t non-white nations properly manage the sovereignty they have been given (by white nations)?

Against the background normality, legitimacy, and ubiquity of questions of the foregoing sort, it is no wonder that the interventionary table for both civil rights and international law is set largely with ideas about foreign aid, antidiscrimination, and “racial preferences,” rather than ideas about reparations, redistribution, unjust enrichment, and disgorgement. ...

...

TWAIL scholars, too, have surfaced how international law and its implementations have racialized the Third World and its peoples as “proper” subjects of First World receivership. For example, Makau

Mutua contends that, as a historical matter, international law routinely depicted the Third World as culturally aberrant savages--corrupt, despotic, and violent -- and the populations of those states as “powerless, helpless innocent[s] whose naturalist attributes have been negated by the primitive and offensive actions of the [Third World] state. . . . “ ...

...

E. Moment V: Quasi and Second-Class Scholarship

... Moment V ... [focuses on] an epistemological legitimacy problem. ... CRT and TWAIL are always already under pressure to signal and supply intellectual credibility and to assimilate into, dare we say, the “civilized” conventions of constitutional law and international law, respectively. The perception that both literatures exist outside the boundaries of the presumptively neutral scholarly conventions of constitutional law and international law has engendered either criticism or willful disattention and nonengagement. ...

...

F. Moment VI: Reconstruction and Transformation

Moment VI speaks to CRT’s and TWAIL’s reconstructive interventions. In neither CRT nor TWAIL is this interventionary sensibility predicated on the view that law, standing alone, can produce a racially emancipatory world. The point is rather that law as a site of power should not be ceded but rather mobilized progressively to move the social justice needle. ...

...

... While the critique of international law is a fundamental part of TWAIL’s intellectual identity, the theory also reflects a commitment to rearticulate international law to achieve less subordinating and more liberatory ends. ... [To] borrow from Luis Eslava and Sundhya Pahuja, ... “[r]esistance and reform ... come together in TWAIL to form a single process of destabilisation and renewal of international law’s history and operation. Rather than replacement, TWAIL scholarship is more interested in overcoming international law’s problems while still remaining committed to the idea of an international normative regime”³²¹ For many within TWAIL, international law retains transformative potential, and law remains a means of constraining power, notwithstanding the indeterminacy that inheres in international law and in law generally. Thus, even while TWAIL scholars remain determined to confront and critique the imperial and colonial nature of international law, they view the abandonment of international law as a site of struggle, and potential emancipatory gains as a luxury that many Third World peoples cannot afford. ...

...

The Trump administration’s approach to equality-related programs in the United States.

On 20 January 2025, President Trump issued the first of a series of Executive Orders. It is entitled ‘Ending Radical And Wasteful Government DEI Programs And Preferencing’. Without revising any relevant legislation, the orders require the termination of diversity, equity, and inclusion (DEI) offices, positions, and programs in the federal government; termination of equity-related government grants and contracts; repeal of prior executive orders promoting workplace equal opportunity; and limiting what educational institutions can do to ensure equal access. This order, along with another addressing antisemitism, provides the purported bases for deeply punitive measures against elite universities and many other institutions.

³²¹ L. Eslava and S. Pahuja, ‘Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law,’ 45 *Verfassung Und Recht In Übersee* (2012) 195, at 204.

QUESTIONS

1. What conclusions might be drawn from the century-long history of engagement by both U.S. civil society groups and the U.S. Government in international debates over racism?

2. Consider the feasibility of the Council's global approach to anti-racism in light of the following analysis by Kevin Davis, in 'Legal Responses to Black Subordination, Global Perspectives', 134 *Harv. L. Rev.* (2021) 359:

[A] global perspective need not and should not presume that there is either a universal Black experience, a universal definition of Blackness, or a universally effective set of legal responses to Black subordination. ... ['Legal universalist'] projects founder whenever either (a) the people in the relevant jurisdictions face different problems or (b) the relevant legal response can be expected to have different effects in different environments. Both these factors ... are likely to limit the value of comparative analysis as a way of identifying legal responses to the problems that Black people face. Afro-descendants in different countries have different histories and do not necessarily have the same ideals and aspirations.

3. Does it matter if the focus of international anti-racism efforts is on 'racism' as opposed to 'racial discrimination'? Anna Spain Bradley, in 'Human Rights Racism', 32 *Harv. Hum. Rts. J.* (2019) 1, at 58, suggests that UN efforts have stopped short of tackling racism per se. She argues that it is essential to 'acknowledge the deeper problems embedded in racism, including the use of race as a means for categorizing humans, racial ideology that promotes racial supremacy, and racial bias.'

4. Critical Race Theory, with its emphasis on the need for intersectional and structural approaches to ending racism, has drawn a backlash in the United States. In March 2022, former President Trump said: 'Getting critical race theory out of our schools is not just a matter of values, it's also a matter of national survival. ... If we allow the Marxists and Communists and Socialists to teach our children to hate America, there will be no one left to defend ... its freedom' [Newsweek, 13 March 2022]. On 22 April 2022, Florida Governor Ron de Santis signed House Bill 7 on Individual Freedom (the 'Stop Woke Act') to confront 'both corporate wokeness and Critical Race Theory in schools'. 'Schools are required to teach factual information on topics including African American history and the Holocaust instead of subjective indoctrination that pushes collective guilt.'³²² Discuss in light of the materials above.

Israel

The situation in the Palestinian territories occupied by Israel since 1967 has long been among the most controversial and divisive of issues both on the global agenda and on that of the UN Human Rights Council. The United States vetoed 58 Security Council resolutions critical of Israel between 1972 and June 2025.³²³ One consequence was to move such debates to other UN organs. In 1975, the General Assembly (Res. 3379) notoriously declared that 'Zionism is a form of racism'. The vote was 72 in favour, 35 against, and 32 abstentions. That resolution was revoked in 1991 (Res. 46/86).

The Human Rights Council's Agenda has long been divided into ten different 'items'. Under item 4 – 'human rights situations that require the Council's attention' – violations anywhere in the world can

³²² 'Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination' (22 April 2022) at www.flgov.com

³²³ https://www.un.org/depts/dhl/resguide/scact_veto_table_en.htm

be debated. A separate item 7 concerns the ‘human rights situation in Palestine and other occupied Arab territories’. No other country situation is accorded a separate item. The Organization of Islamic Cooperation and other blocs within the Council argue that this is justified because the situation is different by virtue of the ongoing occupation. The Western Group and others consider the separate item to be discriminatory and evidence of a double standard that singles out Israel and downplays other situations of grave concern. In December 2006, the UN Secretary-General expressed his concern at the Council’s ‘disproportionate focus on violations by Israel.’ He added: ‘Not that Israel should be given a free pass. Absolutely not. But the Council should give the same attention to grave violations committed by other states as well.’

In 1993, the Council appointed a Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, who reports annually to the Human Rights Council and the General Assembly. The Council has also launched a series of high-profile inquiries. One of the most controversial was the so-called Goldstone Report, named after Richard Goldstone, the chairman of the Fact Finding Mission on the Gaza Conflict. The 452-page report (UN Doc. A/HRC/12/48 (2009)) concluded that grave violations of international human rights and humanitarian law and possible war crimes and crimes against humanity had been committed by both the Israel Defence Forces and the Palestinian armed groups. It called for action by the Council, as well as the Security Council and the General Assembly. The Gaza authorities facilitated a visit by the Commission, but Israel refused cooperation.

The report proved to be the start of a new round of ongoing and continuing controversy. It was powerfully criticized by Israel, the United States, and some other Western governments, and led to a severe backlash against human rights organizations in Israel,³²⁴ culminating in six leading Palestinian NGOs being designated by Israel as ‘terrorist organizations’ in 2021, and raids on their offices in August 2022 leading to their closure under Article 319 of the Emergency Regulations of 1945. The representative of Human Rights Watch had already been expelled from Israel in 2019.

Since the Goldstone Report, the Council has continued to appoint various inquiries to examine the situation but Israel has consistently refused to cooperate and has rejected the relevant reports. On 19 June 2018, the Trump administration withdrew the United States from membership of the Council. U.S. Ambassador Nikki Haley condemned the Council as ‘a protector of human rights abusers and a cesspool of political bias.’ She especially singled out:

[T]he chronic bias against Israel. Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel – more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.

Israeli Prime Minister Benjamin Netanyahu was reported to have thanked ‘Trump and Haley for their “courageous decision against the hypocrisy and the lies of the so-called UN Human Rights Council”’.³²⁵

In May 2021, the Council convened a Special Session in response to an outbreak of violence that, according to the Special Rapporteur, led to the deaths of at least 12 civilians in Israel and 240 Palestinians, including 63 children, in Gaza. In response, the Council (Res. S-30/1, adopted by 24 votes in favour, nine against, and 14 abstentions) created ‘an ongoing independent, international commission of inquiry’ with a mandate ‘to investigate in the Occupied Palestinian Territory, including East Jerusalem, and in Israel all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since 13 April 2021, and all

³²⁴ H. Khoury-Bisharat, ‘The Unintended Consequences of the Goldstone Commission of Inquiry on Human Rights Organizations in Israel’, 30 *Emr. J. Int’l L.* (2019) 877.

³²⁵ ‘US leaving UN Human Rights Council – “a cesspool of political bias”’, CNN (20 June 2018).

underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity’.

The following is a UN summary of the debate in the Third Committee of the General Assembly on 27 October 2022 (UN Doc. GA/SHC/4360) when the Commission’s first report was presented:

NAVANETHEM PILLAY, Chairperson of the Commission ..., presenting her report (UN Doc. A/77/328), highlighted the responsibility of Member States to ensure a just solution for the situation in Israel and Palestine that protects the human rights of all. Israel is treating the occupation as permanent, she said, annexing parts of the West Bank while hiding behind a fiction of temporariness. This permanence and annexation, including the purported de jure annexation of East Jerusalem and the Golan Heights, have led the Commission to conclude that Israel’s occupation is now unlawful, she added. Actions of the Israeli Government may constitute the war crime of transferring – directly or indirectly – part of one’s own civilian population as well as deportation or forcible transfer.

... Noting Israel’s security-based justifications for some of its actions, the Commission found that many actions in the West Bank are often used as a pretext to justify territorial expansion and that it could not identify efforts to end the occupation. Instead, statements made by officials indicate that the State intends for the occupation to be permanent. Citing coercive treatment of Palestinians, including destruction of properties and homes, mass incarceration and limitations on access to livelihoods, she said this environment is meant to force Palestinians to leave their homes to make room for more Israeli settlements. The report suggests that Israel has no intention of ending the occupation, and the conflict, if left unaddressed by the international community, will continue interminably, she said. The General Assembly should address the fact that Palestine is occupied due to the persistent refusal of successive Israeli governments to abide by international law. Next month, it will be 55 years since the Security Council adopted resolution 242, calling for Israel to withdraw from territories it occupied in the 1967 war, and yet Israel remains in occupation without any consequence, she said. ...

In the ensuing interactive dialogue, the *representative of Israel* recounted the death of five-year-old Ido Avigal by Hamas rocket shrapnel that penetrated a bomb shelter in Lod during a strike. He said that his story, like those of all Israeli victims of terror, is omitted from the hate-filled Commissioners’ report, as it deliberately omits Hamas rockets in lieu of placing blame on the law-abiding democracy of Israel. Pointing to Ido Avigal’s parents in the conference room, he asked Commission members to explain why they ignored their son’s murder, calling them heartless and dismissing the report as illegitimate. He said that, although it is no longer politically correct today to be antisemitic, the world now burns the Jewish State, as it once burned Jews at the stake, and decried the Human Rights Council’s disproportionate targeting of his country. The Council has adopted more resolutions condemning Israel than condemning Syria, the Democratic People’s Republic of Korea and Iran combined, he said. Adding that this inquisition of the Commission of Inquiry is led by countries like Libya, Venezuela and China, he cited the United States and United Kingdom’s opposition to Ms. Pillay’s open-ended mandate, calling her and her colleagues antisemitic and non-objective.

The *observer for the State of Palestine* said that Israel has no sovereignty over the Occupied Palestinian Territory, including East Jerusalem. This is guaranteed by law and not an opinion, she stressed. She condemned Israel’s refusal to allow the Special Rapporteur and Commission of Inquiry entry, as well as its obstructing Security Council visits to the Territories, stating that this is evidence of Israel’s efforts to hide its colonial and apartheid regime. ... Israel’s refusal to implement [various UN] resolutions and the continued lack of action or accountability from the international

community will only result in more arbitrary detentions, land theft, maimings and killings. She asked what third party obligations are regarding impunity in the context of occupation.

The *representative of the European Union* ... said that his delegation did not support the creation of this Commission of Inquiry because of concerns over its broad mandate. He expressed great concern over the occupation that began in 1967, calling on Israel to significantly improve the lives of the Palestinian people.

...

Responding to delegates, Ms. PILLAY said: “I am 81 years old, and this is the first time I have been accused of antisemitism.” Expressing astonishment at antisemitic labels for the report, she stressed that it is based on law and that Israel is bound by international law, just like all countries. Addressing criticism of the mandate itself, she said it is open-ended and will allow time to address issues raised, such as armed Palestinian groups and the implications of the conflict on children. She said that the Commission condemns all violence and expressed condolences to the mother of Ido Avigal, adding that, if Israel will allow her Commission access to the country, she will express her sympathies personally to all victims. ...

On 7 October 2023, heavily-armed Hamas forces launched a wave of attacks on Israel from Gaza, targeting and killing some 1,200 people - overwhelmingly civilians - in Israel, and taking 240 hostages, including children and elderly people. The Government of Israel responded that it was at war and within ten weeks over 20,000 people in Gaza (70 per cent of whom were women and children) were said to have been killed by Israeli bombing.³²⁶ On 26 June 2025 the UN reported that at least 56,156 Palestinians had been killed, and 132,239 injured. Between 27 May and 25 June 2025 549 people had been killed and over 4,000 injured seeking to access food distribution centres.³²⁷ Scholars have cautioned that statistics on deaths and physical injuries capture only a very limited part of the overall picture in such situations.³²⁸

Within three days of the Hamas attacks, the UN COI pointed to clear evidence of war crimes on both sides and on 27 October 2023 it accused ‘all parties to the conflict’ of having ‘shown reckless disregard for civilian life’ and called for them to ‘comply with international law to prevent atrocities from continuing’.

While some partisans on each side suggested that the blame lay entirely with the other side, the UN Secretary-General, António Guterres, told the Security Council on 24 October 2023:

I have condemned unequivocally the horrifying and unprecedented 7 October acts of terror by Hamas in Israel. Nothing can justify the deliberate killing, injuring and kidnapping of civilians – or the launching of rockets against civilian targets. All hostages must be treated humanely and released immediately and without conditions. ...

It is important to also recognize the attacks by Hamas did not happen in a vacuum. The Palestinian people have been subjected to 56 years of suffocating occupation. They have seen their land steadily devoured by settlements and plagued by violence; their economy stifled; their people displaced and their homes demolished. Their hopes for a political solution to their plight have been vanishing.

In response, Israeli ambassador Gilad Erdan accused Guterres of expressing ‘an understanding for terrorism and murder’. Israel called for Guterres’s immediate resignation and refused visas to UN humanitarian officials.

³²⁶ ‘20,000 Dead and Counting: The Battle Over Verifying Gaza’s Death Toll’, *Haaretz*, 26 December 2023.

³²⁷ <https://www.ochaopt.org/content/humanitarian-situation-update-300-gaza-strip>

³²⁸ F. Ní Aoláin, ‘Cumulative Civilian Harm in Gaza: A Gendered View’, *Just Security*, 25 June 2025.

After various draft resolutions were vetoed by different states in the Security Council, in 2024 the General Assembly, by a vote of 120-14-45 called for a ‘humanitarian truce’ and urged all parties to comply with IHRL and IHL. A more far-reaching resolution was adopted on 12 June 2025 by 149-12-19, also after a Security Council veto. Ambassador Erdan responded in 2024 that “the UN is committed to ensuring further atrocity. According to the family of nations, Israel has no right to defend itself.”

In June 2024, the COI presented two reports to the Human Rights Council. The first was a 59-page report on Hamas’s attacks in Israel (UN Doc. A/HRC/56/CRP.3) and the second a 126-page report on Israel’s assault on Gaza (UN Doc. A/HRC/56/CRP.4). In summarizing its findings (UN Doc. A/HRC/56/26) the COI found that a range of war crimes had been committed both by Hamas and Israeli forces. But by this time the main focus of the international community was on the announcement by the Prosecutor of the International Criminal Court that he had sought arrest warrants against three leaders of Hamas and the Prime Minister and Defense Minister of Israel (see Ch. 16B, below). In June 2025 (A/HRC/59/26, para. 76), the COI reported that Israeli attacks had damaged more than 70 per cent of the school buildings in Gaza, resulting in 658,000 children in Gaza having had no schooling in the preceding 18 months.

On 29 December 2023, South Africa instituted proceedings against Israel before the International Court of Justice (ICJ)³²⁹ claiming that ‘the conduct of Israel — through its State organs, State agents, and other persons and entities acting on its instructions or under its direction, control or influence — in relation to Palestinians in Gaza, is in violation of its obligations under the Genocide Convention’. It sought provisional measures, some of which were included in an Order delivered by the Court on 26 January 2024. By a vote of 15-2 (with Judge Sebutinde and Judge ad hoc Barak dissenting) the Court ordered Israel, in relation to Palestinians in Gaza, to:

... take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
- (d) imposing measures intended to prevent births within the group;

In addition, Israel was ordered to: ‘ensure with immediate effect that its military does not commit any’ of those acts; ‘take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip’; ‘take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip; and to report to the Court within a month on the measures taken to give effect to its Order. On 28 March 2024, the Court indicated additional measures.

On 24 May 2024 further measures were ordered in response to what the Court characterized as a ‘disastrous’ humanitarian situation in Rafah, the last remaining part of Gaza that had not been devastated and to which over one million Palestinians had fled. Rafah was then being targeted by a major military ground offensive. It concluded that the exacerbated crisis constituted a change in the situation that warranted new measures. The Court (by 13 votes to 2) ordered Israel to:

³²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part; ...

Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance; ...

Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide; ...

QUESTION

The United States has consistently argued that the issues that have arisen in the complex and contested relationship between Israel and Palestine could only be resolved through a political settlement. Where do the various elements described above fit within such an approach?

3. The Special Procedures System

In 2006, former UN Secretary-General Kofi Annan described the special procedures as ‘the crown jewel of the [UN human rights] system’. Those procedures consist of mandates focused solely on a specific country and a range of ‘thematic procedures’ devoted to a theme rather than a state or region and thus with a potentially global scope. Of fundamental importance is the status of those involved as ‘independent experts’, not beholden to governments or others.³³⁰ The first such mechanism was the Working Group on Disappearances, established by the Commission in 1980. Its origins lay in efforts to respond to the massive ‘disappearances’ that took place during the 1970s in Argentina’s ‘dirty war’ against leftist and other forces opposed to the military government. The government’s strategy was effective in avoiding condemnation by international human rights fora until 1978, when the Inter-American Commission on Human Rights issued a damning indictment. Despite this precedent, within the UN context many governments were reluctant to ‘name’ Argentina, for a variety of reasons ranging from trade interests to fear that they themselves might be next on the list.

To get around this opposition, the UN Commission opted to avoid a country-specific inquiry and instead established the first ‘thematic’ mechanism. Argentina hoped that the thematic approach would not single out any one country, would demonstrate that it was only one of many countries that had problems and would give a significant number of governments a strong incentive to ensure that the new mechanism would be kept under careful political control and thus remain ineffectual. But in the first few years of its existence, the Disappearances Working Group played an important role in developing techniques which were subsequently to serve as a model for a growing range of mechanisms dealing with other themes.

Number and Scope

Rapporteurs focused on specific countries are dealt with in Sec. B3, below. While the number of country rapporteurs has remained relatively stable (currently 14), the thematic mechanisms have grown almost exponentially. In 1985, there were three, there were six in 1990, 14 in 1995, 21 in 2000, 28 in 2007, and by 2025 there were 46. Of these, six were working groups: on disappearances, arbitrary detention, mercenaries, people of African descent, discrimination against women, business, and peasants’ rights. In 2024, by way of example, these mechanisms submitted 181 reports to the Council or the Assembly, including 57 country visit reports. The same year, 665 communications were sent to

³³⁰ A. Hoffmann, ‘The Plural Professional: How UN Human Rights Experts Construct their Independence’, 51 *Rev. Int’l Studies* (2025) 000.

124 governments and 145 non-state actors. In 47% of cases governments replied but many of these were not substantive. 500 press releases or other media notices were issued, and these often drew more of a response from the government concerned.³³¹

The 46 mandates deal with: (1) disappearances; (2) extrajudicial executions; (3) torture; (4) freedom of religion or belief; (5) the sale of children, child prostitution and child pornography; (6) arbitrary detention; (7) freedom of opinion and expression; (8) contemporary forms of racism; (9) independence of judges and lawyers; (10) violence against women; (11) hazardous substances and waste; (12) extreme poverty; (13) migrants; (14) foreign debt; (15) the right to education; (16) the right to food; (17) the right to housing; (18) human rights defenders; (19) indigenous peoples; (20) people of African descent; (21) the right to health; (22) internally displaced persons; (23) trafficking in persons; (24) mercenaries; (25) terrorism; (26) international solidarity; (27) business; (28) minority issues; (29) contemporary forms of slavery; (30) right to water and sanitation; (31) cultural rights; (32) freedom of assembly and association; (33) discrimination against women; (34) a democratic and equitable international order; (35) truth and justice; (36) environment; (37) older persons; (38) persons with disabilities; (39) unilateral coercive measures; (40) privacy; (41) persons with albinism; (42) sexual orientation and gender identity; (43) right to development; (44) persons affected by leprosy; (45) climate change; and (46) peasants' rights. Thus, in the years since the creation of the first mechanism in 1980, more than one new mechanism has been created on average every year.

The terminology used for the different mechanisms is confusing — 'Working Group', 'Special Rapporteur', 'Independent Expert', 'Representative' or 'Special Representative' of the Secretary-General — but relatively little significance attaches to it in practice. A few are appointed by the Secretary-General or the HCHR but most are appointed by the Chairperson of the Council who is expected to 'consult' with the regional groups before making an appointment. Those selected are generally prominent personalities from human rights-related backgrounds, including academics, lawyers, economists and NGO leaders. The first female expert was not appointed until 1994, but by 2025, 64% of mandate-holders were female. The experts receive no financial reward for their work, although their expenses are covered. They rely upon the OHCHR for secretariat services, but they have long complained of the gross inadequacy of the assistance available to them as a result of chronic financial and staff shortages within that Office. Some of them receive considerable financial support from governments or foundations, but others do not.

Mandate-holders self-nominate through a transparent nomination process. A Consultative Group, consisting of five government representatives who consult with all stakeholders, then makes ranked recommendations to the President of the Council. If the latter does not follow the group's recommendations, reasons must be provided for the divergence. 'Individuals holding decision-making positions in governments or in any other organization or entity which could represent a conflict of interest with the responsibilities arising from the mandate' are not eligible. A mandate-holder may be renewed once for a total of two three-year terms. The resolution establishing the Council envisaged that the Council might 'streamline, merge or eventually dismantle' some mandates. While some country mandates have been terminated, no thematic mandate has been.

Functions

The functions undertaken by the Special Procedures (with variations according to whether it is a country or a thematic mandate, and the nature of the issues involved) include the following: (i) responding to allegations of violations brought to their attention, usually through correspondence with the government and sometimes by issuing public statements; (ii) visiting a country to assess the situation and make recommendations to the government and the Council; (iii) undertaking 'thematic' studies that enhance the understanding of an issue perhaps contributing to the process of developing jurisprudence; and (iv) reporting annually to the Council and, in many cases, also the General Assembly.

³³¹ *Facts and figures with regard to the special procedures in 2024*, UN Doc. A/HRC/58/70/Add.1 (2025).

We turn now to consider each of the principal functions of the Council, in which the Special Procedures play an important part: standard-setting, country reporting, examining complaints, and carrying out the Universal Periodic Review.

Standard-Setting

The work of many of the Special Procedures has led to the elaboration of many new sets of guidelines, codes, recommendations and such like.³³² Among the more prominent examples of the latter are the Guiding Principles on Business and Human Rights (2011) and the Guiding Principles on Internal Displacement (1998),³³³ both of which originated from the work of experts reporting to the Council. A more recent example are the Méndez Principles on Effective Interviewing for Investigations and Information Gathering (2021), which emerged from the work of the former Special Rapporteur on torture, Juan Méndez.

QUESTIONS

In 1986, the General Assembly (Res. 41/120) adopted ‘guidelines’ for future human rights standard-setting. It suggested that proposed instruments should, *inter alia*:

- (a) be consistent with the existing body of international human rights law;
- (b) be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
- (e) attract broad international support.

Are these guidelines likely to exclude very many proposals? What factors do you consider might be the most crucial in deciding whether to embark upon a new standard-setting exercise?

Country Reports

Reporting on the human rights situation in individual countries constitutes an important part of the work of the Council, although it remains controversial and contested. Country reports are prepared by country rapporteurs, thematic rapporteurs and commissions of inquiry. The latter have become especially prominent in recent years and are dealt with in Chapter 10 below. It bears emphasizing that the focus on violations is only one part of the Council’s overall work.

A. COUNTRY RAPPORTEURS

As of 2025, the following 14 country situations were being examined under separate ‘country mandates’ by the Human Rights Council: Afghanistan, Belarus, Burundi, Cambodia, Central African Republic, Democratic People’s Republic of Korea, Eritrea, Islamic Republic of Iran, Mali, Myanmar, Palestinian territories occupied since 1967, Russia, Somalia, and the Syrian Arab Republic. The establishment of a separate country mandate is considered to be a ‘badge of dishonour’ by concerned states and such decisions are always hotly contested. Over the past decade, however, the Council has

³³² See generally J. Alvarez, ‘Standard-Setting in UN System Organizations’, in J. Klabbers (ed.), *The Cambridge Companion to International Organizations Law* (2022) 120.

³³³ ‘Twenty Years of the Guiding Principles on Internal Displacement’, 59 *Forced Migration Rev.* (2018) 4-51.

been much more likely to establish a commission of inquiry rather than seek to create a new country mandate. The latter generally have three commissioners, a sizeable staff, and a broad mandate. For now, we consider the functions that are served by a country rapporteur and the ways in which they might make a difference. The following report on Iran provides an example. Note that this reporting takes place parallel to examinations by treaty bodies of the reports submitted by States Parties to each treaty.³³⁴ The Council first appointed a Special Rapporteur on Iran in 1984. The position finished in 2002 but was reinstated in 2011.

**REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN THE
ISLAMIC REPUBLIC OF IRAN, MAI SATO, UN DOC. A/HRC/58/62 (12 MARCH 2025)**

[The report adopts a gender lens.]

...

II. Right to life

A. *Death penalty*

12. The year 2024 marked a significant increase in known executions, the highest since 2015 [at] ... well over 900

13. [The government] ... categorically rejected [these] execution numbers ... but failed to provide official statistics. ...

14. States wielding the power to impose death sentences have a corresponding obligation to demonstrate transparency and accountability. ... Opacity also makes it impossible for a State to demonstrate non-discrimination and equal treatment. ...

...

17. The categorization of a broad range of activities and activism as national security offences and the subsequent overturning of convictions in some cases point to arbitrary categorization as a means of suppression. For example, ... Kurdish activist Pakhshan Azizi ... [was] sentenced to death in July 2024 on multiple charges, including *baghy* [“armed rebellion against the State”] and “membership in opposition groups”. Her arrest and sentence appear to have been related solely to her legitimate work as a social worker, supporting refugees in Iraq and the Syrian Arab Republic. ...

...

Gendered analysis of the death penalty

26. Between January 2010 and January 2024, at least 241 women were executed. A small proportion of executions (26 per cent) were announced by official sources during that period

...

IV. Freedom of expression, association and peaceful assembly

41. ... The interrogation, arrest, detention and sentencing of labour organizers, cultural rights activists, human rights defenders and journalists not only directly limit the freedom of expression of those individuals but also create a chilling effect on the exercise of freedom of expression in the country. ...

...

43. ... The culture of impunity surrounding sexual violence persists, with survivors facing formidable barriers to justice, including social stigma, victim-blaming and fear of retribution

44. While the failure to wear the hijab is already punishable with heavy penalties under the existing Islamic Penal Code, the new Law on Protecting the Family through the Promotion of the Culture of Chastity and Hijab ... marked a dramatic expansion in the State regulation of personal dress codes. The legislation criminalizes hijab non-compliance for anyone over 12 years of age, both in physical spaces and online, while introducing harsh penalties, including extended prison terms of up to 15 years and possible death sentences under the offence of “corruption on earth”. Moving beyond traditional law enforcement, the measure employs a comprehensive strategy of social control through mandatory

³³⁴ For example, see the concluding observations of the Human Rights Committee on Iran (UN Doc. CCPR/C/IRN/CO/4 (2023)).

reporting requirements for citizens and businesses, State-directed educational programmes and technological surveillance. ... The approach effectively transforms private citizens into enforcement agents, fostering an environment of mutual suspicion and hostility, while placing particularly harsh economic and social burdens on vulnerable groups, including young people and social media users. There are also reports that the Iranian authorities have begun to use the label of “mental illness” to discredit or commit to psychiatric care those who violate or criticize the hijab law.

45. Beyond the implementation of stricter dress codes, the broader pattern of State control has coincided with a concerning trend of writers being imprisoned. ...

...

VI. Equality of men and women before the law

...

52. There is no law that criminalizes domestic violence in the Islamic Republic of Iran. The Bill to Protect the Dignity and Security of Women against Violence was proposed in the Islamic Consultative Assembly, and its initial draft was made public in 2017. Its general provisions were approved in April 2023 and it is awaiting another review by the Assembly. [The report recounts the convoluted drafting history and the strengths and shortcomings of the various versions.]

...

57. Women often hesitate to file criminal complaints against their abusers, not only because there is currently no law that criminalizes domestic violence but also because of cultural norms A recent study ... found that the police and the judiciary played a significant role in legitimizing and perpetuating violence against women by rationalizing violence as inevitable parts of family life and blaming women for bringing a private matter to public scrutiny. ...

58. The law on divorce is also gendered, with a man able to divorce his wife unilaterally. If a woman wishes to divorce and her husband is unwilling, however, she has to satisfy cumbersome evidentiary requirements. While the law includes wife battery or any kind of mistreatment of the wife as grounds for divorce, judges may still refuse to grant divorce, even in the most severe cases of domestic violence.

...

59. ... [W]omen’s judicial participation has been heavily restricted since 1982, when legislation explicitly limited judgeships to men, based on a constitutional requirement for sharia-compliant judicial criteria. While subsequent reforms have allowed women to serve in limited judicial roles, for example as legal advisers, investigators and family court consultants, they remain unable to independently issue verdicts. ...

60. In sum, women face multiple layers of barriers to justice due to discriminatory laws, institutional bias and societal constraints. The Civil Code and the Islamic Penal Code grant men disproportionate legal authority in marriage, divorce and child custody, while women’s testimony is valued at half that of men. Similarly, women’s freedom of movement in the Islamic Republic of Iran remains constrained by the 1973 Passport Law, which requires a husband’s written permission for a wife to obtain a passport. The Civil Code further entrenches gender discrimination through inheritance laws that systematically favour male heirs

VII. Child marriage

61. ... Article 1,041 of the Civil Code establishes problematic marriage age limits of 13 years for girls and 15 years for boys, while allowing those thresholds to be further lowered with guardian and judicial approval, potentially permitting marriages of girls as young as 9 years of age. ...

...

VIII. Access to education and employment

65. The Special Rapporteur notes that the Islamic Republic of Iran has achieved significant progress in educational access, with enrolment rates reaching 98 per cent in primary education and 94 per cent in lower secondary education. Women outnumber men in colleges and universities. That advancement has not translated into equal economic opportunities, however. As of 2023, women’s labour force

participation rate remained low (14 per cent) compared to men's (71 per cent). The disparity is reinforced by legal barriers ...

...

IX. Minorities

68. ... Religious and ethnic minorities face systemic discrimination, including arbitrary detention, unfair trials and the disproportionate application of the death penalty, often carried out in secret. Members of the Baha'i faith, Christian converts, Sunni Muslims and ethnic groups such as Azerbaijanis, Ahwazi Arabs, Balochis and Kurds, experience restrictions on their cultural practices, language rights and religious freedom, along with limited access to education, employment and economic opportunities.

...

X. Impact of sanctions

...

73. ... While urging States imposing sanctions to implement effective humanitarian exemptions to minimize human rights impacts, the Special Rapporteur cautions against attributing the country's economic challenges solely to sanctions. Sanctions have affected the economy; they do not, however, absolve the State from the responsibility to protect women's economic rights and opportunities. The low employment rate for women, discriminatory family laws, child marriage and inadequate domestic violence protections reflect domestic policy decisions independent of international restrictions.

XII. Recommendations

75. The Special Rapporteur appeals to the Islamic Republic of Iran:

(a) To continue to engage with the Special Rapporteur, including by granting her unhindered access to the country;

(b) Data and transparency:

(i) To make publicly available data disaggregated by sex, age, nationality and race on the use of the death penalty, ... ;

(ii) To make judgments publicly available ...;

(iii) To collect and provide reliable, updated and comprehensive statistics on the demographic composition of the population, including data on ethnic and ethnoreligious minorities;

...

(c) Death penalty:

(i) To establish a moratorium on the death penalty with a view to complete abolition;

(ii) To urgently abolish the death penalty for individuals who were below the age of 18 years at the time of the offence;

(iii) To abolish the death penalty for offences that do not meet the most serious crimes threshold under the Covenant, namely, drug-related offences, broadly defined national security offences, blasphemy, adultery and consensual sexual conduct between people of the same sex;

...

(e) Due process and detention conditions:

(i) To ensure that all accused have the right to a fair trial and due process ... ;

(ii) To ensure that prisoners and detainees are protected from all forms of torture and other cruel, inhuman or degrading treatment or punishment

(iii) To provide prisoners with access to timely and appropriate healthcare;
...

(f) Civic space:

(i) To ensure the protection of human rights defenders, activists, journalists, lawyers and their families from threats, intimidation, arbitrary arrest, detention or other sanctions and immediately release those detained for exercising their fundamental rights;

(ii) To end all forms of transnational repression, including violence, harassment, kidnapping and extra-judicial executions;

(iii) To treat dissent as a vital force for growth and progress, rather than a threat that must be suppressed, create an enabling environment for civil society organizations and remove restrictions on their operations;

(g) Bodily autonomy and violence against women:

(i) To repeal all laws that impose mandatory dress codes and ensure that women can participate freely in the community and have their safety and autonomy preserved, whether or not the hijab is worn;

(ii) To enact and strengthen laws criminalizing all forms of gender-based violence, including domestic violence, harassment, sexual violence and economic violence, with clear penalties for perpetrators;
...

QUESTION

How far should a Special Rapporteur go in challenging the basic cultural norms or the system of government in a country? What considerations might be relevant? Who is the intended audience for such a report?

B. COUNTRY REPORTS BY THEMATIC SPECIAL RAPPORTEURS

Thematic mandate-holders generally undertake two or three country missions annually. The purpose of these missions is explained below in the Manual prepared by the mandate-holders to guide their own activities. We then examine a critical report concerning a mission to China, and the government's response.

MANUAL OF OPERATIONS OF THE SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL (11 AUGUST 2008)

...

52. Country visits are an essential means to obtain direct and first-hand information on human rights violations. They allow for direct observation of the human rights situation and facilitate an intensive dialogue with all relevant state authorities, including those in the executive, legislative and judicial branches. They also allow for contact with and information gathering from victims, relatives of victims, witnesses, national human rights institutions, international and local NGOs and other members of civil society, the academic community, and officials of international agencies present in the country concerned.

53. Country visits generally last between one and two weeks but can be shorter or longer if the circumstances so require. The visit occurs at the invitation of a State

54. Country visits ... enhance awareness ... of the specific problems ... inter alia, through meetings, briefings, press coverage of the visit and dissemination of the report.

...

56. When a State does not respond to requests for an invitation to visit, it is appropriate for a mandate-holder to remind the Government concerned, to draw the attention of the Council to the outstanding request, and to take other appropriate measures

57. Considerations which might lead a mandate-holder to request to visit a country include, inter alia, human rights developments at the national level (whether positive or negative), the availability of reliable information regarding human rights violations falling within the mandate, or a wish to pursue a particular thematic interest. Other factors ... might include considerations of geographical balance, the expected impact of the visit and the willingness of national actors to cooperate with the mandate-holder, the likelihood of follow-up on any recommendations made, the recent adoption by one or more treaty bodies of relevant concluding observations, the upcoming examination of the situation by one or more treaty bodies, recent or proposed visits by other Special Procedure mandate-holders, the list of countries scheduled for consideration under the Council's Universal Periodic Review (UPR) mechanism, follow up to the recommendations and conclusions of the UPR mechanism, and the priorities reflected in OHCHR's country engagement strategy.

REVISED TERMS OF REFERENCE FOR COUNTRY VISITS BY SPECIAL PROCEDURE MANDATE HOLDERS

UN DOC. A/HRC/34/34/ADD.1 (2017) 51

During country visits, special procedures mandate holders of the United Nations Human Rights Council, as well as United Nations staff accompanying them, should be given the following guarantees and facilities by the Government that invited them to visit its country:

(a) Freedom of movement in any part of the country, including facilitation of transport, particularly to restricted areas;

(b) Freedom of inquiry, in particular as regards:

(iii) Contacts with central and local authorities of all branches of government;

(iv) Private contacts with representatives of civil society, including non-governmental organizations, other private institutions and the media;

(v) Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the mandate holder;

(vi) Access to all prisons, detention centres and places of interrogation as considered necessary by the mandate holder to fulfil his or her mandate; and

(vii) Full access to all documentary materials relevant to the mandate;

(c) Assurance by the Government that no person or group of persons, whether acting in their official or individual capacities, who cooperate, seek to cooperate, or have cooperated with the mandate holder in relation to the mandate, will for this reason suffer intimidation, threats, harassment or punishment, be subjected to judicial proceedings or to any other kind of reprisals by any means whatsoever; assurance that any measures that could deter such cooperation or be perceived as such, will be avoided. These assurances should apply before, during and after the conduct of country visits.

(d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above;

(e) Extension of the same guarantees and facilities mentioned above to the appropriate United Nations staff who will assist the special procedures mandate holder before, during and after the visit.

**PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND
HUMAN RIGHTS ON HIS MISSION TO CHINA
UN DOC. A/HRC/35/26/ADD.2, (28 MARCH 2017)**

...

Government cooperation

5. ... Between 1997 and 2015, six mandate holders visited [China]: on arbitrary detention (1997 and 2004); torture (2005); the right to education (2003); the right to food (2010); discrimination against women in law and in practice (2013); and foreign debt (2015). ...

6. The Special Rapporteur commends the Government for inviting him to China, but would also wish to draw attention to some difficulties that arose in the course of the mission:

(a) The Government's view that it was fully responsible for determining every detail of the agenda of the visit reflects a misunderstanding of the role of special rapporteurs as independent experts;

(b) The Government advised the Special Rapporteur not to make direct contact with civil society organizations to arrange meetings, and requested full details of any private meetings held. However, in conformity with established procedures, he notified the Government only when requested to do so by the civil society actor concerned;

(c) The Special Rapporteur was regularly followed by security officers posing as private citizens, thus making it virtually impossible to meet privately with civil society organizations and individuals;

(d) The Government warned the Special Rapporteur not to meet with individuals it considered "sensitive", and those individuals were warned not to meet with the Special Rapporteur; in one case, a person with whom the Special Rapporteur was supposed to meet was taken into custody for a couple of hours, thus preventing the meeting from happening;

(e) As a result of these combined measures, the Special Rapporteur was unable to meet with the great majority of civil society actors with any degree of freedom or confidentiality;

(f) The Yunnan visit was organized by the Government in a way that ignored the Special Rapporteur's stated preferences and ensured that most of the meetings and other activities were formalities;

(g) Both during and after the mission, certain individuals with whom the Special Rapporteur met or was supposed to meet were subjected to what appear to be acts of intimidation and reprisal. ... [Particular concern was expressed about] the disappearance on 21 November 2016 of human rights lawyer Jiang Tianyong, whom the Special Rapporteur had met in Beijing.

7. The ability of the special procedure mandate holders to carry out their tasks of promoting and protecting human rights depends on their being able to engage in free and unsupervised communication with civil society and private individuals, before, during and after country visits. This applies as much to visits to China as to any other country.

8. A mandate holder's programme is organized in consultation with the Government, but this does not mean that the Government is entitled to determine and control every aspect of the agenda or to insist that, apart from government officials, meetings can only be held with "approved" non-governmental actors. A mission conducted on that basis would not enable a special rapporteur to discharge his or her obligation to establish the facts impartially and independently. The resulting report would rightly be criticized for providing only an incomplete and distorted picture.

9. The basis on which United Nations human rights fact-finding missions are undertaken by special procedure mandate holders reflects long-standing practice spanning many decades — including initial sets of standards adopted in the 1950s and 1960s, the terms of reference adopted for the 1978 mission to Chile, and follow-up work by the Commission on Human Rights and the Economic and Social Council.

10. The procedural arrangements that were agreed in the late 1970s have been followed ever since, and were reflected in the 1998 terms of reference for fact-finding missions by special rapporteurs/representatives of the Commission on Human Rights and in the 1999 special procedures' manual of operations. ...

11. Both the 2007 code of conduct and 2008 revised manual of operations, which the Council noted are to be read "in consonance" with one another, emphasize the importance of experts acting "in an independent capacity", having the "freedom to assess" situations, establishing "facts, based on objective, reliable information", preserving "the confidentiality of sources", establishing a dialogue not only with government authorities but also "with all other stakeholders" and having their security protected "without prejudice to the privacy and confidentiality that mandate holders require to fulfil their mandate". The position expressed by the Government is clearly not compatible with these long-established principles.

**OFFICIAL RESPONSE BY THE GOVERNMENT OF CHINA
(22 MARCH 2017)**

...

XI. Visit Arrangement (paragraph 6, 72)

The Chinese side carefully prepared the visit to China by the Special Rapporteur, made utmost efforts to meet the requests of the Special Rapporteur, and arranged rich field visit activities. The Chinese side would like to carry out constructive dialogue and cooperation with the Special Rapporteur. At the same time, the Chinese side hopes that the Special Rapporteur could value the good faith of the Chinese side, strictly abide by its mandate, and refrain from dealing with questions irrelevant to poverty alleviation.

**HUMAN RIGHTS WATCH, THE COSTS OF INTERNATIONAL ADVOCACY:
CHINA'S INTERFERENCE IN UNITED NATIONS HUMAN RIGHTS MECHANISMS
(5 SEPTEMBER 2017)**

...

As a UN member state and party to several international human rights treaties, China engages with the UN human rights system. It is a member of the Human Rights Council (the "Council"), participates in reviews of its treaty compliance, allows some UN independent human rights experts to visit China, and joins in assessments of its human rights record and those of other countries as part of the Council's Universal Periodic Review (UPR) process.

Even as it engages with UN human rights institutions, however, China has worked consistently and often aggressively to silence criticism of its human rights record before UN bodies and has taken actions aimed at weakening some of the central mechanisms available in those institutions to advance rights. Because of China's growing international influence, the stakes of such interventions go beyond how China's own human rights record is addressed at the UN and pose a longer-term challenge to the integrity of the system as a whole.

Chinese officials have harassed activists, primarily those from China, by photographing and filming them on UN premises in violation of UN rules, and restricting their travel to Geneva. China has used its membership on the Economic and Social Council's (ECOSOC) NGO Committee to block NGOs critical of China from being granted UN accreditation, and it has sought to blacklist accredited activists to bar their attendance. Behind the scenes, Chinese diplomats, in violation of UN rules, have contacted UN staff and experts on treaty bodies and special procedures (independent experts focusing on specific human rights issues), including behavior that at times has amounted to harassment and intimidation.

In a particularly egregious case in 2013, authorities in China detained activist Cao Shunli after she urged the Chinese government to consult with civil society in drafting China's second Universal Periodic Review, and tried to travel to Geneva to participate in trainings on the Human Rights Council. After Cao became gravely ill in detention and died, the Chinese delegation in Geneva in March 2014 blocked a moment of silence called for by NGOs at the Council.

China has also repeatedly sought to block or weaken UN resolutions on civil society, human rights defenders, and peaceful protests, including when they do not directly concern policy and practice in China. And it has pushed back against efforts to strengthen some of the key mechanisms available at the UN to advance human rights, notably country-specific resolutions on grave situations like North Korea and Syria, and efforts to strengthen treaty body reviews.

...

While UN officials have at times pushed back against improper Chinese pressure or steadfastly ignored it, in other instances, they have capitulated, as illustrated by the Dolkun Isa case, or have soft-pedaled their concerns, presumably to avoid confrontation with China.

China is not alone in playing a negative human rights role at the UN but, as with all other countries, it should be expected to cooperate and constructively engage with UN institutions. When its actions are in bad faith, it should publicly be held to account.

...

DAVID KAYE, A REJOINDER TO CHINA'S RESPONSE TO UN HUMAN RIGHTS EXPERTS JUST SECURITY (27 JUNE 2020)

On [26 June 2020], fifty independent United Nations human rights experts published a statement expressing "alarm regarding the repression of fundamental freedoms in China." The statement calls for the implementation of immediate and decisive measures to protect against human rights abuses in the country. ... [T]he statement notes a range of concerns and urges China to permit independent experts access to the country to conduct independent human rights monitoring missions and calls on the UN Human Rights Council to consider mechanisms to monitor Chinese human rights behavior.

The Government of China was quick to respond. As a drafter and signer of the statement, I wanted to [reply].

...

Statements and Actions on China

For the last several years, the UN Human Rights Council has observed increasing repression of human rights in China. It is, of course, a complicated and remarkable country, with a history and culture as rich as any on earth and a massive potential to influence the development of international law and institutions. ... China regularly highlights the strides it has made in development terms, elements of which are certainly praiseworthy

Nonetheless, it is impossible to avoid the very serious ongoing allegations

We, as independent UN monitors, have regularly highlighted our concerns with the Government. ... [C]ommunications ... have addressed concerns about repression of the Uyghur population in Xinjiang, the attacks on autonomy and protest in Hong Kong, the role of censorship in the country, the detention of lawyers and activists in Tibet and across the country, and many other issues of extremely serious concern. However, despite these communications, and regular rejection of our concerns by the Government, the Government ... has not invited an expert focused on civil and political rights since 2005

The call for such measures is not all that unusual. In fact, we took the same approach the previous day, calling for an investigation into the widespread threats in the Philippines. Such calls are a regular part of our work. Such monitoring is not an interference with the sovereignty of any State but an

example of robust implementation of the mandates the Human Rights Council has assigned us. If we avoided this kind of monitoring, we would be abandoning our mandated responsibilities.

The same day we issued our statement, China quickly objected. Saying that the Government “categorically rejects and strongly condemns” the UN experts’ statement China called the statement an interference with its internal affairs. It also stated the following:

In recent years some Special Procedures “experts” have repeatedly abused their mandates out of ulterior motives and made press release based on unverified information to interfere with the sovereignty and internal affairs of States, to the extent of hijacking the work of the inter-governmental organization consisting of sovereign States. These acts have gravely breached the Charter of the United Nations, seriously undermined the credibility of the Special Procedures and aroused concerns from more and more States. The Human Rights Council must hold misconducts of “experts” accountable to ensure that the Special Procedures truly facilitate and contribute to the international human rights cause, instead of becoming obstacles to or undoers of human rights the world over.

A Brief Reply by the Special Procedures Mandate-Holders

It is entirely fair and even important for China to object and to identify any statements or allegations made in error. Experts on China, for their part, may wish to weigh in on the specifics of our statement and China’s response. But we make our assessments in good faith, and ... we call out all sorts of government behavior, whether from democratic or authoritarian States. Indeed, many democratic governments wonder why we call *them* out when there are such serious examples of repression worldwide.

... [T]he last line should be of particular concern ... – the threat to hold rapporteurs “accountable” for some kind of vague breach of standards. It’s true that the Council adopted a Code of Conduct in 2007 to guide Special Procedures, but there is nothing in that document that precludes the kind of statement we issued yesterday.

... Monitoring human rights is not some interference with state sovereignty or an “external intervention in China’s domestic affairs.” Monitoring human rights is the international community’s way to ensure that States meet their obligations to all people within their jurisdictions.

That oversight is obviously uncomfortable for many States, but it is the nature of the human rights system that the commitment to human rights means accepting that those obligations are international, owed to other States and to those subject to their jurisdiction. Human rights monitoring by its nature involves investigating the “internal affairs” of States. There is no magic wand of sovereignty that can wave that away.

* * *

Rana Siu Inboden concludes in ‘China, Power and the United Nations Special Procedures’, 15 *Global Policy* (2024) Suppl. 2, 74 at 81 that China’s ‘impact on this part of the UN remains modest overall since the functioning and independence of the [Special Procedures] remains intact.’³³⁵ In Sec. C, below, dealing with the High Commissioner, further consideration is given to China’s engagement with UN human rights bodies.

³³⁵ But cf. International Service for Human Rights, *China’s Efforts to Block Civil Society Access to the United Nations* (April 2025).

C. THEMATIC REPORTS BY SPECIAL RAPPORTEURS

FARIDA SHAHEED, ARTIFICIAL INTELLIGENCE IN EDUCATION, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO EDUCATION, UN DOC. A/79/520 (16 OCTOBER 2024)

I. Introduction

1. ... [T]he rapidly expanding use of AI tools and systems in education, often with limited oversight or regulation, merits urgent examination through the lens of the human right to education.

...

4. AI presents unique challenges that necessitate the rethinking of all three foundational pillars of education: curriculum, pedagogy and assessment. ...

...

II. Opportunities for artificial intelligence to advance the right to education

...

8. The actual impact of AI tools on learners, teachers or education systems, especially over time, is unclear. Problematically, the overwhelming majority of the claimed evidence of impact is produced by the developers of the tool studied. Studies on the long-term effects of the use of AI in education will take years to complete. ...

9. ... In the absence of independent research on the short-term and long-term impact of AI in education, only the claimed purpose of AI tools and potential implications can be reviewed in the present report.

10. This is achieved through the lens of the right to education framework, which includes the “4 As” necessary for quality education: accessibility, availability, acceptability and adaptability, adding to this the concept of accountability.

A. Personalized learning to advance availability of education

11. Personalized learning AI tools use adaptive technologies to adjust the difficulty and pace of lessons based on a student’s progress, allowing learners to focus on areas where they need support. Examples include AI-powered learning platforms, more complex learning management systems, intelligent (or adaptive) tutoring systems and AI-powered learning assistants or chatbots

12. These AI tools can support course management, content delivery, assessments and communication and aim to create tailored, engaging experiences in diverse in- person, hybrid or online learning environments. ...

13. AI tools may enhance availability by making personalized education available anytime, anywhere and allowing learners to access high-quality, individualized instruction regardless of location.

14. However, AI-powered learning platforms cannot replicate the emotional support, motivation and interpersonal connection essential for many learners

...

B. Assistive technologies and accessibility

1. Students with special learning needs or disabilities

16. Ethically developed and implemented assistive technologies can create more accessible learning places with, for instance, facial and sign recognition for sign languages, computer vision algorithms that interpret images and videos then translate information into Braille or audio output, bionic and rehabilitation technologies and algorithms that augment existing tools.

...

18. Social robotics and algorithms can support the education of students with neurodisabilities and those with psychoemotional disorders or anxiety-related learning disabilities. There are emotion recognition tools for students with autism and adaptive platforms supporting students who struggle with writing owing to dyslexia, dyspraxia, attention deficit or hyperactivity disorders.

...

2. Linguistic skills and diversity

23. International, refugee and migrant students or those speaking minority languages may benefit from AI-powered simultaneous translation and transcription tools which display subtitles in real time in different languages, albeit, to date, with different proficiencies. AI-based language learning apps and platforms offer interactive, personalized exercises, correct pronunciation and provide recommendations.

...

C. Adaptability and acceptability

...

28. Teachers stress that ... AI tools do save time on routine activities such as lesson planning, content creation or assessments. AI tools offer easy-to-use interfaces and design suggestions, for example image-generation, creating videos from scripts, quizzes and dynamic presentations Some tools offer real-time insights into student performances, enabling adaptive lesson planning and customized educational experiences to improve outcomes.

...

D. Accountability and data analytics

32. Learners' interaction with education hardware and software generates vast amounts of data, which, when properly curated and analysed, help teachers understand student progress and support better decision-making by school leaders. By analysing educational data, AI algorithms identify patterns, trends and correlations to inform instructional strategies, curriculum design and student interventions.

...

III. Risks and challenges of artificial intelligence in education

A. Privatization and platformization of education

...

38. A UNESCO report, *An ed-tech tragedy?*, highlights how, among other negative impacts, ed-tech has empowered and enriched already powerful private sector actors, enabled new invasive forms of surveillance and control and ushered in often overlooked environmental impacts, especially electricity and water consumption. Expansion of AI in education is likely to accelerate privatization and further reframe education as a private and commercial good, jeopardizing its special status as a human right and public good.

39. Reportedly, commercial enterprises aggressively push AI into classrooms, promoting digital systems for analysing institutional and student data or adding AI features to products that schools already use and cannot easily replace. Ed-tech is a lucrative market ... estimated to be worth \$20 billion by 2027. ... On average, by a child's thirteenth birthday, advertisers will have gathered more than 72 million data points about them. ...

40. As schools experience growing pressure for "digital transformation" in the name of improving efficiency, accountability and performance monitoring while cutting costs, commercial AI providers increasingly become private actors in public education, with schools and Governments relinquishing key functions and responsibilities to third-party technology vendors. As the commercial sector is inevitably driven by profit, digital education content and platforms become shaped by profit objectives

rather than children's best interests and right to education, with judgments about educational requirements made by tech companies rather than education professionals.

41. International law requires States to deliver free education of the highest attainable quality for all to the maximum of its available resources. However, school budgets, which are largely public funds intended for public education, are being channelled to private tech companies.

...

44. ... The transfer of educational decisions to national and international tech companies, the lack of transparency and participation in strategic decisions on AI use in education and the general opacity in AI-mediated systems in educational processes are elements of datafication. AI intrusion into school pedagogy and administrative processes and embedment in all school routines poses a direct and significant threat to the democratic governance of schools.

...

B. Digital tools and inequalities

46. ... One third of the global population remains unconnected or lacks basic digital infrastructure.

...

47. Rapid advancements in AI are widening the digital divide, between and within States. Income, geography, culture, gender, educational attainment and family structure, as well as race, language and urban/rural location, inadequate connectivity, limited access and insufficient digital literacy, all exacerbate the risk of falling further behind for learners without high-speed Internet or personal devices. Therefore, in 2019, UNESCO proposed that access to the Internet and AI technologies be considered as fundamental human rights.

C. Changing nature of learning, teaching and assessment

48. ... [O]verreliance on technology can encourage students to rely on AI formulaic answers, limiting active participation in the learning process, inhibit critical thinking and reduce reasoning and synthesis skills.

...

D. Deprofessionalization of teaching

55. ... [T]here are concerns about AI tools disempowering teachers and deprofessionalizing teaching, especially when pedagogical decisions are heavily influenced by algorithms. The danger is transforming teachers into mere facilitators in a narrow, technocratic approach to education that reduces human interaction and undermines teacher-student relationships.

56. Delegating tasks to a tutor-bot inserts a digital intermediary between students and teachers who are pedagogical experts in their fields, know their students and understand their contexts. ...

...

E. Privacy and data protection

62. The right to privacy encompasses multiple aspects of a person's physical and psychological integrity. The Committee on the Rights of the Child underlined that children have a right to privacy in digital spaces too. AI systems, too often introduced without any impact assessment, appropriate legal frameworks and safeguards, generate, collect, process, retain and use mass amounts of personal data to make inferences about students.

...

66. The use of generative AI tools in the education system, where many users are children obliged to use the technology adopted by their schools, raises serious concerns about data ownership, the use of

children’s personal information for third- party marketing, potential authoritarian abuses through digital surveillance, cyberattacks and exploitation of student data for cyberbullying and identity theft, such as harassment through circulation of deep-fake pornographic images, especially of female students and teachers.

67. Also troubling is the intrusive nature of AI-driven facial recognition technology in educational settings, increasingly used in a growing number of countries, despite persistent evidence of facial recognition technology biases, especially against students with disabilities and Black students. ...

69. The increasing trend of biometric surveillance technologies in education is worrying. The facial recognition technology variant, e-proctoring, is often used in higher education for remotely conducted examinations to verify student identities and monitor examination environments for suspicious activity. ...

70. There are parallel concerns about emotion recognition and social media surveillance. For example, educational institutions throughout Hong Kong use emotion recognition software to monitor facial expressions to determine children’s moods and motivational levels, gauge progress and even predict their scores.

71. Social media surveillance software also increasingly uses AI to flag purportedly harmful, inappropriate or concerning messages in student’s texts, social media or browsing history. From algorithms blocking or inappropriately flagging LGBTQ+ content and allegedly outing students to their parents, to “forestalling” protests, the software is used in ways that undermine students’ academic freedom, freedom of expression and right to non-discrimination. ...

F. Algorithmic biases, discrimination and misinformation

72. Artificial intelligence is based on the use of algorithms and the large-scale harvesting of publicly available data from which they “learn”. There is wide recognition that algorithms are not neutral, but neither is the Internet as a database. The data of marginalized groups without digital access are not in the training data sets. There are also biases due to the identity and backgrounds of programmers developing algorithms and those used to test algorithms.

74. As general-purpose AI systems can amplify misinformation and provide output that is simply wrong, using generative AI or conversational tutor-bots in education without critical oversight may impact the type of information and disinformation to which learners and educators are exposed. Education-specific tools generally have in-built safeguards and offer peer-reviewed content. Nonetheless, caution is needed in customizing educational content to guard against artificially limiting the diversity of perspectives. ...

G. Student well-being and mental health

75. Integrating AI in education may decrease face-to-face interactions, impeding the development of social, emotional and communication skills necessary to build healthy social relationships, with mental health implications for students. Generative AI and AI recommender systems pushing information to learners produce an information overload which impacts students’ concentration and, in turn, their behaviour in class.

76. Young people’s mental health crisis – a rise in anxiety, depression and self- harm – is often linked to the increased use of social media and the widespread adoption of smartphones and social media starting in the early 2010s. While there is not yet a consensus on the exact causation and extent of harm, the primary question should be whether there is sufficient evidence to deem AI, smartphones and social media technologies safe for children and adolescents. A precautionary approach is necessary, particularly within educational settings.

IV. Strategies for aligning artificial intelligence in education with human rights frameworks and principles

[The Special Rapporteur identifies and explains ten key strategies followed by a series of specific recommendations addressed to states and to the private sector. The strategies are:

- (a) Adhere to human rights principles; (b) close all digital divides as a matter of priority; (c) engage stakeholders; (d) ensure artificial intelligence alignment with educational goals; (e) implement ethical artificial intelligence frameworks; (f) establish robust legal and policy frameworks; (g) promote and facilitate artificial intelligence literacy; (h) recognize the right to due process in artificial intelligence-informed decision-making; (i) monitor and evaluate artificial intelligence impact; and (j) engage in international cooperation and sharing of best practices.]

D. RESPONDING TO COMPLAINTS

The great majority of special procedures mandates envisage a process of ‘communicating’ with governments about alleged human rights violations either through ‘allegation letters’ seeking an official response to alleged violations or through ‘urgent action’ letters which allege imminent harm unless a government acts immediately. This system seeks to: raise international awareness of allegedly significant violations; give states an opportunity to set the record straight and justify their actions; generate a record of abuses alleged against states over time; enable the mandate-holder to offer an interpretation of the applicable law; and provide an incentive for governments to act to rectify any violations.

The most sophisticated of the Special Procedures communications processes is that developed by the five-member Working Group on Arbitrary Detention, established in 1991. The Group receives cases from any relevant source, transmits the allegations to governments with a request for a reply within 90 days and then adopts an ‘opinion’ on the case. It was previously termed a ‘decision’, but this characterization was resisted by governments.

The following are examples of ‘communications’ issued by Special Procedures to different actors.

COMMUNICATION SENT TO THE GOVERNMENT OF ITALY, BY SPECIAL PROCEDURES MANDATE HOLDERS DEALING WITH: HUMAN RIGHTS DEFENDERS; INTERNATIONAL SOLIDARITY; THE HUMAN RIGHTS OF MIGRANTS; AND TRAFFICKING IN PERSONS (19 MAY 2022)

... [W]e would like to bring to the attention of your Excellency’s Government information we have received concerning the criminal prosecution of three human rights defenders for providing assistance to migrants and asylum seekers.

...

According to the information received:

On 14 March 2016, Messers. Gebremedhn, Ghebrehiwet and Mebrahtom, along with three other Eritrean men, were arrested on suspicion of being members of an international people smuggling organisation. They were charged with criminal conspiracy to facilitate illegal immigration under article 416 of the Italian Criminal Code and article 12 of the Consolidated Immigration Act, 1998. The accusations against these men stemmed from acts of assistance towards other Eritreans, which they had performed between May 2014 and October 2015. These acts included giving advice on how to use public transport, helping the migrants and asylum seekers buy tickets for buses or trains, buying them clothes, food, phones and sim cards, as well as hosting recently arrived migrants and asylum seekers and helping them find places to stay. ...

... The case was opened following an investigation involving the Italian Anti-Mafia Directorate in Rome and the Italian Coastguard into an alleged international organisation of people smugglers claimed to be involved in organising the journeys of people from Eritrea to Europe, via Italy. Proposed

evidence against the accused men was collected through surveillance conducted in the course of this investigation, including by means of wiretapping.

In the first instance, [the three, along with others], were convicted by the Rome Criminal Court of the charge of aiding and abetting illegal immigration ... and sentenced to between 2 and 4 years imprisonment, along with fines of up to €125,000. ... The decision was based on the Court's interpretation of the acts performed by the men as having been aimed at aiding the migrants and asylum seekers to cross Italy's borders into another State, an offence punishable under the Consolidated Immigration Act without a requisite profit motive. The Court dismissed the charge that the men had been involved in a criminal conspiracy [and the] charges relating to the illicit transfer of money [for lack of evidence].

The decision in the first instance was appealed by the defence to the Court of Appeal of Rome, ... [and subsequently] to the Court of Cassation

... Without wishing to prejudge the accuracy of the above-detailed allegations, we wish to underline our concern at the prosecution of [the three men], whose pursuit by the State would appear to represent the criminalisation of acts of solidarity and assistance towards migrants and asylum seekers through the misapplication of elements of the national legal framework designed, in principle, to regulate migration and combat trafficking in persons. ... We fear that this investigatory approach has contributed to the conflation of humanitarian acts of solidarity aimed at defending, promoting and enabling the fulfilment of the human rights of migrants, including the right to seek asylum, with criminal activity. We further state our concern that the result of this approach has been to repress the legitimate work of human rights defenders and to deter individuals from engaging in acts of solidarity with migrants and asylum seekers.

In this regard, we wish to stress the crucial role played by human rights defenders undertaking humanitarian action aimed at preventing and alleviating suffering of migrants

... [W]e would be grateful for your observations on the following matters:

1. Please provide any additional information and comment(s) [on these allegations].
2. Please provide detailed information to clarify the legal and factual basis for the prosecution[s]
... .
3. Please provide detailed information as to the legal basis for the pre-trial detention of [the three men], along with information as to the assessments taken to evaluate the necessity of such detention and information concerning the reasons for its extended duration.
4. Please provide information on any measures to ensure that criminal justice laws are not misused to punish migration-related humanitarian acts or to harass human rights defenders or civil society organizations that work with migrants.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

**COMMUNICATION SENT TO THE GOVERNMENT OF ERITREA, BY SPECIAL PROCEDURES
MANDATE HOLDERS DEALING WITH: TRAFFICKING IN PERSONS; DISABILITIES; ERITREA;
THE RIGHT TO HEALTH; INTERNALLY DISPLACED PERSONS; SALE AND SEXUAL
EXPLOITATION OF CHILDREN; AND CONTEMPORARY FORMS OF SLAVERY
(11 MAY 2022)**

... [We] have received [information] which indicates the occurrence of trafficking in persons, especially women and girls, for purposes of sexual exploitation, including sexual slavery, by members of the Ethiopian National Defense Force, the Eritrean Defense Forces, the Amhara Regional/Special Forces, Tigrayan forces, and militia groups, in the context of the armed conflict in the Tigray region of Ethiopia since November 2020, and later in neighbouring Ahmara and Afar regions.

According to the information received:

Sexual violence against women and girls in the Tigray, Afar, and Amhara regions of Ethiopia, has reportedly included abductions of women and girls, who have been arbitrarily detained, held in captivity for short periods (several days) and long periods of time (one or two months), and subjected to sexual exploitation including sexual slavery.

Women and girls have been held captive, and subjected to sexual exploitation, including sexual slavery, in military camps, in houses and in remote locations in rural areas. It is alleged that the acts of trafficking include the transfer and harbouring of women and girls, by means such as the use of force, abduction, coercion or abuse of a position of vulnerability, for purposes of sexual exploitation including sexual slavery.

There is a lack of effective action by the State to prevent such trafficking in persons for purposes of sexual exploitation, or to assist and protect victims of trafficking and persons at risk of trafficking.

...

Refugee women and girls in [five named camps] camps may have been trafficked for purposes of sexual exploitation by armed groups and armed forces. ...

Information received indicates that children, particularly in the Tigray region, may have been victims of trafficking for purposes of sexual exploitation by armed groups and armed forces. Further it is alleged that the high number of separated and unaccompanied children may be at particular risk of trafficking and have been provided with limited support or assistance to ensure a protective environment. ... The continuing lack of humanitarian access heightens risks

It is reported that victims of trafficking for purposes of sexual exploitation, who are pregnant as a result of being trafficked and raped, are not receiving specialized and adequate assistance or protection.

...

Men and boys may have also been victims

It is further alleged that commanders of armed forces, or other superiors knew or ought to have known that such violations of international human rights law, international humanitarian law and international criminal law, were being or were about to be committed, and failed to take all necessary and reasonable measures to prevent or punish these acts.

There are reportedly no effective investigations into [these] allegations

Without pre-judging the allegations raised, we express our grave concerns

... [We] would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on [these] allegations

2. Please provide information on any policies in place and/or the orders given to armed and security forces prohibiting sexual and gender-based violence, including trafficking
3. Please provide details, and where available the results, of any investigations, prosecution or criminal charges, and other inquiries carried out in relation to the allegations
4. Please provide information on what measures are being taken to ensure prompt identification of and assistance of victims of trafficking

...

QUESTIONS

1. Is it appropriate for the independent expert on the right to education to be raising such a wide range of issues about the impacts of artificial intelligence, or should this debate be located elsewhere within or outside the human rights system? Why, or why not?
2. Should access to the internet and/or AI be treated as human rights, per se?
3. Are the relevant governments really the principal addressees of the complaints sent to Italy and Eritrea, respectively, or do these communications serve other purposes as well?

E. THE UNIVERSAL PERIODIC REVIEW

The Universal Periodic Review (UPR), established in 2006, requires all UN member states to report to the Council once every 4½ years on their human rights record. This mechanism ensures that every state, rather than only those accused of serious violations, must account to the Council. It is a peer mechanism in the sense that the review is undertaken by states, rather than experts, and the reporting state retains significant control over the outcome.

The review is carried out by all 47 Council members acting as a Working Group. Three states, chosen by lottery (the ‘troika’), act as Rapporteurs in the review of a given state’s report. In addition to the National Report, there is (1) a ‘Compilation’ by the OHCHR of information from treaty bodies, special procedures and other UN sources; and (2) a ‘Stakeholder Summary’ of information submitted by civil society, researchers, national human rights institutions and others.

The ‘constructive dialogue’ between the ‘State under Review’ and the Working Group lasts for 3.5 hours. NGOs may observe but not pose questions. The troika then prepares a review of issues raised and the government concerned indicates which recommendations it accepts or rejects. The final outcome of the review is adopted by consensus. At the next cycle, the state is expected to report on the recommendations it has implemented in the intervening 4-5 years. The fourth round of the UPR began in 2022.³³⁶

HILARY CHARLESWORTH AND EMMA LARKING (EDS.),
HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW:
 RITUALS AND RITUALISM
 (2015) 1

...

We understand rituals as ceremonies or formalities that, through repetition, entrench the understandings and the power relationships that they embody. Rituals are a means of enacting a social consensus – or at least of demonstrating the efficacy of the mode of power they internalise. They can be markers of success, indicating that a way of thinking or of being has achieved some degree of permanence and importance: enshrining a practice as ritual reduces contestation. An example is rituals

³³⁶ See generally, D. Etone et al. (eds), *Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion* (2024); and S. Molloy, ‘The Universal Periodic Review and Peace Agreement Implementation: Conceptualising Connections, Challenges, and Ways Forward’, 12 *London Rev. Int’l L.* (2024) 95.

of transitional justice and of apology that mark a break between the old and the new, and signal a society's recognition of certain wrongs, as well as its determination to leave these wrongs behind. Although they seek to inaugurate a new order, such rituals are signs of success in the sense that they embody a new consensus about how a society now relates to its past and also intends to move beyond it. In doing so, rituals can help to establish and entrench that consensus. Rituals can also be understood as a more prosaic form of human engagement, helping make sense of incoherence in our social and political lives. On this account, rituals are concerned with 'the endless work of building, refining, and rebuilding webs of relationships in an otherwise fragmented world'. They may contribute to 'a world that, for brief moments, creates pockets of order, pockets of joy, pockets of inspiration'.

To engage in a ritual is to take part in an embodied performance. As such, participants' focus is often on the requirements of the performance rather than on its regulatory significance. Our aim here is, first, to highlight the presence of ritual in the UPR process. The cyclical nature of this process, and its carefully managed calendar of events, contributes to its ritualistic character. The process itself is also intricately managed and highly formalised. All parties must conform to the requirements of the process in order to secure their participation. ...

Observers of the UPR, whether sitting in the spectacular Salle XX of the Palais des Nations in Geneva where the Council meets, watching webcasts of proceedings, or ploughing through the summary records, are spectators to the elaborate rituals embedded in the process. These include the extended formal introductions, the courtly congratulations, the rigorously observed time constraints ... and the formulaic structure and style of UPR documents. Observers may register these rituals as entertaining, foreign, intimidating, bizarre, or perhaps just enervating, but they may be less likely to understand them as forms of social control and instances of regulatory power.

REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW:

UNITED STATES OF AMERICA

UN DOC. A/HRC/46/15 (15 DECEMBER 2020)³³⁷

Introduction

1. ... The review of the United States of America was held ... on 9 November 2020. The delegation [included the U.S. Ambassador to the UN in Geneva, the Assistant Secretary, Bureau of Democracy, Human Rights and Labor, and the Acting Legal Adviser, both from the State Department].
2. [The troika] to facilitate the review [consisted of]: the Bahamas, Germany and Pakistan.
4. A list of questions prepared in advance by [12 States] ... was transmitted to the [U.S.]

I. Summary of the proceedings of the review process

A. Presentation by the State under review

5. The Permanent Representative of the [U.S.] began by underscoring the pride of the [U.S.] in its human rights record. The [U.S.] advocated strongly for the universal freedoms of religion or belief and expression, including for members of the press, and for the rights of individuals to assemble peaceably and to petition their government for redress for grievances. In 2020, the United States had launched the International Religious Freedom or Belief Alliance ... [and] also joined 32 countries in signing the Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family

6. The Assistant Secretary, ... Department of State, said that promoting human rights was a foreign policy priority for the [U.S.] [It] was also firmly committed to finding meaningful remedies for claims of injustice at home. The demonstrations over the tragic death of George Floyd had shown the world that the citizens of the [U.S.] understood that they had the inherent right to raise their voices, individually and collectively, to demand that their government address their grievances.

7. A representative of the [U.S.] Department of Justice added that the [Minnesota] government ... had filed strong charges against four police officers for the death of Mr. Floyd. While the vast majority of police officers in the [U.S.] did their job bravely and righteously, some officers did not live up to their

³³⁷ Note that a Presidential election took place in the U.S. on 3 November 2020. As a result, the U.S. report was presented by the outgoing Trump administration, while the official response was provided in March 2021 by the incoming Biden administration.

responsibilities, leading some individuals, particularly in the black community, to lose confidence in the [U.S.] criminal justice system. ... Between 1994 and January 2020, the Department of Justice had opened 70 civil investigations into police departments On 16 June 2020, the President, Donald J. Trump, had signed an Executive Order entitled “Safe policing for safe communities” to develop and incentivize critical policing reforms.

8. The representative noted that the federal Government and most states in the United States had hate crime laws The [U.S.] did not criminalize speech, ... even when such ideas were found by some to be extremely offensive or harmful. The authorities did, however, act forcefully when hateful expressions turned into discrimination or violence, threats of violence or solicitations to commit violence.

B. Interactive dialogue and responses by the State under review

9. During the interactive dialogue, 116 delegations made statements. ...

...

11. The Acting [State Department] Legal Adviser ..., noted that the United States was a party to many human rights treaties and took those obligations very seriously. The reasons for not ratifying all treaties varied from treaty to treaty. ... In many cases, such as in respect of the Convention on the Rights of Persons with Disabilities, United States domestic protections were even stronger than those of international treaties. ...

12. The Attorney General for the State of Utah underscored state-level efforts to promote human rights. ...

13. A representative of the Department of Homeland Security said that the Department took seriously its role in ensuring proper implementation of immigration laws to protect the rights of citizens and non-citizens The Trump Administration had taken decisive action to strengthen the country’s border system, address the unintended consequences of laws and judicial rulings and work with neighbouring countries

...

17. A representative of the ... Department of Defense said that the [U.S.] had no plans to close its facilities at Guantanamo Bay

18. The representative said that the [U.S.] military took scrupulous care to ensure that military and counter-terrorism operations were conducted in accordance with all applicable domestic and international laws, in particular the law of war. ...

19. The representative of the [U.S.] Department of Justice said that the Federal Bureau of Prisons met its constitutional and statutory mandates by confining inmates in prisons and community-based facilities that were safe, humane and appropriately secure. The Constitution prohibited the use of solitary confinement in a manner that constituted cruel and unusual punishment. ...

...

25. The Permanent Representative of the United States thanked States for their constructive recommendations and reaffirmed the commitment of the United States to creating a more perfect union.

II. Conclusions and/or recommendations

26. The following recommendations will be examined by the United States

[347 separate recommendations are recorded in the report. The list below is illustrative, and the response subsequently given by the U.S. is noted in italics in square brackets, and is taken from UN Doc. A/HRC/46/15/Add.1 (4 March 2021).]

26.1 Consider ratifying all remaining human rights conventions (Somalia); [other states suggested ratification of CEDAW, CRC, CRPD, ICESCR, the Migrant Workers Convention, various optional protocols, the ICC Statute, the American Convention, and certain ILO Conventions]. [*Response: support recommendations to ratify CEDAW, CRPD, ILO Convention 111, and CRC.*]

...

26.65 Take immediate steps to overturn the executive branch decision to withdraw from the Paris Agreement (Fiji); [*Response: already done.*]

26.66 ... [L]ift sanctions against the International Criminal Court and constructively collaborate in investigations aimed at preventing impunity for international crimes (Switzerland); [*Response: ‘We continue*

to have concerns about the ICC's activities related to the Afghanistan and Palestinian situations. ... There may be exceptional cases where we consider cooperating with the court as we sometimes have in the past. ...]

...

26.76 Recommit to multilateral human rights institutions (Poland); [*Response: support.*]

...

26.95 Consider establishing a national human rights institution in accordance with the Paris Principles (India); [*Response: do not support.*]

...

26.105 Stop interfering in the internal affairs of sovereign States (Russian Federation); [*Response: do not support.*]

26.106 Stop interfering, for political purposes, in other countries' internal affairs under the pretext of human rights (China); [*Response: do not support.*]

26.107 Put an immediate end to the blockade against Cuba, which seriously violates the human rights of the Cuban people (Cuba); [*Response: do not support.*]

...

26.109 Respect the peoples of the world in their freedoms and in the democratic development of their own constitutional electoral processes (Nicaragua); [*Response: support.*]

...

26.112 Take effective measures to review policies at the federal, state and local levels with a view to preventing , racial discrimination, xenophobia and related intolerance (Slovakia); [*Response: 'share the ideals.'*]

...

26.123 Enhance laws and legislation based on the abolition of all forms of discrimination, racism and hatred (Saudi Arabia); [*Response: 'share the ideals.'*]

...

26.141 Take necessary measures to end systemic racism against minorities, including African-Americans (Islamic Republic of Iran); [*Response: support.*]

...

26.145 Address issues of racism, xenophobia and bullying among children at schools (Myanmar); [*Response: we share the ideals.*]

26.146 Take all possible steps at the state and federal levels to prohibit discrimination based on sexual orientation or gender identity in credit, education, employment, housing, jury service, public accommodation and taxpayer-funded programmes (Belgium); [*Response: support.*]

...

26.164 Prohibit torture in detention and ensure detainees have access to fair trials and full redress (Malaysia); [*Response: support in part.*]

...

26.167 Hold United States political and military personnel to account for war crimes committed by the United States military forces in the Syrian Arab Republic ... (Syrian Arab Republic); [*Response: do not support.*]

...

26.173 Stop the use of torture in antiterrorism operations, halt military intervention in other countries and stop killing civilians in military operations (China); [*Response: do not support.*]

...

26.180 Repeal the decision to resume federal capital punishment and take steps to promote federal- and state-level moratoriums on executions with a view to permanently abolishing the death penalty (Norway); [*Response: do not support.*]

...

26.215 Take necessary measures to reduce gun violence, concerned at the large number of gun-related deaths and injuries, which disproportionately affect members of racial and ethnic minorities (Iceland); [*Response: support.*]

...

26.228 Take urgent action to end systemic racism in police work and bring those responsible for racially motivated violence to justice (Belarus); [*Response: support.*]

...

26.240 Address further the issue of sexual violence in the military (Israel); [*Response: support.*]

- ...
- 26.242 Take further action to prevent overcrowding of jails and prisons, especially during the current pandemic; eliminating or reducing mandatory minimum sentences would be crucial to this effect (Portugal); [*Response: we share the ideals.*]
- 26.243 Take legal and practical measures to end deep-rooted racism and racial discrimination, police brutality, killings by guns and torture in national detention facilities (Democratic People's Republic of Korea); [*Response: support.*]
- ...
- 26.255 Continue to reduce the role of policing as a response to societal problems largely related to poverty, while investing in direct solutions to those problems that do not involve criminalization (Malta); [*Response: support.*]
- ...
- 26.261 Address the growing influence of extremist groups, such as white supremacists, within law enforcement agencies and start comprehensive training mechanisms focused on human rights and fundamental freedoms for law enforcement members (Turkey); [*Response: support in part, although do not agree with some premises.*]
- 26.262 Redouble efforts in addressing issues of racial disparities in the criminal justice system (South Sudan); [*Response: support.*]
- ...
- 26.266 Combat the increasingly severe religious intolerance and xenophobic violence (China); [*Response: support in part, although do not agree with some premises.*]
- ...
- 26.268 Adopt new measures to guarantee freedom of expression on the Internet (Haiti); [*Response: support in part.*]
- ...
- 26.271 Investigate any allegations of the excessive use of force by law enforcement officials against protesters and investigate any allegations of torture and reduce restrictions on the right to peaceful assembly (Egypt); [*Response: support.*]
- ...
- 26.275 Ensure the exercise of the right to vote, including by demanding that states refrain from using voter identification requirements that can have a discriminatory impact on voters (Germany); [*Response: support in part.*]
- ...
- 26.285 Introduce reforms to reverse the high rates of poverty and inequality and recognize economic, social and cultural rights internally (Cuba); [*Response: support in part; The U.S. is not a party to the ICESCR, and we understand that the rights therein are to be realized progressively. ... [W]e support the policy goals of reducing poverty and inequality.*]
- ...
- 26.293 Ensure access to health care, drugs and treatment to all segments of society (Iraq); [*Response: support.*]
- ...
- 26.299 Lift funding restrictions on United States foreign assistance to promote women's full access to sexual and reproductive health and rights (Norway); [*Response: support.*]
- 26.300 Clarify its approach to ensuring access to comprehensive sexual and reproductive health services (United Kingdom ...); [*Response: support.*]
- ...
- 26.318 Encourage further private employers to strengthen equality and to offer paid maternity leave (Israel); [*Response: support.*]
- ...
- 26.337 Seek alternatives to the present immigration detention system and improve conditions of confinement to meet basic human rights standards (Zambia); [*Response: support.*]
- ...
- 26.345 Include in legislation the ban on the separation of families in the context of migration (Luxembourg); [*Response: support.*]
-

* * *

The format and language used by states in responding to UPR recommendations varies considerably. While the U.S. indicated explicitly its non-support for various recommendations, other states merely ‘take note’ of recommendations with which they do not agree. Some also situate their response in light of a general policy statement. Consider Singapore, for example:³³⁸

2. ... Singapore takes a practical and outcomes-based approach to implementing our human rights obligations. This involves the careful balancing of competing rights according to our national priorities and unique circumstances. Singapore’s approach to human rights is premised on two tenets. First, human rights do not exist in a vacuum and must take into account a country’s specific circumstances including cultural, social, economic, and historical contexts. Second, the rule of law is an essential pre-condition for the promotion and protection of human rights.

...

4. For many of the recommendations we have noted, Singapore already has legislation and policies that address the underlying objectives in ways that best suit our unique social and cultural context. Singapore has not supported recommendations which are predicated on unfounded assertions, inaccurate assumptions, or erroneous information. We also cannot implement recommendations that are not appropriate in our national context.

COMMENTARY ON THE UPR

The UN has emphasized the importance of the UPR process for country-level advocacy. It notes that ‘UPR recommendations accepted by a State – publicly in front of all its peers and other stakeholders – present an important entry point for positive engagement and advocacy on many issues within the mandate of [the UN Country Teams] and peace operations’.³³⁹ A review of experience with the UPR concluded that the process has been characterized by an unusually ‘collaborative spirit’ among stakeholders, and points to the enhanced involvement of national parliaments, NHRIs, UN agencies, and a broad array of civil society groups.³⁴⁰ This is, of course, not always the case, as illustrated by Guatemala in 2023, when the Government ‘noted’ 40 per cent of the 207 recommendations received (UN Doc. A/HRC/53/9/Add.1), thereby effectively rejecting them.

ROCHELLE Terman and ERIK Voeten, *The Relational Politics of Shame: Evidence from the Universal Periodic Review* 13 REV. INT’L ORG. (2018) 1

...

The informative value of politicized peer-review

Theoretical argument

We propose that governments are sensitive to symbolic political assessments, even when those assessments are neither independent nor impartial. ...

... [O]ur explanation for shaming in the UPR emphasizes the political relationship between source and target. Because states behave primarily to further their material interests, they strive to avoid alienating other states on which those interests depend. Goodliffe and Hawkins call this set of partners a “dependence network”: those with whom a state “regularly engages in exchanges of valued goods,

³³⁸ UN Doc. A/HRC/48/16/Add.1 (10 September 2021).

³³⁹ OHCHR, *Maximizing the use of the Universal Periodic Review at country level: Practical Guidance* (2020).

³⁴⁰ M. Kothari, *Study on emerging Good Practices from the Universal Periodic Review* (UPR) (OHCHR, 2021). See also M. Lane, ‘The Universal Periodic Review: A Catalyst for Domestic Mobilisation’, 40 *Nordic J. Hum. Rts.* (2022) 507.

where those exchanges would be costly to break”. These goods can be economic, security, or political in nature, including humanitarian aid, foreign policy support, and military alliance. States exchange such goods in the context of a strategic partnership, where each party cooperates as a means to further their own interests. Insofar as states value these relationships, they will strive to maintain them by anticipating potential reactions from their partners. As Goodliffe and Hawkins note, these reactions need not involve explicit rewards or punishments contingent on the behavior in question. Rather, states merely anticipate the *potential* costs (or benefits) to a valued relationship, and factor these into their decision calculus. All else equal, states would rather avoid provoking a negative judgment from their strategic partners.

How does this insight pertain to interstate interactions in the UPR? We propose that peer-review is mediated by strategic relations between reviewer and target, affecting the behavior of each party. This involves two distinct yet interrelated mechanisms. First, we expect governments to vary their evaluations depending on their political ties to the SuR [state under review]. Although delegations are mandated to be objective in their reviews, the reality is that recommendations vary widely in tone, ranging from disparaging to congratulatory. On average, states will condemn their strategic partners less harshly so as to signal their commitment to a valued relationship. In general, states do not take well to accusations of human rights abuse. When evaluating a partner, delegations on average mute their criticisms so as to avoid this negative reaction.

At the same time, some states genuinely do care about human rights. This concern may originate in domestic societal pressure (e.g., an outraged public demanding condemnation of an abuse abroad) or the normative beliefs of government officials. In some cases, these preferences are strong enough to warrant a tough stance and risk alienating an otherwise beneficial partnership. When a state publicly shames its strategic partner, it serves as a credible signal reflecting the shamer’s preferences vis-à-vis human rights, and the target will take such criticism seriously in order to maintain the relationship.

...

When deciding whether or not to accept a recommendation, states must factor in political context, because recommendations reveal very different signals depending on the source. In a politicized environment, governments interpret criticism by their enemies as a cynical attempt to sully their country’s reputation. Not only are there few incentives to comply in such cases, doing so may confer costs on the part of the SuR if they are seen as “kowtowing” to the enemy. On the other hand, recommendations mean something very different when coming from a state that shares strong political, economic, or security ties with the target. Since there are few *strategic* incentives to criticize friends, shaming in this case serves as a credible signal reflecting the critic’s preferences on a particular norm. In this context, the SuR is more likely to accept the recommendation in order to avoid damaging a valuable partnership.

...

**KAROLINA M. MILEWICZ AND ROBERT E. GOODIN, DELIBERATIVE CAPACITY BUILDING
THROUGH INTERNATIONAL ORGANIZATIONS: THE CASE OF THE UNIVERSAL PERIODIC
REVIEW OF HUMAN RIGHTS
48 BRIT. J. POL. S. (2016) 513**

Pinning any great hopes on international organizations has, since the failure of the League of Nations, generally been thought to be the province of dewy-eyed idealists. Hard-headed realists know that international organizations are simply the products of deals struck by nation states for their own purposes. They are creatures of states, at the service of states; states can enter reservations and derogations upon joining them and, by and large, states can leave them whenever they want with due notice. Realists have trouble seeing how such organizations could ever transcend the narrow purposes of the states that created them. It is hard for them to see how such organizations can get states to do anything they seriously do not want to do.

Organizational sociologists, however, know all is not quite as it seems to the self-styled realists. International organizations ‘bring people together’. They ‘convene’; they ‘orchestrate’. Once created,

international organizations – like all organizations – take on a life of their own. They acquire purposes and missions, proud histories and follow-on aspirations, all of which infuse the lives of those working in them and with them. Maybe they make only soft, unenforceable law in the first instance. But that takes on increasingly hard forms over time, as actors in and around the organizations increasingly invest their outputs with normative force.

Realists may scoff, saying that demands that are ultimately unenforceable are practically irrelevant. But norms developed within and around international organizations can increasingly come to constrain even powerful players. ...

...

Assessing the UPR's Contribution to the Deliberative System

...

A threshold question is whether the UPR process really involves much deliberation. Its centerpiece is a highly public moment of state-to-state discursive accountability, during the Interactive Dialogue in the grand Salle XX of the Palais des Nations in Geneva. That is a hugely important event, at which national governments are questioned on their human rights performance by other states, with NGOs in the room and many of their citizens back home watching the live or archived webcast. The live webcasts of their countries' Interactive Dialogues was watched by some 5,000 people in China, 6,000 in Malaysia and an astonishing 7,000 in tiny Vanuatu (almost 3 per cent of its population). In some cases, citizens were seeing their rulers publicly account for their human rights practices for the first time; the Saudi delegation seems to have felt this particularly, coming to its first UPR with an exceptionally large, senior and well-prepared delegation.

...

While the proceedings on the day itself may fall short of the highest deliberative ideal, the requirement that states present themselves for questioning induces a great deal of high-quality deliberation in the run-up to (and the backwash of) the open session. There are protracted discussions within the government of the SuR – and with and among stakeholders – about formulating the national report to be submitted to the UPR and anticipating challenges that might arise during it. There are protracted discussions within the UNOHCHR, and between them and stakeholders, in preparing the stakeholder report, and within the UNOHCHR in preparing its own submission to the UPR. The troika passes questions from other states to the SuR in anticipation of the Interactive Dialogue, and facilitates discussion among states over their recommendations afterwards. While the SuR does not have time to respond to all the interventions and recommendations on the day, it is expected to give a written response to each recommendation within a few months of its Interactive Dialogue. Furthermore – crucially – each country will be subject to another Interactive Dialogue in four-and-a-half years. So responding to the last Interactive Dialogue blends into preparing for the next, as part of an ongoing dialogic process.

In short, the UPR as a whole is a protracted deliberative process, with a moment of highly public state-to-state accountability at its heart. ...

We now assess the quality of the deliberation involved in terms of the elements introduced above. The first element of a high-quality deliberative system is inclusiveness. The UPR is insistently open and inclusive, certainly with respect to all UN member states and to all internationally recognized human rights organizations. It is specifically designed to 'ensure universal coverage and equal treatment of all States' and to 'promote the universality, interdependence, indivisibility and interrelatedness of all human rights'.

Universality is not merely UPR's aspiration: it is its hallmark. Every state took part in its first UPR and, so far, every state has taken part in its second. ...

Looking beyond member states, the UPR also mandates the participation of all relevant stakeholders, 'guided by the principles of universality, impartiality, objectivity and non-selectivity'. This demopolizes states as suppliers of information. NGOs provide independent information and transparency, especially where the states fail to report fully or reliably. Taken as a whole, NGOs introduce a diversity and range of views that would be missing under standard practices of monitoring

and reporting. They also play a leading role on the ground, gathering together different segments of their society in UPR-related events prior to the review, disseminating information and providing training to less experienced NGOs.

...

Why It Works: Deliberative Capacity in Action

The case of the HRC's UPR reveals 'what it takes' for deliberation to 'have effect' in the international setting. Three features of the deliberation seem highly useful in that connection.

One crucial source of the UPR's deliberative capacity is the fact that it is a repeated game among the same players. Repeat play can evoke more co-operative behavior, simply because players will have an opportunity to reward or punish one another in subsequent rounds of the game, depending on how they behave in this round; as a consequence, the shadow of the future makes players better behaved in the current round. This is one plausible interpretation of how international law constrains states' behavior in general.

...

A second, related source of the UPR's deliberative success is peer-to-peer accountability. It matters greatly that the UPR is a system of peers reviewing one another's performance, because peers care about each others' opinions. ... States can dismiss experts and NGOs, but not other states.

Among some states, particularly of the Global South, it is a point of pride to boast of the large percentage of UPR recommendations that they accepted. ...

But the peer pressure is felt equally keenly by the most powerful states in the world. Members of the G20, and especially the P5, are under special scrutiny in the UPR precisely because they are ordinarily immune. They particularly feel the obligation to 'look good' – or as good as they can – at their UPR in order to vindicate their position of international leadership.

The third crucial element of the UPR process is discursive entrapment. This is a particular instance of a more general process by which recalcitrant states are socialized into international norms, including human rights norms: 'Norm-violating governments accepted the norms rhetorically in order to decrease the international and domestic pressures against them.' But after making what started as a purely tactical rhetorical concession, states are increasingly held responsible (by themselves as well as others) for acting on it. This leads to increasingly co-operative joint action toward increasingly convergent goals. Parties have simply 'talked themselves into a corner', as a result of 'rhetorical coercion', 'persuasion' or 'socialization'.

An analogous cycle of self-entrapment seems to be at work in the UPR. In one cycle, the SuR receives a raft of recommendations. As a tactical concession to placate critics (at least in the short term), an SuR that is under heavy pressure over its human rights record might 'accept' some of the recommendations. But at its next UPR, it will have to account for its follow-through on the recommendations it accepted.

...

Conclusion

The UPR of human rights is, at face value, a toothless mechanism. Realists would scoff at its absence of any serious sanctions. But under some conditions, seemingly toothless mechanisms can have a real impact. Peer-to-peer accountability – universal in scope and repeated in form – engages states in co-operative dialogue that leads, for example, to their ratifying human rights treaties that they had failed to ratify before. Furthermore, the deliberative engagement is not only with other states but also with civil society, and the dialogue is continuous in form – occurring not only in anticipation of moments of peer-to-peer accountability but also because of it. In this way, the UPR mechanism induces a much more co-operative, deliberative culture across the system as a whole.

...

QUESTION

Cowan has argued that the UPR process ‘deflects attention away from human rights harm caused by parties beyond the state, including the actions of states that are acting as monitors.’ She cites the example of the 2016 review of Greece in which only Iceland acknowledged that there was an element of collective responsibility on the part of other European states and the International Monetary Fund in the austerity policies that had caused so many problems in the country.³⁴¹ To what extent does the UPR decontextualize problems and serve to ignore the responsibility of actors other than the State?

C. THE HIGH COMMISSIONER FOR HUMAN RIGHTS

The first UN High Commissioner for Human Rights (HC) took office on 5 April 1994. The following day, the aircraft carrying the Rwandan President, a Hutu, was shot down, and a wave of genocidal killing ensued in Rwanda. The HC was plunged immediately into having to deal with an epochal human rights crisis with a mere handful of staff. Over the following three decades, the HC has been at the heart of many of the most intractable challenges in the field, as well as being responsible for managing a rapidly growing office that today has over 1,800 staff from 154 nationalities, half of whom are located in Geneva and New York, with the other half in 101 ‘field offices’ around the world.

Proposals to create such a post emerged in 1947. The Soviet Union and its allies were strongly opposed, most developing countries were very wary, and even the West was ambivalent. The breakthrough came at the Vienna World Conference on Human Rights in 1993. A combination of factors were at play: the demise of the Socialist bloc, post-Cold War optimism, and a new (Clinton) administration in the United States. Boutros Boutros-Ghali, then UN Secretary-General, opposed the initiative. He subsequently did all he could to limit the potential of the office.

General Assembly Resolution 48/141 (1993) decided that the HC was to be appointed by the Secretary-General, with the approval of the General Assembly (which, in practice, has been a formality). The HC can serve a maximum of two four-year terms, although not one of the office-holders has so far served for the full eight years. The likelihood of earning the enmity of powers great and small seems too great. In principle, there should be ‘geographical rotation’ in terms of the nationalities and regions from which the appointee comes.

Resolution 48/141 described the HC as the UN ‘official with principal responsibility for [UN] human rights activities under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights’. The HC’s responsibilities are:

- (a) To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;
- (b) To carry out the tasks assigned to him/her by the competent bodies of the United Nations system in the field of human rights and to make recommendations to them with a view to improving the promotion and protection of all human rights;
- ...
- (e) To coordinate relevant United Nations education and public information programmes in the field of human rights;

³⁴¹ J. K. Cowan, ‘Modes of Acting Virtuously at the Universal Periodic Review’, in G. Vasconcelos Vilaça and M. Varaki (eds.), *Ethical Leadership in International Organizations: Concepts, Narratives, Judgment, and Assessment* (2021) 176, at 201.

(f) To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world, as reflected in the Vienna Declaration and Programme of Action;

(g) To engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights;

...

(j) To rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness;

...

The following individuals have served as HC:

- 1994-1997: José Ayala-Lasso, previously Foreign Minister of Ecuador;
- 1997-2002: Mary Robinson, previously a human rights lawyer and President of Ireland;
- 2002-2003: Sergio Vieira de Mello, a UN humanitarian specialist from Brazil, killed in a bombing in Baghdad;³⁴²
- 2003-2004: B. G. Ramcharan, a senior UN official from Guyana, who served as acting-HC;
- 2004-2008: Louise Arbour, previously a judge of the Supreme Court of Canada, and ICTY Prosecutor;
- 2008-2014: Navanethem Pillay, former South African High Court judge, and President of the ICTR;
- 2014-2018: Zeid Ra'ad Al Hussein, former Jordanian Ambassador to the UN;
- 2018-2022: Michelle Bachelet Jeria, former President of Chile; and
- 2022--- : Volker Türk, previously a senior official in the UN and the Office of the UN High Commissioner for Refugees.

The HC plays many roles, including being the main UN spokesperson on human rights issues, the principal human rights interlocutor with governments at the foreign minister and presidential levels as well as with all levels of civil society, CEO of the Office of the HC, and human rights envoy to other UN and international organizations. The complexity of the job was highlighted by HC Zeid Ra'ad Al Hussein in his farewell speech to the Council on 18 June 2018:

... [T]he UN is symptomatic of the wider global picture. It is only as great or as pathetic as the prevailing state of the international scene at the time. ...

There is a dangerous remove and superficiality to so many of our discussions, so much so that the deepest, core issue seems to have been lost on many.

...

Those of us in the UN Secretariat ... work collaboratively and we do not answer to any State. In contrast, too many governments represented at the UN will often pull in the opposing direction: feigning a commitment to the common effort, yet fighting for nothing more than their thinly-thought interests The more pronounced their sense of self-importance – the more they glory in nationalism – the more unvarnished is the assault by these governments on the overall common good: on universal rights, on universal law and universal institutions, such as this one.

And as the attack on the multilateral system and its rules, including most especially international human rights law, intensifies, so too will the risk increase of further

³⁴² S. Power, *Chasing the Flame: One Man's Fight to Save the World* (2008).

mischief on a grander scale. The UN's collective voice must therefore be principled and strong; not weak and whining, obsessed with endless wrangling over process, the small things, as it is the case today.

The HC is also chief fund-raiser for the Office, a role made more difficult by chronic under-funding, which is often intentional on the part of governments. In 2024, OHCHR's 'aspirational' budget was \$692 million. Only \$169.5m came from the UN's regular budget (see UN Doc. A/80/6 (Sect. 24) (2025)). An additional \$270m was raised through voluntary contributions, leaving a shortfall of \$256m. Leading contributors included the United States, the European Commission, Germany, Sweden, Norway, the UNDP, the United Kingdom, the Netherlands, Denmark, Switzerland, the Republic of Korea, Belgium, China, Spain, Saudi Arabia, Luxembourg, and New Zealand. These voluntary contributions depend on the goodwill of states from year to year, and accounted for almost 60 percent of the total budget. But two-thirds were 'earmarked', or donated for specific purposes.³⁴³

In 2024, the Office had 2,046 staff, of whom 61% were 'international' and 39% were 'local'. 51% were based in Geneva or New York, and 49% in 'the field'. 57% were women and 43% men. In 2025, the United States ceased all funding for the OHCHR, including for arrears. Major donor countries began reducing their overseas development assistance (with the United States all but eliminating the US Agency for International Development). In July 2025 the UN was implementing 20% across the board budget cuts, with major implications for all of its human rights activities, including treaty bodies, special procedures, and field offices.

1. Reporting from Field Offices

Among the many functions played by the HC, we briefly consider below the Office's in-country presences, and its external monitoring and reporting role, which is its most contentious activity. In 2024, the OHCHR's field offices included 18 Country/Stand-alone Offices/Human Rights Missions, 13 Regional Offices/Centres, 9 Human rights components, of UN Peace/Political Missions, 39 Human Rights Advisers in UN Country Teams, and 9 other types of field presences.³⁴⁴

Andrew Clapham, in 'The High Commissioner for Human Rights', in Frédéric Mégret and Philip Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2nd Ed., 2020) 667 reflects on the dilemmas that arise if criticism of a country's record has to be muted in the hope that the government will agree to permit the establishment of a field office.

... [W]hen the prospects of obtaining a foothold [such as a field office] are weak, denunciation rather than just the threat of it should be considered a definite option. Indeed, even after an agreement is successfully concluded allowing the High Commissioner to establish such a field presence, the tension is likely to remain as the government can terminate its consent and demand that the mission leave the country ([as in] Rwanda). Given this dynamic, two questions arise. First, is it worth remaining mute in the hope of obtaining a presence? Second, is it worth negotiating a presence which will have no power to monitor human rights violations and will merely legitimize the government's claim that it is doing everything possible to cooperate on human rights with the United Nations?

This is a tension that lies at the heart of contemporary international human rights work more generally. All organizations that seek to engage with governments in a constructive way are faced with the difficulty of knowing how and when to complain about violations and denounce non-cooperation or obstruction. It is acknowledged that the most effective fieldwork tends to combine assistance and reporting. In the words of one experienced field worker:

³⁴³ OHCHR, *United Nations Human Rights Appeal* 2025, at 9.

³⁴⁴ OHCHR, *Annual Report 2024* (2025), at 78.

Some local officials refused outright to allow HROs [human rights officers] to interview refugees during investigations into alleged human rights violations. They regarded us with suspicion, unsure of our motives or how we would use the information we gathered. In such situations, we would invest time in implementing the assistance aspects of our mandate: human rights training for officials, making local human rights broadcasts. Only after developing a relationship of mutual trust with local authorities could we implement our monitoring and investigating roles. Without the assistance aspect of our mandate—important in and of itself—we would never have succeeded in seeking accountability for violations.³⁴⁵

A related problem, but one for which OHCHR is not responsible, occurs when the main United Nations office in a country is unwilling to broach human rights issues with the government, or even inhibits or prevents others from doing so.³⁴⁶

a. Colombia

One of the longest-standing, best resourced, and probably most effective field offices was established in Colombia in 1997. The Government agreed to it largely in order to avoid the perceived stigma of the appointment of a country rapporteur. An in-depth evaluation of the first 15 years of the mission concluded that it had made an important contribution to reducing extrajudicial killings, and that it did so through combining intensive on the ground monitoring, continuing dialogue with the government including in relation to specific cases, an active public media presence, and regular reporting to the Council.³⁴⁷ In 2022, the Office submitted a detailed analysis reporting on and condemning violence carried out by ‘non-state armed groups and criminal organizations’. But it was also critical of the government’s role in response:

7. Despite the efforts of the State, the predominantly military response to combat these groups has not been able to stop their expansion and the violence they generate. In addition, the weakness of the rule of law and development alternatives in the territories affected by violence have exacerbated the situation.
8. The affected communities denounce State abandonment and the absence or limited presence of civil State authorities to deal with this situation. In various territories, mistrust in the State is growing and in some cases acts of collusion between authorities and non-State armed actors have been denounced.³⁴⁸

The Government published a 30-page response, expressing appreciation of the report, outlining all that has already been done, and the future steps it proposes to take.³⁴⁹

b. Ukraine

In 2014, after the Russian annexation of the Crimean Peninsula, OHCHR established the UN Human Rights Monitoring Mission in Ukraine (HRMMU). As a result, after the Russian invasion of Ukraine in February 2022, the OHCHR was well placed to provide in-depth reporting. The following is an example of its regularly updated reports to the Council (UN Doc. A/HRC/52/CRP.1 (December, 2022)):

³⁴⁵ B. Majekodunmi, ‘United Nations Human Rights Field Officers’ in Y. Danieli (ed.), *Sharing the Front Line and the Back Hills* (2002) 137.

³⁴⁶ See, in relation to Laos, UN Doc. A/HRC/41/39/Add.2 (2019), para. 80; and in relation to Myanmar, *How the UN is Failing Myanmar* (Special Advisory Council for Myanmar, October 2023) 54.

³⁴⁷ C. Salazar Volkman, ‘Evaluating the Impact of Human Rights Work: The Office of the [UNHCHR] and the Reduction of Extrajudicial Executions in Colombia’, 4 *J. Hum. Rts. Prac.* (2012) 396.

³⁴⁸ OHCHR in Colombia, *Territorial Violence in Colombia: Recommendations for the New Government* (2022) (machine translation from Spanish).

³⁴⁹ Ministerio de Relaciones Exteriores de Colombia, ‘Observaciones’ (2 July 2022), at <https://www.ohchr.org/es/documents/country-reports/violencia-territorial-en-colombia>

3. As at 31 October 2022, OHCHR – through the ... HRMMU – had documented summary executions and attacks on individual civilians in 102 villages and towns of the [Kyiv, Chernihiv and Sumy] regions between 24 February and 6 April 2022. The acts in question were committed by Russian armed forces in control of these areas and led to the deaths of 441 civilians (341 men, 72 women, 20 boys and 8 girls). One hundred of those killings are analysed in this report and its annex, as illustrative examples of the suffering borne by civilians in these areas.

4. ... [The actual numbers are likely to be] considerably higher.

5. OHCHR found that the killings of civilians were not confined to specific locations, although some areas were more affected than others. [Statistics follow.]

6. ... In most cases, victims of killings in places of detention were found with their hands cuffed or bound by duct-tape, and with injuries suggesting torture or other ill-treatment before being killed. In at least one case, the body of one of the victims showed signs consistent with sexual violence. The circumstances of the summary executions provide strong indications that these killings may amount to the war crime of wilful killing, a grave breach of the Geneva Conventions.

10. This report is based on information gathered during OHCHR field visits to those areas, including through interviews with victims and witnesses, as well as other relevant material. The information obtained through interviews was further cross-checked and corroborated by other sources, including official records, open-source documents, audio and photo materials, forensic reports, criminal investigation materials, court documents, and other relevant sources assessed as credible and reliable in line with established methodology.

11. Findings are included in the report where they meet the “reasonable grounds to believe” standard

...

13. ... In accordance with regular practice, OHCHR shared the draft report with the concerned States for factual comments.

2. Reporting on the Basis of Limited or No Access

When the OHCHR was first created, the likelihood that it would evolve into an organization that could actively monitor ongoing situations with little or no cooperation from the government concerned, and report on them to the Council, seemed slight. But through a series of precedent-setting initiatives by successive HCs, and especially in the aftermath of the Arab Spring in 2011, the Office has firmly established its role in this regard. In principle, it seeks an invitation to visit, but if this is not forthcoming. The most thorough example of a report based on an invited visit (as a result of a change of government) is the OHCHR’s *Fact-Finding Report: Human Rights Violations and Abuses related to the Protests of July and August 2024 in Bangladesh* (12 February 2025). When an invitation is refused, the Office must rely on other sources. We consider two examples. The first is Nicaragua, which has refused to cooperate with the Office. The second is China, which involved a prolonged and complex set of negotiations, resulting in a very brief and highly controversial visit by the HC.

a. Nicaragua

On 15 December 2022, the Council held an ‘Interactive Dialogue on the Periodic Update of Nicaragua’.

Oral update by HC Volker Türk:

The number of people arbitrarily detained for expressing their political views or for being perceived as critics of the Government went up from 195 in September to 225 today [T]heir conditions of detention are precarious. ... With humiliating and degrading treatment of family members visiting prisoners, such as elderly women subjected to strip-searching. ... Over 3,000 national and international NGOs were shut down Muzzling of the media, with 26 national outlets and three international outlets closed by the Government. And a new law adopted in October requiring registration and Government authorization for the production, filming and exhibition of any audio-visual material in the country.

...

Human rights defenders, journalists, clergy or those perceived to be political opponents, are arrested, harassed, intimidated. Some are prosecuted for the offences of conspiracy to undermine national integrity or for “false news”. All part of a systematised effort to stifle opposition and dissent.

The lead up to and holding of the November municipal elections had the trappings of an exercise in autocracy. With a wave of arrests and dismissals of political opponents in the months leading up to the elections.

...

The effects of this crisis continue rippling beyond its borders. Between January and October 2022, Costa Rica received 70,000 new asylum applications from Nicaraguans. Over 147,000 Nicaraguans ended up at the borders of the United States of America.

What can be done. ... My Office is ready to work with the authorities in these areas, and I request access to the country for my staff.

Speech by the Delegation of Nicaragua (machine translation)

The legitimate Government of Reconciliation and National Unity of Nicaragua will not tire of repeating with dignity, loudly and irrefutably, our TOTAL REJECTION of this type of mechanism, which “updates its Human Rights reports”, in a unilateral and biased manner; acting as an “instrument of pressure and interference” by using arguments that are far from the reality of our homeland, with the sole purpose of keeping us underdeveloped and undermining our achievements, to keep us submerged in the guidelines of foreign powers.

...

We reaffirm that with these Update Reports [the OHCHR] continues to be infamous towards us, discrediting and denigrating our authorities and national institutions. Despite this, we maintain our dignity, our sovereignty and our progress in all areas

... [We denounce the OHCHR for ‘not pronouncing itself, for example, on the arbitrary, aggressive and illegal sanctions that some countries have imposed on us, which really directly attack the essential Human Rights of our people and that constitute a true crime against humanity.

We are aware that the developments achieved in our country do not please those who have lived at the expense of other peoples: looting, attacking and intervening, in order to hoard all the wealth for themselves; however, we are convinced, -as we have already stated-, that without the democratization of wealth, real Human Rights could never exist. ...

b. China

Prior to the brutal suppression of protests in Tiananmen Square, in Beijing, on 4 June 1989, China's profile in the UN human rights system was low. Sustained criticism by the US and its allies thereafter prompted deep engagement, initially to defend itself, and subsequently to seek to influence the shape of the overall regime, in both normative and institutional terms.³⁵⁰

In terms of engagement with UN procedures, China has ratified most of the major treaties, but not the ICCPR. It has reported reliably to the treaty bodies, but has been reluctant to facilitate visits to the country. Between 1997 and 2023, eight Special Procedures have made official visits (arbitrary detention (1997 and 2004); education (2003); torture (2005); food (2010); discrimination against women (2013); foreign debt (2015); poverty (2016); and older persons (2019)). Successive HCs have also sought to visit. In 2005, Louise Arbour (UN Press Release, 2 September 2005) visited for one week. In trying to capture the tenor of her approach she stated that: "In a spirit of cooperation and constructiveness we can sometimes be critical. ... I leave China encouraged about taking this work forward, energized by the prospect of helping the country face daunting challenges, and guardedly optimistic about the enormous potential for positive change." But her main achievement was to sign a memorandum of understanding with the Government providing for future cooperation. Little was to come of the MOU in substantive terms. Not until 2022 was agreement reached to enable Michelle Bachelet to visit.

While many issues could have been on Bachelet's agenda, including Hong Kong and Tibet, the situation in the Xinjiang Uyghur Autonomous Region (XUAR) was the most pressing. With a population of some 25 million, it is China's only majority Muslim region and, in 2014, in response to civil unrest, China had responded with a 'Strike Hard Against Violent Extremism' campaign. In 2017, civil society groups began sending allegations to the OHCHR of systematic human rights violations. In 2018, the UN Working Group on Enforced or Involuntary Disappearances reported a dramatic increase in cases of disappearances, and a range of other UN expert groups and NGOs claimed that torture and other ill-treatment, including sexual violence, and forced labour, were common in the XUAR. In 2021, Human Rights Watch reported, for example, that:

As many as a million people have been arbitrarily detained in 300 to 400 facilities, which include "political education" camps, pretrial detention centers, and prisons. Courts have handed down harsh prison sentences without due process, sentencing Turkic Muslims to years in prison merely for sending an Islamic religious recording to a family member or downloading e-books in Uyghur. Detainees and prisoners are subjected to torture and other ill-treatment, cultural and political indoctrination, and forced labor. ... [O]utside the detention facilities ... the Chinese authorities impose on Turkic Muslims a pervasive system of mass surveillance, controls on movement, arbitrary arrest and enforced disappearance, cultural and religious erasure, and family separation.

The United States State Department and the parliaments of Belgium, Canada, and the Netherlands have determined that China's conduct also constitutes genocide under international law. Human Rights Watch has not documented the existence of the necessary genocidal intent at this time. ...³⁵¹

In September 2018, the HC requested access to the XUAR and her Office began preparing an 'assessment of available information ... with a view to making it public'. Delays ensued, COVID-19 struck, and only in March 2022 was agreement reached, although the assessment remained unpublished at that time. In October 2021, 43 mainly Western countries, led by France, made a public statement to the Council demanding that the HC be given immediate, meaningful and unfettered

³⁵⁰ See generally: E. Pils, 'Autocratic Challenges to International Human Rights Law: A Chinese Case Study', 75 *Current Legal Problems* (2022) 189; Yu-Jie Chen, 'The United States, China and the European Union at the UN Human Rights Council', in Chien-Huei Wu et al. (eds.), *Multilateralism in Peril: The Uneasy Triangle of the US, China and the EU* (2022) 36; and R. Siu Inboden, *China and the International Human Rights Regime* (2021).

³⁵¹ Human Rights Watch, 'Break Their Lineage, Break Their Roots': China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims (2021) 2.

access. In response, Cuba made a counter-statement on behalf of 62 countries insisting that the XUAR was part of China's internal affairs and dismissing the allegations as being based on 'political motivation' and 'disinformation'. Days before her visit, Human Rights Watch and other groups warned that the HC's credibility was at stake and that her 'legacy [as HC] will be measured by her willingness to hold a powerful state accountable for crimes against humanity.'³⁵² Amnesty International warned that 'the UN must avoid becoming complicit'.

The HC's six-day visit took her only to Guangzhou and the two largest cities in the XUAR. China insisted that pandemic-related restrictions required her visit to be conducted in a 'closed loop', and they characterized it as 'a private visit to enhance exchanges and cooperation'. She met with President Xi Jinping by videolink, and the Foreign Minister in person. On 28 May 2022, she held a press conference to report the results of her visit. Before announcing various forms of follow up between her Office and the Chinese Government, she clarified the goals of the visit:

This visit was not an investigation – official visits by a High Commissioner are by their nature high-profile and simply not conducive to the kind of detailed, methodical, discreet work of an investigative nature. The visit was an opportunity to hold direct discussions – with China's most senior leaders – on human rights ...

.

...

To those who have sent me appeals, asking me to raise issues or cases with the authorities - I have heard you. Your advocacy matters and my visit was an opportunity to raise a number of specific situations and issues of concern with the Government. I will continue to follow up on such issues and instances of concern on a sustained basis.

Reporting on the outcome, one journalist wrote that '[c]ritics had expected Bachelet to lambast Beijing on its heavy-handed way of dealing with the Uyghurs – which some call "genocidal", and which Beijing denies – during that press conference, but Bachelet did not do that.' He added that she 'was right, however, to remind her audience of the importance of engaging China at a time of increased global challenges ...'.³⁵³

Amnesty International said that Bachelet's 'visit has been characterized by photo opportunities with senior government officials and manipulation of her statements by Chinese state media, leaving an impression that she has walked straight into a highly predictable propaganda exercise for the Chinese government.' Amnesty called for the release of 'the long-awaited report on Xinjiang'.

In the months that followed there was considerable speculation as to the HC's intention, especially as her term of office was to expire on 31 August 2022, unless she sought and was given a new term. Minutes before midnight on her last day, the Office released a 45-page report, which concluded that:

143. Serious human rights violations have been committed in XUAR in the context of the Government's application of counter-terrorism and counter-"extremism" strategies. The implementation of these strategies, and associated policies in XUAR has led to interlocking patterns of severe and undue restrictions on a wide range of human rights. These patterns of restrictions are characterized by a discriminatory component, as the underlying acts often directly or indirectly affect Uyghur and other predominantly Muslim communities.

...

148. ... The extent of arbitrary and discriminatory detention of members of Uyghur and other predominantly Muslim groups, pursuant to law and policy, in context of restrictions and deprivation more generally of fundamental rights enjoyed

³⁵² *Ibid*, 'UN: Rights Chief's Credibility at Stake in China Visit' (22 May 2022).

³⁵³ V. Ni, 'Bachelet's Xinjiang visit is emblematic of the growing divide between China and the west', *The Guardian* (30 May 2022).

individually and collectively, may constitute international crimes, in particular crimes against humanity.

The report did not, however, address the hotly contested issue of whether the crimes might have qualified as genocide. In a statement on the same day, China released a lengthy rebuttal:

... Based on the disinformation and lies fabricated by anti-China forces and out of presumption of guilt, the so-called ‘assessment’ distorts China’s laws and policies, wantonly smears and slanders China, and interferes in China’s internal affairs, which violates principles including dialogue and cooperation, and non-politicization in the field of human rights, and also undermines the credibility of the OHCHR.

Soon after leaving China, Michelle Bachelet announced that she had informed the Secretary-General several months earlier that she did not wish to be re-appointed as HC. The Secretary-General subsequently nominated a long-time UN and UN High Commissioner for Refugees official, Volker Türk, as HC. The former Executive Director of Human Rights Watch, Kenneth Roth, (in ‘The U.N. Gave a Quiet Diplomat the Wrong Job’, *Foreign Policy*, September 16, 2022) harshly criticized the choice on the grounds that ‘by virtue of temperament and experience, [Türk] seems poorly suited for the U.N.’s top human rights post’. His reasoning was that:

... [T]he U.N. human rights chief[‘s] ... only ability to move governments is by generating pressure through his investigations and public reporting of human rights violations and his public condemnation of misconduct.

Such public reporting and commentary can be shameful, tarnishing the reputation for respecting human rights that most governments seek to cultivate, however disingenuously. That shaming, if done well, can change the cost-benefit calculation behind repression, leading to positive change. But Türk has no history of publicly criticizing particular governments. Like his boss [the Secretary-General], he seems to prefer to work behind the scenes while speaking publicly in only broad generalities.

On 6 October 2022, the Human Rights Council considered a Western-sponsored resolution to ‘take note with interest’ of the HC’s report and to hold a debate on the situation in Xinjiang at the following session in March 2023. Intense lobbying on both sides led to the defeat of the resolution, with 17 states in favor, 19 against, and 11 abstaining.

QUESTIONS

1. How would you assess the fact that the OHCHR relies, for two-thirds of its funding, on voluntary contributions, mostly from governments?
2. What do you make of the virulent denunciations of the Office by countries under scrutiny?
3. Is public condemnation (‘naming and shaming’) the only responsible approach for a HC to take in situations such as that existing in China? Are there alternative, and legitimate, conceptions of the role of a HC in response to serious violations?
4. When reading about China and the UN³⁵⁴ consider the assessment of Malin Oud, in ‘Powers of Persuasion? China’s Struggle for Human Rights Discourse Power at the UN’, 15 *Global Policy* (2024) Suppl. 2, 85, at 92;

³⁵⁴ See also J. Neagli, ‘Bend, Don’t Break: China’s Approach to the International Human Rights Order’, 64 *Harv. Int’l L. J.* (2023) 489.

... China has always advocated for a state-centric 'development-based approach to human rights' and defended its oppressive policies on grounds of national security and economic development. However, in the last decade ... China has abandoned its previous foreign policy of 'keeping a low profile and biding one's time' and instead become an active international norm entrepreneur that does not shy away from mobilising compulsory power means. ...

China's strategic narratives on human rights and development have traction because they speak to real grievances about Western hypocrisy and global inequalities in many parts of the world. ...

... In essence, China seeks to reshape international norms so that human rights become each member state's 'internal affairs' rather than a legitimate concern of the international community.

D. THE SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT

For more than four decades, the Security Council exercised a remarkably limited role in human rights matters. With the end of the Cold War, however, that role expanded significantly and many of the issues coming before it over the past 35 years have had human rights dimensions. Most notably, the Council played the central role in establishing the ad hoc criminal tribunals in relation to the former Yugoslavia and Rwanda, thus paving the way for the International Criminal Court (see Ch. 16A, below). It has ensured the inclusion of human rights provisions in peace agreements, and engaged in efforts to eliminate the use of child soldiers and ostracize groups that violate that ban. We consider some of its key roles elsewhere in this book, including in relation to counter-terrorism, the imposition of sanctions, and the Women, Peace and Security Agenda. Its biggest challenge, however, has involved the authorization of forcible measures, including military intervention, to stop massive human rights violations in member states.

The Security Council consists of 15 members, five of which are permanent — China, France, Russia, the United Kingdom and the United States.³⁵⁵ Ten others are elected by the General Assembly for two-year terms. Each member has one vote. Substantive decisions require nine votes out of the 15, and must include the concurring votes (defined by the Council to include abstentions) of all five permanent members. This is the so-called 'veto' power. The Council is able to be convened at any time and non-members may be invited to participate, but without a vote, when their interests are affected.

The Council is given 'primary responsibility' for the maintenance of international peace and security under the collective security system provided for in the UN Charter (Art. 24), and member states are obligated to carry out its decisions (Art. 25). It can act under *Chapter VI* of the Charter (Arts. 33–8) to achieve the pacific settlement of 'any dispute, the continuance of which is likely to endanger the maintenance of international peace and security'. It is empowered to investigate any such dispute and to recommend 'appropriate procedures or methods of adjustment'. It can act under *Chapter VII* (Arts. 39–51) whenever it determines 'the existence of any threat to the peace, breach of the peace, or act of aggression'. In such situations, the Council can call on states to apply sanctions of various kinds (Art. 41) or to take such military action 'as may be necessary to restore international peace and security' (Art. 42). Since all states are obligated by Article 2(4) of the Charter to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state', except in the exercise of the right of self-defence against an armed attack (Art. 51), the Council enjoys a legal monopoly over the use of force in all other circumstances. This monopoly extends to Article 53(1) which authorizes the Council to make use of 'regional arrangements or

³⁵⁵ See generally M. Wood and E. Stohger, *The UN Security Council and International Law* (2022).

agencies for enforcement action under its authority'. But the latter are not permitted to act without the Council's authorization.

Precedents Set in the Struggle Against Apartheid

Many procedures and techniques which were eventually developed by the General Assembly and the Security Council to deal with human rights were hammered out on the anvil of the South African apartheid system. The issue was first brought to the Assembly in 1946 by India, which complained of the discriminatory treatment of persons of Indian origin. Very early on, India suggested that such conduct could be seen as a threat to international peace and thus as requiring the attention of the Council. South Africa replied that most of those concerned were its nationals and that, in any event, the issue was exclusively a domestic affair.

The battle lines were thus set for a struggle continuing until today to clarify two key issues: (1) the relationship between the human rights provisions of the UN Charter and the domestic jurisdiction clause in Article 2(7) of the Charter (considered in Ch. 3A, above); and (2) the circumstances under which gross human rights violations can be considered to threaten international peace and security and thus warrant Security Council measures under Chapter VII. While South Africa was the main focus of these debates, the situations in Southern Rhodesia (Zimbabwe) and the Portuguese colonies in southern Africa (Angola and Mozambique) also figured.

With the influx of newly independent states into the United Nations from the late 1950s onwards, the South African case pitted a Security Council, dominated by Western governments that were reluctant to act, against a General Assembly which was increasingly frustrated at the intransigence of the racist governments in southern Africa and the failure of the Assembly's barrage of resolutions to make any difference. In 1962, the Assembly tested the limits of its division of labour with the Security Council by itself calling upon member states to break off diplomatic relations with South Africa, to refuse entry to its ships and aircraft, to boycott its goods and to impose an arms embargo. In 1963, the Council characterized the South African situation as 'seriously disturbing international peace and security' and called for, but did not mandatorily impose, an arms embargo. The Assembly raised the stakes again in 1966 by condemning apartheid as 'a crime against humanity', an approach which was taken further by its adoption in 1973 of the Convention on the Suppression and Punishment of the Crime of Apartheid (GA Res. 3068 (XXVIII)). Three years later, the Assembly concluded that 'the continued brutal repression, including indiscriminate mass killings' by the apartheid regime left 'no alternative to the oppressed people of South Africa but to resort to armed struggle to achieve their legitimate rights', thus giving its imprimatur to the national liberation struggle.

It was not until 1977 that the Council (Res. 418) imposed a mandatory arms embargo under Chapter VII. In 1984, the Council rejected a new constitution that had been adopted by an exclusively white electorate as contrary to UN principles and thus 'null and void'. With the end of apartheid and the transition to democracy, the Council terminated the arms embargo and all other restrictions in May 1994.

From Humanitarian Intervention to the 'Responsibility to Protect'

It has long been claimed that, despite the prohibition on the use of force contained in Article 2(4) of the UN Charter, there is a humanitarian exception of some sort, which would justify the use of force by a state to protect individuals in another state from egregious violations of human rights. With the end of the Cold War, the 1990s brought a distinctly greater willingness on the part of some states, including the United States, to intervene for such reasons. Somalia, Haiti and the former Yugoslavia were key examples. But the failure to intervene in the face of genocide in Rwanda and to stop a genocidal massacre in Bosnia traumatized the UN and other actors and led to extensive soul-searching as to the nature of any principle of intervention for humanitarian reasons. A UN-commissioned report on Rwanda characterized the 1994 genocide in which 800,000 people were killed in about 100 days as 'one of the most abhorrent events of the twentieth century'. It condemned the failure to 'prevent, and

subsequently, to stop the genocide in Rwanda' as a failure by the UN system as a whole. 'The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there. There was a persistent lack of political will by Member States to act, or to act with enough assertiveness' It called upon the 'Security Council and troop contributing countries ... to act to prevent acts of genocide or gross violations of human rights wherever they may take place.'³⁵⁶ The UN also published a report criticizing its failure to stop massacres in Bosnia.

In the same year as the UN published these strongly self-critical reviews a crisis erupted in Kosovo, then a province of Serbia. Since 1993, reports to the UN Commission on Human Rights had documented serious human rights abuses by Serbia against the Kosovo Albanians who made up 90 per cent of the province's population. In 1998, the Security Council, acting under Chapter VII, imposed an arms embargo (Res. 1160) and subsequently determined that there was 'a threat to peace and security in the region' (Res. 1199). Russia and China, however, made clear that they would veto any Council resolution authorizing the use of force. After a grave deterioration of the situation, and the failure of talks among the relevant parties held in Rambouillet (France), the North Atlantic Treaty Organization (NATO) launched military action against Serbia for non-compliance with the Council resolutions and in the name of 'humanitarian intervention'. It was estimated that 90 per cent of the Kosovo Albanian population — some 1.45 million people — had been displaced by the conflict by the time it ended.³⁵⁷

The challenge of framing a new 'doctrine' that would enable effective action to prevent or terminate atrocities was encouraged by the UN Secretary-General, given conceptual form by an independent commission organized by Canada, promoted by some states within the UN, and given a degree of institutional recognition through the UN Secretary-General's appointment of a Special Adviser on the Prevention of Genocide (in 2004) and a Special Adviser on the Responsibility to Protect (in 2007). The two now work together in a 'Joint Office' at the UN (<https://www.un.org/en/genocide-prevention/>).

**KOFI ANNAN, IMPLICATIONS OF INTERNATIONAL RESPONSE TO EVENTS IN RWANDA,
KOSOVO EXAMINED BY SECRETARY-GENERAL
UN PRESS RELEASE GA/9595 (20 SEPTEMBER 1999)**

[Report of a speech by UN Secretary-General, Kofi Annan]

'While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo had prompted important questions about the consequences of action in the absence of unity on the part of the international community', he said. In the case of Kosovo, the inability of that community to reconcile the question of the legitimacy of an action taken by a regional organization without a United Nations mandate, on one side, and the universally accepted imperative of effectively halting gross and systematic violations of human rights, on the other, could only be viewed as a tragedy. It had revealed the core challenge to the Security Council and the United Nations in the next century: To forge unity behind the principle that massive, systematic violations of human rights — wherever they might take place — should not be allowed to stand.

He said that, to those for whom the greatest threat to the future of international order was the use of force in the absence of a Council mandate, one might ask — not in the context of Kosovo, but in the context of Rwanda — if a coalition of States had been prepared to act in defence of the Tutsi population, but had not received prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when States and groups of States could take military action outside the established mechanisms for

³⁵⁶ Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, UN Doc. S/1999. On Bosnia, see 'The Fall of Srebrenica', UN Doc. A/54/549 (1999).

³⁵⁷ See generally A. Hehir, 'Kosovo 1999: The False Dawn of Humanitarian Intervention', 38 *Comparative Strategy* (2019) 454.

enforcing international law, one might ask: Was there not a danger of such intervention undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions?

...

... [I]n the Charter's own words, 'armed force shall not be used, save in the common interest'. ...

...

... In [Rwanda and Kosovo] Member States of the United Nations should have been able to find common ground in upholding the principles of the Charter, and acting in defence of 'our common heritage'. The Charter required the Council to be the defender of the 'common interest'. Unless it was seen to be so, there was a danger that others could seek to take its place.

ICISS, THE RESPONSIBILITY TO PROTECT (2001)

In order to address systematically the policy issues emerging from situations such as Rwanda and Kosovo the Canadian Government established an International Commission on Intervention and State Sovereignty (ICISS) which reported in 2001. Its report, entitled *The Responsibility to Protect* put forward a series of 'core principles' premised on the argument that while the notion of state sovereignty could not be brushed aside in the name of intervention, it should be interpreted as implying that 'the primary responsibility for the protection of its people lies with the state itself'. But where a state is 'unwilling or unable' to halt or avert serious harm to its own population, 'the principle of non-intervention yields to the international responsibility to protect'. A similar approach was subsequently endorsed by a 'High-Level Panel' appointed by the UN Secretary-General.

A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004)

201. The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community. There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of *every* State when it comes to people suffering from avoidable catastrophe — mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community — with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. The primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions. Force, if it needs to be used, should be deployed as a last resort.

202. The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security", not especially difficult when breaches of international law are involved.

203. We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

B. The question of legitimacy

...

207. In considering whether to authorize or endorse the use of military force, the Security Council should always address — whatever other considerations it may take into account — at least the following five basic criteria of legitimacy:

- (a) *Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
- (b) *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
- (c) *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
- (d) *Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
- (e) *Balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

2005 WORLD SUMMIT OUTCOME GENERAL ASSEMBLY RES. 60/1

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide,

war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

UN SECRETARY-GENERAL, IMPLEMENTING THE RESPONSIBILITY TO PROTECT (2009)

This report [UN Doc. A/63/677] introduced a three-pillar strategy for implementing R2P:

Pillar 1: Every state has the Responsibility to Protect its populations from the four mass atrocity crimes.

Pillar 2: The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility.

Pillar 3: If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action in a timely and decisive manner and in accordance with the UN Charter.

Differing Views on R2P

Whatever its practical impact, R2P has succeeded in generating a vibrant scholarly debate. Consider the following examples.

Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (2015) 121:

Simply stated, the antinomy here is between the non-use of force rule, which knows of no exception for human rights, and the active protection of the most fundamental rights of human persons, for example against the commission of genocide or massacres, if necessary by using a proportionate amount of force. Conflicts between these two norms may occur in different settings. Either the nonuse of force rule is a binding prohibition and the human protection rule is a mere legal faculty, which can but must not be exercised by States; or alternatively the norm on human protection is also framed as an internationally recognised duty to act, possibly imbued with peremptory status. In this latter case, a duty to act would directly conflict with a duty to abstain. In reality, there is much doubt as to the existence of a rule allowing for the use of force in such situations; even more doubtful is the existence of a rule requiring the use of force. Conversely, if the rule on human protection is negated in the sense that it does not encompass a licence or a duty to use force, the antinomy disappears. If we assume for the sake of our argument that some rule on human protection exists in such extreme contexts, either as a faculty or as a duty, how is the antinomy to be solved?

... The balancing process is as follows. First, the overwhelming majority of States... have emphatically rejected the idea that one State or a self-proclaimed coalition of States can intervene militarily in another State without the latter's consent, even if massacres are being perpetrated there. There are many arguments in favour of this position, in particular the fact that in view of the chronic instability of many States and the open-ended spectrum of possible triggering situations, a power to intervene militarily would destabilise the international system and open the gates to subjective, pretexted and power-policy interventions. Second, the same overwhelming majority of States accept the recent Chapter VII ... interpretation which gives the Security Council the power (and morally the duty) to take collective measures in order to prevent, to halt and to remedy such gross human rights violations (today under the banner of the 'Responsibility to Protect'). In other words, the faculty or duty to act is transferred from the plane of States taken individually to the plane of the organised community acting through [the Security Council]. ... The two

imperatives are taken into account and harmonised through an interpretation which upholds the non-use of force rule and acknowledges at the same time the necessity to act. The solution is found along the lines of differentiating the actors called to deal with the humanitarian urgency. ...

Ilia Siatitsa, *Serious Violations of Human Rights: On the Emergence of a New Special Regime* (2022) 141:

The responsibility to protect threshold was from the very beginning set too high. In ... 2005 ..., states opted [to enumerate] four international crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing. ... The suggestion that massive human rights violations be included was overlooked, on the understanding that the crimes were more specific.

The chosen terminology was still unfortunate. The states chose to use individual criminal responsibility terminology to deal with state responsibility matters. The reference to crimes instead of human rights violations points towards individuals (as perpetrators or victims) rather than states. In addition, international crimes have strict definitions, as prescribed by the principle of legality in criminal justice. As a result, their invocation in the context of mobilising the international community outside a judicial framework either makes the threshold unnecessarily rigid, or jeopardises the deliberation of criminal justice.

...

The concept of responsibility to protect has undergone considerable transformations since its inception, and in more than one direction, to the point where it is materially impossible to pin down exactly what it describes— whose responsibility and to do what. ...

... [R2P] does not address the question of the possible direct responsibility of a state for these crimes; it only underlines the primary responsibility to protect the populations from such acts, and the residual responsibility of the international community, including international organisations and states, to help protect them. Protection in that sense includes the criminal prosecution of the individuals responsible for these crimes, overshadowing the responsibility of the state itself for the commission of such crimes. ...

...

The ICISS relied heavily on the idea that changing the permissive authority (a possibility) to an affirmative obligation (a duty) would challenge the status quo, establishing a duty of the Security Council to react and to legitimise unilateral action in the event that the former was blocked. However, the simple change of terminology was not sufficient to shift the legal order already in place. States embraced an abstract responsibility to protect without any solid commitments and specific considerations regarding the content of this so-called responsibility.

... [E]ven as a framework that reinforces the normative power of existing legal rules and principles, [R2P] is significant. It facilitated the mobilisation of political pressure on the United Nations to take action in extreme circumstances. It did not generate legal obligations. ...

Anastasia Prokhorova, 'The Special Adviser on the Responsibility to Protect: Performing Norm Leadership', 14 *Global Responsibility to Protect* (2022) 281:

[The Special Adviser on R2P drafts the Secretary-General's annual report on R2P], which lays the ground for and stirs the discussion of the principle in the General Assembly held either as an informal dialogue (2010–17) or as a recently resumed

formal debate (2009, 2018–21). The performativity of the Special Adviser in the Assembly meetings manifests not only in ‘setting the scene’ with the annual report but also in a strategic debate with the member states. Its participants display their competing interpretations of the norm, which can be roughly grouped in three categories: (category i) R2P does not generally apply to their domestic politics but shapes their foreign policy (Canada, Germany, Switzerland, United Arab Emirates, United States); (category ii) R2P is degraded, exploited, and misused by some states to justify military interventions and undermine the sovereignty of others (the Philippines, Russia, Syrian Arab Republic, Ukraine, Venezuela); (category iii) R2P amplifies ‘sovereignty as responsibility’, which can and should be implemented primarily through domestic or (sub)regional, consensual, and preventive means (UN Secretariat, European Union, the Group of Friends of R2P). Following the reiteration and enactment of these clashing meanings of R2P in the Assembly over the last decade, the mainstreaming of R2P in foreign policy agendas (category i) has been criticised by the ‘watchdogs’ of sovereignty (category ii) but also by the Special Advisers, and eventually subsided to the vision that R2P and atrocity prevention ‘start at home’ and should focus on building up local, state, and regional capacities to withstand crises (category iii).

...

[The author concludes that successive Special Advisers have engaged in ‘performative leadership’, thereby contributing] to protection against atrocities by ‘framing’ certain situations as at risk of mass violence to incentivise action; shaping states’ experience with norm use; reinterpreting the mandate given the needs at a specific time and context; strategically using language and rhetorical tools to navigate R2P through contestation and to support norm implementation. ...

QUESTIONS

1. Are the criteria identified by the High-Level Panel likely to be very helpful in resolving a concrete situation that comes before the Security Council? If not, why not?
2. In light of the materials above, how would you assess the following critiques by Philip Cunliffe: (1) R2P inverts the burden of justification for intervention; (2) R2P usurps self-determination in favour of paternalism; (3) victims’ rights provide license for powerful states to further abuse their power; (4) the doctrine imposes imperfect duties; and (5) R2P diffuses post-conflict responsibilities.³⁵⁸

The Women, Peace and Security Agenda³⁵⁹

In Chapter 3 we traced the evolution of the concept of violence against women and its central role in much human rights advocacy over the past thirty years or more. An important exception to the Security Council’s aversion to engaging with human rights issues has come in the form of a series of resolutions since 2000 linking women to issues of peace and security. The so-called Women, Peace and Security (WPS) Agenda rests on four pillars: (i) the role of women in conflict prevention; (ii) women’s participation in peacemaking and peacebuilding; (iii) the protection of women’s rights during

³⁵⁸ P. Cunliffe, ‘From ISIS to ICISS: A Critical Return to the Responsibility to Protect Report’, 51 *Cooperation and Conflict* (2016) 233; see also *ibid.*, *Cosmopolitan Dystopia: International Intervention and the Failure of the West* (2020).

³⁵⁹ C. Chinkin, *Women, Peace and Security and International Law* (2022).

and after conflict; and (iv) women's specific needs during repatriation, resettlement, rehabilitation, reintegration and post-conflict reconstruction.

The foundation stone was this resolution:

**SECURITY COUNCIL RESOLUTION 1325
(2000)**

The Security Council,

...

1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;

...

5. Expresses its willingness to incorporate a gender perspective into peacekeeping operations, and urges the Secretary-General to ensure that, where appropriate, field operations include a gender component;

6. Requests the Secretary-General to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peace- building measures ...;

...

8. Calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:

(a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction;

(b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements;

(c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary;

9. Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians ...;

10. Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;

11. Emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions;

Up until January 2024 there have been nine additional resolutions. Some have focused especially on enhanced participation by women: Resolutions 1889 (2013), 2122 (2013), 2242 (2015) and 2493 (2019). Others have focused mainly on conflict-related sexual violence (CRSV): Resolutions 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013), and 2467 (2019).

* * *

Karen Engle, Vasuki Nesiah, and Dianne Otto, in ‘Feminist Approaches to International Law’, in Jeffrey Dunoff and Mark Pollack (eds.), *International Legal Theory: Foundations and Frontiers* (2022) 174 explain the background to Resolution 1325:

... SCR 1325 was a bold initiative, seeking the admission of at least some feminist ideas into the inner sanctum of the Security Council At the same time, many feminist antiwar goals, especially those directed towards achieving “positive peace,” were glaringly absent.

[Its adoption] can be understood as a crisis measure in at least two senses. First, ... antiwar feminists rode the global wave of panic about the high rates of sexual violence in armed conflict This panic helped focus attention – even in SCR 1325 – on a specific set of women’s experiences during armed conflict and in its wake, neglecting feminist concerns about other war time experiences such as racism and xenophobia, forced displacement, erosion of the space for dissent, and increased precarity of basic livelihood. Second, SCR 1325 was adopted during a period of heightened anxiety about the legitimacy of the superpower-dominated Security Council [The resolution reassured] the global community of the Security Council’s commitment to a social agenda that includes providing for the safety of civilians – paradigmatically Third World women – during armed conflict and in its wake.

... [But] sexual violence came to dominate in the resolutions, even though the primary original impetus for feminist support for SCR 1325 was the promise of increased women’s participation in conflict-related decisionmaking – a move away from the ubiquitous representation of women as always vulnerable and in need of masculine/military protection. SCR 1820, for example, even proposes that women “under imminent threat of sexual violence” be given priority in evacuation plans, presumably jumping other queues of those who are seriously injured or threatened with death.

... [M]ost of the sexual violence resolutions can be read to justify the lawful use of force by using language often found in Chapter VII resolutions, expressing the “readiness” of the Security Council, “where necessary,” to take steps to address widespread or systematic sexual violence in situations on its agenda. As we see below, in 2015, SCR 2242 brought the Security Council’s counterterrorism tools to bear on sexual violence. It also calls for targeted sanctions to respond to sexual violence, and increases the range of possible justifications for the use of force in the name of protecting women. ...

**CHRISTINE CHINKIN, WOMEN, PEACE, AND SECURITY: A HUMAN RIGHTS AGENDA?,
IN GRÁINNE DE BÚRCA (ED.)
LEGAL MOBILIZATION FOR HUMAN RIGHTS (2022) 30**

Is Resolution 1325 an instrument for advancing women’s human rights in conflict settings as wished for by many of those who mobilized for its adoption? On the one hand, the resolution reaffirms the need to implement human rights law and states are explicitly reminded of relevant human rights instruments, CEDAW and CRC. On the other hand, concepts and obligations that were already part of human rights law are either unacknowledged or weakened. There is no provision for a monitoring body such as is provided for within the UN human rights treaties. Difficult questions of human rights law are evaded; for instance, the Council does not explore the human rights obligations of non-state actors but merely assumes the applicability of international law to them. But if Resolution 1325 is ambiguous as a human rights treaty the same is true of it as a feminist peace agenda [It] makes no mention of disarmament ..., reduction of military expenditure, or of any connection between promotion of women’s human rights and peace, or between eradication of gender-based violence and sustainable peace.

...

[Resolution 1820 (2008) emphasized sexual violence in armed conflict.] Under human rights law, all people are entitled to be free from sexual violence, not just civilians and not just women and girls. The attention paid to sexual violence including rape as a tactic of war is limiting for women and girls within the civilian population at whom it is directed. It discounts the many other reasons for conflict-related sexual violence and that it is committed by the state as well as by a range of non-state actors. Nor does it take account of the additional vulnerabilities to gender-based discrimination and violence caused by factors such as displacement, collapse of social norms and structures, poverty, and unemployment. These contribute to further human rights violations against women and girls including the unavailability of appropriate healthcare following sexual violence and denial of their sexual and reproductive rights, harassment, lack of access to education, the destruction of shelter, livelihoods, and food for women who are the primary carers within their families and communities. It has the potential to create a hierarchy of rights and of victims, contrary to the universalism of human rights. There is no direct reference to the Global South as the location of wartime sexual violence against civilians, but this is the tenor of the resolutions For WPS ‘champions’ such as the US and UK, ‘rapacious violence’ happens in foreign territories, not at home.

Human rights law has a lower explicit profile in Resolution 1820 than in Resolution 1325. ... Resolution 1820 assumes sexual violence committed by (male) military personnel and women’s security as both transgressed and upheld through military means. In the Security Council’s militarized and masculinized view of the world this inevitably involves the securitization of rights, transforming people into objects of the security apparatus to be protected in the interests of international peace and security rather than as individual and collective rights bearers.

...

... [By 2019] the political climate had harshened with respect to women’s rights with backlash against progress, opposition to women’s and girls’ equal rights, rising violent misogyny, and a growing number of brutal attacks on those challenging social gender norms including women in politics, and women human rights defenders. ...

... [In negotiating WPS resolutions in 2019, two] issues were especially contentious Sexual and reproductive rights had explicitly entered the WPS agenda in [2013]. [The preamble, but not the operative part of Resolution 2122 (2013)] notes ‘the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination’ [It] was adopted on the same day as the CEDAW Committee’s General Recommendation No. 30 that directly upholds women’s right to safe abortion services. Neither Resolution 2467 nor 2493 refer directly to sexual and reproductive rights. ... [T]he US delegate stated that it could not ‘accept references to “sexual and reproductive health”, nor any references to “safe termination of pregnancy” or language that would promote abortion or suggest a right to abortion’.

...

With respect to ... the word ‘gender’—the Security Council has never offered any definition and uses it in practice to mean ‘women’. The WPS resolutions make minimal references to men and boys and none to persons who reject the gender binary. Nevertheless, some delegations feared its use would incorporate the rights of trans persons or uphold gay rights. ...

...

6. Conclusions

So where are we? Women human rights and peace activists mobilized in the 1990s to secure the adoption of Resolution 1325 but was it a strategic decision to engage the world’s most powerful actors for advancement of women’s rights in conflict? Or was it a misjudgement to rely on the Security Council thereby making human rights a hostage to geopolitical imperatives? Was it absurd to think that the Council—a state-centric body that considers military intervention as the norm and with the world’s leading arms dealers as members—could ever be committed to human rights, especially those of women in armed conflict? Can proponents of human rights take language found in one instrument—a Security Council resolution—and tie it back to a human rights context to reinforce state obligations, or does the institutional divide prevent this consistency? And any such attempt is

made harder by fluctuating language in the WPS resolutions; it cannot be assumed that good wording in one resolution that civil society can mobilize around will be repeated in subsequent resolutions.

I don't have the answers. What we have is an international system based in militarized security that is prioritized over a human security approach that might be progressed through human rights, a system trapped in hierarchical power structures, and a civil society not quite ready to reframe the discussion for fear of this issue being 'downgraded' to human rights, and an overall failure to commit resources.

...

* * *

Karen Engle, in *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (2020) 176 argues that the pre-occupation with sexual violence in the WPS and related contexts has:

... narrowed and distorted the lens through which feminists understand, represent, and address issues of gender, sex, ethnicity, and armed conflict. Through power they often deny, many feminists—including women's rights advocates and women's peace advocates—have facilitated, if not deployed, stereotyped images of victims and their communities to support militarized or criminalized responses to sexual violence in conflict. Those responses have had distributive effects. Not only have they failed to make a significant dent in incidences of sexual violence in conflict, but they have displaced attention to imperialism, economic distribution, and—relatedly—the causes of the very armed conflicts in which they aim to intervene. Also, somewhat ironically, they have sidelined attention to a great deal of gender inequality. Further, whether or not military interventions and counterterrorism measures have women at the helm or are done in the name of protecting women, they have had devastating effects on uncountable lives, mostly in the global South, and have perpetuated both political and economic global inequality.

... [F]eminist successes in bringing international institutional attention to sexual violence—whether through military intervention, criminal law, or the [WPS agenda]—have cemented and even amplified some of the very imaginaries about rape and sexual violence that nearly all feminists originally hoped to dispel. ... [F]eminists, however unwittingly, have participated in the continuation of the common-sense view that rape is a fate worse than death. Relatedly, their efforts have led to ... the “hypervisibility” of wartime rape, which elides not only other issues but also other aspects of victims' lives.

The Security Council in the 2020s

Before reading an overall assessment of the Council's role in relation to human rights, consider some diverse case studies.

a. The Democratic People's Republic of Korea (the DPRK, or North Korea)

The UN Human Rights Council has used every technique available to it in response to human rights violations in the DPRK. There has been a country Special Rapporteur since 2004 (UN Doc. A/77/522 (2022)). Following a damning report by a Commission of Inquiry, which concluded that crimes against humanity had been committed (UN Doc. A/HRC/25/63 (2013)), a field office was established in Seoul to monitor human rights in the DPRK in 2015, a group of experts on accountability was created (UN Doc. A/HRC/34/66/Add.1 (2017)), the Security Council held annual debates on the subject from 2014 to 2017, and the Secretary-General presents an annual report (UN Doc. A/78/212 (2023)). A more institutionally sustained case for Security Council action would be difficult to imagine. But

between 2018 and 2022, requests for an open meeting of the Council to discuss the situation were rejected. As noted in December 2022:

... [M]embers hold differing views as to whether human rights violations in the DPRK constitute a threat to international peace and security. China has argued that the Security Council is not a forum for discussing human rights issues, that such issues should not be politicised and that discussion of human rights in the DPRK jeopardises the denuclearisation of the Korean peninsula. Russia, together with some elected members, has adopted a similar position.³⁶⁰

In August 2023, the Council held an open meeting on the DPRK, at which the High Commissioner spoke.

b. Climate change

Consider the following Research Report by Security Council Report, ‘The UN Security Council and Climate Change: Tracking the Agenda after the 2021 Veto’ (30 December 2022)

On 13 December 2021, the Security Council voted on a draft resolution on the security implications of climate change, proposed by Ireland and Niger. The draft emphasised the need for “a comprehensive, whole of UN approach to address climate change and its effects”. It requested the Secretary-General to “... [report to the Council] ... on how climate-related security risks can be addressed”. And it encouraged relevant UN peacekeeping operations and special political missions to deploy dedicated capacity, as appropriate, on climate security.

[This] represented the first time a thematic resolution on climate change and security had been tabled for a vote in the Council. But the idea for such a resolution was years in the making. Germany had proposed a similar, albeit more ambitious, draft in July 2020, but ultimately aborted the effort because the US, which was in the final year of the Trump presidency, informed Germany that it would block any thematic outcome on climate change and security. The Irish-Nigerien draft resolution had the support of 12 Council members and was co-sponsored by 113 member states, but China, India, and Russia expressed strong reservations from the outset of the negotiations.

...
While 12 members voted in favour of the draft resolution, Russia vetoed it. India also voted against the draft, while China abstained. ...

c. Responding to Coups

Consider the following analysis by the International Crisis Group, ‘Why the UN Security Council Stumbles in Responding to Coups’ (24 January 2022):

[The UN Security Council has a poor record in terms of meaningful responses to coup d'états involving the military ouster of governments.]

... [T]he Council did not address coups at all until the Cold War ended and has taken only a “highly selective” approach to them since. It has responded to fewer than a quarter of the coups that have taken place in this period, ignoring military takeovers in cases including Pakistan (1999), Thailand (2006 and 2014) and Egypt (2013). Although it has acted forcefully on rare occasions – including mandating a U.S. military intervention in Haiti to restore the democratically elected President Jean-Bertrand Aristide to power in 1994 – it more often confines itself to making statements of [‘serious concern’].

³⁶⁰ Security Council Report, ‘DPRK: Meeting on the Human Rights Situation under “Any Other Business”’ (8 December 2022).

A Record of Inaction

There is no consensus among Council members about how far the body should go in responding to coups. Some, including China and Russia, argue that the Council should stay out of UN member states' internal politics altogether and often aim to rein in Council comments on coups. Beijing and Moscow are generally suspicious of UN sanctions in principle and oppose applying such measures to coup plotters. ... But non-Western Council members counter that Western countries display double standards in response to military takeovers. ...

Reasons to Hit the Brakes

Beyond fundamental disagreements about the Council's remit in countries' internal affairs, there are three recurrent considerations that appear to contribute to its stuttering response to this type of crisis: confusion, geopolitics and the Council's lack of leverage in the countries concerned.

First, the element of confusion tends to be especially important in the early stages of the Council's response to a coup. In the aftermath of a military takeover, Council members often lack good information about what is happening on the ground. They may also have no clear instructions from their capitals. ...

Secondly, as the initial diplomatic confusion following a military takeover dissipates, the geopolitical interests of the Council's five veto-wielding permanent members are liable to hamper its long-term response. While Beijing was surprised and displeased by events in Myanmar, where it had developed close ties with the civilian government, China grew somewhat closer to the junta over the course of 2021. ... Russia was even quicker to show support for the Myanmar junta – which is a limited but growing purchaser of Russian arms

Finally, ... Council members ... leverage is limited. ... [F]ew diplomats in New York, whatever their national stances on coups, believe the body has the will or capabilities to take drastic action to reverse military takeovers.

...

The Biden Administration sought to stigmatize some coups in Africa,³⁶¹ but by 2025, after coups in Mali, Burkina Faso and Niger, the various military regimes had established the Alliance of Sahel States and withdrawn from the regional bloc ECOWAS.

Evaluation

Consider the following assessment by Frédéric Mégret, in 'The Security Council', in Frédéric Mégret and Philip Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2nd ed., 2020) 39:

The Council's impact on human rights appears at the same time potentially formidable and problematic in practice. ...

...

... The creation and support of international criminal tribunals ... stands as a remarkable example of the diversification of the Council's activities, as does the increasing mainstreaming of human rights within peacekeeping operations.

Together, these developments suggest, in the best of cases, an approach in which ends and means are increasingly seen as inseparable: human rights are the means to

³⁶¹ 'The United States Designates the Overthrow of Niger's Government a "Coups d'Etat"', 118 *Am. Jo. Int'l L.* (2024) 539.

a lasting peace that has respect for human rights as one of its foundations. In the most utopian of scenarios, the Council might be seen as gradually pulling itself up by the boot- straps: its actions in favour of human rights today will provide the standards to which it can be held tomorrow By the same token, at least four, not necessarily compatible, major concerns arise in relation to the Council's increased interest in human rights, which potentially cast a long shadow over its role.

First, ... the Council is (still) not doing enough. ... [T]he Darfur and the Rohingya crises are a reminder that for all its rhetoric, the Council continues to have tremendous difficulty in transcending its divides and in taking resolute action where it would be most needed. ... [T]he tension between the demands of human rights and respect for sovereignty, even though it has been powerfully mediated by 'international peace and security', remains a particularly resilient one.

...

A second [is inconsistency.] ... For each circumstance where human rights have been taken into account by the Council, there are many if not more when it was not, even though a strong argument existed that it should. Whereas restoring democracy, for example, was a major ground for intervention in Haiti, this Council precedent has not been matched by similar action in any other context and in fact the Kosovo intervention may have been deeply undemocratic; although the Security Council created the ICTY and the ICTR and usefully referred the Darfur situation to the ICC, it has at the first opportunity used its referral power vis- à- vis the ICC to block prosecutions of peacekeepers of non-state parties

At the heart of these dilemmas is a tension between a vision of the Council increasingly bound by its precedents and acting as a law enforcer, and a vision of the Council as merely a decision- making mechanism endlessly tied to the contingent interests of its members. ...

A third concern is that the Council is interested in human rights in certain areas of its activities, but has often failed to see the negative human rights impact that it has in other areas, especially as it takes on more and more governance responsibilities. In quantitative terms, no type of measure has done more harm to the Council's claims that it cares about human rights than embargoes, in Iraq and beyond. The behaviour of peacekeepers or troops more generally under Council mandate and the risk of rights violations arising out of the regime set up to deal with terrorism are also significant concerns. ...

...

A fourth ... concern is that the Council may already be ... doing too much. The oft-heard clamour for the Council to intervene (for example, in Syria) may be a case of 'beware what you wish for' on the part of the human rights community. ... There is certainly consensus that at the very least the Council should not violate or otherwise negatively affect human rights through its actions, a sort of 'do- no- harm' minimalist line. What is more contentious is the issue of the Council more proactively seeing itself as a defender of human rights. Indeed, it remains to be seen whether, even were the Security Council to adopt a higher human rights profile, this is something that should be welcomed as an unmitigated blessing and whether regular encroachments on the sovereignty of states guided by human rights concerns, might not end up weakening rights.

QUESTION

What are the principal arguments for and against the Security Council taking an active, even a leading, role in promoting human rights? Consider, in this context, the following critique of UN peacekeeping operations:

During the transformative era of decolonisation in the mid-twentieth century, UN peacekeeping staff orchestrated a reinvention of sovereignty and a remaking of colonial-era hierarchies for Global South populations on the front lines of post-colonial statehood. Peacekeeping missions perpetuated colonial structures, imaginaries, and staffing into newly independent or politically transitional spaces. Using a humanitarian guise, the organisation set host populations and international community expectations of the rights-based motivations and interests protected by peacekeeping staff.

...

... Cold War-era peacekeeping missions and staff played an integral role in perpetuating racial hierarchies, international interference, and technocratic supremacy within conflict contexts.³⁶²

³⁶² M. Tudor, *Blue Helmet Bureaucrats: United Nations Peacekeeping and the Reinvention of Colonialism, 1945–1971* (2023) 1.

Chapter 9. Treaty Bodies: the ICCPR Human Rights Committee

This chapter continues the inquiry into the structure, roles, functions and processes of international human rights bodies. We continue to emphasize the relationships among human rights norms, institutions and processes, as well as the reasons and techniques for ‘institutionalization’ of norms.

The Human Rights Council, created under the UN Charter (thus a ‘Charter organ’), which was examined in Chapter 8, remains the most complex and politically charged of the specifically human rights organs with universal reach. It differs markedly in organization, functions and powers, as well as public prominence, from the ten ‘treaty bodies’ established to monitor implementation of the key UN treaties (dealing respectively with civil and political rights, economic, social and cultural rights, racial discrimination, gender discrimination, torture (a committee and a separate sub-committee), children’s rights, migrant workers’ rights, persons with disabilities and enforced disappearances. Each of the treaty bodies is distinctive in some respects; each has functions only in relation to the treaty creating it; each such treaty regime is now to some extent ‘monitored’ or ‘implemented’ or ‘developed’ by that body.

Chapter 9 provides a systematic study of one such treaty body, the Human Rights Committee, created by and functioning within one of the UN’s two umbrella human rights treaties, the International Covenant on Civil and Political Rights. In 2025, 174 states are party to the ICCPR. We refer to it as the ‘ICCPR Committee’ to distinguish it from the ‘Human Rights Council’, with which it shares the same acronym (‘HRC’).

In reading the materials, keep in mind the extent to which the ICCPR Committee is distinct from or very much a part of the broad international human rights regime, and also the extent to which the different functions performed by the Committee interact with and ideally complement one another.

A. POWERS, FUNCTIONS AND PERFORMANCE OF THE ICCPR COMMITTEE³⁶³

1. Introduction

Based on Articles 40 and 41 of the Covenant, and on the first Optional Protocol to the ICCPR, the Committee has four main functions: (1) the consideration of states’ reports; (2) the adoption of ‘General Comments’; (3) the examination of ‘communications’ (i.e. complaints) from individuals claiming to be victims of violations by states parties of the Covenant; and (4) an interstate complaints procedure (Art. 21). While the latter was considered to be potentially important when the Covenant was drafted, it has never been used by states, although comparable procedures under other treaties, such as the ECHR and the Convention on the Elimination of All Forms of Racial Discrimination (three complaints as of 2025), have been addressed.³⁶⁴

Before considering the first three of these functions we consider the organizational arrangements reflected in the ICCPR.

³⁶³ For a detailed bibliography on the ICCPR see P. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (2020) 824–841. For analysis, see W. Schabas, UN *International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd. ed. 2019); L. Hennebel, ‘The Human Rights Committee’, in F. Mégret and P. Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2nd. ed., 2020) 339; and I. Jelić and L. Mührel, ‘The Human Rights Committee: Challenges and Prospects for Enhanced Effectiveness and Integration’, 14 *J. Hum. Rts. Prac.* (2022) 17.

³⁶⁴ N. Salem, ‘Awakening of Inter-State Communications Mechanism Before the CERD and Its Potential to Enhance the Justiciability of Racial Discrimination,’ 47 *Hum. Rts. Q.* (2025) 45.

Article 28

1. There shall be established a Human Rights Committee It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

...

Article 31

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

...

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

...

Article 39

... (2)(b) Decisions of the Committee shall be made by a majority vote of the members present.

The professional background of Committee members has varied considerably and includes judges, prosecutors, university teachers, public interest lawyers, former diplomats and former government officials. In general, members have demonstrated a high level of competence. Because Article 31(2) does not actually set regional quotas, the group of experts elected to the Committee has not always reflected the ‘equitable geographical’ balance called for.

Gender balance has improved significantly over the years. From 1977 to 1983, there were no female members. In 1999 there were four, in 2001 there were two, and in 2023-24 there were seven, making up just under 40 per cent. Since 1987, the Committee has elected a new Chair every two years, each time from a different region, but not necessarily in strict rotation. There are also three vice-Chairs and a Rapporteur.

Under Article 28(3), all members are to be ‘elected and shall serve in their personal capacity’. The UN term for such members is ‘experts’, as opposed to the ‘representatives’ of states who sit on the UN Human Rights Council. The inference is that Committee members are to act independently of the governments of their states.

Generally, this aspiration appears to have been realized, but in many contexts ‘independence’ in the sense identified has been a relative rather than absolute concept. Since Committee membership is a part-time activity, a minority of members have continued to hold government (diplomatic and other) posts, thus qualifying the degree of possible independence from their governments’ positions on given issues. But even determinedly independent individuals have to be in sufficiently good standing with their own governments in order to gain nomination in the first place. Consider the following ‘Guidelines’ (UN Doc. A/67/222 (2012), Annex 1) applicable to all treaty bodies, and to the ICCPR Committee according to Rule 15 of its Rules of Procedure (2021):

2. ... Treaty body members shall not only be independent and impartial, but shall also be seen by a reasonable observer to be so.
3. ... [A] treaty body member shall not be considered to have a real or perceived conflict of interest as a consequence of his or her race, ethnicity, religion, gender, disability, colour, descent
- ...
5. The principle of independence requires that members not be removable during their term of office [They] are accountable only to their own conscience and the relevant treaty body and not to their State or any other State.
- ...
8. A member shall not participate or influence in any way the consideration of a State party report by the treaty body, or ... [in procedures] such as follow-up, early warning or urgent action
- ...
10. A member shall not participate in, be present during, or influence in any way the examination of a communication
- ...
12. The independence and impartiality of treaty body members is compromised by the political nature of their affiliation with the executive branch of the State. Members of treaty bodies shall consequently avoid functions or activities which are, or are seen by a reasonable observer to be, incompatible with the obligations and responsibilities of independent experts under the relevant treaties.
- ...
16. Observance of the above guidelines falls first and foremost within the individual responsibility of each treaty body member and his or her own conscience. ... Ultimately, the relevant committee as a whole shall take any measures deemed necessary to safeguard the requirements of independence and impartiality of its members.

The Committee meets in Geneva for three sessions annually, for a total of 13 weeks. There is some inter-sessional work by individual members in the context of working groups, which meet for one week prior to the start of each session. Living and travel expenses are paid by the UN but in 2002 an annual honorarium of \$3,000 paid to members was reduced to a token \$1, in order to save money. The work is part time, members hold 'regular', often full-time, jobs, and must fit the Committee's work into already busy schedules. Most meetings (other than those considering 'communications' under the Optional Protocol) are public. Public attendance is usually rather limited, but public meetings have been webcast live since 2012 (available at <https://webtv.un.org/en>) and in 2020-21, in response to the Covid-19 pandemic, most Committee sessions took place online.

Decisions of the Committee are, in theory, by majority vote pursuant to Article 39(2). In practice, all decisions relating to concluding observations or the text of a General Comment, have been taken by consensus. This is also generally the case in relation to communications, even though individual concurring or dissenting opinions are now common. In general, working by consensus puts a premium on cooperation, avoids polarization, enables trade-offs over time and generates positions endorsed by the Committee as a whole. By the same token, it privileges compromise, interrupts the flow of consistent reasoning, and rules out bolder steps.

Historical Evolution

As with the Council, the ICCPR Committee has witnessed vast changes in global politics since it first met in 1977. The disputes and compromises over the Committee's basic structure and functions that marked the drafting of the Covenant and the Optional Protocol have left a strong imprint on the Committee today. Consider the following brief summaries by two authors of the nature of the earlier disputes and their continuing influence. The first is taken from Dominic McGoldrick, *The Human Rights Committee* (1994), at 13–14:

1.18 There was general agreement during the drafting that the primary obligation under the ICCPR would be implementation at the national level by States. There was continuing disagreement, however, on the question whether there should also be international measures of implementation. A minority of States, principally the Soviet bloc, insisted that there should be provisions to ensure implementation but that there should be no international measures of implementation. It was argued that such measures were a system of international pressure intended to force States to take particular steps connected with the execution of obligations under the Covenant. They were, therefore, contrary to the principle of domestic jurisdiction in article 2(7) of the United Nations Charter, would undermine the sovereignty and independence of States and would upset the balance of powers established by the UN Charter. Moreover, the establishment of petitions systems would transform complaints into international disputes with consequent effects upon peaceful international relations.

1.19 Against these views it was argued that the undertaking of international measures of implementation was an exercise of domestic jurisdiction and not an interference with it. International measures were essential to the effective observance of human rights, which were matters of international concern. However, even within those States that agreed that international measures were essential, there were significant differences of opinion as to the appropriate types of measures. The proposals included an International Court of Human Rights empowered to settle disputes concerning the Covenant; settlement by diplomatic negotiation and, in default, by *ad hoc* fact-finding Committees; the establishment of an Office of High Commissioner (or Attorney-General) for Human Rights; the establishment of reporting procedures covering some or all of the provisions in the Covenant; empowering the proposed Human Rights Committee to collect information on all matters relevant to the observance and enforcement of human rights and to initiate an inquiry if it thought one necessary.

...

1.21 The lengthy drafting process of the ICCPR largely coincided with the depths of cold war confrontation, the explosive development of notions of self-determination and independence, the accompanying political tensions of large scale decolonization, and the consequential effects of a rapidly altering balance of diplomatic power within the United Nations. In retrospect then it must be acknowledged that it was much more difficult to agree on the text of a Covenant containing binding legal obligations and limited measures of international implementation than it had been to agree upon the statement of political principles in the Universal Declaration in 1948

The second summary is by Torkel Opsahl, 'The Human Rights Committee', in Philip Alston (ed.), *The United Nations and Human Rights* (1992), at 371:

... The draft Covenant prepared in 1954 by the Commission envisioned a quasi-judicial Human Rights Committee quite different in its powers and functions from that which actually came into existence. It was another twelve years before the General Assembly's Third Committee debated the proposed implementation provisions, at which time they were drastically altered. The majority was opposed to making obligatory the procedure for interstate communications

All of the various positions, except that of dispensing with the Committee altogether, were taken into account by a formula worked out by the Afro-Asian group. According to this version, the Committee's only compulsory role would be to study and comment generally upon the reports of States Parties, a function originally intended for the Commission on Human Rights. Many of the details of this proposal were amended, which later caused doubts and disagreements about the proper role of the Committee in the reporting system. The functions relating to communications were made entirely optional, and arrangements providing for the consideration of individual complaints of violations were separated from the Covenant and put in the Optional Protocol. In other words, the result was a compromise between those States which favoured strong international measures and those which emphasized the primacy of national sovereignty and responsibility. As is inevitably the case with such compromises, many specific issues were left unresolved, perhaps intentionally. As a result the subsequent evolution of the arrangements has had to be shaped by a continuing give-and-take within the Committee over many years.

QUESTION

Some commentators characterize the ICCPR Committee as a 'quasi-judicial' body. Is this consistent with the part-time, unpaid basis of the work, the limited conflict of interest provisions contained in the Guidelines, the lack of formal hearings, and the fact that the Committee generally works by consensus? What changes would be desirable if the Committee were to seek to resemble more closely a quasi-judicial model?

2. State Reporting

A requirement that States Parties submit reports to a human rights treaty body about their implementation of that treaty is now the norm. Prior to the adoption of the Covenant, it would have seemed nearly inconceivable that most of the world's states would periodically submit a report to an international body about their internal matters involving many politically sensitive aspects of relations between government and citizens, and then participate in a discussion about that report with members of that body drawn from all over the world.

The relevant provision is Article 40:

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

- (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
- (b) Thereafter whenever the Committee so requests.

2. ... Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

...

4. The Committee shall study the reports ... [and shall submit them], and such general comments as it may consider appropriate, to the States Parties

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

The Covenant makes no provision about the form of reports, and the system has evolved considerably over the past decade or so. An initial report is due within one year after the Covenant enters into force for that state. But where once both the initial and subsequent ‘periodic’ reports were comprehensive in scope, almost all reporting today follows the LOIPR procedure (‘list of issues prior to reporting’) which involves the Secretariat preparing a comprehensive ‘country file’, containing all relevant data about that country, on the basis of which the Committee draws up a list of issues on which the state is required to report. Since 2020, the Committee has followed a ‘predictable review cycle’ of eight years between required reports.³⁶⁵

Neuman describes the value of the reporting process in these terms:

The activity of generating the report should focus the attention of State organs on their ICCPR obligations and on the needs expressed by civil society; the constructive dialogue between the State and the HRC gives the State the opportunity to educate the Committee and the world at large on its efforts to comply, and to receive legal guidance and advice from the HRC; the transparency of the dialogue, especially if webcast, offers the State’s populace a different perspective on their government; the HRC’s welcoming and use of NGOs’ information can bolster the legitimacy of their activities and their issues; the HRC’s concluding observations offer a form of public accountability for human rights violations; the concluding observations give the HRC an opportunity to indicate its interpretation of the ICCPR; and the follow-up activities create a further forum for civil society engagement.³⁶⁶

Diverse and accurate information is essential to the Committee’s work. For its first decade or so the Committee was pressured by a majority of its members not to rely upon any information other than that presented by states. Information from intergovernmental organizations, let alone from NGOs, was strongly contested. In the course of the 1990s these self-imposed restrictions gradually evaporated and the Committee now receives regular briefings from key stakeholders. The submission of ‘shadow reports’ by civil society groups (both domestic and international) is an integral part of the process and these reports are available on the OHCHR website. NGOs also brief the Committee in public for one to two hours prior to the examination of a State report, and can provide additional information in private sessions with Committee members held over the lunch break without interpretation. UN agencies also meet with the Committee in private, and sometimes submit confidential reports.

The formal procedure for examining reports consists of several steps. The first is the appointment of a ‘country report task force’ of five members. They have the main responsibility for the conduct of the debate on the report. One of these members will also be designated as the ‘country rapporteur’. He or she takes the lead in preparing a list of issues to be sent to the state party which is requested to provide written replies. The identity of the task force members is confidential.

³⁶⁵ UN Doc. A/74/256 (2019), Annex III.

³⁶⁶ G. Neuman, ‘Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members’ in D. Moeckli, H. Keller, and C. Heri (eds.), *The Human Rights Covenants at 50: Their Past, Present, and Future* (2018) 31.

During the ‘constructive dialogue’ with the representatives of the state party, which lasts for six hours in total, the country rapporteur and other task force members take the lead in posing questions, and other members may participate if time permits. The task force then drafts the concluding observations, which are debated in private, adopted and usually released at the end of the relevant session. The Committee normally deals with no more than five to six reports at each session.

The concluding observations generally highlight up to three ‘urgent recommendations’ in relation to which the Committee requests follow-up information to be provided within three years, or sometimes more speedily. The relevant issues are chosen because of the gravity and/or urgency of the situation. Concise and focused responses are sought and the Committee has a Special Rapporteur (and Deputy) on follow-up who assess the information received and report to the Committee. All stakeholders are invited to submit information during this process and the responses are then ‘graded’ on the following scale: A - Information/action largely satisfactory; B - Information/action partially satisfactory; C - Information/action not satisfactory; D - No cooperation with the Committee; E – The information or measures taken are contrary to or reflect rejection of the recommendation (UN Doc. CCPR/C/5 (2021)).

By way of example, the Committee considered the report of New Zealand in 2016. Its concluding observations (UN Doc. CCPR/C/NZL/CO/6) recommended that ‘[t]he State party should strengthen efforts to combat domestic and all forms of gender-based violence, including sexual violence, particularly in relation to Māori and Pasifika women and girls, as well as women and girls with disabilities’ and identified specific issues in that regard. In response to a request for ‘follow up’ information, the Government noted the work undertaken by a Ministerial Group on Family Violence and Sexual Violence, the allocation of additional budget funding, new legislation designed to strengthen the justice sector response to family violence and to develop a better integrated system, and a range of initiatives undertaken by the police to deliver better responses to domestic and gender-based violence, including sexual violence. The Committee welcomed the various measures, sought additional information, and graded the response as an ‘A’.

The third issue highlighted by the Committee was a recommendation for revised legislation to ensure ‘respect of the customary rights of Māori on their land and resources, and their cultural development.’ The Government replied that it had no plans to revise the relevant legislation, leading the Committee to award a ‘C’ and to reiterate its original recommendation (UN Doc. CCPR/C/132/2/Add.3 (2021)).

The Committee also has a procedure for examining the situation in states that have either not reported or are interminably late in doing so. If necessary, this is done in the absence of a report or even a delegation from the country concerned. In November 2022, the Committee adopted a set of concluding observations (UN Doc. CCPR/C/RUS/CO/8) on the report of the Russian Federation, after the government had twice postponed scheduled appearances before the Committee. The same procedure was also applied to Nicaragua, at the same session.

Case Studies

Below are case studies relating to the Democratic People’s Republic of Korea (the DPRK, or North Korea), Kenya, and the United States. The latter two are ‘concluding observations’ adopted by the Committee. The document below is a LOIPR (‘list of issues prior to reporting’) for the DPRK, which ratified the Covenant in 1981. Previous reports by the DPRK had been considered by the Committee in 1984 and 2001. In-between time, the Government had sought to withdraw from the Covenant in 1997 after its record was criticized by another UN human rights body. Because the Covenant contains no provision for withdrawal, the Secretary-General replied that it would only be possible if all States Parties to the Covenant agreed.³⁶⁷ In 2021, some 15 years after its third report was due, the Committee proceeded to schedule consideration of the situation. The LOIPR is the starting point in that process. Ten different groups of civil society organizations submitted information to facilitate the Committee’s consideration, and the DPRK had also submitted an updated ‘Common Core document’, designed to

³⁶⁷ UN memo C.N.467.1997.TREATIES-10 (12 November 1997).

provide general background for all treaty body reporting by the relevant state. In describing the country's political structure, it notes:

12. The Korean people won the Fatherland Liberation War (1950-1953) against the US and its satellite countries They ... established a socialist system free from exploitation and oppression of man by man.

13. The DPRK ... made the people's power and the socialist system invincible by relying on the single-minded unity and patriotic efforts of the people who are the masters of the State and the society

...

15. Today, the Korean people, led by Comrade Kim Jong Un, ... who realizes the politics of prioritizing, respecting and loving people, are channeling all their efforts into economic construction, making a vigorous onward march towards a prosperous and powerful socialist country in which people's ideal and desire will become a reality. (HRI/CORE/PRK/2019 (2019))

**HUMAN RIGHTS COMMITTEE, LIST OF ISSUES PRIOR TO THE SUBMISSION OF THE THIRD
PERIODIC REPORT OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA
UN DOC. CCPR/C/PRK/QPR/3 (22 JUNE 2021)**

...

**B. Specific information on the implementation of articles 1 to 27 of the Covenant, including
with regard to the previous recommendations of the Committee**

...

Anti-corruption measures (arts. 2 and 25)

4. Please respond to reports that corruption is endemic within the State party, including among Government officials and police officers, and discuss any steps taken to prevent and address such practices. In this regard, please include information about: (a) reports that individuals are required to pay bribes to public officials, including police officers, in order to exercise their fundamental rights, including to liberty and freedom of movement; (b) whether there are any independent mechanisms in place within the State party to investigate and prosecute cases of corruption; and (c) the extent to which information relating to the functioning of the Government is made publicly available in order to ensure transparency and accountability, including any legislation in place to ensure freedom of information.

Derogations (arts. 4, 9, 12 and 21–22)

5. Please provide information about the measures taken by the State party to address the coronavirus disease (COVID-19) pandemic. Please discuss whether any measures taken to address the COVID-19 pandemic derogate from the State party's obligations under the Covenant, including with respect to freedom of assembly, freedom of movement, liberty and due process. If they do, please specify whether the measures were strictly required by and proportional to the exigencies of the situation and limited in duration, geographical coverage and material scope, as outlined by the Committee

Non-discrimination (arts. 2, 19–20 and 26)

6. Please describe the legislative and other measures taken during the reporting period to combat discriminatory laws and social practices based on discriminatory grounds, in particular family background (*songbun*), sexual orientation, gender, religion and disability. ...

...

Violence against women, including domestic violence (arts. 2–3, 6–7 and 26)

8. ... Please: (a) respond to allegations of violence and of cruel and degrading treatment of women in detention facilities, including reports of sexual violence and women being forced to undergo abortions or witness the infanticide of their newborn babies; (b) discuss the legal provisions in place to criminalize all forms of rape, including marital rape, and clarify the criminal penalties for all related offences and the support services in place for women; and (c) outline the steps taken to address high levels of domestic violence

Right to life (art. 6)

9. ... Please: (a) detail which crimes are eligible for the death penalty, according to the Criminal Code, and provide information on how it is ensured that the punishment is only used in cases of the most serious crimes, as outlined in article 6 (2) of the Covenant; (b) provide data on the number of executions that have taken place within the reporting period, including information about the crimes for which the death penalty was applied and the age and gender of the individuals subjected to the punishment; and (c) describe the degree of judicial oversight of death penalty cases and respond to reports that extrajudicial executions have taken place in detention facilities. Please also respond to reports that public executions have taken place within the reporting period.

...

11. Please respond to reports that shoot-to-kill orders have been issued to prevent those suspected of having COVID-19 from entering the State party's territory, in contravention to the non-derogable character of the right to life. ...

12. Bearing in mind paragraph 66 of the Committee's general comment No. 36, please describe the steps taken within the reporting period to stop the proliferation of weapons of mass destruction, including measures: to prevent their acquisition by non-State actors; to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them; to destroy existing stockpiles; to take adequate measures of protection against accidental use; and to negotiate in order to achieve nuclear disarmament. Please also discuss the environmental impact of nuclear test sites, including responding to reports that groundwater sources have become contaminated and have exposed people in affected areas to radiation.

13. Recalling the previous recommendation of the Committee (para. 12), please provide information about the steps taken within the reporting period to improve access to food, reduce infant mortality and improve life expectancy

...

Prohibition of torture ... (arts. 6–7)

14. In the light of the Committee's previous recommendation (para. 15), please respond to reports of the widespread use of torture and other cruel, inhuman or degrading treatment or punishment, including violence by State officials, forced confessions, sexual harassment and violence, and deliberate withholding of food, in detention facilities within the State party. ...

Liberty and security of persons and the treatment of persons deprived of their liberty (arts. 9–10)

15. Please respond to reports of widespread arbitrary detention within the State party. ...

...

Elimination of slavery, servitude and trafficking in persons (arts. 2, 7–8 and 26)

18. ... Please also respond to reports that forced labour is widespread within the State party, in particular within political prison camps and labour reform camps, where prisoners, including children, are subjected to long hours of physically demanding, unpaid labour with limited access to food, water and basic sanitation.

...

Right to privacy (art. 17)

24. Please discuss reports of large-scale surveillance activities within the State party and comment on their compatibility with article 17 of the Covenant. Please include information about: (a) the activities of the neighbourhood watch units (*inminban*) and Group 109, including reports that they search private homes without a warrant or notice; (b) reports of State monitoring of the written and telephone communications of individuals, and of surveillance of 3G technology usage among mobile telephone owners; and (c) the legal basis for such surveillance activities, and the processes for judicial oversight of their application.

...

**HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC
REPORT OF KENYA³⁶⁸
UN DOC. CCPR/C/KEN/CO/4 (11 MAY 2021)**

1. The Committee considered the fourth periodic report of Kenya (CCPR/C/KEN/4) [during three sessions from 9-11 March 2021]. The meetings were held virtually, owing to the coronavirus disease (COVID-19) pandemic. ...

...

C. Principal matters of concern and recommendations

Domestic implementation and dissemination of the Covenant

4. ... While noting that the Covenant and other international legal provisions have direct applicability in domestic law following ratification, the Committee is also concerned that the Constitution and its interpretation are not in full conformity with the Covenant. ...

5. The State party should:

(a) Continue evaluating and revising, where necessary, domestic legal provisions, including the Constitution, to ensure harmonization with the rights guaranteed in the Covenant and ensure that domestic laws are interpreted and applied in conformity with its provisions;

...

(d) Expedite the process of ratification of the first Optional Protocol ...;

(e) Accelerate the process of appointing new commissioners to the Kenya National Commission on Human Rights.

Corruption

6. The Committee notes the development of draft legislation, including the Anti-Corruption Laws (Amendment) Bill of 2021 and the Whistleblower Protection Bill of 2021. It is concerned, however, about the lack of information about when the draft provisions are likely to be enacted into law and about the low overall number of convictions for corruption. ...

7. The State party should continue and strengthen its efforts ... to combat corruption and promote good governance, transparency and accountability. It should also expedite the passing into law of [the two Bills] The State party should step up efforts to investigate and prosecute corruption and, if a person is convicted, apply penalties commensurate with the seriousness of the offence and ensure asset recovery, where appropriate. ...

Fight against impunity and past human rights violations

8. The Committee is concerned by the limited progress made in providing full redress for the gross human rights violations that occurred between 1963 and 2008. It is also concerned that Public Finance Management (Reparations for Historical Injustices Fund) Regulations of 2017, which were designed to operationalize the Restorative Justice Fund, remain at the consultative stage; therefore, victims cannot yet access reparations. It also notes with concern a lack of information about how the Government will ensure the implementation of all the recommendations of the Truth, Justice and Reconciliation Commission [which reported in 2011]. ...

³⁶⁸ Note that specific issues are dealt with in paired paragraphs. The first expresses the Committee's 'concerns', while the second, in bold, contains its recommendations.

9. The State party should:

- (a) Intensify efforts to ensure the full and effective implementation of all the recommendations of the ... Commission ...;
- (b) Step up efforts to provide access to remedies for victims of post-election violence in 2017 ...;
- ...

Non-discrimination

10. The Committee is concerned about the lack of comprehensive anti-discrimination legislation, in line with article 27 of the Constitution and the provisions of the Covenant

11. The State party should:

- (a) Adopt comprehensive legislation prohibiting discrimination, including multiple, direct and indirect discrimination, in all spheres, in both the public and the private sectors, on all the grounds prohibited under the Covenant, including sex, sexual orientation, gender identity, religion, disability, albinism, socioeconomic status, HIV/AIDS status, ethnic and political affiliation or other status;
- (b) Guarantee effective remedies for victims of discrimination in judicial and administrative proceedings;
- (c) Take concrete steps, such as comprehensive awareness-raising campaigns and sensitization activities, to address stigma and discriminatory attitudes and promote sensitivity and respect for diversity among the general public.

Sexual orientation, gender identity and intersexuality

12. The Committee is concerned about:

- (a) Sections 162 and 165 of the Penal Code criminalizing same-sex relations, and the High Court ruling in 2019 that declared those provisions to be constitutional;
- (b) The State party reporting that that prohibition is based upon same-sex relations being unacceptable to Kenyan culture and values but not providing information about any measures taken to address discriminatory attitudes and stigma among the general public;
- (c) Reports of lesbian, gay, bisexual, transgender and intersex individuals experiencing harassment, discrimination and violence, including violations perpetrated by law enforcement officers and vigilante groups, and facing barriers to access justice and remedies;
- (d) Incidences of children being expelled from schools on the basis of actual or suspected sexual orientation and/or gender identity;
- (e) Cases of non-urgent, irreversible surgical procedures, infanticide and abandonment among intersex children

13. The State party should take appropriate steps to:

- (a) Amend all relevant laws ... to decriminalize consensual sexual relations between adults of the same sex;
- (b) Address discriminatory attitudes and stigma towards [LGBTI persons] ..., including through comprehensive awareness-raising and sensitization activities;
- ...
- (d) Take immediate action to address the expulsion of children from schools on the basis of their actual or suspected sexual orientation and/or gender identity;
- (e) Strengthen measures to end the performance of irreversible medical acts, especially surgical operations, on intersex children who are not yet capable of giving their full, free and informed consent, except in cases where such interventions are absolutely necessary for medical reasons. Access to effective remedies for victims of such interventions should also be ensured.

Gender equality

14. The Committee remains concerned that constitutional provisions requiring not more than two thirds of elective and appointive positions to be persons of the same gender have not been implemented. It notes with concern that women's representation in both the National Assembly and Senate remains below one third of the membership of those bodies and that multiple attempts to ensure the implementation of the constitutional provisions have not been effective. ...
15. The State party should intensify efforts to implement [the relevant] constitutional provisions

Counter-terrorism measures

16. While acknowledging the terrorist threat faced by the State party, the Committee remains concerned that the legal framework governing counter-terrorism efforts does not clearly set out that human rights must be respected in the fight against terrorism. The Committee is concerned that the Prevention of Terrorism Act (... 2012) contains a definition of terrorism that is vague, overly broad and has been used to oppress those critical of the Government. ... The Committee is also concerned about reports of arbitrary arrests, harassment, extortion, forcible relocation, extrajudicial killings, refoulement and enforced disappearances being perpetrated by State officials in the context of counter-terrorism operations
17. The State party should undergo a process of legal review and reform to ensure respect for human rights in the fight against terrorism It should also take steps to ensure counter-terrorism legislation is not used to limit any rights enshrined in the Covenant

Violence against women

18. The Committee is concerned about:
- (a) Continuing female genital mutilation ... ;
 - (b) Reports of other harmful traditional practices in the State party, including wife inheritance, ritual cleansing and child marriage;
 - (c) Sexual offences, including gang rape, being perpetrated against women in the period surrounding the 2017 elections, and a lack of access to protection and remedies among victims;
 - (d) High levels of domestic violence ... weaknesses in the legal and institutional response, ..., and a failure to criminalize marital rape;

(e) Safe spaces for women who have been subjected to violence not being available to women in all parts of the State party's territory;

...

19. The State party should:
[Take steps to address each of these concerns]

Voluntary termination of pregnancy and sexual and reproductive rights

20. The Committee is concerned that while article 26 of the Constitution allows for voluntary termination of pregnancy in limited circumstances, ... the Penal Code criminalize[s] acts relating to the provision of abortion services. ...

21. Bearing in mind paragraph 8 of the Committee's general comment No. 36 (2018) on the right to life, the State party should take steps to ensure clear and harmonized laws, policies and guidelines to govern access to safe and legal termination of pregnancy, as permitted under article 26 of the Constitution, including in cases of pregnancy resulting from sexual violence. ... It should also consider widening access to safe and legal termination of pregnancy.

Death penalty

22. While welcoming the steps taken by the State party to implement the judgment in the 2017 Supreme Court case of [*Muruatetu*, Ch. 1B, above, concerning the mandatory death penalty]... the Committee is concerned about the lack of information about when the process of legal reform to enact that judgment and the resentencing of eligible death row inmates will likely conclude. The Committee is concerned that the State party has yet to take concrete steps to implement the recommendation of the Task Force on the Implementation of the Supreme Court Ruling on the Death Penalty to abolish the death penalty, as well as to accede to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty

...

Enforced disappearances, extrajudicial killings ...

...

25. The State party should:

- (a) Step up efforts to ensure timely investigations, prosecutions and punishments of all reported cases of enforced disappearances, extrajudicial killings and other unlawful uses of force ...;
- (b) Revise the legal framework to ensure that all forms of enforced disappearance are clearly defined in criminal law with associated penalties that are proportionate to the severity of the offence;
- (c) Ensure that the training of police officers is extended to all relevant State officers

Climate change and environmental degradation

...

27. The State party should continue and expand its efforts to develop its resilience to climate change through adaptation and mitigation measures. All [related] projects ... should be developed with the meaningful and informed participation of the affected population, including indigenous peoples. ...

Prohibition of torture ...

28. The Committee is concerned about reports of torture and ill-treatment, including in the context of policing activities and places of detention, and about the low number of convictions and punishments for such crimes. ...

...

Prison conditions

...

31. The State party should continue and intensify its efforts to improve conditions and reduce overcrowding in places of deprivation of liberty, in particular by increasing the use of alternatives to detention

Liberty and security of person

32. The Committee is concerned about reports of the use of arbitrary arrest and detention, including among human rights defenders, journalists, civil society representatives and lesbian, gay, bisexual, transgender and intersex individuals. It is also concerned about the compatibility of provisions in the Prevention of Terrorism Act (... 2012), which allows suspects to be held in pretrial detention for up to 90 days, with article 50 of the Constitution and the provisions of the Covenant. ...

...

Internally displaced persons

...

39. The State party should intensify its efforts to expedite durable solutions for internally displaced persons in accordance with relevant international standards, including the Covenant and the Guiding Principles on Internal Displacement. The State party should also operationalize the National Consultative Coordination Committee for Internally Displaced Persons as a matter of priority.

Forced evictions

40. The Committee is concerned about continued reports of forced, and sometimes violent, evictions, including among indigenous populations in forest areas

41. The State party should ensure that all evictions are carried out in accordance with national and international standards, including by:

- (a) Putting in place a sustainable system of equitable land tenure to prevent forced evictions;
- (b) When there is no alternative to forced evictions, taking all necessary measures to implement effective protections, including the need for adequate notice and prior and meaningful consultation with and the provision of adequate compensation and/or resettlement of those affected. ...;
- (c) Strictly upholding the moratorium declared during the COVID-19 pandemic and all judicial decisions on evictions;
- (d) Improving compensation and resettlement among those affected by evictions ...;
- (e) Ensuring the investigation, prosecution, conviction and punishment of all individuals who breach the law during evictions.

Freedom of expression

42. The Committee is concerned about the lack of harmonization of the legal standards in the State party, including sections ... of the Penal Code, the Computer Misuse and Cybercrimes Act (... 2018), the Prevention of Terrorism Act (... 2012), the Kenya Information and Communications

(Amendment) Act (... 2013) and the Security Laws (Amendment) Act (... 2014), with articles 33 and 34 of the Constitution and articles 19 and 20 of the Covenant. The Committee is also concerned that national legal provisions have been used to limit online expression, repress lesbian, gay, bisexual, transgender and intersex individuals, and quell criticism of the Government

43. ... The State party should ensure that any restrictions on the exercise of freedom of expression, including online expression, comply with the strict requirements of article 19 (3) of the Covenant. They should also take concrete steps to prevent any interference with the free press during the 2022 elections and protect journalists and media workers from all forms of harassment and violence.

Right of peaceful assembly

44. The Committee welcomes that the Public Order (Amendment Bill) of 2019, and provisions therein creating criminal and civil liability for harms and losses during assemblies, has been deemed unconstitutional and rejected by the parliament. It is concerned, however, about reports that the requirements in the Public Order Act (... 1950) to notify the police of all assemblies are being used in practice to deny authorization for peaceful assemblies. The Committee is also concerned about reports of the excessive use of force to disperse protests and of the arbitrary detention and arrest of human rights defenders for exercising their right to peaceful assembly

...

Rights of the child

...

47. The State party should expedite the enactment of the Children (Amendment) Bill 2018 into law, harmonize all national provisions to reflect 12 years as the minimum age of criminal responsibility and ensure the consistent application of the best interests of the child principle in all incidences of children in conflict with the law.

Participation in public affairs

48. The Committee is concerned that continued impunity for the grave human rights violations that occurred in the context of the 2017 elections ... could undermine the electoral process in 2022. It is also concerned that the root causes of violence in 2017, including inter alia multiple violations of electoral regulations, voting irregularities, failure to effectively decentralize the electoral process and challenges faced by the Independent Electoral and Boundaries Commission in effectively and independently implementing their mandate, have not been adequately addressed.

49. The State party should intensify efforts to provide remedies to all victims of violence in the context of the 2017 elections, including guarantees of non-repetition. The State party should also take all necessary steps ahead of the 2022 elections to prevent violence and ensure the effective and independent functioning of the Independent Electoral and Boundaries Commission. In addition, it should adopt all measures necessary to ensure transparency in voting and in vote-counting procedures.

Indigenous peoples

...

51. The State party should:

(a) Develop and enact dedicated legislation to expand specific protection for indigenous peoples;

(b) Step up safeguards against forced evictions of indigenous peoples and ensure the consistent and effective application of the principle of free, informed and prior consent before any developmental or other activities take place on lands traditionally used, occupied or owned by indigenous communities;

...

(d) Publish without delay the recommendations of the task force to advise the Government on the implementation of the decision of the African Court on Human and Peoples' Rights in respect of the rights of the Ogiek community of Mau and enhancing the participation of indigenous communities in the sustainable management of forests, and comply with the decision of the Court;

(e) Ensure that specific measures are in place to promote and protect the rights of indigenous women.

D. Dissemination and follow-up

52. The State party should widely disseminate the Covenant, its two Optional Protocols, its fourth periodic report and the present concluding observations with a view to raising awareness of the rights enshrined in the Covenant among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, and the general public. The [State report and these concluding observations should be] translated into the official languages of the State party.

53. ... [T]he State party is requested to provide, by 26 March 2023, information on the implementation of the recommendations made by the Committee in paragraphs 19 (violence against women), 41 (forced evictions) and 49 (participation in public affairs) above.

...

HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FIFTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA UN DOC. CCPR/C/USA/CO/5 (3 NOVEMBER 2023)

[Selected excerpts from the diagnosis rather than the resulting recommendations follow:]

4. The Committee remains concerned at the lack of measures to effectively incorporate the Covenant in the domestic legal order. ...

10. ... the Committee is concerned about the persistence of hate crimes, including mass shootings, and hate speech against people of African descent, Indigenous Peoples, persons of Hispanic/Latino origin, persons of Asian descent, members of Muslim and Jewish communities, migrants, asylum seekers and against persons based on their real or perceived sexual orientation and gender identity, including by politicians and high-level officials, as well as in the media and on social media platforms. It is also concerned at the underreporting of hate crimes by law enforcement agencies to the Federal Bureau of Investigation (FBI) due to the voluntary nature of such reporting, which has led to a lack of statistical data on hate speech.

14. ... [T]he Committee continues to be concerned that persons belonging to racial and ethnic minorities, in particular people of African descent, Indigenous Peoples and persons of Hispanic/Latino origin, are overrepresented in the criminal justice system, are disproportionately placed and held in pre-trial detention and affected by parole and probation sentences, and are more often subject to prison labour and harsher sentences

26. ... [T]he Committee is deeply concerned at the increase of maternal mortality and morbidity in the State party, which has the highest rate of maternal mortality among developed countries, and particularly affects women from vulnerable and minority groups. ...

32. The Committee remains seriously concerned at the continuing practice of the State party of killings in extraterritorial counter-terrorism operations using armed drones, the lack of full and continuous transparency regarding the legal and policy criteria for drone strikes, the alleged possibility of variations through classified plans, as well as the lack of accountability for the loss of life and for other serious harm caused, particularly to civilians. The Committee notes that the State party maintains its position

that extraterritorial counter-terrorism operations, including drones strikes, are conducted in the course of its armed conflict with Al-Qaida and associated forces in accordance with its inherent right of national self-defence, and that they are governed by international humanitarian law as well as by the current Presidential Policy Memorandum that establishes standards and procedures that govern the use of lethal force outside of various active hostilities. However, it reiterates its concern about the State party's broad approach to the definition of "armed conflict", including an overbroad geographical and temporal scope. While noting the adoption of the Civilian Harm Mitigation and Response Action Plan (CHMR-AP), the Committee is seriously concerned that it only applies to lethal strikes carried out by the Department of Defence and not by other agencies such as the Central Intelligence Agency (CIA). It is further concerned at the very limited use of ex gratia payments to affected civilians and their families in recent years.

34. ... [T]he Committee is gravely concerned at the increase in gun-related deaths and injuries, which disproportionately affects racial and ethnic minorities as well as women and children.

...

36. The Committee remains deeply concerned at police brutality and the excessive and deadly use of force by law enforcement officials, including by Customs and Border Protection (CBP) officers, which has a disparate impact on people of African descent, Indigenous peoples, persons of Hispanic/Latino origin, migrants and asylum seekers. It is also concerned at reports of the lack of accountability in the majority of cases of excessive and deadly use for force by law enforcement officials.

...

40. The Committee is concerned about reports of an increase of state and local laws criminalizing homelessness, of violence against homeless persons as well as at the higher risk of premature death that they experience due to homelessness. ...

42. ... the Committee is seriously concerned that the specific offence of torture has not yet been introduced at the federal level.

44. ... [T]he Committee is concerned at reports of the extensive use of solitary confinement in the State party, including prolonged and even indefinite confinement, and of its use with respect to juveniles and persons with mental disabilities and health needs.

64. ... [T]he Committee is concerned at the increase of legislative initiatives and practices at the state level that limit the exercise of the right to vote, inter alia, partisan gerrymandering, restrictions on voting by mail and on ballot collection, and burdensome voter identification requirements. It is also concerned about the disproportionate impact of these measures on low-income voters, persons with disabilities, and racial and ethnic minorities as well as at reports of increasing harassment and attacks against election officials. ...

...

* * *

Impact

Questions inevitably arise as to the impact of the treaty bodies' 'dialogues' with states and the value of the concluding observations. Cosette Creamer and Beth Simmons, in 'The Proof is in the Process: Self-Reporting Under International Human Rights Treaties', 114 *Am. J. Int'l L.* (2020) 1, have undertaken in-depth analyses around these questions:³⁶⁹

... [S]tate self-reporting [to treaty bodies] can lead to positive consequences [through elite] socialization, learning and capacity development, domestic political mobilization, and law development ... [This analysis shows] that

³⁶⁹ See also C. Creamer and B. Simmons, 'Do Self-Reporting Regimes Matter? Evidence from the Convention Against Torture', 63 *Int'l Stud. Q.* (2019) 1051.

improved human rights practices on the ground are theoretically and evidentially connected to the report-and-review process. ...

...

A finding that self-reporting “works”—even when states have an incentive to shirk and prevaricate—will strike some observers as hopelessly naïve. Critics look at the proliferation of treaty obligations and assert that the reporting system is breaking under its own unwieldy weight. “Reporting fatigue” is a common diagnosis of the problem and a major reason for reporting delinquency. But evidence of serious reporting fatigue is weak. Failure to report is best explained by a lack of state capacity

...

Perhaps a more insidious critique is that reporting may become a bureaucratized end in itself.

The self-reporting process is evolutionary, not revolutionary, and is certainly one part of a wider ecosystem of human rights accountability. But research demonstrates that repeat participation in the process sometimes results in important improvements. Moreover, the proof—the why and the how—is in the process: engagement quality is improving, not declining. Ritualism may be a risk, but even actors who think they are engaged in ritual may be socialized into meaningful dialogue. ... [E]ager publics and alert press reporters have not permitted the process to become meaninglessly performative across the board.

Policy Recommendations

...

First, treaty bodies should increase efforts to encourage states to participate, especially to submit their first report, since doing so familiarizes governments with the process. ...

Second, as socialization research makes clear, the nature of the dialogue with treaty bodies is central to successful internalization of rights norms. Committee members’ language and tone matter. Many governments have suggested the dialogue should follow a more “positive” and “constructive” narrative geared toward a “positive impact on the ground through implementation,” which would facilitate socialization and learning. Despite an increasing turn to grades and rankings at the international level, we discourage the use of performance “grades” by the treaty bodies. Persuasion is potentially undermined by a superficial scramble to avoid low marks.

Expertise is also central to the process of persuasion, suggesting that the independence and professional qualifications of the treaty body members should be a focus of reform efforts. ...

Third, the composition of delegations sent to Geneva—and particularly the representatives’ connectedness to domestic policy implementation—improves the chances for relevant lessons to seep into policy discussions back home. ...

Fourth, successful learning and capacity development depend on interactive dialogue, geared toward problem-solving and resulting in a limited set of priority recommendations that are targeted and actionable. ...

Fifth, we support “bring[ing] the treaty body system closer to the people on the ground,” by holding some committee meetings away from Geneva and within the region of the countries under review. ...

...

Over time, governments develop some capacity and expertise to collect and analyze information, detect violations, and deal with them in their domestic settings. Civil society organizations offer additional and sometimes contradictory information, mobilize around the reporting process, and articulate demands for change. Regional courts have increasingly looked to the expert committees’ concluding observations to support their judgments. The reporting system therefore has the potential to reverberate in domestic and regional politics, policy, and law and thereby improve the realization of human rights on the ground.

QUESTIONS

1. Does the Committee cover too much ground in its concluding observations? Should it limit their scope in some way?
2. How would you assess the Committee's concluding observations in terms of their specificity, robustness, and potential to make a difference? What alternative styles or approaches might be envisaged?
3. Responding to the perceived inefficacy of the Committee's concluding observations, Tomuschat has argued that these analyses 'should be relied upon by the entire international community, States and international organizations alike, when making policy determinations vis-à-vis a State whose compliance with the obligations under the ICCPR is seriously defective.' Are these documents formulated in such a way as to fulfill that function effectively?
4. On 3 March 2022, one week after Russia's invasion of Ukraine, the Committee adopted a statement (UN Doc. CCPR/C/134/2) expressing 'its extreme concern at the ongoing military invasion ... conducted in breach of the fundamental principles of the United Nations, including the prohibition on the threat or use of force'. Is this a constructive precedent, and if so, under what circumstances should the Committee make such statements in the future?

3. General Comments

The text of the ICCPR is characteristically terse and ambiguous about what is intended by 'general comments'. Article 40, after setting forth the undertaking of states to submit periodic reports to the Committee, provides in paragraph 4 that the Committee 'shall study the reports' submitted by states and 'shall transmit its reports, and such *general comments* as it may consider appropriate' to the states (emphasis added). Under paragraph 5, states 'may submit to the Committee observations on any [such] comments'.

The adoption of the phrase in 1966 followed extensive debate over whether any comments resulting from the Committee's examination of reports should be general or specific in nature, and a deliberate failure to resolve the issue. It was thus left to the Committee to decide. Western European members of the Committee wanted country-specific and violations-focused comments to emerge from the reporting process, but the Eastern Europeans rejected both specificity and appraisal. In their view, since the Covenant was not a 'control mechanism', general comments should be directed to all states parties rather than one. Under a 1980 compromise, the committee decided that such comments would be designed to 'promote co-operation' and 'stimulate activities' by states and would focus on procedural issues as well as 'questions related to the application and the content of individual articles of the Covenant'. They thus evolved from a concept of unclear and contested meaning to a tool of fundamental importance in the armoury of those seeking to promote greater clarity and interpretative detail in international human rights law.³⁷⁰

³⁷⁰ P. Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law', in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), at 763.

Evolution of General Comments³⁷¹

Between 1981 and July 2025 the ICCPR Committee adopted 37 General Comments. While most are devoted to specific rights or articles, there are also a number of wide-ranging General Comments which deal with broader issues such as reservations, emergencies, gender equality and states' obligations in general.³⁷²

A close reading of these Comments and of the evolution in style and substance reflected therein reveals that the Committee's record might usefully be understood by distinguishing four somewhat, but not entirely, separate phases in its approach to General Comments. They are: (1) consolidation of procedures — 1981–1983; (2) tentative first substantive steps — 1984–1988; (3) the post-Cold War period in which agreement could be reached on expansive interpretations of key substantive rights; and (4) since 2000 when the Committee has adopted an important set of umbrella comments designed to consolidate its understanding of the system as a whole.

The output in the first of these phases has been described as 'laconic', 'hesitant', 'bland and uninspiring'.³⁷³ Judged by today's standards this is fair, but in fact the General Comments adopted during this phase played a very important role in consolidating various procedural and organizational innovations in the Committee's working methods which, up until that point, might have been reversible. The caution of this phase was also justified by the need to ensure that states would acquiesce in the development of the notion of General Comments.

The second phase saw the adoption of only three Comments but they were considerably longer, more detailed and reflected more sophisticated legal analysis. The constraints imposed by political factors were nevertheless evident, both in the Comments that were adopted and those that were not (e.g., a long-term effort to adopt a draft on the rights of minorities had to be abandoned)³⁷⁴ and the jurisprudential innovations were rather limited.

The third phase, after 1989, showed a Committee which had freed itself from most of the limitations that flowed from competing socialist and liberal perceptions of the nature of human rights and of the appropriate role of treaty bodies and from the constraints that flowed from the early understandings of the limited functions of General Comments. It adopted expansive Comments on the rights of the child, non-discrimination and the family, and it marked a definitive break with the past by adopting revised Comments on Articles 7 and 10 which replaced the very tentative efforts it had made during the first phase with much longer and more assertive texts. The end of the influence of the Cold War was also strongly underlined by the range of topics on which detailed and progressive Comments were adopted after 1992. In particular, the Comments on freedom of expression (1993), minorities (1994), the right to vote and take part in government (1996) and freedom of movement (1999) could never have been agreed during the earlier phases and each contains very important jurisprudential elements.

³⁷¹ See H. Keller and L. Grover, 'General Comments of the Human Rights Committee and their Legitimacy', in H. Keller and G. Ulfstein (eds.), *U.N. Human Rights Treaty Bodies: Law and Legitimacy* (2012) 116.

³⁷² The subjects and dates of adoption are as follows: No. 1 Reporting obligations (1981); No. 2 Reporting guidelines (1981); No. 3 Implementation at the national level (1981); No. 4 Equal right of men and women (1981); No. 5 Derogations; No. 6 Right to life (1982); No. 7. Prohibition of torture or cruel, inhuman or degrading treatment or punishment (1982); No. 8. Right to liberty and security of persons (1982); No. 9. Article 10 (Humane treatment of persons deprived of their liberty (1982); No. 10 Freedom of opinion (1983); No. 11 Article 20 (propaganda for war and advocacy of hatred) (1983); No. 12 Right to self-determination (1984); No. 13 Administration of justice (1984); No. 14 Right to life (1984); No. 15 The position of aliens under the Covenant (1986); No. 16 Right to privacy (1998); No. 17 Rights of the child (1989); No. 18 Non-discrimination (1989); No. 19 The family (1990); No. 20 Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (1992); No. 21 Humane treatment of persons deprived of their liberty (1992); No. 22 Freedom of thought, conscience religion (1993); No. 23 Rights of minorities (1994); No. 24 Reservations (1994); No. 25. Participation in public affairs and the right to vote (1996); No. 26 Continuity of obligations (1997); No. 27 Freedom of movement (1999); No. 28 The equality of rights between men and women (2000); No. 29 Derogations during a state of emergency (2001); No. 30 Reporting obligations (2002); No. 31 The nature of the general legal obligation imposed on States Parties to the Covenant (2004); No. 32 Right to a fair trial (2007); No. 33 Obligations of States Parties under the Optional Protocol (2008); No. 34 Freedom of opinion and expression (2011); No. 35 Liberty and security of person (2014); No. 36 Right to life (2018); and No. 37 Right of peaceful assembly (2020).

³⁷³ T. Buergenthal, 'The Human Rights Committee', 5 *Max Planck Y.B. of U. N. Law* 341 (2001), at 387.

³⁷⁴ For the record of debates over an aborted draft, see UN Docs. CCPR/C/SR 590, 607, 618, 633 (1985).

The fourth phase, since 2000, has seen the Committee consolidate its views on the system as a whole with detailed and expansive statements on gender equality, rights in emergency contexts, reporting obligations, the legal nature of states' obligations, freedom of expression and assembly, and the right to life.

Illustrations of General Comments

In reading the sampling of General Comments (GCs) that follows you should re-read the relevant articles of the Covenant.³⁷⁵ Consider: the functions played by GCs, what their evolution reflects in terms of the changing roles of the Covenant and of the Committee, what they reveal about the Committee's understanding of the Covenant, the significance of GCs in expanding the interpretive reach of the Covenant and its norms and the relevance of GCs in relation to the human rights regime in general.

A. PHASE 1 (1981–1983)

The purpose of [the Committee's] general comments is to make this experience available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights ...

³⁷⁶

GC No. 2, 'Reporting Guidelines' (1981):

3. The Committee considers that the reporting obligation embraces not only the relevant laws and other norms relating to the obligations under the Covenant but also the practices and decisions of courts and other organs of the State party ...

GC No. 3, 'Implementation at the National Level' (1981):

1. The Committee notes that article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. ... [T]he obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. [I]n principle this undertaking relates to all rights set forth in the Covenant.

...

B. PHASE 2 (1984–1988)

GC No. 14, 'Article 6' (1984) builds on GC No. 6, 'Article 6' (1982). Both address the right to life, and their orientation reflects the revived influence of Cold War concerns, as well as efforts to explore how the ICCPR Covenant might relate to economic and social rights-type concerns. These GCs were subsequently superseded by GC No. 36. Consider the following excerpt from GC No. 6:

³⁷⁵ In addition to those excerpted below, other GCs feature elsewhere in the book. See e.g.: (1) GC No. 26 at 165, above, on a state's withdrawal from the Covenant; (2) GC No. 22 at 604, above, on freedom of religion; (3) GC No. 24 at 1097, above, on reservations to the ICCPR; (4) GC No. 29 at 397, above, on states of emergency; and (5) GC No. 32 at 470, above, on the right to a fair trial.

³⁷⁶ UN Doc. HRI/GEN/1/Rev.8 (2006).

...

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

Compare these provisions from the earlier GC with *GC No. 14*, two years later:

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

...

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

GC No. 16, 'Article 17' (1988) (at 21) elaborates the article's reference to interference with privacy. The following excerpt illustrates the Committee's preparedness to go into substantive issues in more depth and to read more into the terms of the Covenant than it had been prepared to do at the outset:

10. The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

C. PHASE 3 (1989–1999)

GC No. 18, ‘Non-discrimination’ (1989) deals with several provisions of the Covenant — Articles 2, 3 and 26 among others — that state the principle of non-discrimination. Compare it with GC No. 28 on equality, adopted during the fourth phase.

7. ... [T]he Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

...

10. The Committee also wishes to point out that the 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. ... [A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant. ...

...

12. ... [A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right ... [T]he application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. [N]ot 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.

GC No. 20, ‘Article 7’ (1992) concerns torture and cruel or degrading treatment or punishment. Note the detail in the following provisions that bear on implementation:

11. ... To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

...

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

D. PHASE 4 (2000–PRESENT)

Today, the process for adopting a GC is much more complicated than it once was. For the Committee member who serves as rapporteur on a new GC it represents ‘a huge time commitment, both during and between sessions. The rapporteur produces the initial draft, and shepherds the evolving text through the stages of discussion. The procedure ... has become highly consultative, and the HRC receives very useful suggestions from States and other stakeholders, ... and each paragraph of the text is adopted by consensus.’³⁷⁷ Thus, for example, in drafting GC No. 36 (below) 23 states (all except Brazil, Egypt, and Namibia, from the global North), a UN agency, a UN treaty body, three Special Procedures mandates, two national human rights institutions, 33 academics, and 108 civil society groups made submissions. Another important innovation in this phase is the inclusion of footnote references to establish or reinforce many of the propositions put forward. GC No. 36, for example, is more than 15,000 words and has 281 footnotes. The drafting process began in July 2015 and was completed in October 2018.

GC No. 28, ‘Equality of rights between men and women’ (2000):

3. The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. ...

4. States parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.

5. Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights. ...

GC No. 31, ‘Nature of the General Legal Obligation’ (2004):

2. While article 2 is couched in terms of the obligations of State parties towards individuals as the right-holders under the Covenant, every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the “rules concerning the basic rights of the human

³⁷⁷ Neuman, n. 3 above, 39.

person” are *erga omnes* obligations. ... [The Committee then urges States parties to make use of the so far moribund interstate complaints procedure provided for in Article 41.] To draw attention to possible breaches of Covenant obligations by other States parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

...

4. The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level (national, regional or local) are in a position to engage the responsibility of the State party. The executive branch that usually represents the State party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State party from responsibility for the action and consequent incompatibility

...

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. ...

16. Article 2, paragraph 3, requires that States parties make reparation to individuals whose Covenant rights have been violated. ... [T]he Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant

18.... [W]here public officials or State agents have committed violations of the Covenant rights referred to in [Articles 6, 7 or 9], the States parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see general comment No. 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. ...

...

GC No. 34, ‘Article 19: Freedoms of opinion and expression’ (2011):

...

Freedom of expression

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.

Freedom of expression and the media

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. ...

...

Right of access to information

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. ...

...

Limitative scope of restrictions on freedom of expression in certain specific areas

...

38. ... [T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, *lese majeste*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.

...

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

...

GC No. 36, Article 6: right to life (2018):

I. General remarks

1. This general comment replaces general comments [No. 6 (1982) and No. 14 (1984)].

2. Article 6 of the [ICCPR] recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation. ...

3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement 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. ...

...

6. Deprivation of life involves intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto.

7. States parties must respect the right to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State. The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.

8. [For excerpts from para. 8, see above.]

9. While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations, including individuals deprived of their liberty.

...

...

II. Prohibition against arbitrary deprivation of life

...

11. The second sentence of article 6 (1) requires that the right to life be protected by law, while the third sentence requires that no one be arbitrarily deprived of life. The two requirements partly overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature. ...

12. Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law. A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of “arbitrariness” is not to be fully equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. ...

...

14. While preferable to more lethal weapons, States parties should ensure that less-lethal weapons are subject to strict independent testing and evaluate and monitor the impact on the right to life of weapons such as electro-muscular disruption devices (Tasers), rubber or foam bullets, and other attenuating energy projectiles, which are designed for use or are actually used by law enforcement officials, including soldiers charged with law enforcement missions. ... [L]ess-lethal weapons must be employed only subject to strict requirements of necessity and proportionality, in situations in which other less harmful measures have proven to be or clearly are ineffective to address the threat. States parties should not resort to less-lethal weapons in situations of crowd control that can be addressed through less harmful means, especially situations involving the exercise of the right to peaceful assembly.

...

III. Duty to protect life

18. The second sentence of article 6 (1) provides that the right to life “shall be protected by law”. This implies that States parties must establish a legal framework to ensure the full enjoyment of the right to life by all individuals as may be necessary to give effect to the right to life. The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.

...

20. States parties must enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life, such as intentional and negligent homicide, unnecessary or disproportionate use of firearms, infanticide, “honour” killings, lynching, violent hate crimes, blood feuds, ritual killings, death threats and terrorist attacks. The criminal sanctions attached to these crimes must be commensurate with their gravity, while remaining compatible with all the provisions of the Covenant.

[For excerpts from paras. 21 and 22, see above.]

23. The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. Such persons include human rights defenders (see also para. 53 below), officials fighting corruption and organized crime, humanitarian workers, journalists, prominent public figures, witnesses to crime and victims of domestic and gender-based violence and human trafficking. They may also include children, especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities, indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, persons with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.

24. Persons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others. Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services, and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities.

...

26. [For excerpts from para. 26, see below.]

...

30. The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases. For example, as explained in paragraph 34 below, it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty. Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed; or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language. ...

...

IV. Imposition of the death penalty

[For excerpts from Section IV, see above.]

V. Relationship of article 6 with other articles of the Covenant and other legal regimes

...

59. A particular connection exists between article 6 and article 20, which prohibits any propaganda for war and certain forms of advocacy constituting incitement to discrimination, hostility or violence. Failure to comply with these obligations under article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.

60. Article 24 (1) of the Covenant entitles every child to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State. This article requires adoption of special measures designed to protect the life of every child, in addition to the general measures required by article 6 for protecting the lives of all individuals. When taking special measures of protection, States parties should be guided by the best interests of the child, and by the need to ensure all children's survival, development and well-being.

61. The right to life must be respected and ensured without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste, ethnicity, membership of an indigenous group, sexual orientation or gender identity, disability, socioeconomic status, albinism and age. Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination. Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature. Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life.

62. [For excerpts from para. 62, see below.]

63. [Para. 63 is excerpted below.]

64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international

humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields would also violate article 6 of the Covenant. States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards (see paras. 27–28 above).

65. [For excerpts from para. 65, see above.]

66. [For excerpts from para. 66, see below.]

70. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

Some Controversies Addressed in GCs

In some important instances GCs have been the Committee's chosen vehicle for propounding far-reaching and often controversial, interpretations of the Covenant. Consider the following examples relating to reservations, succession, jurisdiction, and nuclear weapons.

A. RESERVATIONS: GC NO. 24 (1994)³⁷⁸

8. ... [P]rovisions 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 engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses

³⁷⁸ Note that more detailed excerpts from this GC appear below.

of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

...

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task ...

Nowak notes that, prior to the adoption of GC No. 24, several members of the Committee had expressed the view that it was not authorized to review the validity of reservations. He notes that several governments — in particular France, the United States, and the United Kingdom — expressly objected to some of the conclusions reached in the GC, and that some academic commentators have also been critical.³⁷⁹ Nowak characterizes GC No. 24 as 'one of the most important legal documents ever adopted on the controversial question of reservations to human rights treaties'. While supportive of the Committee's conclusions as to its own competence, he questions the broad range of reasons given to justify the incompatibility:

First of all, the Committee made no clear distinction between customary international law and peremptory norms (*ius cogens*) Secondly, the list of provisions regarded as representing customary law seems far too broad [Since rights relating to self-determination, marriage, minorities and incitement to hatred] have in fact been the subject of reservations by a considerable number of States, it is not surprising that Governments objected to this comprehensive list which, according to the Committee, may not be the subject of reservations.³⁸⁰

In written comments, submitted in 1995, France rejected the 'entire analysis' contained in paragraph 18 and stated that:

As for the opinion that the Committee is particularly well placed to take decisions on the compatibility of a reservation with the object and purpose of the Covenant, France points out that the Committee, like any other treaty body or similar body established by agreement, owes its existence exclusively to the treaty and has no powers other than those conferred on it by the States parties; it is therefore for the latter, and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty.³⁸¹

B. SUCCESSION AND DENUNCIATION: GC NO. 26 (1997)

Two very important issues in relation to treaty law concern whether: (1) a successor state is automatically bound by the international human rights treaty obligations of its predecessor; and (2)

³⁷⁹ Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (2nd edn. 2005), xxxi–xxxiii.

³⁸⁰ *Ibid.*

³⁸¹ UN Doc. A/51/40 (1995), Annex VI, para. 14.

whether a state which is a party to the ICCPR can denounce it, and is thus no longer bound by its provisions.³⁸² The text of the Covenant is silent on both issues, although Article 12 of the First Optional Protocol to the ICCPR explicitly provides for a state to denounce the Protocol.

GC No. 26, Continuity of obligations (1997):

1. [The Committee observes that the issue is governed by customary law as reflected in the Vienna Convention on the Law of Treaties]. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.
2. [The Committee notes that denunciation is specifically provided for in relation to (i) the interstate procedure under Article 41(2); (ii) the First Optional Protocol to the ICCPR; and (iii) the International Convention on the Elimination of All Forms of Racial Discrimination, adopted before the ICCPR.] It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.
3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted [ICESCR], the Covenant codifies in treaty form the universal human rights enshrined in the [UDHR], the three instruments together often being referred to as the “International Bill of Human Rights”. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.
4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.
5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

The succession issue arose in relation to some of the successor states to the former Soviet Union and Hong Kong and Macau. While most of the former group accepted the continuing applicability of the ICCPR obligations, they nonetheless deposited instruments of succession, rather than assuming the automaticity of the process.³⁸³ Kazakhstan was the exception, but the Committee continued to treat it as a state party and requested reports. Eventually, in 2006, Kazakhstan ratified the Covenant. When China resumed its control of Hong Kong and Macau in 1997 it also agreed to succeed to the pertinent ICCPR obligations of the United Kingdom (in relation to Hong Kong) and Portugal (Macau), and has since presented a report to the ICCPR Committee on compliance with the Covenant in those two territories.

³⁸² See L. Hennebel and H. Tigroudja, *International Human Rights: A Treatise* (2025) at 61-63.

³⁸³ One Committee member subsequently indicated in remarks under an Optional Protocol case that he agreed with para. 4 of GC No. 26 ‘as a matter of policy, but I cannot agree with it as a statement of a rule of customary international law’ (Mr Ando in *Kuok Koi v. Portugal*, No. 925/00).

Denunciation was more complex. The GC was adopted in October 1997 in direct response to North Korea's purported denunciation of the ICCPR, lodged with the UN in August 1997. North Korea did not pursue it plans, and subsequently presented a report to the Committee. But other states had also previously contemplated denunciation. Thus, for example, the Netherlands considered withdrawal after decisions of the ICCPR Committee on non-discrimination in relation to social security law which had major financial implications.³⁸⁴

C. JURISDICTION

ICCPR Article 2 (1) 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 ...". Consider the Committee's analysis of this issue in para. 63 of GC No. 36, above.

In observations submitted after the adoption of the GC, France stated that the text relating to extraterritoriality is 'too broad and does not conform to the letter or the spirit of the Covenant or to the jurisprudence of the European Court of Human Rights. The vague and imprecise criteria used are a source of legal uncertainty.'³⁸⁵

The United States has regularly objected to the Committee's interpretation of the Covenant's jurisdictional provision. In 2008, in response to GC No 31, the U.S. submitted these observations (<https://2001-2009.state.gov/s/1/2007/112674.htm>):

4. This interpretation [of Article 2 (1)], which dispenses with the well-established rules of treaty interpretation, is inconsistent with the plain text of the Covenant as well as its negotiating history. ... Without any analysis or reasoning to support its view, the Committee's interpretation would have the effect of transforming the "and" in Article 2(1) into an "or."

5. ... It is lamentable that the General Comment treats this provision in such a cavalier and inconsistent manner [The GC's] demonstrated indifference to the precise wording of this carefully negotiated text is unfortunate and serves to undermine the Committee's persuasive authority.

...

9. ... [T]he United States considers this interpretation wholly incorrect as a matter of international law on the interpretation of treaties.

Five years later, under the Obama administration, the United States took a marginally more conciliatory approach. It recalled its earlier position, but also acknowledged its awareness 'of the jurisprudence of the International Court of Justice, which has found the ICCPR "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," as well as positions taken by other States Parties.' (Fourth Periodic Report, United States of America, UN Doc. CCPR/C/USA/4 (2012), para. 505.)

But days before the Committee adopted GC No. 36 in 2018, the United States reiterated its earlier position and added:

14. We likewise do not agree that an individual on State-Party-registered ships located beyond that State Party's territorial sea, or on State Party-registered aircraft flying in international airspace (or in another State's airspace), would be located within the territory of that State Party for purposes of application of ICCPR rights. Merely being on a ship or aircraft registered in a State (and thereby being generally subject to its exclusive jurisdiction on the high seas, for example) does not constitute being in a State's territory. And with respect to

³⁸⁴ See *Broeks v. The Netherlands*, No. 172/1984; and generally Nowak, n. 16, above, xxxvi.

³⁸⁵ 'France', at <https://www.ohchr.org/en/hrbodies/ccpr/pages/ge36-article6righttolife.aspx>

individuals in distress, search and rescue regions are expressly distinct from questions of jurisdiction and control. Even the reliance on the concept that there are “areas of the high seas over which particular States Parties have assumed de facto responsibility” is at odds with fundamental law of the sea principles. We therefore urge deletion of these assertions.

15. Although some States Parties may have accepted somewhat broader jurisdictional obligations as parties to regional human rights conventions, or because doing so might correspond with their domestic laws, the United States has not done so. To the extent that there are differing views among States Parties, the Committee has no mandate to resolve them or to interpret authoritatively the Convention’s terms. ...³⁸⁶

Ryan Goodman has pointed out that despite its position in relation to the ICCPR, the United States has long accepted the existence of such obligations as a matter of customary international law. He cites the position taken by the U.S. in relation to the Soviet Union’s conduct in Afghanistan, Iran’s and Russia’s in Syria, and Iraq’s in Kuwait. In addition, the U.S. military’s 2018 *Operational Law Handbook* states that “[i]n contrast to much of human rights treaty law, fundamental customary [international human rights law] binds a State’s forces during all operations, both inside and outside the State’s territory.”³⁸⁷

Consider the following defence of the Committee’s position by Nowak:

When States parties ... take *actions on foreign territory* that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible. It is irrelevant whether these actions are permissible under general international law (e.g., sovereign act by diplomatic or consular representatives, or in border traffic or by border officials in customs-free zones; actions by occupation forces in accordance with the rules of the law of war) or constitute illegal interference, such as the kidnapping of persons by secret service agents.

Departing from earlier views in the literature, which had adhered to a literal reading of Art. 2(1), the Committee has sought to correct the wording of this provision by developing case law oriented along the object and purpose of the Covenant and affording increased legal protection. In the first place, it has made it clear that persons who have fled abroad are not prevented by Art. 2(1) from submitting individual communications. Second, in the so-called *Passport cases* concerning Uruguay, it held that States parties are also responsible for violations of the Covenant (at least of Art. 12) by foreign diplomatic representatives. Third, it has considered communications by persons who had been kidnapped by Uruguayan agents in neighbouring States to be admissible, reasoning that States parties are responsible for the actions of their agents on foreign territory.³⁸⁸

D. NUCLEAR WEAPONS

The Committee first raised its concerns about nuclear weapons in GC No. 14 (1984). But despite being virtually silent in the interim years, it returned to the issue in GC No. 36 in 2018:

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause

³⁸⁶ ‘United States of America’, at <https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx> Note this position was reiterated by the United States in its fifth periodic report to the Committee, in 2021 (UN Doc. CCPR/C/USA/5, para. 14).

³⁸⁷ R. Goodman, ‘Human Rights Law and U.S. Military Operations in Foreign Countries: The Prohibition on Arbitrary Deprivation of Life’, *Just Security*, 19 February 2019.

³⁸⁸ Nowak, n. 16 above, at 43–4.

destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control, and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.

...

Roger S. Clark, in 'The Human Rights Committee, the Right to Life and Nuclear Weapons: The Committee's General Comment No 36 on Article 6 of the Covenant on Civil and Political Rights', 16 *New Zealand Y.B. Int'l L.* (2018) 263, provides a detailed analysis of the international standards that underpin each of the propositions in the foregoing paragraph:

When ... the HRC was preparing its first reading version of *GC 36*, the word "threat" was seating itself in the *Treaty on the Prohibition of Nuclear Weapons* ("*tpnw*"). The HRC placed "threat" in brackets at that point and several subsequent submissions supported the removal of those brackets, now having the *tpnw* to rely on. The use of the term "indiscriminate effect" is a reference to the laws of armed conflict. The phrase "of a nature to cause destruction of human life on a catastrophic scale" is also an echo of the similar notion in the 1899 *Hague Convention* ("of a nature to cause superfluous injury"). The phrase "respect for the right to life" combines the content of article 6 of the *iccpr* with article 2's reference to respecting and ensuring the rights contained in the *iccpr*. The use of the word "incompatible" is a stronger statement than the [International Court of Justice's] proposition that nuclear weapons are "scarcely reconcilable" with the laws of armed conflict. The assertion that the threat or use "may amount to a crime under international law" is both tentative and ambiguous. Unlike, for example, the General Assembly resolution in 1946 that asserted bluntly that "genocide *is* a crime under international law", the critical word here is "may". Does "may" mean that some cases are crimes and some are not? Or, is it an acknowledgement that the law is not quite there yet? And, is this a reference to individual criminal responsibility or to some notion of state criminal responsibility? Note, in this respect, that it had not been possible to include a prohibition of the employment of nuclear weapons in the *Rome Statute*.

The second sentence begins by addressing the non-proliferation of all weapons of mass destruction, not only nuclear ones, and the measures which all parties to the *iccpr* "*must take*". The footnote refers to the 1968 *Treaty on the Non-Proliferation of Nuclear Weapons* ("*npt*"), the *Comprehensive Nuclear-Test-Ban Treaty*, the *tpnw* and the biological and chemical weapons conventions. The phrase "including measures to prevent their acquisition by non-state actors" is a direct use of the term "non-state actors", which is probably a blunter version of the *tpnw*'s wording of "transfer to any recipient whatsoever". The obligation to refrain from developing, producing, testing, and the like is essentially the list of prohibitions in the *tpnw*. The obligation to "destroy existing stockpiles" goes beyond what the nuclear powers have accepted, and is a bone of contention for them. The reference to taking "adequate measures of protection against accidental use" sits a little strangely with an obligation to destroy existing stockpiles, as does the phrase "all in accordance with their international

obligations”. Is this a reference to customary obligations being enshrined in the *GC 36*? Or, do different parties to the *icpr* have different obligations, depending on which weapons treaties they have ratified?

The third sentence contains two notions. One is that parties “must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control”. I take this as a reference both to the treaty obligation under art VI of the *npt* and to the corresponding customary law obligation to the same effect, which is asserted in the [ICJ’s] *Nuclear Weapons Advisory Opinion*. The nuclear powers have failed dismally in fulfilling that obligation, and the effort by the Marshall Islands to enforce it in the ICJ was rejected by a bare majority of the court on procedural grounds, based on jurisprudence that is frankly incoherent.

The other is the obligation “to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility”. Victim assistance and environmental remediation is an important aspect of the *tpmw*, but this is not where the footnote to this sentence refers. Rather, it cites the HRC’s 2015 *Concluding Observations* concerning France. The relevant section in these observations notes that some 98.3% of claims relating to damage suffered during the French tests in Moruroa and Fangataufa between 1966 and 1996 were rejected, and urges something more effective. Article 6 of the *tpmw* speaks of “assistance” to those under a state party’s jurisdiction who are affected by the use or testing of nuclear weapons. This is exactly the situation in which the inhabitants of French Polynesia found themselves. The *GC 36*’s reference to “reparation” is perhaps a little stronger than the *tpmw*’s mention of “assistance”, and the word “victims” would surely include people in neighbouring states or those involved militarily in testing activities.

France and the United States, both nuclear powers, objected to the Committee’s formulation. The United States stated that:

19. ... [T]he International Court of Justice (ICJ) acknowledged in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons that “[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use” of nuclear weapons as such. The Committee provides no legal support for its speculation; to the contrary, and moreover, these views go far beyond the Committee’s mandate under the ICCPR. The [relevant questions are] governed by IHL The Committee should not seek to opine on issues related to IHL with respect to the study, development, acquisition, adoption, or use of various types of weapons, including non-lethal weapons, nor on the nature of obligations of parties to treaties other than the ICCPR, such as the Treaty on the Non-Proliferation of Nuclear Weapons.

Brazil, in contrast, informed the Committee that it ‘considers that weapons of mass destruction, nuclear weapons chief among them, are incompatible with the right to life. Nuclear weapons are, by their very nature, abhorrent to the principle of humanity and to the dictates of the public conscience.’ It added that the ICJ had stated ‘in its 1996 Advisory Opinion, that the use and threat of use of nuclear weapons are generally contrary to international law. The illegality of these weapons has been further reinforced by the adoption, on 7th of July [2017], of the Treaty on the Prohibition of Nuclear Weapons, with the support of two thirds of the United Nations membership.’

QUESTIONS

1. In paragraph 14 of GC No. 31, the Committee says the requirement in Article 2(2) to ‘take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights’ is ‘unqualified and of immediate effect’. It goes on to state that ‘failure to comply with this obligation cannot be justified by reference to ... economic considerations within the State’. What do you think this means in practice? The prevention of torture as a technique of policing, for example, usually requires careful training of law enforcement personnel, the creation of effective monitoring and complaints mechanisms and the existence of a vigilant and independent judiciary. How do Sweden’s obligations differ from Swaziland’s?

2. The then Executive Director of Human Rights Watch stated in 2004 that, in its work on prison conditions, his organization ‘routinely avoids recommending large infrastructure investments’ and instead ‘focus[es] on improvements in the treatment of prisoners that would involve relatively inexpensive policy changes. Similarly, our advocacy of due process in places such as Rwanda with weak and impoverished judicial systems implicitly takes account of the practical limitations facing the country leading us to be more tolerant of prosecutorial compromises such as *gacaca* courts than we would be in a richer country.’³⁸⁹ Is this approach consistent with GC No. 31?

3. What characteristics make the ICCPR the type of treaty which is not susceptible to denunciation? How potentially far-reaching are the implications of the Committee’s reasoning, especially in paragraph 3 of GC No. 26?

4. How would you respond to the following criticisms of GC No. 36, made by Australia and Canada?

Australia

[C]onduct or measures will only engage the right to life in Article 6 where they constitute arbitrary deprivation of life or a failure to protect the right to life by law. ...

... [Some] statements do not reflect the current state of international law, for example:

- ‘The right to life is a right which should not be interpreted narrowly’ [para. 3]
- ‘States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations’ [para. 9]
- ‘States parties should take appropriate measures to address the general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity’ [para. 26]

... [N]ot all human rights violations are connected to the right to life. Rather, each provision of the Covenant should be interpreted and applied independently.

Many paragraphs of the draft General Comment relate to obligations that are the subject of a separate, specific treaty or a specific area of international law. ... [T]hese matters. For example,

[R]ights or obligations which arise under: the [ICESCR], international humanitarian law, and international environmental law [should be dealt with in the context of those treaties and those areas of international law, and not in this GC].

³⁸⁹ K. Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization’, 26 *Hum. Rs. Q.* (2004) 63.

... Australia does not agree with the characterisation of Article 6 as ‘the supreme right’. ...

Canada

Article 6 does not provide the authority for the Committee to expand the scope of measures required by the Covenant to prevent violations of the right to life. It is appropriate for the Committee to recommend effective measures and “best practices”. The Committee should refrain from intimating that these measures are legally required to be adopted by States Parties pursuant to Article 6. ...

[The GC] raises issues that fall more squarely within other bodies’ mandates, particularly [CAT and CESCR]. Canada urges this Committee to focus on its core mandate.

... Canada regrets that the Committee has described Article 6 as encompassing many protections already protected under the rubric of other civil, political, economic, social and cultural rights. Its approach ... is too expansive and does not provide helpful guidance to States Canada urges the Committee to restrict its comments to the substantive and procedural obligations under the Covenant, rather than what is required under other branches of international law, such as refugee law.

Canada disagrees with the Committee’s assertion that the right to life includes a right to a life with dignity to the extent that this could be read to encompass certain socio-economic entitlements. ... [T]he ICESCR imposes a different standard of implementation of States Parties’ obligations, which is progressive realization

4. Individual Communications³⁹⁰

In 2025, 116 of the 174 states parties to the ICCPR were also parties to the First Optional Protocol. The Protocol allows for individuals to submit ‘communications’ (complaints). Note some of its critical provisions. The communications must be ‘from individuals ... who claim to be victims of a violation’ by a state party to the Protocol ‘of any of the rights set forth in the Covenant’. After being notified of the communication, the state party shall ‘submit to the Committee written explanations or statements clarifying the matter ...’. The Committee considers communications ‘in the light of all written information made available to it by the individual and by the State Party concerned.’ It will not consider a communication before ascertaining that the matter is ‘not being examined under another procedure of international investigation or settlement’. Examination of the communications takes place at ‘closed meetings’. The Committee is to forward ‘its views’ to the individual and state concerned. The goals of the procedure are to: (1) enable the Committee to identify steps that States should take to comply with their international legal obligations in the context of concrete individual situations; (2) to offer individual relief to victims of human rights violations; and (3) to stimulate general legal, policy and programme change.

The historical background to the adoption of the Optional Protocol highlights two aspects: (1) the deep disagreement over whether such a procedure was appropriate; and (2) the extremely vague understanding of how such a procedure should work which emerged from the hurried drafting process. A decision in principle was taken by the General Assembly in 1950 to include a petition procedure in the Covenant, but various draft proposals were unsuccessful and the draft adopted in 1954 contained no such provision.

Twelve years passed before the [General Assembly] once again took up this issue. In 1966 the Netherlands [proposed] an optional right of communication

³⁹⁰ All of the main UN human rights treaties provide for communications procedures, but the ICCPR Committee’s system is the oldest of them and has received and examined far more complaints than the others put together.

on the part of individuals and groups; in a supplementary motion, Jamaica even sought to make this procedure obligatory But opposition persisted from a variety of States, particularly Socialist countries, all of whom viewed the individual communication as a violation of State sovereignty, a threat to international relations and a departure from the principle that individuals are not subjects of international law. On account of this, France introduced a compromise that sought to limit the function of the Committee to the mere acknowledgement of and confidential reply to communications by individuals and groups. The three drafts were ultimately withdrawn in favour of a proposal introduced by 10 States from all geopolitical regions with the exception of Eastern Europe. ...

... The text finally adopted is based on a Nigerian proposal, which was clearly oriented along the “10 State Draft” The time pressure under which these provisions were drafted led to a rather rudimentary description of the procedure, to systematic absurdities and to lack of clarity at points. It is thus not incorrect to assume that the Committee had been provided with quite wide discretion ... to work out the details of the procedure ³⁹¹

The resulting provisions led to the adoption of a rather barebones procedure. Note the following characteristics:

1. The proceedings are not a continuation of, or appeal from, judicial proceedings in the state in which the dispute originated. They are fresh, distinct proceedings that may involve the same two parties to prior proceedings, or different parties.
2. Unlike some other international procedures, the complaint need not allege that the violation complained of is systemic — that is, involves a consistent pattern of violations reaching a certain level of gravity. Thus, an isolated, atypical violation can suffice to found a communication.
3. Only once has an oral hearing taken place, although the Committee has in place a set of guidelines to enable use of this option (UN Doc. CCPR/C/159/Rev.1 (2019)). The system essentially involves exchanges of written submissions, and there is no provision for independent fact-finding (such as examination of the parties or witnesses or independent experts, or on-site visits) by the Committee.
4. There are no public hearings or open debates by the Committee about how to deal with a particular communication.
5. There is no formally agreed statement of the precise legal effect of Views, nor are there any particular consequences for a State that rejects the Views out of hand.

The procedures have evolved significantly through the practice of the Committee. This sets the scene for the main challenge in evaluating the Committee’s work under the Optional Protocol: how to reconcile the paucity of powers and resources given to the Committee in consequence of the determinedly modest original vision of the drafters, with the substantial subsequent evolution of the aspirations of the Committee and the overall human rights regime in relation to such procedures. The questions to focus upon in reading the following materials are: (1) the extent to which the ICCPR Committee is using rather primitive tools to achieve increasingly sophisticated goals; and (2) whether such an approach is optimal given the need to balance continuing concerns about state sovereignty with the Committee’s goals of holding states to some account, ensuring remedies for violations, and developing a more sophisticated jurisprudence.

The Committee’s Caseload

³⁹¹ Nowak, ‘Historical Background to the OP’, in *UN Covenant on Civil and Political Rights: ICCPR Commentary* (2nd ed. 2005), at 821.

Between 1977 and 2024 the Committee registered 4,639 communications concerning 94 states parties. Of those, 2,038 led to the adoption of Views, including 1,494 in which violations of the Covenant were found. There were 866 declared inadmissible, 671 which were discontinued or withdrawn and 1,064 were pending. Given the speed at which it works (in 2023 it concluded 164 communications), this is an immense backlog. In its 2024 annual report (UN Doc. A/79/40, para. 27), the Committee observes that its ability to move faster is ‘seriously compromised’ by a lack of staff, which in turn has ‘a serious impact on victims’ rights.

The Committee’s Working Methods

Complaints alleging a violation of the ICCPR by a state party to the Optional Protocol are considered first by the Committee’s Special Rapporteur on new communications and interim measures, who decides whether to register them and send them on to states for a response, and where appropriate to request interim measures (see below). The Working Group on Communications can itself declare some communications to be inadmissible. While the Protocol envisages separate admissibility and merits stages in the examination of a communication, the two are now generally considered together. The bulk of the Committee’s work on any particular communication is carried out by the Special Rapporteur and the Working Group, and the Committee as a whole generally only examines a communication once in light of the Working Group’s recommendations.

The Committee’s substantive analysis is often terse and sometimes almost peremptory. Ludovic Hennebel has noted that its views ‘are occasionally rather poor on the fundamentals’ and follow ‘a syllogistic formal reasoning’ which ‘is sometimes difficult to identify and apprehend’.³⁹² The growing frequency of dissenting views that expose the vulnerabilities of the majority, and of concurrences that either provide additional argumentation to supplement the majority view or provide a different justification, enriches the Committee’s overall output. As Neuman notes:

Separate opinions bring internal debates into the open, which may prompt wider discussion, and they record arguments that may prove influential when a related issue arises in a later case. The individualized style of many separate opinions has potential to persuade a variety of audiences that the concise institutional style of HRC majority opinions may lack.³⁹³

Findings of Fact

One of the biggest challenges for the Committee is its inability to undertake independent fact-finding when confronted with contradictory evidence offered by a complainant and a state party, or when a state essentially refuses to cooperate. The Committee very often defers to the state when issues relating to a fair trial or the situation in a destination country in deportation proceedings are raised. As it noted in response to a claim that an individual on death row in Guyana had been tortured:

5.2 The Committee maintains its position that it is generally not in the position to evaluate facts and evidence presented before a domestic court. In the current case, however, the Committee takes the view that the instructions to the jury raise an issue under article 14 of the Covenant, as the defendant had managed to present prima facie evidence of being mistreated, and the Court did not alert the jury that the prosecution must prove that the confession was made without duress. This error constituted a violation of Mr. Deolall’s right to a fair trial ...

.³⁹⁴

The Committee has long been criticized for its approach to evidentiary matters:

³⁹² Hennebel, above, 365.

³⁹³ Neuman, above, 39.

³⁹⁴ *Deolall v. Guyana*, Communication No. 912/2000, UN Doc. CCPR/C/82/D/912/2000 (28 January 2005).

The HRC appears to rely frequently on circumstantial evidence, including evidence of a consistent pattern of conduct The use of inference can be highly prejudicial to a state party as it is a very small shift in logic to conclude from the existence of a general pattern that this person, the author, suffered from the alleged violation. It therefore becomes particularly important that the HRC identify the circumstantial evidence, such as patterns of conduct, that it is using to raise an inference or a rebuttable presumption.

The same author advocates the use of oral proceedings and rejects the argument that the Committee lacks the competence to initiate such an approach. She also calls for increased fact-finding:

This would not necessarily entail embarking on on-site missions or extensive research in every case. In some cases, the HRC could simply charge its Secretariat with using material obtained through other treaty or U.N. bodies that would confirm the author's allegations. In addition, there are many NGOs that could be invited to provide evidence in support of allegations, such as corroborative testimony or relevant statistics.

The HRC is in no way barred from sending missions to a state party where that state party has consented ³⁹⁵

In 2020, the Committee amended its Rules of Procedure to provide that 'the Committee or its special rapporteur may accept information and documentation submitted by third parties which may be relevant for the proper determination of the case.' (UN Doc. CCPR/C/3/Rev.12 (2021), Rule 96(1)). This has opened up important new sources of information and legal analysis, although the Committee's very out of date listing of registered cases makes it difficult for outside groups to learn of the opportunity in a particular case. Under Rule 111 petitioners of the State party can make public their submissions, unless otherwise requested by the Committee.

Case Studies

The Views adopted by the Committee feature prominently in various chapters of this book. Most of the Views that it generates could be considered routine and unremarkable in terms of the jurisprudence and the outcome. Compliance will depend on many different factors,³⁹⁶ and is generally difficult to assess, especially if the only criterion is an explicit reversal of government policy. But there are many other ways in which this process can generate more positive human rights outcomes. The two principal case studies below, from Italy and the Netherlands, are not routine, partly because of the challenging nature of the issues addressed, and partly because of the diversity of opinions reflected in the Committee's Views. Before examining those cases, it is instructive to consider how the communications procedure has functioned in the context of a particular country.

AUSTRALIA: A CASE STUDY

Australia ratified the Optional Protocol in 1991 and has since been engaged extensively with this procedure. The first case lodged and one of the best known was *Toonen v. Australia* (UN Doc. CCPR/C/50/D/488/1992, Views adopted 31 March 1994).

In 1867, Tasmania was the last Australian state to carry out the death penalty for sodomy, and it continued to prosecute the offence vigorously over the next century. The author of this communication was a leading member of the Tasmanian Gay Law Reform Group. He challenged two provisions of the Tasmanian Criminal Code which criminalized 'various forms of sexual conduct between men, including all forms of sexual contacts between consenting adult homosexual men in

³⁹⁵ K. A. Young, *The Law and Process of the U.N. Human Rights Committee* (2002), at 299–300.

³⁹⁶ A. Ullmann and A. von Staden, 'A Room Full of 'Views': Introducing a New Dataset to Explore Compliance with the Decisions of the UN Human Rights Treaty Bodies' Individual Complaints Procedures', 68 *J. Confl. Resolut.* (2024) 534.

private'. The Tasmanian police had not charged anyone with violations of these statutes, such as 'intercourse against nature', but there remained a threat of enforcement. Moreover, the author alleged that the criminalization of homosexuality had nourished prejudice and 'created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.'

...

6.5 The state party does not accept the argument of the Tasmanian authorities that the retention of the challenged provisions is partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds. This assessment in fact goes against the Australian Government's National HIV/AIDS Strategy, which emphasizes that laws criminalizing homosexual activity obstruct public health programmes promoting safer sex. ...

6.6 Nonetheless, the State party cautions that the formulation of article 17 allows for *some* infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy. The State party observes that while laws penalizing homosexual activity existed in the past in other Australian states, they have since been repealed with the exception of Tasmania. ... The Federal Government has declared sexual preference to be a ground of discrimination that may be invoked under ILO Convention No. 111 (Discrimination in Employment or Occupation Convention)

6.7 ... [T]he State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society. On balance, the State party 'does not seek to claim that the challenged laws are based on reasonable and objective criteria'.

...

Examination of the merits:

...

8.2 Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy', and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws.

...

8.3 The prohibition against private homosexual behaviour is provided for by law As to whether it may be deemed arbitrary, the Committee ... interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

...

8.5 ... [T]he Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, ... there is no consensus Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the 'reasonableness' test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

9. The [Committee] is of the view that the facts before it reveal a violation of articles [17(1) and 2(1)].

10. ... In the opinion of the Committee, an effective remedy would be the repeal of Sections 122 (a), (c) and 123 of the Tasmanian Criminal Code.

...

Malcolm Langford and Cosette Creamer, in 'The Toonen Decision: Domestic and International Impact', in Siri Gloppen and Malcolm Langford (eds.), *International Sexual and Reproductive Rights Lawfare* (2024) 000 conclude that the case 'had a partly transformative effect on LGBT politics in Australia, helped spark increased reporting by states on the theme, was cited by judges in some key decisions around the world and legitimized the advocacy of LGBT rights by international agencies.' For an even more positive assessment, see Douglas Pretsell and Timothy Willem Jones, 'How Human Rights Became Gay Rights: A History of *Toonen v Australia*', 46 *Hum. Rts. Q.* (2024) 437.

Compare that assessment with the following comment by Alfred de Zayas, in 'Review of W.A. Schabas, Nowak's CCPR Commentary, 3rd rev. ed.', 67 *Neths. Int'l L. Rev.* (2020) 553:

... [A]t the time of the adoption of the Covenant in 1966 and its entry into force in 1976, marriage meant only and exclusively the union of a man and a woman and was not understood as encompassing a civil union between same-sex couples. ... [R]edefining terms to meet subsequent aspirations does not constitute good faith interpretation under [the Vienna Convention on the Law of Treaties (VCLT)]. [The author then notes arguments by some states and NGOs of the incompatibility of LGBT rights with States' obligation] to protect the family as 'the natural and fundamental group unit of society' ... and 'to found a family' [Article 23 of the ICCPR] ..., by which it was meant the husband, the wife and the children that may emanate from this union. ... The credibility of the Committee—and the predictability of international law in general—depends on its rigorous application of the Covenant and its 'judicial restraint'. ...

Besides opening a 'Pandora's box', the quasi-judicial reinterpretation of Article 23 would entail changing the substantive content of a Covenant provision without the agreement of the States parties. Moreover, an obvious conflict would arise with the application of Article 18 of the Covenant which guarantees the 'freedom to have or to adopt a religion' and the prohibition on States to

interfere with these beliefs, which for billions of human beings are sacred and very much part of their identities. Bearing in mind that same-sex relations are considered wrong or even ‘sinful’ in many societies, a universal treaty like the ICCPR cannot be instrumentalized to impose ‘Western’ approaches on the rest of humanity.

In June 2023, there were 26 applications from Australia awaiting the Committee’s consideration. Between 2000 and 2022, the Committee adopted Views on some 50 communications from Australia. They addressed a range of issues, including climate change-related claims (see *Daniel Billy et al. v. Australia* (2022), in Ch. 15B, below). Immigration and asylum claims were especially prominent. In 2021–22, for example, six cases were decided. One concerned a Chinese national, deported back to China. Her claim that much of her personal data had been inadvertently published on a government website was upheld, leading to a finding that Article 17 had been violated (*J.S. v. Australia*, UN Doc. CCPR/C/135/2804/2016 (2022)). In *A.K. et al. v. Australia* (UN Doc. CCPR/C/132/D/2365/2014 (2022)), the Committee held that placing several unaccompanied minor asylum-seekers from Afghanistan in immigration detention was arbitrary and violated Articles 9(1) and 24 of the Covenant. In *Thileepan Gnaneswaran v. Australia* (UN Doc. CCPR/C/133/D/3212/2018 (2022)), it held that deporting a husband/father to Sri Lanka had taken place without consideration of important changes in his circumstances and violated Article 17 of the Covenant. In *O.H.D., O.A.D., and B.O.M. v. Australia* (UN Doc. CCPR/C/134/D/3023/2017 (2022)) it found that sending three Nigerian nationals back to Nigeria did not violate the right to non-refoulement. And in *Graham Cayzer v. Australia* (UN Doc. CCPR/C/135/D/2981/2017 (2022)) it held that the deportation of a man who had lived in Australia since 1965 to the United Kingdom following his conviction of a sex crime did not violate the Covenant. For more recent migration-related cases, see *Mona Nabhari v. Australia* (UN Doc. CCPR/C/142/D/3663/2019 (2024)); *M. I. et al. v. Australia* (UN Doc. CCPR/C/142/D/2749/2016 (2024)); and *Huyen Thu Thi Tran et al. v. Australia* (UN Doc. CCPR/C/143/D/3665/2019 (2025)).

Finally, two important cases involving indigenous peoples were *A.S. v. Australia* (UN Doc. CCPR/C/132/D/2900/2016 (2021)), in which the Committee found that the detention and treatment of an indigenous Australian within the criminal justice of the Northern Territory violated five different provisions of the Covenant; and *Roy v. Australia* (UN Doc. CCPR/C/137/D/3585/2019 (2023)) involving a violation of the right to a fair hearing (Article 14(1)) in relation to a contested land rights claim. It reasoned that because ‘human rights treaties are living instruments that must be interpreted and applied taking into account contemporary circumstances, States are bound to adopt measures to guarantee and give legal certainty to indigenous peoples’ rights in relation to ownership of their traditional territories, through the establishment of such mechanisms and procedures for delimitation, demarcation, and titling in accordance with their customary law, values and customs.’

What is instructive about these examples is that they address issues in relation to which the Australian justice system has long been found wanting, and in areas where political actors have generally resisted complying with international human rights standards. In addition, domestic remedies are often inadequate, either because there is no federal Bill of Rights, or because Parliament has legislated to minimize judicial review.³⁹⁷ While government Ministers have, on occasion, been dismissive of the relevance of the Committee’s Views, the government generally provides a detailed public response on the website of the Attorney-General’s Department. When it disagrees, it might challenge the Committee’s interpretation of the law or the Covenant, accuse it of misconceiving or misconstruing the facts, or simply state its disagreement. On occasion, however, it is clear that the Committee’s Views have prevailed. Thus in 2017, it advised the Committee that legislation had been adopted to permit same sex couples to marry and divorce in Australia. This was in response to the finding of a violation in that regard in *C. v. Australia* (UN Doc. CCPR/C/119/D/2216/2012 (2017)).

³⁹⁷ ‘Australia has a patchwork legal framework of human rights protection. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law. It is incomplete and piecemeal.’ Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (2022) 11. In support of that Commission’s call for the adoption of an Australian Human Rights Act, see Parliamentary Joint Committee on Human Rights, *Inquiry into Australia’s Human Rights Framework* (May 2024).

A.S., D.I., O.I. AND G.D. v. ITALY**UN DOC. CCPR/C/130/D/3042/2017 (2021), VIEWS ADOPTED 4 NOVEMBER 2020**

[*Note:* This communication was submitted on 19 May 2017, and decided on 4 November 2020. It was submitted at the same time as a companion case, *A.S. et al v. Malta* (Communication No. 3043/2017, UN Doc. CCPR/C/128/D/3043/2017 (27 January 2021)). The facts were essentially the same, but the Committee found the complaint against Malta to be inadmissible because of the applicants' failure to have exhausted domestic remedies.]³⁹⁸

1.1 The authors of the communication are A.S. a national of Palestine, born in 1958, and D.I., O.I. and G.D., nationals of the Syrian Arab Republic, born in 1983, 1988 and 1977, respectively. They are submitting the communication on their own behalf and on behalf of 13 of their relatives who, on 11 October 2013, were on board a vessel that shipwrecked in the Mediterranean Sea, 113 km south of Lampedusa, Italy and 218 km from Malta, causing the estimated death of more than 200 people. ...

1.2 The authors allege that the State party authorities failed to take appropriate measures to render assistance to their relatives, who were in distress at sea, in violation of their relatives' rights under article 6 of the Covenant. ...

The facts as presented by the authors

2.1 The authors ... relatives attempted to escape from the serious threats to their lives that they and their children were facing in Syria. On 10 October 2013, [they] arrived in Libya and were transported ... to a fishing vessel anchored outside the port of Zuwarah, which set out to sea the following day at around 1.00 a.m. The vessel was reported to have carried over 400 people. A few hours after the vessel had set off, it was shot at by a boat flying a Berber flag. Large quantities of water were entering the vessel and one person on the vessel, M.J., called the Italian number for emergencies at sea around 11.00 a.m., explaining that the vessel was going to sink and also informing the emergency operator that there were children on board the vessel. M.J. also forwarded the geographical coordinates of the vessel

2.2 The first call was followed by several others [12.26 p.m., 12.39 p.m. and 12.56 p.m. In a call at 1.17 p.m.] the operator explained that their vessel was in the Maltese search and rescue zone and gave them the phone number of the Rescue Coordination Centre of Malta (RCC Malta).

2.3 Several calls were made from the vessel to the Armed Forces of Malta (AFM Malta) between 1 p.m. and 3 p.m., as well as calls made to the MRCC at 2.22 p.m. and 3.37 p.m.. The persons on board the vessel were finally told that their vessel had been identified and that rescue units would arrive within 45 minutes. [In a subsequent] press statement ... AFM Malta stated that the vessel was not detected until 4.00 p.m., and that the first rescue boat, an AFM patrol boat, did not reach the site of the shipwreck until 5.50 p.m., with an Italian navy ship ITS *Libra* reaching the location at around 6 p.m. The authors claim that AFM Malta did not contact MRCC Rome for assistance until after the vessel had capsized. ...

...

State party's observations on admissibility and the merits

...

4.5 The State party submits that as the alleged violation of the duty to protect the lives of the alleged victims took place outside Italian territorial waters and outside its SAR area, the facts under review do not fall within its jurisdiction under article 2 of the Covenant and article 1 of the Optional Protocol. ... [In Italy's view] it cannot be argued that Italy would have *de facto* responsibility over the area

³⁹⁸ For broader context, see N. Klein, 'International Law-making and the Geneva Declaration on Human Rights at Sea', 38 *Leiden J. Int'l L.* (2025) 000

concerned merely due to the fact that Italian authorities organize rescue interventions, in an autonomous and non-obligatory manner, in the Maltese SAR area. The State party argues that by establishing its own SAR area, Malta has assumed the power and responsibility to fulfil its own obligations in its own area and it submits that the vessel carrying the migrants was not under the jurisdiction, understood as power and control, of Italy. The State party further notes that the Maltese authorities had made a formal undertaking of coordinating the rescue operation. Malta had also sent, although informed by MRCC Rome that there was an Italian Navy ship in the area, rescue assets to intercept the vessel in distress. The State party argues that Malta had therefore formalized its intention to exercise its jurisdiction of the rescue operation and had in fact exercised it. ...

Issues and proceedings before the Committee

Consideration of admissibility

...

7.3 The Committee notes the State party's submission that the communication is inadmissible under article 1 of the Optional Protocol for lack of jurisdiction as the events occurred outside the territorial waters of the State party. It notes the authors' submission that the complaint falls under the State party's jurisdiction as State party authorities were exercising *de facto* control over the Maltese search and rescue area; were in continuous contact with the vessel in distress; and had activated rescue procedures, thus exercising control over the persons in distress.

7.4 The committee ... has competency to receive and consider communications from individuals subject to the jurisdiction of States parties. [It recalls its general comments No. 31 (2004) and No. 15 (1986)]. ...

7.5 The Committee further recalls paragraph 63 of its general comment No. 36 (2019) on the right to life, in which it observed that: "In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner. States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea." ...

7.6 The Committee further notes that according to article 98 of the 1982 United Nations Convention on the Law of the Sea, each State shall require the master of a ship flying its flag "to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him" In addition, it notes that specific arrangements concerning the provision and coordination of search and rescue services are found in the 1979 International Convention on Maritime Search and Rescue and in the Regulations adopted pursuant to the 1974 International Convention for the Safety of Life at Sea (SOLAS), including on coordination of search and rescue operations of ships from different States by the regional coordination center, and the duty of states to cooperate in search and rescue activities upon receiving information on situations of distress at sea.

7.7 In the present case, the Committee notes that it is undisputed between the parties that the shipwreck occurred outside the State party's territory, and that none of the alleged violations occurred when the authors' relatives were on board a vessel hoisting an Italian flag. The question before the Committee is therefore whether the alleged victims could be considered to have been within the power or effective control of the State party, even though the incident took place outside its territory. ...

7.8 The Committee considers that in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy. This relationship comprised of factual elements – in particular, the initial contact made by the vessel in distress with the MRCC, the close proximity of ITS Libra to the vessel in distress and the ongoing involvement of the MRCC in the rescue operation and – as well as relevant legal obligations incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations and a duty to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue. As a result, the Committee considers that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant Consequently, the Committee finds that it is not precluded by article 1 of the Optional Protocol from considering the present communication.

...

Consideration of the merits

8.3. The Committee notes that the right to life includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats. It also notes that such due diligence require taking reasonable, positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life. [*Ed.: omitted footnotes refer to General Comment No. 36, paras. 18 and 21.*]

8.4 In the present case, the authors maintain that the Italian authorities have failed to respond promptly to the initial distress call, and have greatly delayed the dispatch of ITS Libra towards the vessel in distress. They further claim that the naval ship was ordered to move further away from the vessel in distress as, had it been identified by Maltese patrol boats, the latter would have avoided taking charge of the rescue operation. ...

8.5 The Committee notes that the principal responsibility for the rescue operation lies with Malta, since the capsizing occurred in its search and rescue area, and since it undertook in writing responsibility for the search and rescue operation. The Committee however considers that the State party has not provided a clear explanation for what appears to be a failure to promptly respond to the distress call, prior to the assumption of responsibility for the search and rescue operation by the Maltese authorities. It also notes that the State party has not provided any information about measures taken by State party authorities to ascertain that the RCC Malta was informed of the exact location of the vessel in distress and that it was effectively responding to the incident, despite the information about the deteriorating situation and the need for Italian assistance. In addition, the State party failed to explain the delay in dispatching the ITS Libra, which was located only one hour away from the vessel in distress, towards it, even after being formally requested to do so by RCC Malta. Finally, the Committee notes that the State party has not clearly explained or refuted the authors' claim that intercepted phone calls indicate that the ITS Libra was ordered to sail away from the vessel in distress. In light of these facts, the Committee considers that Italy has failed to show that it has met its due diligence obligations under article 6 (1) of the Covenant.

...

9. The [Committee] ... is of the view that the facts before it disclose a violation of article 6, read alone and in conjunction with article 2 (3).

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant's rights have been violated, bearing in mind the potential responsibility of other States for the same incident. Accordingly, the State party is obligated, *inter alia*, to proceed with an independent and effective investigation in a prompt manner and, if found necessary, to prosecute and try those who are responsible for the death and disappearance of the authors' relatives. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

...

ANNEX: 1: INDIVIDUAL OPINION OF YUVAL SHANY, CHRISTOF HEYNS AND PHOTINI PAZARTZIS (DISSENTING)

1. We do not agree with the majority's decision

2. Paragraph 7.8 of the Views explains that a “a special relationship of dependency” had been established between the victims found on the vessel in distress and Italy We are of the opinion that the majority Views fails to distinguish between situations in which states have the *potential* to place under their effective control individuals who are found outside their territory or areas already subject to their effective control, and situations involving the *actual* placement of individuals under effective state control. Only the latter situations establish jurisdiction for the purposes of the Covenant and the Optional Protocol.

...

4. Although initial contact was made between the vessel in distress and the MRCC in Rome, this fact alone ... is not sufficient to conclude that the State actually exercised jurisdiction over the individuals on board the vessel from that moment onwards or was legally obliged to do so. In particular, it is significant that Italy did not actually coordinate the search and rescue operation, but rather referred the distress call to the competent authorities in Malta, and that the latter confirmed in writing Malta's coordinating role [T]he vessel in distress did not become under the effective control of an Italian Navy party before 6:30 pm on the day of the sinking (more than an hour after it had capsized), at which time ITS Libra arrived at the scene and became the on-site coordinator of the rescue operation.

5. While there may have been critical failures in the response of the MRCC in Rome and the Italian Navy to the distress calls and to the Maltese requests for assistance that contributed to the tragic loss of life of large numbers of victims, such failures do not establish in and of themselves effective control by Italy over the individuals on the vessels in distress, regardless of whether or not such failures entail criminal responsibility under Italian law or a violation of Italy's law of the sea obligations vis-a-vis Malta and other states. This is especially the case in circumstances where the said individuals are located in an area for which another state has assumed legal responsibility – and by implication, jurisdiction - under the law of the sea for search and rescue operations. Since Malta, and not Italy, was responsible *de jure* or *de facto* for the overall conduct of the operation, we do not consider it appropriate to hold Italy accountable under the Covenant for failing to deploy more quickly Italian vessels which would enable it to assume earlier *de facto* responsibility over the search and rescue operation.

6. We further consider that the approach taken by the majority of collapsing the ability to engage in a maritime operation in search and rescue areas for which another state is internationally responsible with the notion of jurisdiction over the individuals on vessels in distress might disrupt the legal order which the SOLAS and SAR Conventions attempted to introduce, with a view to minimizing the “tragedy of the global commons”, generated by the lack of a clear division of labor between coastal states over search and rescue operations. ...

7. As a result, ... the Committee should not have concluded that the victims on board of the capsized vessel fell before, or at the time of capsizing, under the jurisdiction of Italy for the purposes of the Covenant

ANNEX: 2: INDIVIDUAL OPINION OF ANDREAS ZIMMERMANN (DISSENTING)

1. ... [T]he mere fact that a person did find him- or herself in a SAR zone administered by a given State party of the Covenant does not bring that person within the jurisdiction of such State party for purposes of Art. 2 (1)

2. [I]taly, by refusing to have its naval ship ITS Libra undertake a rescue operation to save the lives of the persons in distress at sea, was violating its obligations under applicable rules of the law of the sea.

Yet, this was neither the question that was before the Committee nor what the Committee had to decide

...

4. Finally, the Committee attempts to limit its holding when stating “that *in the particular circumstances of the case*, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy” which then triggered, in the majority’s view, the applicability of the Covenant. It is however safe to assume that the outcome of both cases, i.e. the Maltese and the Italian case, when read together, will be perceived as providing for a general applicability of the Covenant as far as persons are concerned that find themselves in distress at sea either in the SAR zone of a State party or close to a ship flying the flag of a State party. This might ... eventually have the very unfortunate effect of States parties of the Covenant no longer be willing to undertake such obligations, respectively might even try to avoid coming close to boats in distress so as to avoid any impressions of a ‘special relationship of dependency’ having been created.

ANNEX: INDIVIDUAL OPINION OF DAVID MOORE (DISSENTING)

...

4. The Committee’s decision to find jurisdiction outside [Italy’s SAR] region in this tragic case reflects noble intent, particularly given Italy’s questionable actions. Yet I fear the decision adds a layer of uncertainty, and even apprehension, regarding responsibility on the high seas that may hinder, rather than sharpen, the response to future emergencies. I would find the communication inadmissible.

...

ANNEX: 5: INDIVIDUAL OPINION OF JOSÉ SANTOS-PAIS (CONCURRING)

1. I agree with the decision

2. ... [T]he main question is whether victims were within the power or effective control of Italy, even though the incident took place outside its territory (para 7.7). Also, whether, under relevant international instruments, Italy failed to provide assistance to rescue of persons in distress at sea.

...

10. [N]ot only did Italian naval authorities refuse to act when they were still the First RCC responsible for coordinating the case and issued the first navigational warning, they consistently omitted valuable information to Maltese authorities and kept deliberately *Libra*, the closest ship, away from intervening in rescue operations until after the shipwreck.

11. I therefore consider individuals on the vessel in distress were under Italy’s jurisdiction for the purposes of the Covenant (paras 7.5-7.8). Furthermore, there was a failure by Italian authorities to explain convincingly motives for not providing timely assistance under such pressing circumstances, thus affecting lives of so many people (para 8.5).

...

ANNEX: 7: INDIVIDUAL OPINION OF HÉLÈNE TIGROUDJA (CONCURRING)

1. I fully support the solution reached by the majority. The views are a first contribution of this Committee aiming at addressing some “Maritime Legal Black Holes.” They may provide some substance to a new “right to be rescued at sea”. ... I am not fully convinced by the way the majority solved the question [of the *extraterritorial jurisdiction* exercised by Italy] (para. 7.8). There is a mix up between substantive obligations and the existence of a jurisdictional link with Italy. More importantly, the grounds for establishing this jurisdictional link are unclear

D. Z. v. THE NETHERLANDS

UN DOC. CCPR/C/130/D/2918/2016 (2021), VIEWS ADOPTED ON 19 OCTOBER 2020

1. The author of the communication is D.Z., born on 18 February 2010 without a recognized nationality. He claims that, by his nationality being registered by authorities of the State party as “unknown” since his birth, and by leaving him with no prospect of acquiring a nationality, the State

party has violated his rights under article 24, read alone and in conjunction with article 2 (2) and (3), of the Covenant. ...

Facts as submitted by the author

2.1 The author's mother was born in China in 1989, but her birth was not registered in the civil records in that country. ... After her brother was born a few years later, her parents abandoned her.

2.2 As the author's mother was not registered in the civil registry in China she was unable to obtain proof of Chinese citizenship. She holds no documentation proving her identity. In 2004, at the age of 15, she was trafficked to the Netherlands but was able to escape upon her arrival at Schiphol airport in Amsterdam. [An asylum application was rejected.] In 2006, she was forced into prostitution. She eventually managed to escape and on 20 March 2008 she reported to the Netherlands police that she was a victim of human trafficking. [After 14 months] ... the investigation was closed as the police could not identify or locate her traffickers. [Her] temporary residence permit ... was revoked ... and she is currently classified as an "illegal alien", as is the author. The author's father is not in contact with him or with his mother and has not recognized paternity.

2.3 The author was born on 18 February 2010 in Utrecht and was registered in the Municipal Personal Records Database with the annotation "unknown nationality", as his mother had provided no proof of his nationality. ...

2.4 For this reason, and despite years of efforts, the author's mother has been unable to change the author's nationality entry in the civil registry to "stateless" so that he can enjoy the international protections afforded to stateless children, including the right to acquire the nationality of the State in which he was born – the Netherlands. It is impossible to correct the author's registration, due to the strict proof required under domestic rules applicable to the registration process, and the lack of an appropriate statelessness status determination procedure. ... As at September 2016, the total number of "unknown" nationality entries [in the Netherlands] was 74,055, which included 13,169 children under 10 years of age.

2.5 ... On 17 September 2012, the [Utrecht] municipality rejected [a request for civil registration], on the ground that there was no proof that the author lacked a nationality. [Since it had not been] established, with official legal or State-issued documents, that the author was stateless, [the presumption was that he was a Chinese national.]

2.6 [Appeals subsequently reached] ... the Council of State, the highest appeal court in the country, [which] ruled that the municipality was correct when it decided that the author had not adequately demonstrated that he was stateless. The Council of State ... found that it was not up to the authorities to conduct inquiries and determine statelessness status. The Council of State did, however, acknowledge that the lack of a status determination procedure meant that individuals entitled to protection, including children, were falling through a gap in legislation. However, the Council of State concluded that it was for the legislature to provide a remedy

2.7 The author notes that without being registered as stateless he cannot acquire Dutch nationality. Furthermore, even if he were to be successful in changing his registration from "unknown nationality" to stateless, he would still have no clear means of acquiring Dutch nationality, as the State party requires that children born stateless in the country hold a lawful residence permit for at least three years before they are eligible to apply for Dutch nationality. He notes that this position contravenes the obligations of the Netherlands as a party to the 1961 Convention on the Reduction of Statelessness, under which States may only impose habitual residence requirements. He notes that the State party has acknowledged that its law is not in line with the 1961 Convention.

2.8 ... [Further appeals all led to the same outcome.]

2.9 The author lives with his mother in a restricted freedom centre for failed asylum seekers with young children. He has nearly no contact with Dutch society and lives under permanent threat of

deportation. His mother is not eligible for any social benefits besides a small weekly allowance. ... He notes that this system has been severely criticized by children's rights groups as especially damaging and traumatic for children. Residents cannot leave the municipal area to which they are assigned, and have strict daily reporting requirements on all days except Sundays, enforced by threat of criminal detention. Children experience constant fear, health problems, family tensions and social exclusion, due to living under such restrictions in the centres.

...

Issues and proceedings before the Committee

...

Consideration of the merits

...

8.2 The Committee recalls that, under article 24, every child has a right to special measures of protection because of her or his status as a minor. ... The Committee recalls its general comment No. 17 (1989), in which it ... notes that "States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents".

8.3 The Committee notes that in the UNHCR Guidelines on Statelessness No. 4 [reflecting the 1961 Convention on the Reduction of Statelessness] – a Convention to which the Netherlands is a party – it is stated that "a contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. ...". [The Guidelines also state that] the burden of proof must be shared between the claimant and the authorities of the contracting State to obtain evidence and to establish the facts as to whether an individual would otherwise be stateless. [Under the Guidelines, the determination period should not exceed five years.]

...

8.5 [T]he Human Rights Committee notes that the author's mother has contacted Chinese authorities several times to confirm whether they consider the author a Chinese national, without success. ... It also notes that in their decisions the domestic authorities [in the Netherlands] did not outline any further steps that the author's mother could have taken to obtain official documents from Chinese authorities ... [and] the domestic authorities made no inquiries of their own in order to attempt to confirm the author's nationality status, or lack thereof. It notes that the Council of State, in its decision of 21 May 2014, acknowledged that the lack of a status determination procedure in the State party meant that individuals entitled to protection, including children, were falling through a gap in legislation. The Committee notes the State party's declaration that having examined the author's complaint, it has concluded and acknowledged that the author is currently unable to effectively enjoy his right as a minor to acquire a nationality. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's rights under article 24 (3) of the Covenant. The Committee also considers that the failure to provide the author with an effective remedy amounts to a violation of the author's rights under article 24 (3) read in conjunction with article 2 (3) of the Covenant.

...

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide the author with adequate compensation. The State party is also required to review its decision on the author's application to be registered as stateless in the civil registry of the State party, as well as its decision on the author's application to be recognized as a Dutch citizen, taking into account the Committee's findings in the present Views; the State party is also requested to review the author's living circumstances and residence permit, taking into account the principle of the best interests of the child and the Committee's findings in the present Views. Additionally, the State party is under an obligation to take all steps necessary to avoid similar violations in the future

...

INDIVIDUAL OPINION OF COMMITTEE MEMBER YADH BEN ACHOUR (CONCURRING)

1. I fully agree with the Committee's finding of a violation ... under article 24 (3) of the Covenant.
2. [The member contests the Committee's decision not to also find a violation of articles 2 (2).]
3. ... I disagree with the two general rules laid down by the Committee in [its caselaw.]. The first rule states that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol. The second rule states that article 2 cannot be invoked in conjunction with other articles of the Covenant, unless it can be proven that the State party's failure to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the victim.
4. The first rule ... is based on the notion that the provisions of article 2 of the Covenant are of a secondary or "ancillary" nature and do not have a substantive impact on the individual rights that are enshrined in the Covenant. Since these rights are not set out until part III of the Covenant, the preamble and articles 1 to 5 cannot be directly invoked in a communication submitted under the Optional Protocol ... This interpretation ... seems questionable for a number of reasons, particularly because it contradicts the rules of interpretation established in article 31 of the Vienna Convention on the Law of Treaties and because it is hard to understand why such an obligation may be invoked ... in the Committee's concluding observations ... but ... not ... in a communication submitted under the Optional Protocol. ...
- ...
6. ... [The second] rule is perfectly applicable in precisely the present case. The lack of diligence on the part of the legislature of the Netherlands ... was the direct and sole cause of the great harm suffered by the author. ...
7. The State party's behaviour in the present case is of such gravity as to fall within the scope of article 16 of the Covenant, for it amounts almost to denial of recognition as a person before the law. ...
8. Consequently ... the State party's failure to observe its obligations under article 2 (2) of the Covenant is the direct and proximate cause of a distinct violation of the Covenant. ...
- ...

INDIVIDUAL OPINION OF COMMITTEE MEMBER HÉLÈNE TIGROUDJA (CONCURRING)

1. I fully share the conclusion [as] to the violation of article 24 (3)
2. However, ... I regret that the majority did not elaborate on the other breaches of the Covenant ...
- ...
4. Indeed, as recently affirmed by the African Court on Human and Peoples' Rights, "the right to nationality is a fundamental aspect of the dignity of the human person". In the same vein, the jurisprudence of the Inter-American Court of Human Rights – whose persuasive authority in this field is recognized in the UNHCR Guidelines on Statelessness No. 5 adopted in May 2020 – affirms that nationality is "an inherent right of all human beings", as well as "the basic requirement for the exercise of political rights" and a key element for "the individual's legal capacity". More critically, the Inter-American Court of Human Rights pointed out in the *Yean and Bosico Girls* case that while persons without nationality are in a situation of extreme vulnerability, children are in an even more vulnerable situation. ...
5. This is exactly the situation described by the author Therefore, his situation of statelessness does not only constitute a violation of his right to a nationality (art. 24 (3) of the Covenant). It should also have been analysed by the majority as a violation of the right to be recognized by the law as a legal person (art. 16) and the right to be treated with humanity and dignity (art. 7).

Political Cases

The Committee has also issued Final Views in several high-profile and politically-charged cases. In *Garzón v. Spain* (UN Doc. CCPR/C/132/D/2844/2016), decided in July 2021, a very prominent judge of the Spanish National Court, Baltasar Garzón, alleged that prosecutions against him for abuse of authority in two high-profile cases had violated his human rights. In the *Franco* case, he assumed jurisdiction under the Spanish Historical Memory Act to investigate enforced disappearances that occurred during the Civil War and subsequent dictatorship of General Francisco Franco, as crimes against humanity. In 2010 he was suspended from office and faced criminal charges, although he was ultimately acquitted by the Supreme Court in 2012. In the *Gürtel* case, he authorized wiretapping of conversations between the accused and their lawyers in a case involving alleged illegal financing of the Spanish center-right political party, the Partido Popular. He was convicted of abuse of power and disbarred from office for 11 years in 2012.

The Committee held both prosecutions to have been arbitrary. His actions in the *Franco* case ‘were at least a plausible legal interpretation, the appropriateness of which was reviewed on appeal, without it being concluded that such decisions constituted misconduct or incompetence that could justify his inability to perform his duties’. In the *Gürtel* case, the Committee noted that Garzón’s interpretation had been shared by other judges and the Public Prosecutor and that even if it had been erroneous, as argued by the State, it ‘did not constitute serious misconduct or incompetence that could justify his criminal conviction’. It concluded that any judicial error should have been corrected in proceedings before a higher court, rather than through a criminal prosecution. In addition, his right to be tried by an impartial tribunal was violated because some Supreme Court judges had participated in both cases, the trials were conducted simultaneously, and the judgements were issued 18 days apart.

The Committee concluded that the State Party should provide Garzón with an effective remedy, including expunging his criminal record, providing adequate compensation for the harm suffered and taking measures to prevent similar violations in the future. The importance of the Committee’s views in this case is suggested by the fact that 97% of cases claiming the protection of fundamental rights taken to the Spanish Constitutional Court between 2007 and 2020 were held inadmissible, and a similar result prevailed at the European Court of Human Rights in such cases from Spain.³⁹⁹

Luiz Inácio Lula da Silva v. Brazil (UN Doc. CCPR/C/134/2841/2016) involved a complaint submitted in 2016 by the former President of Brazil (2003-2010)). The Committee published its Final Views in March 2022. Lula had been investigated in 2016 for alleged involvement in ‘Operation Car Wash’, which involved corruption between the State-owned oil company, Petrobrás, several construction companies, and Brazilian politicians. to obtain secret campaign funds. Federal Criminal Court Judge Sergio Moro approved a request by the prosecutor to tap the telephones of Lula, his family, and his lawyer. Moro then released the recordings to the media even before charges had been filed. He also leaked the details of a warrant to detain Lula for questioning, leading to media photos of Lula making it look as if he were under arrest. Lula was sentenced to nine years in prison, subsequently increased to 12 years. That in turn led to the rejection of his candidacy for the Presidential Elections which he had been widely favoured to win. In 2021, the Supreme Federal Court quashed the sentence, on the grounds that Moro had lacked jurisdiction, and that he had not acted impartially. In 2022, he was again elected as President.

The Committee found violations of Lula’s right to personal liberty, right to privacy, right to be tried by an impartial tribunal, right to presumption of innocence, and his right to run for office:

8.8 ... [T]he Committee notes that the Supreme Federal Court characterized all disclosures ... as “manipulatively selective”, and considered that the tapping of

³⁹⁹ I. de la Rasilla, ‘The Trials of Judge Garzón and the Enforceability of Decisions by Human Rights Treaty Bodies in Spain’, 28 *Int’l J. Hum. Rts.* (2024) 759.

the [lawyers'] telephones was conducted "in order to monitor and anticipate defence strategies" in "flagrant violation of [the author's] constitutional right to a full defence". The Committee therefore considers that the timing and manner of [the wiretapping and the] disclosures reveal ulterior purposes that are "unauthorized by law" ... and thus arbitrary ... [and] in violation of article 17 of the Covenant.

8.9 With regards to [the right to an impartial tribunal] the Committee recalls its longstanding jurisprudence according to which the right to be tried by an independent and impartial tribunal is an absolute right that ... has a subjective and an objective element. According to the first one, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. According to the second one, the tribunal must also appear to a reasonable observer to be impartial. That is, judges must not only be impartial, they must also be seen to be impartial, and there are ascertainable objective facts which may raise doubts as to their impartiality. ...

8.10 In [Lula's] case, the Committee notes that the Supreme Federal Court found seven facts that showed that Judge Moro was subjectively partial. ... The Committee observes that a timely decision on the matter would have avoided the harm caused to the author, which included a conviction, the confirmation of the conviction, being debarred from running for president, and 580 days of wrongful imprisonment....

...

10 ... [T]he State party is obligated, inter alia, to ensure that the criminal proceedings against the author comply with all the due process guarantees set out in article 14 of the Covenant. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

...

Finally, the case of Belarus is instructive. The state is not a party to the European Convention on Human Rights, but acceded to the Optional Protocol in 1992. Since 2000 the Committee has received over 175 complaints from Belarus, many of which related to religious freedom. In November 2021 the Committee found that 'by convicting and fining [an individual] for creating and leading a religious organisation without State registration and by restricting [his] right to peacefully manifest his religious beliefs in community with others', the State party violated article 18 (1) on the freedom of religion (UN Doc. CCPR/C/131/D/2695/2015 (2021)). In response, Belarus withdrew from the Optional Protocol, effective in February 2023. The Deputy Foreign Minister attributed the decision to the 'arbitrary expansion of the powers of the Human Rights Committee, creating additional unreasonable obligations for the state, which it did not accept when joining' the treaty.⁴⁰⁰

QUESTIONS

1. How would you respond to de Zayas's argument that the Committee has failed to show good faith by 'redefining' the terms of the Covenant to cover issues of sexual orientation?
2. *A.S. et al v Italy* addresses a 'maritime legal black hole', a feature of what Benhabib has called practices that 'create deterritorialized zones of lawlessness at border crossing, airports,

⁴⁰⁰ O. Glace, 'Belarus: Closing "one of the last remaining opportunities to seek justice"', *Forum* 18, 2 September 2022.

and maritime ports and encourage the excision of territories as well as the building of outsourced camps on the territories of failed states'.⁴⁰¹ What contribution could a set of Views by the ICCPR Committee make by way of a response to such a set of practices? Achiume argues that 'achieving an ideal form of global migration governance would ... require remedying the fatally flawed conception of state sovereignty at the heart of international law and which nation States are strongly incentivized to protect'.⁴⁰² Is there a risk that the work of the Committee ends up reinforcing such a system of sovereignty?

Communications Procedures

A. EVIDENCE

A former Committee member, Christian Tomuschat, argues in 'Human Rights Committee', in R. Wolfrum and A. Peters (eds), *Max Planck Encyclopaedia of Public International Law* (2019, online ed.), para. 33 that:

[t]he appraisal of evidence placed before the [Committee] remains highly unsatisfactory. ... [W]here there are clear contradictions between the allegations of the petitioner and the defence of the respondent government, the [Committee] has evolved the rule of thumb that governments are under a duty to respond specifically and in detail to factual contentions which have every appearance of seriousness. If the government concerned does not launch an investigation [or] abstains from presenting the results thereof, the Committee proceeds from the assumption that the allegations of the petitioner must be given due weight as long as they are sufficiently substantiated, thus making a 'default finding'. Blanket denials of the respondent government are not enough. In cases where both sides have advanced substantiated contentions, it is almost impossible for the HRC to disentangle the factual situation.

One possibility would be oral hearings, a technique only used once, in *Muller and Carrol v. New Zealand* (UN Doc. CCPR/C/121/D/2502/2014 (2017)). The procedure was apparently not considered to have worked well. In Tomuschat's view, 'the practical difficulties entailed by oral hearings would be insurmountable at world level. Granting a fair hearing to everyone, irrespective of his/her place of residence, including his/her presence at the proceedings, cannot be arranged in practical logistical terms. Additionally, if transformed into a trial body, the HRC would have to sit permanently because of the increased time requirements.'

B. REMEDIES⁴⁰³

In its early years the Committee was reluctant to recommend specific remedies and instead relied upon the standard phrase, still used at the end of every set of Views, that calls upon the state party to adopt 'measures . . . to give effect to the Committee's Views'. But, over time, the Committee has become increasingly specific as to the measures it believes states should take. In 2016 it adopted 'Guidelines on measures of reparation under the Optional Protocol'(UN Doc. CCPR/C/158):

Restitution

6. The Committee requests that States parties provide for measures of restitution with a view to restoring rights that have been violated. ...

⁴⁰¹ S. Benhabib, 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights', 2 *Jus Cogens* (2020) 75, at 96.

⁴⁰² E. T. Achiume, 'The Fatal Flaw in International Law for Migration', 56 *Colum. J. Trans'l L.* (2018) 257, at 262.

⁴⁰³ See generally K. Roach, *Remedies for Human Rights Violations: A Two Track Approach to Supra-National and National Law* (2021).

7. In cases of deprivation of liberty the Committee may, as appropriate, request the person's release, [review of the case or re-trial]. ...

Rehabilitation

8. ... [If appropriate] the Committee indicates that the State party is to provide the victim or his or her family, as appropriate, with medical or psychological treatment, or the funds to pay for such treatment.

Compensation

9. As a general rule, the Committee does not specify sums of money.

...

Measures of satisfaction

11. When specifying measures of satisfaction, the Committee takes into consideration, inter alia, the following elements:

(a) When appropriate, the Committee may indicate that the fact that its Views declare that a violation of the Covenant has occurred constitutes in and of itself a form of reparation. That will not prevent the Committee from indicating additional measures of reparation;

(b) In many cases, the Committee requests that the State party conduct investigations ... ;

(c) When appropriate, the Committee requests that States parties take measures to commute, reduce or not enforce a sentence;

...

(e) The Committee may request that States parties issue a public apology, particularly in cases of grave or systematic violations where the injury cannot be fully redressed by restitution or compensation only. ...;

(f) ... [O]ther measures of satisfaction [might include] the possibility of having a monument built, putting up a commemorative plaque or changing the name of a street or other public place ...;

Guarantees of non-repetition

...

13. The following are examples ...:

(a) When laws or regulations in the State party are found to be at variance with Covenant obligations, the Committee should request their repeal or amendment;

(b) Improvements in conditions in places of detention, in accordance with international standards;

(c) Changes in official procedures and practices. When identifying such measures, the Committee should be as specific as possible;

- (d) Where applicable, the Committee should consider recommending measures for training and raising the awareness

In practice, the Committee has been less ambitious than those Guidelines might suggest. Dinah Shelton, in *Remedies in International Human Rights Law* (3rd. ed., 2015) 198 lists the type of remedies used by the Committee: (a) public investigation to establish the facts; (b) bringing to justice the perpetrators; (c) compensation; (d) ensuring non-repetition of the violation; (e) amending the law; (f) providing restitution of liberty, employment, property, and human remains; (g) rehabilitation, including medical care and treatment; (h) permitting the victim to leave the country; and (i) enjoining an imminent violation.

C. FOLLOW-UP AND COMPLIANCE

The Committee appoints a Special Rapporteur for Follow-up on Views. This UN Press Release (21 March 2022) illustrates the sort of results achieved:

... [The] communication concerning Canada concerned the refusal of a First Nations individual's application for social services, and preferential treatment of Indian men over Indian women born prior to 1985 regarding social service registration. The Committee commended the State party for allowing the person involved to register, reforming the Indian Act to remove barriers to registration, and for taking steps to address residual discrimination within First Nations groups. It called on the State party to continue discussions with the person involved and First Nations groups and to work on implementing the legislative changes.

Regarding Cameroon, the communication concerned the wrongful imprisonment of an individual. [T]here had been no response received from the State party to the Committee's call to immediately release the individual pending trial, to conduct the trial without delay, and provide compensation to the author. The Committee noted the State party's unsatisfactory response, and proposed to follow-up on the case in the State party's next periodic report.

On Colombia, the communication concerned the conviction of two former officials, with the State party offering no possibility of review of the cases. The Committee repeated its calls for compensation to be provided to the persons concerned, and for measures to be implemented to prevent repetition of similar incidents. The Committee planned to continue dialogue with the State party on the issue.

Regarding Lithuania, the communication concerned a violation of the rights of an individual in court proceedings, especially when it came to the use of handcuffs and metal cages in court rooms. The Committee closed the dialogue on the communication, noting that although the State party had not yet paid compensation ..., it had provided an avenue for the person involved to obtain adequate compensation [and had] taken measures to eliminate the use of handcuffs and metal cages in court rooms.

As for *D.Z. v The Netherlands* [see above] ... the compensation which had been provided by the Netherlands to the person involved was inadequate, and [the Committee] criticised the State party for not reviewing the author's application to be recognised as a citizen of the Netherlands. The Committee further faulted Netherlands for not reviewing the living circumstances of the person involved, and not implementing measures to review legislation on determining statelessness and eligibility for citizenship applications.

Regarding the Russian Federation, the communication concerned the arrest without record of an individual, and the failure of the State to provide adequate health care to the individual while in detention. The ... State party had not provided compensation [nor] taken measures to prevent repetition of similar incidents. ...

Concerning Tajikistan, the communication related to the torture and death of an individual in police custody. The Committee said that the State party had not sufficiently prosecuted and punished the perpetrators in the case, noting its lack of communication with the author of the communication regarding the progress of the investigation, and not providing the author with adequate compensation. The Committee resolved to close the case with a note of unsatisfactory implementation of the Committee's views.

An earlier implementation survey by the UN Secretariat suggested the following reasons to explain States failure to implement the Views:

a lack of understanding by States parties of their obligations under the respective treaties; unwillingness, on the part of certain States parties to abide by their obligations; the 'non-legally binding' nature of decisions; the divergent views between States and the Committees on the interpretation of treaty provisions; weak decisions often resulting from consensus decision-making; insufficient follow-up by the Committees themselves; lack of political support (unlike ECHR — where implementation is monitored by the Council of Ministers, i.e. the States themselves); lack of expertise within States parties and lack of assistance to them on how to better implement; and failure to adopt enabling legislation.⁴⁰⁴

Based on an empirical analysis, Vera Shikhelman, in 'Implementing Decisions of International Human Rights Institutions: Evidence from the United Nations Human Rights Committee', 30 *Eur. J. Int'l L.* (2019) 753 suggests that the following factors influence the willingness of states to implement the Committee's Final Views: (i) the level of democracy and human rights protection in the state; (ii) internal capacity; (iii) strength of civil society; (iv) type of remedy; (v) representation on the HRC; (6) subject matter of the communication. Other relevant factors included the state's internal capacity and whether it is a member of the Human Rights Council.

D. THE LEGAL STATUS OF VIEWS

The legal status of the Committee's Views is important. If they are legally binding, then their relative neglect by many states is deeply problematic. If they are merely advisory, it would hardly be surprising if states downplayed their significance. The views of commentators vary.

Manfred Nowak argues that the Committee 'cannot be termed a court in the strict sense of the word' because of 'the relatively brief term of office of its members and the lack of internationally binding effect of its decisions', as well as its designation as a 'Committee'. He concludes that it is a 'quasi-judicial organ', and has suggested that the Views enjoy a 'quasi-binding nature'.⁴⁰⁵

A former member of the Committee, Martin Scheinin, argues that its Views are, in effect, binding:

... They are the end result of a quasi-judicial adversarial international body established ... for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. ... If a state wishes to question the correctness of a legal interpretation by the Committee, it should at least resort to some other procedure before an international court or independent expert body. As this is not likely to happen in practice, the presumption should be that the

⁴⁰⁴ 'Follow-up procedures on individual complaints', UN Doc. HRI/ICM/WGFU/2011/3 (16 Dec. 2010), at 5.

⁴⁰⁵ M. Nowak and E. McArthur, *The United Nations Convention against Torture: A Commentary* (2008), at 77-8.

Committee's views in Optional Protocol cases are treated as the authoritative interpretation of the Covenant under international law.⁴⁰⁶

In contrast, Walter Kälin, also a former Committee member, considers the Views to be 'legally non-binding', but adds that they 'possess considerable authority because they stem from a body entrusted and empowered by states parties to determine authoritatively whether human rights have been violated in specific cases. Thus, the principle of good faith ... requires that states at least weigh the reasons why they are not ready to implement a finding of a violation.'⁴⁰⁷ Christian Tomuschat says 'States Parties cannot simply ignore [the Views], but have to consider them in good faith. [But] they are not debarred from dismissing them, after careful consideration Not to react at all ... however, would appear to amount to a violation of the obligations under the ICCPR.' An even more tentative formulation is suggested by Leonardo Borlini and Luigi Crema, in 'The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or *Mission Éducatrice*?', *Global Community Yb. Int'l L. & Juris.* 2019 (2020) 129 who conclude that 'the authoritativeness of [treaty bodies]' pronouncements lies in the quality of their reasoning, their methodological rigour and the persuasiveness of the views expressed. And, when these qualities emerge, it is appropriate for domestic courts to consider their pronouncements attentively.'

In its General Comment No. 33 (2008) the Committee observed that its Views 'exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions' (para. 11). It added that they 'represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument' (para. 13), and that States Parties have a 'duty to cooperate with the Committee [arising] from an application of the principle of good faith to the observance of all treaty obligations' (para. 15). It concluded that even where the state has clearly rejected the Views, 'the Committee regards dialogue between the Committee and the State party as ongoing with a view to implementation' (para. 18).

The Committee's current approach is reflected in a provision that is included near the end of its Views in cases where it has found a violation. It states:

Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to provide adequate compensation to the author for the violation suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.⁴⁰⁸

E. SITUATING THE COMMITTEE IN THE BROADER REGIME

Consider the comments by a former Chair of the Committee comparing it with the European Court of Human Rights (Yuval Shany, 'Can Strasbourg be Replicated at a Global Level? A View from Geneva', in Helmut Aust and Esra Demir-Gürsel (eds.), *The European Court of Human Rights* (2021) 71, at 82):

In *Yaker v France* (2018) the HRCtee found the French criminal ban on wearing full-facial veils to violate the ICCPR, deviating from the position of the ECtHR, which found in *S.A.S. v France* (2014) such a ban to fall within France's margin of appreciation. In *Mellet v Ireland* (2016), the Committee held that Ireland's

⁴⁰⁶ R. Hanski & M. Scheinin (eds.), *Leading Cases of the Human Rights Committee* (2003), at 22.

⁴⁰⁷ W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (2nd. ed., 2019), at 218.

⁴⁰⁸ From *J. S. v. Australia*, UN Doc. CCPR/C/135/2804/2016 (2022) para. 10.

broad ban on abortion violates the ICCPR, effectively rejecting the approach taken by the ECtHR in *A, B and C v Ireland* (2010), in which the Court found the conditions of the Irish ban on abortion to fall within that state's margin of appreciation. [I]n 2018 Ireland held a referendum leading to a change of its constitution, paving the way for the passage of new legislation on abortion which conforms with the formally non-binding Views of the Committee.

He then asks how one might explain the Committee's comparatively more demanding approach.

... [O]ne possibility is that the Committee's lack of binding legal authority actually serves as a liberating factor, which allows it to adopt progressive interpretations of the law without assuming full responsibility for the consequences of following its Views. According to this hypothesis, ... the Committee is less concerned than the ECtHR with the question of whether or not states would comply with them. As a result, it can be less timid in its decisions than its regional judicial counterpart, which expects its decisions to be regularly followed by the member states and would suffer a set-back if they were not. ... [T]he HRCttee ... may ... have less to lose than the ECtHR by confronting 'high-reputation' states like France or Ireland, or by adopting interpretations of the law not likely to be followed.

... [But the Committee is not] agnostic about compliance with its decisions. To the contrary, it invests considerable efforts in monitoring compliance with them ... [This] is likely to serve as a constraint against normative overreach in its decisions. Furthermore, the lack of formally binding authority compels the Committee to rely not on *ipse dixit* [simple assertions], but rather on persuasion as a central compliance-inducing strategy. This, in turn, is expected to incentivize the HRCttee to exercise incrementalism in norm-development and to base new decisions on persuasive past precedents.

Finally, he addresses the consequences of the Committee's universal constituency:

[I]n some areas of activity, the HRCttee did indeed adopt a minimalist approach to the interpretation of the Covenant, arguably in view of the diversity of its membership. While not invoking the margin of appreciation doctrine, which the Committee considers to conflict, in principle, with the notion of universality of human rights law, it has often settled for a 'thin' construction of the rights provided in the Covenant and exercised 'light review' of the justifications provided by state parties for limiting rights. Arguably, awareness of a global audience, which at times explains the Committee's preference for restricting state discretion regarding the manner of implementing the Covenant, explains, at other times, a modest reading of Covenant rights and a flexible reading of justifications for restricting them. The fundamental nature of the right in question and the risk of abuse of discretion in light of actual state practice may help to distinguish between these two modes of operation by the Committee.

...

[Unlike the Court, the Committee] is not involved in a political, legal or economic integration project and does not serve a community of predominantly democratic or secular-liberal states (but rather a very diverse group of states). As a result, it draws much of its legitimacy from the intrinsic moral value of human rights as universal norms. This means that it must consider the implications of its decisions for protection of rights in both democratic and non-democratic countries – that is, develop rights as a barrier against both authoritarian regimes and tyranny of the majority in democracy.

Furthermore, the Committee operates in an institutional framework – the UN – that involves only a limited level of inter-state cooperation and works at great distance from the member states. The Committee itself is comprised of members coming from only a small percentage of the state parties (18 out of 174). As a result, the Committee as a whole is less exposed than the ECtHR to the political expectations of the state parties and is less influenced by the overarching international framework in which it operates.

Lacking an enforcement machinery, and facing states with chronic compliance problems, the Committee positions itself primarily as a norm-supporting and not a regime-supporting institution. Hence, it sees its role as an external monitoring body, whose principal loyalty is to the norms it seeks to uphold and to the beneficiaries of the said norms: once it deems a specific interpretation of a human rights norm fit for universal application, it should identify violations of the norm whenever it sees them and provide as much as possible concrete contents to such human rights, even if prospects for compliance with its decisions remain low.

F. RECONCILING COMPETING TREATY BODY INTERPRETATIONS

One of the problems that inevitably arises as a result of the proliferation of treaty bodies with overlapping competences is the risk of divergent or dissonant interpretations of the same or similar norms in different contexts. Cora True-Frost, in ‘Listening to Dissonance at the Intersections of International Human Rights Law’, 43 *Mich. J. Int’l L.* (2022) 361 provides examples arising out of the work of the CRPD, the HRC and the CRC. She observes that in its General Comment No. 35 on liberty and security ‘the HRC disagreed with the CRPD Committee “regarding whether involuntary hospitalization [by the state] is ever permitted.”’ [Another] example pertains to the CRC and the CRPD Committees’ continuing debate about the right to live in a family, and the related issue of the permissibility of placing children with disabilities in group homes. The CRC Committee holds that such placement by the state may be necessary, even as the CRPD Committee maintains that institutional living for children with disabilities should not be an option for state parties.’

But True-Frost resists calls for harmonization or normative hierarchies on the grounds that minority-sensitive perspectives would inevitably lose out:

... People with specialized, compounded, or intersectional rights claims within and across race, gender, and disability, may have more opportunities to have their rights violations acknowledged and addressed through varying, un-harmonized, and sometimes even dissonant interpretations. ... [Dissonance, at least] in the short-term ... may benefit historically marginalized people by moving toward new conceptualizations of time- honored legal doctrine. ... [But this also] leaves treaty bodies, human rights claimants, and states frustratingly vulnerable to indeterminacy and power differentials.

... The quest for a “coherent system” should not destroy the potential to develop overlapping and intersectional norms for minority groups such as female children with physical disabilities; poor pregnant women who are religious minorities; or Deaf Blackmen. ...

In the near term, dissonance may be modulated by design modifications, including deepening consultation between treaty bodies, encouraging joint General Comments regarding the intersectionality of rights, and strengthening treaty bodies’ capacity to develop the scientific and policy records that apply to persistent conflicts. ... [For example, acknowledging conflicting interpretations] would promote transparency and credibility for the treaty bodies and possibly create more urgency for working toward substantive resolution of the conflict.

While it is also important to acknowledge that despite the clear risks associated with fragmentation, it is increasingly common for treaty bodies to explicitly engage with and endorse the findings of other such bodies.⁴⁰⁹

QUESTIONS

1. Do you consider states to be ‘bound’ by the Views? If so, on the basis of what theory of obligation? Is it desirable for the communications procedure to have a binding outcome? What techniques do you think the Committee should use to promote compliance with its Views?
2. Some members of the Committee have suggested that ‘the most meaningful approach to interpretation of the Covenant as a global human rights treaty is one that is dynamic, conscious of the evolving nature of this subject, and attentive to the developments occurring in other international bodies.’⁴¹⁰ What are the legal and practical implications of such an approach?
3. ‘Each of the Committee’s three functions can be found inadequate from different perspectives. But if we look at the Committee as a totality, and examine these functions not discretely but as complementary approaches, we reach a far more favourable judgment about the significance of the Committee’s contribution to the human rights regime.’ Do you agree?

B. REFORMING THE OVERALL UN HUMAN RIGHTS TREATY BODY SYSTEM

While this chapter has focused on the ICCPR, many of the techniques used are followed by the other treaty bodies operating within the UN human rights regime. Since 2011, there have been ten so-called ‘core’ treaties in force, each with its own monitoring body. They are: (1) ICCPR: Human Rights Committee; (2) ICESCR: Committee on Economic, Social and Cultural Rights; (3) CERD: Committee on the Elimination of Racial Discrimination; (4) CEDAW: Committee on the Elimination of Discrimination against Women; (5) CAT: Committee against Torture; (6) OPCAT: the Subcommittee on Prevention of Torture; (7) CRC: Committee on the Rights of the Child; (8) CMW: Committee on Migrant Workers; (Convention on the Protection of All Migrant Workers and Members of Their Families); (9) CRPD: Committee on the Rights of Persons with Disabilities; and (10) CED: Committee on Enforced Disappearances. The accompanying Table provides some relevant details about each.

This final section takes note of various proposals made over the years to improve the functioning of the treaty body system as a whole. As early as the late 1980s a range of shortcomings had been identified which led to concerns about the sustainability of a system which is fragmented, complex and under-resourced. The problems included widespread non-reporting and late reporting by states, superficial reports, a lack of domestic debate around the reports, insufficient expertise among

⁴⁰⁹ See, for example, Wahaj Ali, Imran Ali and Bakhtaware Ali v. Norway, Views of the Human Rights Committee concerning communication No. 2926/2017, UN Doc. CCPR/C/135/D/2926/2017 (2023).

⁴¹⁰ *Eugénie Chakupewa et al. v. Democratic Republic of Congo*, UN Doc. CCPR/C/131/D/2835/2016 (2021), concurring opinion of A. Bulkan and H. Tigroudja.

committee members and limited independence of some, excessively general concluding observations, and inadequate follow-up in general.

The ups and downs of the ‘reform’ process that began in 1988 and is still going is described by Suzanne Egan, in ‘Transforming the UN Human Rights Treaty System: A Realistic Appraisal’, 42 *Hum. Rts. Q.* (2020) 762. She describes several sets of reform initiatives. The first consisted of three reports, presented between 1988 and 1997 by Philip Alston, in his capacity as an Independent Expert appointed by the UN Secretary-General.⁴¹¹

Alston’s recommendations ... comprised a broad swathe of measures including the extension of meeting times ...; the development of concerted practices and procedures to deal with persistent non-reporting states; as well as various methods of reducing the overall burden of reporting requirements. ... [H]is final report set out a range of [longer-term] options ... [including] a single consolidated report for all of the treaty bodies, based on issues identified in advance by the treaty bodies As further “food for thought”, he mooted the possibility of consolidating the existing network of treaty bodies, potentially into an entirely new “super-committee” or possibly two such committees [But he] warned that the idea ... would require “a sustained exchange of views in order that the advantages and disadvantages can be adequately articulated.”

[S]ome of the less far-reaching measures advocated by Alston were gradually introduced [In 2006, High Commissioner Louise Arbour presented] a detailed proposal for a Unified Standing Treaty Body [T]his proposal ... was an abject failure Objections raised included a fear that the focus on specific issues in particular treaties would be lost in a unified treaty body; that the creation of such a body would raise complex legal and political problems; and that ... there was insufficient evidence that a unified treaty body would necessarily mark an improvement in human rights protection or [solve systemic problems]. ... [The proposal was presented] without advance consultation, ... [and] was widely perceived as [a] “top-down” exercise that failed to generate buy-in from the key stakeholders. ...

The third major initiative ... was spearheaded by [High Commissioner] Navanethem Pillay [who] championed a consultative process from 2009 to 2011 involving most of the key stakeholders [The resulting] recommendations ... focused largely on ways and means of streamlining and harmonizing treaty body working methods. ...

[These] proposals eventually formed the basis for ... an intergovernmental process ... [which] culminated in General Assembly Res. 68/268 (2014). [The resolution endorsed additional meeting time but also adopted ... various cost-saving measures mooted in Pillay’s report While no mention was made of [Pillay’s] idea of national reporting and coordinating mechanisms, the text encouraged the treaty bodies to harmonize their working methods including with respect to a streamlined SRP [simplified reporting procedure], the conduct of the constructive dialogue, and an aligned consultation process for General Comments. It also endorsed the notion of an enhanced role for the [annual meeting of the Chairpersons of all of the treaty bodies] in steering harmonization.

Many have criticized the proposal for a single unified treaty body. Tomuschat (para. 36) argues that:

⁴¹¹ P. Alston, ‘Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System’, UN Doc. E/CN.4/1997/74. Earlier reports were published as UN Doc. A/44/668 (1989) and UN Doc. A/CONF.157/PC/62/Add.11/ Rev.1 (1993).

[There would be] a fierce competition for the few posts Smaller countries would no longer have a chance to be represented Moreover, some of the human rights treaties require special expertise Lastly, the experts on a permanent body would have to serve full time. It is the advantage of the current system, in contrast, that the experts maintain their ties with their countries of origin. They do not become part of a bureaucratic elite.’

In Res. 68/268 the General Assembly also promised additional staff resources for the treaty body system, but this did not eventuate. COVID-19 hit the system hard and exacerbated existing backlogs. While online meetings were introduced, they too were assessed to have suffered from ‘(a) poor communication systems; (b) a lack of reliable data systems; (c) the need for online platforms to be tailored to meet the special needs of people with disabilities; (d) insufficient interpretation services; and (e) concern regarding lack of compensation to help experts to offset the costs associated with online meetings’, Report of the Office of Internal Oversight Services, UN Doc. A/76/197 (2021).

As the system has continued to expand, most problems have been exacerbated. Between 2013 and 2021, the total number of ratifications increased by 13%. By 2021, there were some 1,800 communications awaiting processing and the staff-time available to undertake this work was diminishing. Only 14% of states had no overdue reports, and 441 reports were awaiting consideration (UN Doc. A/77/279 (2022)). Despite a series of requests by the treaty bodies and by the Secretary-General, states have maintained the existing severe underfunding of the system.⁴¹²

The principal locus for reform is the annual meeting of the Chairpersons of all of the treaty bodies. Although it has produced important blueprints (e. g. UN Doc. A/78/354 (2023), Egan (above, 788) is critical of the ‘conflicting strategic agendas’ of the key stakeholders, a leadership vacuum which implicates both the OHCHR and the chairpersons, and the overall failure to envision treaty body reform within the overall context of the UN human rights system.

An important dimension of future endeavours will be what the chairpersons have called the ‘digital uplift’ of the system (UN Doc. A/77/228 (2022) para. 55), although these will also require adequate financial resources to be provided by states:

- (a) While State party reviews should always be held in person, there are areas of treaty body work that could benefit from using advanced, integrated digital platforms, including hybrid meetings with States parties in exceptional circumstances. ... ;
- (b) A digital case file management system for individual communications ... must be completed to allow for uploading communications and tracking the process, including the status of the case. The submission process is to be streamlined, and allow the option of videoconferencing, oral evidence and States parties’ responses in real time. ... ;
- (c) The digital option could also be offered to those small island developing States and least developed countries that request it either as a cost-saving measure ... or as a result of temporary exceptional circumstances ...;
- (d) Greater engagement with civil society organizations and other non-State actors would be enhanced by the undertaking of ... online outreach activities ...

⁴¹² See T. Kleinlein and D. Steiger, ‘The State of the International Human Rights System—Normativity and Compliance: Introduction’, 14 *J. Hum. Rts. Prac.* (2022) 1; and G. Zyberi and I. Salama, ‘The Influence of Politics on the Work of the UN Human Rights Treaty Bodies’, in B. Andreassen (ed.), *Research Handbook on the Politics of Human Rights Law* (2023) 310.

QUESTION

What do you see as the principal disadvantages of a unified treaty body? Could these be overcome through creative arrangements in establishing the new body, or would too much of the appeal of the existing system be lost?

A World Court for Human Rights?

As early as 1947, Australia called for the creation of an international human rights court, and the United Kingdom responded by suggesting that the International Court of Justice could be authorized to give advisory opinions on human rights. Neither proposal was successful, but the idea has continued to surface periodically. In recent years, several NGO-led, but government-supported, initiatives have put forward elaborate proposals for such a world human rights court. Note that the International Criminal Court already has jurisdiction over crimes against humanity, thus enabling it to adjudicate on a significant range of human rights violations. The most developed proposal for a new court has been put forward by Julia Kozma, Manfred Nowak and Martin Scheinin in *A World Court of Human Rights: Consolidated Statute and Commentary* (2010). Nowak summarizes the proposal in ‘A World Court of Human Rights’, in Gerd Oberleitner (ed.), *International Human Rights Institutions, Tribunals, and Courts* (2018) 271:

... The [draft] Statute proposes a permanent court with international legal personality, based in Geneva with the power to decide in a legally binding manner on all complaints about alleged human rights violations brought before it in accordance with this Statute. The court should have 21 judges to be elected by the States parties to the Statute, sitting as a plenary court, in chambers of seven and committees of three judges, similar to the European Court of Human Rights (European Court of Human Rights). The Court shall render binding judgments on individual complaints, declare complaints inadmissible, facilitate friendly settlements, order interim measures, or strike out complaints, similar to other human rights courts. It shall also be entrusted with the power to provide advisory opinions upon request of States, the UN Secretary General, and the UN High Commissioner for Human Rights, similar to the Inter-American Court of Human Rights. Final judgments of the court are binding under international law. Their implementation by States shall be supervised by the UN High Commissioner for Human Rights, who may seize the Human Rights Council or, in exceptional cases through the UN Secretary General, the Security Council, with a request to take the necessary measures that will bring about the enforcement of the judgment (Article 18).

The Statute does not create any new substantive human rights obligations for States parties. As applicable law, Article 5 defines a total of 21 existing human rights treaties of the United Nations. Of course, the provisions of these treaties are only applicable if the State concerned is also a party to the respective treaty in addition to having ratified the Statute of the WCHR. In addition, Article 50 contains an opting out clause which provides any State party to the WCHR with the right to declare that it does not recognize the jurisdiction of the Court in relation to certain human rights treaties or certain provisions thereof. ...

For “Entities,” which are defined in Article 4 as “any inter-governmental organization or non-State actor, including any business corporation, which has recognized the jurisdiction of the Court in accordance with Article 51,” the

Statute envisages a special “opting in” clause. Such “Entities” cannot usually become parties to any international human rights treaty. ... Under the draft Statute ..., such Entities are invited to voluntarily declare under Article 51 that they recognize the competence of the WCHR to “receive and examine complaints from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by the respective Entity of any human right provided for in any human rights treaty listed in Article 5(1).” When making such a declaration, the “Entity” may specify under Article 51(2) which human rights treaties and which provisions thereof shall be subject to the jurisdiction of the Court. ...

Finally, there is no hierarchy between the proposed WCHR and regional human rights courts. As other similar treaties, the draft Statute requires as admissibility criteria the exhaustion of domestic remedies (Article 9) and various other criteria, including in Article 19(1)(b) the pre-condition that the same matter has not “already been examined in substance by the Court or by any other procedure of international investigation and settlement, including before a regional human rights court.” In other words, applicants must make up their minds whether they prefer to lodge a complaint ... with the WCHR or with a regional human rights court, if applicable. Consequently, there will be no review of a judgment of a regional court by the WCHR if it concerns the same matter.

After reviewing the history of such proposals, Ignacio de la Rasilla, concludes in ‘The World Court of Human Rights: Rise, Fall and Revival?’, 19 *Hum. Rts. L. Rev.* (2019) 585 that the idea of a World Court is ‘a useful heuristic’ for appraising the challenges involved in global human rights protection. He recalls Isaiah Berlin’s comment that ‘Utopias have their value as nothing so wonderfully expands the imaginative horizons of human potentialities.’ Olivier de Frouville generally supports the project in his book *Cosmopolitanism to Human Rights* (2021) 215. Others have been more critical. See Philip Alston, ‘Against a World Court of Human Rights’, 28 *Ethics & Int’l Aff.* (2014) 197.

QUESTION

What arguments do you see for and against the creation of a World Court as proposed above? Writing in 2004, Stefan Trechsel noted: ‘If one imagines an ideal world, certainly a WCHR is desirable. ... If one looks at the world today, one will have very serious doubts. The conflicts which we read about every day are not of a kind that could be solved by judicial proceedings.’ He concluded that such a Court is ‘neither desirable, nor necessary, nor probable’.

Chapter 10. International Human Rights Fact-Finding

Fact-finding is at the core of most human rights advocacy. In recent years there has been a huge increase in the number and variety of fact-finding missions undertaken by intergovernmental bodies, international NGOs and a range of other actors. There is, however, no clear definition of the term ‘fact-finding’. Indeed, on its face, the notion that an investigator will simply find the ‘facts’ of a complex and contested situation or incident is problematic at various levels. Nevertheless, fact-finding has become a term of art in the human rights field. It might involve: (1) seeking to ascertain the facts about alleged human rights abuses, ideally through on-site visits, (2) determining state and group responsibility and perhaps also individual responsibility for violations of human rights, and (3) making recommendations as to reforms and reparations. Such functions clearly go beyond the necessary implications of the term ‘fact-finding’.

International law has long made use of the technique of establishing fact-finding mechanisms in the form of commissions of inquiry (COI) in order to resolve disputes among states. The 1899 Hague Convention for the Pacific Settlement of International Disputes contained an entire chapter on such international inquiries. States unable to resolve a dispute diplomatically were urged to institute a COI ‘to facilitate a solution of [their] differences by elucidating the facts by means of an impartial and conscientious investigation.’ Important protections were, however, built in. The provisions did not apply to disputes involving ‘honor [or] vital interests’, and reports were ‘limited to a statement of facts’, thus leaving ‘the conflicting Powers entire freedom as to the effect to be given to this statement’. Subsequently both the League of Nations Covenant of 1919 (Article 12) and the UN Charter (Article 33(1)) called for the use of international inquiries as one of the measures that should be considered in seeking to resolve disputes endangering international peace and security.⁴¹³

In the human rights area, the 1919 Constitution of the International Labour Organization (Article 26) provided for the creation of a COI in cases of persistent violations of labour rights. Although only used 14 times — most recently in relation to Myanmar (1998, and 2023), Belarus (2004), Zimbabwe (2010), and Venezuela (2015) — the procedure was developed in a systematic and relatively rigorous manner, making it an important reference point.

By far the largest volume of fact-finding undertaken in the human rights area is carried out by nongovernmental organizations. Amnesty International began country missions in 1962, and Human Rights Watch (HRW, then Helsinki Watch) in the early 1980s. HRW’s later approach to reporting has been widely imitated. Many other groups, such as the International Commission of Jurists, the Center for Economic and Social Rights, the International Crisis Group, the International Federation of Human Rights, and diverse specialist groups now generate hundreds of fact-finding reports every year. There is also much national level reporting by local NGOs, national human rights institutions, or sector-specific groups. While the focus of the present chapter is primarily on fact-finding by intergovernmental organizations such as the UN, the principles discussed are broadly applicable to these other actors as well.

The international dimension of fact-finding is increasingly central. Given that human rights violations usually imply governmental wrongdoing, the governments in question are often unlikely to undertake meaningful domestic investigations. International involvement thus becomes a means to break through the domestic stalemate. Today, serious human rights violations are increasingly likely to attract sustained international attention and lead to insistent calls for some form of international monitoring or other involvement. The result is often the establishment of an international fact-finding mechanism, generally but not always labeled as a COI. This became especially common after the ‘Arab Spring’ uprisings in 2011, with major UN Human Rights Council-mandated investigations in relation to Libya and Syria, an independent COI on Bahrain, and reports by the OHCHR on countries such as Egypt, Libya, Tunisia and Yemen.

⁴¹³ For a historical overview, see M. Becker, ‘Challenging Some Baseline Assumptions about the Evolution of International Commissions of Inquiry’, 55 *Vand. J. Transnat’l L.* (2022) 559.

The most appropriate and potentially effective fact-finding can usually be done at the domestic level,⁴¹⁴ but this is probably only viable or likely after a change of government or some other major upheaval. Otherwise, governments are more likely to seek to head off international involvement by authorizing a fresh investigation into previously rejected allegations, urging a re-trial in a controversial case, permitting scrutiny of the police and the judiciary's performance by an independent actor or perhaps even creating a national commission of inquiry with a fact-finding mandate. But most such initiatives can be effectively captured, diverted or muzzled if the government concerned chooses to do so. International involvement in fact-finding thus becomes a way to transcend obstacles that might otherwise seem insurmountable.⁴¹⁵

Some of this fact-finding activity has become relatively routinized, such as the monitoring and reporting carried out by a large number of UN Special Rapporteurs, the Council of Europe's Human Rights Commissioner, and the Inter-American Commission on Human Rights. But a great deal of fact-finding is relatively *ad hoc*. It takes the form of diverse types of inquiries established by a range of intergovernmental bodies, both international and regional. Such inquiries are set-up on a one-time only basis in response to a particularly serious or politicized incident or pattern of abuses. These fact-finding bodies are differently composed, are given varying mandates, use widely differing methodologies, and tend to serve a broad range of objectives.

As a general matter, reports from intergovernmental organizations carry more weight internationally than those of even the most credible NGOs. That influence comes from the special legitimacy and credibility they enjoy as emanating from an organization of which the target state is a member. In addition, COI members and staff must be independent of any state. As a result, the state's argument that the report is biased, or a product of another state's foreign policy agenda, is less likely to be accepted by audiences both inside and outside the state.

Unsurprisingly, and indeed perhaps appropriately, some of the more routinized fact-finding has proven to be very controversial, and there has been extensive criticism by governments of such activities. But it is the *ad hoc*, or one-time only, inquiries that have often proven to be the most contentious.

This proliferation of major inquiries across a wide range of situations challenges the common wisdom, which portrays the emergence of the various international and mixed criminal courts and tribunals over the past three decades as the most significant development in the human rights field. The explosion of international fact-finding activities has been a development of comparable significance, but while the criminal courts and tribunals have generated a veritable industry and a vast literature, fact-finding has been relatively under-researched.

At its best, fact-finding is comparatively cost-effective, flexible in design, able to be mobilized rapidly, can transform public and governmental understanding of a situation, and has the potential to promote wide-ranging political or institutional reform. It can also play a crucial role in attributing criminal responsibility and laying the groundwork for subsequent prosecutions. But many COIs fall well short of this ideal.

Before looking at specific fact-finding exercises, it is important to ponder the broader philosophical and other implications of the field's heavy reliance on fact-finding.

FRÉDÉRIC MÉGRET, DO FACTS EXIST, CAN THEY BE 'FOUND,' AND DOES IT MATTER?

⁴¹⁴ This chapter is not concerned with questions relating to judicial modes of human rights fact finding. See T. Stirner, *The Procedural Law Governing Facts and Evidence in International Human Rights Proceedings* (2021).

⁴¹⁵ For a debate about the merits of covert research in this regard see M. Hopman, 'Covert Qualitative Research as a Method to Study Human Rights Under Authoritarian Regimes', 13 *J. Hum. Rts. Prac.* (2021) 548, and K. Kaur et al, 'Ethics and Epistemic Injustice in the Global South: A Response to Hopman's Human Rights Exceptionalism as Justification for Covert Research', 15 *J. Hum. Rts. Prac.* (2023) 347.

P. ALSTON AND S. KNUCKEY (EDS.), THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING (2016) 27

We live in an era that has banished certainty, but in which certainty has lost nothing of its allure. It may therefore come as no surprise that fact-finding as a particular institution of international law is witnessing a new popularity ... The idea behind rights violations, after all, is that they are concrete, identifiable, and knowable, and not simply subjective political claims. ...

In this context, fact-finding commissions, fact-finding by NGOs, indicators, and benchmarks, all seem to be part of a “turn to the factual,” one characterized by an increased attention to the ways in which facts are and ought to be produced and generated. The drivers of this ... include, in addition to the appeal of certainty, the need for actionable, real-time information. Who after all can wait for a trial to determine that genocide has occurred? Long before judicial fact-finding can occur, there is a need for a sort of instant, rapid-fire fact-finding that is the basic building block of decision-making. Fact-finding can be an alternative to improbable and/or lengthy adjudication. ...

...

But we may also have reason to be skeptical of a range of practices that appear under this “turn to the factual.” ... [T]here is an evident politics of describing certain things as facts. To be able to claim that something is a fact is generally a way of insulating it from debate, or at least from the inevitable politics of value or legal judgment. ... “Facts” are part and parcel of discursive strategies. This does not tell us anything about whether facts exist in some essential way, but it does tell us something about the existence of a background politics of fact designation, and an inevitable tendency to compete for “facts.”

... The central question is: What gets described as a fact in the human rights context? ... One could say fact-finding is a form of power. Facts are all-important in justifying international action ... The failure to produce facts may paralyze action, as when international inaction is justified by the failure to establish that genocide is ongoing (Rwanda, Darfur).

...

I. Fact-Finding: The Conventional View

...

A. Do Facts Exist?

The question as to whether facts exist is really another way of asking what facts are. Here, it is important to distinguish between conversational, philosophical, and legal uses of the term that may not be all the same. ... In actuality, there is almost no limit to what one might describe as a fact conventionally ... ,

...

1. Facts as Opposed to Opinion

... The idea of facts is that they are incontrovertible, certain, highly conducive to truth The traditional Enlightenment criterion to distinguish the two is that facts are provable, whereas opinions are not. Yet in practice the distinction between fact and opinion has often proved challenging to uphold consistently, at least in ways that do not involve some arbitrary convention.

Perhaps the most reliable tools in this respect are those of scientific knowledge ... Fact-finding strives to be, essentially, an empirical science. For evident reasons, human rights violations are not a phenomenon that can be replicated in a laboratory, but some human rights violations (for example, those that involve attacks on the right to life) leave traces susceptible to scientific analysis. Scientific, notably forensic, evidence is therefore a part and perhaps an increasingly important one of human rights fact-finding, all the more so that more and more grave and systematic human rights violations are considered to qualify as crimes. New methods based on the analysis of big data or various forms of technological surveillance may also open a sort of brave new world of scientific human rights

surveillance. But scientific fact-finding can only ever be a part of human rights fact-finding. It may be particularly strong when establishing certain outcomes (people were killed, people were tortured) but relatively weak when it comes to some issues of attribution within complex organizations, not to mention a range of rights violations (freedom of expression, freedom of association, discrimination, etc.) that clearly do not lend themselves to forensic analysis. Short of scientifically produced evidence, facts typically seem constructed on the basis of at least three theories of facts, all of which at least raise some puzzling questions in the context of human rights about the extent to which they can be distinguished from opinion.

First, facts emerge from a process of exploration directed by triers of facts who are themselves supposed to have certain qualities, notably of impartiality, neutrality, and objectivity. This is the one thing that human rights fact-finding has in common with judicial fact-finding. It underscores the significance of having fact-finders who are beyond allegations of bias. The choice is one of relying on “persons whose psychological makeup, independence, training and reputation for perspicacity is such that their fact determinations (while not necessarily true in the objective—and irrelevant—sense) will carry a respectable warrant of credibility.” One expects fact-finders, at any rate, to have an ability to, as it were, “step out of their own shoes,” and distance themselves as much as possible from their own privately held opinions in order to endorse a purely public function. This has occasionally been problematic in the human rights context, because of a tendency of human rights fact-finders ... to have a track record in terms of denouncing certain human rights violations and being known for certain substantive stances. ...

Second, facts are also understood in terms of the impact that a certain demonstration has on its intended audience. ... The law, it should be noted, already incorporates some trade-offs between certainty and practicality. The plausibility of allegations and the relative weight of parties will shift the burden of proof in ways that maximize the ability to determine what really happened. On the one hand, this construction of facts relativizes the distinction between fact and opinion, making facts into a form of confidently held opinion, perhaps merely what a majority happens to decide happened. This adaptation to the difficulty or impossibility of certainty does something to reinforce facts’ status by at least not holding them to an impossible standard. On the other hand, it is not clear who needs to be convinced in human rights fact-finding, and on the basis of what threshold. ...

Third and most importantly, facts are derived from certain recognized methods of constructing them. Even a perfectly impartial fact-finder would be suspicious if he failed to follow such a method. Opinion is not necessarily without method, but facts adhere to some presumably exacting and recognized procedure. ... [But, human rights] fact-finding missions are more likely to happen without a systematic contradictory procedure and honest confrontation (with the exception of subsequent disparagement of a fact-finding exercise’s quality). The default of one party (e.g., a state) although it may superficially make things easier for the mission, ultimately risks undermining its authority. At any rate, human rights fact-finding is in a sense all fact-finding and very little procedure, even though various sides to a story may ultimately risk considerably in at least the court of international opinion. There is neither adversarial debate nor representation, although it is becoming increasingly customary to confront various parties to allegations made against them, and this provides at least an after-the-facts option to voice disapproval. Evidence is not introduced but “found,” and issues of probative value trump any issue of admissibility. Again, this risks relativizing the distinction between opinion-making and fact-finding.

In practice, human rights fact-finding is part art and part science, and this is probably inescapable. What counts as a fact, then, is something quite complicated. It is typically a reconstruction based on some source and a particular theory of why that source makes it plausible, perhaps very highly plausible, that a certain thing occurred or is. For example, conventionally we may say that if a hundred people saw a shooting and testify to it in consistent terms and in a context where there is no reason to think that they would lie, then it is a fact that this shooting occurred. It is unlikely, until proof to the contrary, that they were all the victims of a collective illusion. The fact is that “a shooting occurred,” but it might as well be that “a hundred people saw a shooting occur and testified to it in identical terms.” Fact-finding often involves various types of facts (contextual, background facts; individual

facts; facts concerning victims, concerning causation, or concerning state of mind) for which different types of evidence is required. Moreover, these facts rely on very different types of evidence (forensic, indicators, statistics) and, most importantly, a number of mental operations that tie them together (presumptions, deductions, inferences, extrapolations).

Of course, not even a solid method is a guarantee that what is obtained is more than an educated guess. If it has been suggested that as many as half of the testimonies before international criminal tribunals (made under oath in a context of thorough cross-examination and strict rules about admissibility of statements) are unreliable, then what are we to make of witness testimonies before fact-finding bodies, at times when passions will often run high and polarization be extreme? Even testimonies that are made in good faith may be wrong as witnesses confuse their perceptions and facts, or are betrayed by their memory, or allow their worldview to color their rendition of facts. In addition, one must consider that human rights fact-finding may concern facts whose scope and complexity is potentially far greater than the facts that are normally investigated by the judicial system (e.g., a single act of murder).

...

2. Facts as Opposed to Law

The second typical dichotomy involved in the constitution of facts is facts as opposed to norms, particularly legal norms. ...

Yet this dichotomy between fact and law is always at risk of collapsing. ...

...

The tendency for fact-finding to become engaged quite deeply in forms of legal assessment is inevitable but potentially problematic. Fact-finding will be vulnerable to the accusation that it is a form of adjudication without adjudication, or “adjudication lite.” Legal issues will not be discussed in any detail and reduced to simple containers for facts that conveniently help label them and accelerate their delivery. For example, while judgments of international criminal tribunals include page after page of discussions of what constitutes a “generalized and systematic attack” for crimes against humanity, or “intention” and “civilians” when it comes to “intentionally targeting civilians,” fact-finding exercises may omit such discussions, making them seem less important than they ought to be. This will then beg the question of why these complex substantive legal discussions are deemed essential to adjudication but can be taken lightly in the fact-finding context. The same thing applies to the absence of a formal procedure, and the existence of an opportunity for all parties to defend their point of view according to equitable rules.

B. Can They Be Found?

The idea of “fact-finding” tends to suggest an image of “fact finders” busily visiting various sites to find facts. This is potentially confusing. The idea of facts being “found” suggests quite literally that facts are, as it were, lying around waiting to be found. The suggestion seems to be that facts exist independently of our structures of thought, and that they can therefore be “found,” almost literally.

...

The better view is that one does not find facts, as much as, potentially, clues that lead one to conclude that certain things are worthy of the label “factual.” “Facts,” as Jerome Frank put it, “do not walk into court.” They are better seen as a category of understanding rather than a thing in itself. ...

Moreover, what gets apposed the label “fact” is contentious not only in relation to a fact’s verifiability but also in relation to what one might describe as facts’ enduring “unit of analysis” problem. The world is arguably made of endlessly embedded facts, each smaller fact nested into bigger facts, each bigger fact only deriving its fact-ness as a result of the fact-ness of its constituent units. The question

therefore is not only what facts are but how they are strung together or, on the contrary, seen as independent. How one relates a series of smaller facts, for example, to the overall “fact” that Israel or Sri Lanka in certain circumstances engaged in campaigns to terrorize or target civilian populations or, on the contrary, defended themselves from terrorist attacks, is bound to be a complex process.

...

Ultimately, facts are constructed by our sense of what are socially relevant and salient facts. There is no fact-finding that is not a deliberate search for some preexisting fact that one speculates ought to be there, or whose absence would be notable. Every exercise in fact-finding is one that has been authorized at least at some level and that is saturated with the presuppositions that went into this particular search being made socially relevant. In that respect, human rights fact-finding is not just fact-finding for its own sake but fact-finding informed by a particular logic. ...

Allowing for such caveats, facts can no doubt still be constructed. But it is also important to remember that there are all kinds of prisms and filters that may hamper that construction. ...

II. Fact-Finding as Strategic Exercise

Even as fact-finding is an increasingly popular exercise in international human rights, it encounters significant resistance. ... There is, in fact, a certain imperviousness to facts, and simply labeling them as such will not necessarily help much. Holocaust denialism is a well-known example but there are others, such as 9/11 conspiracy theories. The Internet has if anything made facts both less and more accessible, and ensured that every “fact” is immediately in competition with a variety of “counter-facts.” ...

...

... Ultimately, for the purposes of political action, questions about the “reality” of facts may matter less than the question of what it takes to make facts credible in the social world. ... The goal ... is not only to uncover facts but to produce credible ones. ... I focus on three ways in which it may be useful to move beyond a supposedly uncontested notion of facts-as-outcome to a focus on taking the process of fact-finding in new directions, by looking at practices that are not typically thought of as central in the current model of fact-finding.

A. Legitimizing

Rather than simply thinking in terms of the sheer potency of “facts,” it may be useful to think of the legitimacy of various fact-finding exercises, and the ways that legitimacy can be forcefully enhanced by a constant attention to what might otherwise weaken it. In the same way that it is often said that “justice should not only be done but be seen to be done,” fact-finding should also “appear to be done.”

...

...

B. Communicating

Second, fact-finding also crucially involves a degree of communicating the facts to potential audiences. One may think that the production of facts is also a constant process of persuasion and indeed of education about facts. In this context, it seems to matter less whether something is a fact or not than whether it is believed in or not. ...

...

[T]hinking of fact-finding as a form of communication also means that fact-finding can be imagined as a form of a dialogue. Communication is not one-way but a dialogical process, in which upon learning of the conclusions of a fact-finding exercise relevant constituencies may have new evidence to bring to the table. This also has implications for the temporality of fact-finding. ...

...

C. Strategizing

Finally, fact production can be seen as vulnerable to a series of tensions that create a variety of strategic dilemmas. First, we can think of facts as having two purposes, notably in the UN context: facts are needed for action, and they are needed for adjudication. The facts needed for each, however, are not the same. Facts necessary for action are merely quasi-facts, facts as they can best be ascertained in the circumstances; there is a recognition that time is of the essence, that decision cannot afford to wait for certainty. Facts as needed for adjudication are more in the manner of incontrovertible, demonstrable, or highly probable truth because of the way the negative consequences they portend for persons or institutions and because one does not have, unlike political action, the excuse that time is pressing. Human rights fact-finding, and therein lies some of its challenges, now more often than not occupies a dual space: providing facts both for the political decision-maker and potentially for the adjudicator. But there are evident tensions between the needs for urgency and certainty, especially in a context of lack of resources and in perilous environments.

...

III. Conclusion

... [F]acts can be rescued from relativism precisely by safeguarding their relativity. It is when one claims too much in the name of facts that one exposes the practice of fact-finding to brutal reversals.

...

... This chapter has sought to propose a modest approach focused on fact-finding as a practice, one that is broader ultimately than its name suggests and includes the ability to legitimize, communicate, and strategize about facts. In the end, though, we are left with nothing but the struggle over facts, a struggle that should be appreciated at its just value as certainly not doomed but evidently fraught with ambiguities.

...

... [T]here is also an ethical dimension to facts. Refusing to believe what one has no way of disproving, asking for perfection in fact-finding, excluding facts that provoke narrative dissonance, always assuming the worse in others, engaging in conspiracy theories: all such behavior that presents itself as based on a critique of knowledge may in the end merely reveal moral ineptitude. The Holocaust denier in this perspective is perhaps less a flawed scientist/historian than he is someone who has distanced himself from the ability to listen to witnesses, hear sad stories of pain and grief, and, fundamentally, empathize with humanity. This inability to hear the obvious is perhaps a characteristic of many of the campaigns of denigration that have been launched against certain fact-finding exercises, which are never as weak as when they seem to entirely and callously distance themselves from the lived experience of pain of victims, complicated and constructed as it may be. The moral stance, on the contrary, may be to cautiously believe in the best attempts at producing facts, for to not do so on the basis that there is always a possibility that they may not be true—that there is some stone left to be unturned—may not be to defend facts but to be their enemy.

A. UN COMMISSIONS OF INQUIRY: CASE STUDIES

As of July 2025, there were active Human Rights Council-created COIs focused on Belarus (established in 2024), Sudan (2023), Nicaragua (2022), Ukraine (2022), the Occupied Palestinian Territories and Israel (2021), Libya (2020), Venezuela (2019), Myanmar (2018), the Democratic Republic of the Congo (2018), and Syria (2011). A UN *Research Guide on International Commissions of Inquiry, Fact-finding Missions: Chronological list* identifies 93 UN COIs created between 1963 and 2022, 75 of which were established after 2000. UN fact-finding panels can be set up by institutions other than the Human Rights Council, such as the Secretary-General, and the Security Council.

An evaluation of whether these COIs make a difference depends both on the criteria that are used to define success and on complex issues relating to causality. Michael Becker and Sarah Nouwen, in 'International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach', 30 *Eur. J. Int'l L.* (2019) 819, suggest a typology of the differences that a COI could make. They begin by noting that COIs might facilitate or encourage either action or inaction:

A COI is inherently a response to a particular situation. International attention may begin a process of agenda setting and marshalling political will to take other action, or it may provide the impetus (or 'cover') for a government to undertake domestic reforms or engage in negotiations aimed at resolving the underlying problem. The fact that an inquiry body was set up to investigate a situation may in itself have (legal) significance. ...

However, the creation of a COI may also accommodate inaction. It may forestall more destabilizing actions (such as states or non-state actors seeking recourse through the use of force) by giving parties a 'cooling-off' period that can help to prevent decisions being taken in a fog of disputed facts or in the heat of the moment. But it may also (or instead) be a stand-in for other action – a means to signal 'concern without commitment'. Establishing a COI may placate (at least temporarily) concerned parties or function as the best alternative to other potential responses that decision-makers cannot agree upon (for instance, military intervention, peacekeeping or sanctions). ... A COI may also be created to pre-empt or obstruct other forms of intervention (inquiry or otherwise) that are viewed as hostile or more intrusive. For example, in response to the outbreak of violence in South Sudan in December 2013, the African Union created a COI, almost overnight, to avoid a referral of the situation by the UNSC to the ICC. And, ... Bahrain's creation of its Bahrain Independent Commission of Inquiry (BICI) largely extinguished international support for a UN-led inquiry body.

Becker and Nouwen note that COIs might serve to justify other forms of international action, either before or after they report. They also identify a number of other binaries that help us to think about the impact of COIs. Thus, they might (i) foster a shared narrative or harden competing narratives; (ii) legitimize some groups and delegitimize others; (iii) enhance political dialogue or intensify division; (iv) mobilize or demobilize certain constituencies or cause a backlash; and (v) spur reform or encourage more of the same.

We turn now to two in-depth case studies of UN COIs, relating first to Venezuela and then to Myanmar.

Venezuela Case Study

We begin with the mandate given to the COI by the Council and then consider the Mission's 2022 report on crimes against humanity committed in Venezuela. The focus is on the methodology used to build the report, the standard of proof used, and the approach to naming individuals considered to be responsible for crimes.

HUMAN RIGHTS COUNCIL, RESOLUTION 42/25 (2019) ON THE SITUATION OF HUMAN RIGHTS IN THE BOLIVARIAN REPUBLIC OF VENEZUELA

[Adopted by a vote of 19-7-21. States voting against were Cameroon, China, Cuba, Egypt, Eritrea, Philippines, Saudi Arabia.]

The Human Rights Council,

...

Expressing grave concern at the alarming situation of human rights in [Venezuela], which includes patterns of violations directly and indirectly affecting all human rights – civil, political, economic, social and cultural – in the context of the ongoing political, economic, social and humanitarian crisis, as stated in the reports of the [UN HCHR] and of other international organizations,

...

Expressing deep concern for the more than 4 million people compelled to leave [Venezuela] ... because of, inter alia, violations of the rights to food and health, violence and insecurity, the collapse of basic services, the deterioration of the education system, lack of access to pre- and post-natal care, and insufficient mechanisms for protection from violence and persecution on political grounds,

...

Welcoming the mission of the [OHCHR in March 2019] to prepare the visit of the High Commissioner ... from 19 to 21 June 2019, and the resulting commitments, including with regard to the establishment of a permanent presence of the [OHCHR] in the country ...,

Welcoming also the ongoing dialogue between the High Commissioner and the Venezuelan authorities

...,

...

Mindful that the Prosecutor of the International Criminal Court has decided to open a preliminary examination of the situation ... to analyse crimes allegedly committed in this State Party since at least April 2017 ...,

...

2. Strongly condemns all violations and abuses of international human rights law in [Venezuela] ...;

3. Also strongly condemns the widespread targeted repression and persecution on political grounds ... including the excessive use of force against peaceful protests, the excessive use of force during security operations, arbitrary detention, torture, ill-treatment, extrajudicial executions and enforced disappearances by security forces ...;

...

5. Deplores the ... erosion of the rule of law and of democratic institutions ...;

...

22. Requests the High Commissioner to continue to monitor and report on the situation ...;

...

24. Decides to establish, for a period of one year, an independent international fact-finding mission, to be appointed by the President of the Human Rights Council, and to dispatch that mission urgently to [Venezuela] to investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims ...;

25. Urges the Venezuelan authorities to cooperate fully with the fact-finding mission, to grant it immediate, full and unfettered access to and throughout the country, including to victims and places of detention, and to provide it with all the information necessary to fulfil its mandate;

...

DETAILED FINDINGS OF THE INDEPENDENT INTERNATIONAL FACT FINDING MISSION ON THE BOLIVARIAN REPUBLIC OF VENEZUELA UN DOC. A/HRC/51/CRP.3 (2022)

Crimes against humanity committed through the State's intelligence services: structures and individuals involved in the implementation of the plan to repress opposition to the Government

[The report focuses largely on SEBIN, which is the Bolivarian National Intelligence Service, and DGCIM, which is the General Directorate of Military Counter-Intelligence.]

...

B. Methodology

13. [T]he Mission followed established methodologies and best practices for human rights fact-finding, as developed by the United Nations. [It] conducted its work in accordance with the principles of independence, impartiality, objectivity, transparency and integrity.

14. The Mission continued to base its information gathering on the investigation of cases [This] report is based on 471 interviews conducted by the Mission: [125 with victims; 40 with family members; 65 with legal representatives; 53 with former government employees; and 188 with intermediaries, journalists, NGO representatives and others].

15. The Mission has decided to focus the present investigation on deepening its understanding of the chains of command and responsibilities for violations and crimes within two detention centres, SEBIN's El Helicoide and DGCIM's Boleíta. This is due to the especially high number of violations and crimes occurring within these detention centres between 2014 and present, and the availability of information. ...

16. The Mission was able to collect information primarily through ...: (1) confidential interviews, both in-person and via secure telephone or video connections; (2) confidential documents obtained from individuals and organizations, including legal case files; and (3) review of open source information.

17. The factual findings on material facts made in the present report are based on at least one credible source of direct information, which was independently corroborated by at least one other credible source of information. Where the report describes patterns of conduct, these are based on the common elements established by the cases investigated, corroborated by other credible information collected.

18. The Mission considered the following to be sources of direct information, where the sources were reliable and credible:

Interviews with victims and other witnesses with direct knowledge of incidents

Interviews with family members and lawyers of victims with direct knowledge of certain aspects of cases/incidents

Legal case files and other verified confidential documents

Interviews with former Government, intelligence and military officials and others with direct knowledge of specific cases or of the internal workings of certain institutions (insiders)

- Publicly available statements or information regarding relevant facts provided by Government institutions and representatives (including televised statements or statements posted on social media)
- Laws, policies, directives and other legal documents of the Government of Venezuela

19. The Mission devoted throughout its investigations specific attention to gendered issues and impacts of violations and strove to implement a gender approach, using gender-sensitive methodologies and tools for collecting, organizing, analyzing and reflecting information

20. The Mission ensured it had the informed consent from each person it interviewed before using any information provided. It has anonymized the identities of sources, witnesses and victims, where revealing these could place the individual and/or his/her family members at risk of reprisals. While preserving the confidentiality of the interaction of victims and other witnesses with the Mission, it maintains a full database of information and evidence upon which it bases the analysis and conclusions contained in the present report. The information is stored on safe platforms, with strict and controlled access, applying best practices in terms of digital security and permanent control. Access will only be

granted to the extent that witnesses or the originators of other sources of information have given their informed consent, and protection concerns have been addressed.

21. ... The Mission regrets that three years into its mandate, the Government of Venezuela still has not permitted its members or its Secretariat staff to visit Venezuela in order to undertake in-country fact-finding.

C. Standard of proof

22. [T]he Mission used “reasonable grounds to believe” as its standard of proof. [This] standard is met when factual information has been collected, which would satisfy an objective and ordinarily prudent observer that the incident has occurred as described with a reasonable degree of certainty.

23. The Mission applied the standard of proof to determinations as to whether: (a) the violation or crime occurred, and (b) the individual identified was responsible. This standard of proof is lower than that required in criminal proceedings for a criminal conviction (certainty beyond a reasonable doubt) as well as that required to sustain an indictment. It is also lower than the balance of probability test in civil matters (meaning that something is more likely than not to have happened). However, it is sufficiently high to indicate that further investigations are warranted.

...

[Before reading the next excerpt from the Mission’s report, consider OHCHR’s ‘summary of key guidance’ to COIs on attributing individual responsibility:⁴¹⁶

- Investigative bodies may attribute responsibility to individuals for crimes or violations ... [of] international human rights law, international humanitarian law and international criminal law;
- Individuals can be identified as “responsible” for violations and crimes, whether in the criminal legal sense in [sic] or the administrative, civil, moral or political sense;
- For international human rights law findings, the individual identified must have been in a position to invoke the State’s responsibility under international law (i.e., must be a State agent); while for de facto authorities and NSAs, the individual must be similarly situated;
- Even in the absence of explicit language in an applicable international human rights law treaty, the conduct of superiors and accomplices who may be indirectly involved can and should be captured by the investigation;

...

- The personal security of interviewees is never more important than when the topic concerns specific individuals and their responsibility for crimes and violations. Staff must pay maximum attention to witness protection, consent, and information security protocols.]

D. Naming of individuals in the present report

25. The Mission has concluded, on reasonable grounds to believe, that certain individuals addressed in the present report may be responsible for crimes and violations and should therefore be investigated. The Mission reiterates that it is an investigative but not a judicial body, and in essence any determination of criminal responsibility with respect to the individuals mentioned in this report must be made by the appropriate judicial authorities acting with full respect for due process guarantees and fair trial standards. The Mission has chosen to publicly name some of the individuals whose contributions to crimes and violations it investigated. ...

26. The Mission considers that this approach upholds the value of the publicity of the work of fact-finding bodies and carries the potential to act as a deterrent to further violations. The Mission has carefully considered all possible implications and conducted risk-assessments. In light of particular security concerns, including the risk of reprisals against victims, family members, and others, the

⁴¹⁶ OHCHR, *Who’s Responsible? Attributing Individual Responsibility for Violations of International Human Rights and Humanitarian Law in United Nations Commissions of Inquiry, Fact-Finding Missions and Other Investigations* (2018), at 68

Mission has decided to anonymize certain individuals whose contributions to crimes and violations it investigated. ...

27. The Mission ... has actively sought to gather the views of the implicated individuals and to provide them with a right to reply to the allegations made against them. In parallel, the Mission publicly invited interested individuals, groups and organizations to submit information [It] made available an online form and invited interested individuals to submit any “exculpatory information” they may possess.

...

29. The Mission regrets not having received any response or additional information from the relevant individuals, nor from the Government Its factual determinations are therefore based on a rigorous analysis of the information it was able to gather ... [T]hese determinations should prompt thorough criminal investigations

D. Determinations

457. ... [I]t has been established on reasonable grounds to believe that individuals who operated within SEBIN and DGCIM were involved in the commission of crimes and violations

458. Information gathered by the Mission, both from present and previous investigations, supports that the President, seconded by other high-level State officials, put in place a policy/plan that included acts aimed at silencing, discouraging and quashing opposition to the Government, by targeting opponents, persons perceived as such and their relatives or friends. This conduct included the commission of violations and crimes through individuals serving in DGCIM’s Boleíta and SEBIN’s Helicoide.

459. SEBIN and DGCIM operate as hierarchical and organized institutions under the control of the President, seconded by other high-level State officials. To ensure compliance with orders, SEBIN and DGCIM maintain a sufficient pool of available individuals, recruited amongst those prone to commit arbitrary detentions and acts of torture and other cruel, inhuman or degrading treatment, including sexual and gender-based violence. The selection takes into account the manner they react to violent practices, they are often very young and belonged to vulnerable communities. In addition, a system of rewards (promotions and financial benefit) and punishments (retaliation against them and their families) is maintained to ensure compliance. ...

460. ... The Mission finds, with reasonable grounds to believe, that the President and the high-level State officials that [supported] him should be subjected to judicial investigations for their responsibility with regard to the crimes and violations committed through DGCIM and SEBIN officials

...

* * *

The Mission recommended, inter alia, that Venezuela investigate those named in its report and it called upon other States to ‘consider initiating legal actions’ against the same individuals ‘in accordance with their relevant domestic legislation and applicable international principles.’ It also drew its report and its focus on the specific individuals to the attention of the International Criminal Court.

In response to the Mission’s reporting, Venezuela told the Council (UN Press Release, 26 September 2022) that:

[T]he so-called fact-finding Mission had surpassed itself, creating a fiction about the country, aiming to please the international media circus, whose vultures just wanted to feed, and not reflect what was really happening.

Everything was invented - millions of phantom migrants, so-called terrorist camps, and even a parallel President, whose existence was improbable. They had

struck low, but had failed in the criminal aim of regime change, as desired by the United States. The report submitted and the statements made therein were a sad proof of how banal international law had become. It was a perverse media alliance, making such unsubstantiated allegations, bandied about without any proof; a laboratory report, beggaring belief, and aiming to incriminate the President. The Mission used anonymous sources which could not be proved, and were unreliable. This was a testament of fake news. These tactics were often used against countries of the South.

Venezuela was moving forward with freedom and determination, despite its persecution from all these quarters Venezuela protected human rights and did not recognise these parallel mechanisms which sought to destabilise the country, but would always fail. These hegemonic agendas did not foster dialogue nor human rights. Venezuela would take the relevant diplomatic measures if this interventionist mandate continued.'

In October 2022, the Council renewed the Mission's mandate for two more years. For its 2024 report, see UN Doc. A/HRC/57/CRP.5.

QUESTIONS

1. In the Venezuela COI report, an important focus is on criminal accountability, even though no resolution of the situation is in sight. How would you reconcile this with the analysis of Steven Ratner in 'After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses', 36 *Mich. J. Int'l L.* (2015) 541, at 553. Ratner played a key role in COIs on Cambodia, Sri Lanka, and Ethiopia. He argues that, in general, focusing on criminal accountability is 'extremely short-sighted First, in situations where atrocities are ongoing, termination is more important than accountability. ... In rare cases, criminal accountability can serve as a means to end ongoing violations ... but most of the time, the UN should make ending the abuses the priority.' He adds that 'accountability is a gradual process, and a consensus must be built for it; one cannot simply move directly to putting a state's leaders or former leaders in the dock, and certainly not at the ICC. A demand by the UN for immediate trials of named individuals when a state has no willingness to do so will merely allow opponents of accountability to accuse the UN of undermining its sovereignty and wanting nothing more than the heads of governmental leaders.'

2. What is the role of politics in relation to COIs? Ratner's view is that a priority goal 'must be to gain domestic support for accountability' He notes this 'does not mean ignoring a state's legal obligations and international standards' but the report should be 'sensitive to the politics of the country. ... Politics does and should affect the interpretation of a commission's mandate, the tone of the report, and the recommendations. Fact-finding, then, demands political expertise and awareness among those undertaking it' How should a COI balance the need to state the facts or allegations clearly with the need to adopt a tone that will promote political support for its report both within the state and internationally?

3. Could the focus on individual criminal accountability be seen as a 'distraction or decoy drawing attention away from addressing the role of States in perpetrating atrocity crimes and in maintaining structures that may threaten peace'?⁴¹⁷

⁴¹⁷ L. Fletcher, 'A Wolf in Sheep's Clothing: Transitional Justice and the Effacement of State Accountability for International Crimes', 39 *Fordham Int'l L. J.* (2016) 447, at 517.

Myanmar Case Study

In 1948 Myanmar, then Burma, gained independence from British colonial rule. From 1948 to 1962, it was a parliamentary democracy but, in 1962, General Ne Win took power in a military coup. One-party rule ensued, until massive demonstrations forced his resignation in 1988. The military retained power in the guise of the State Law and Order Restoration Council (SLORC). The head of the National League for Democracy (NLD), Daw Aung San Suu Kyi, was placed under house arrest in 1989. Elections were held in 1990 and, although the NLD won 81% of the seats, the military refused to relinquish power. Since independence, the military has been in constant conflict with ethnic and other minorities and, in 1992, this led to a mass exodus of Myanmar Muslims from Rakhine State into neighboring Bangladesh.

A new Constitution was adopted in 2008 but it was carefully designed to ensure the military's continuing dominance of politics and the economy. In 2010, the Government undertook wide-ranging reforms, but without amending the Constitution. Sanctions were lifted and foreign investment welcomed. The NLD took office in 2016 after an overwhelming electoral victory but the Tatmadaw, the Myanmar military, retained the upper hand. Violent attacks against the Rohingyas and other minorities continued on a large-scale, even under the government led by Aung San Suu Kyi. In February 2021, a military coup overthrew the civilian government, leading to sustained resistance and ever greater repression.

In the face of international pressure, the government has regularly created its own COIs to investigate allegations, but none has ever led to meaningful change or prosecutions. The UN Commission on Human Rights appointed a Country Rapporteur in 1992 and, as of 2023, there have been six different Rapporteurs. In 2017, the Human Rights Council established a three member COI called the International Fact-Finding Mission on Myanmar (FFM, or FFMM). It produced several major reports, including a 444-page report in September 2018 and a follow-up report in September 2019. In that year, it handed over its accumulated records to a new Independent Investigative Mechanism for Myanmar (IIM) established by the Council with a mandate to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals. In 2020, the Council called for the Mechanism to cooperate closely with the ICJ and the ICC. By 2024, the Mechanism had collected nearly 28 million items of information and evidence from over 900 sources (IIMM, *Strategic Plan 2025-2027*) including interview statements, documentation, videos, photographs, geospatial imagery and social media material.

The COI's findings featured prominently in argument in *The Gambia v. Myanmar* before the International Court of Justice since 2019 (Ch. 2D, above). The Court had discussed the weight to be accorded to such reports in an earlier case, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, in which it noted that it would 'treat with caution evidentiary materials ... emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. ... [It will also] give weight to evidence that has not ... been challenged by impartial persons for the correctness of what it contains' (para. 61) Ultimately, the Court found 'the coincidence of reports from credible sources [including from a country Special Rapporteur] sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed' (para. 207).⁴¹⁸

In 2018, the UN Secretary-General appointed a senior Guatemalan diplomat, Gert Rosenthal, to assess the UN's own role in Myanmar between 2010 and 2018. The organization was widely accused of standing by and doing little in response to the ever-mounting evidence of atrocities committed by the government, with which it continued to work closely. On the basis of a desk review and no on-

⁴¹⁸ For a critique of this approach, see S. Halink, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case', 40 *NYU J. Intl. L. & Pol.* (2008) 13.

site visit, he concluded that there had been systematic failures and that the UN's performance had been 'obvious[ly] dysfunctional'.⁴¹⁹

A major challenge in fact-finding, including in Myanmar, is how to respond to sexual and gender-based violence (SGBV), which is a major element in the vast majority of conflict situations. Thus, the Council of Europe's Commissioner for Human Rights reported in a 'Memorandum on the human rights consequences of the war in Ukraine' (Doc. CommDH (2022)18), that she had 'received from many sources numerous reports of war-related sexual violence, including rape, gang rape, threats of sexual violence, or coercion to watch an act of sexual violence committed against a partner or a child, allegedly committed by Russian troop members at various locations under their control in Ukraine' (para. 29). For many years, the specificities of the issues raised by SGBV were largely unrecognized. As awareness has grown, especially since the early 1990s, there have been many efforts to ensure that a nuanced, tailored and sensitive approach is adopted by fact-finders and other human rights missions.⁴²⁰ In the Ukraine case, the Commissioner observed that:

[V]ictims and witnesses of sexual violence may be reluctant to speak about their ordeal or to file complaints out of fear or because of trauma or the social stigma associated with sexual violence. Notwithstanding the importance that all allegations of war-related sexual violence are investigated without delay, the Commissioner highlights that the creation of safe conditions for victims to come forward and cooperate with law enforcement, including by preserving their privacy and avoiding re-traumatisation, must be prioritised. Survivors of war-related sexual violence must have effective access to redress for the harm suffered, including medical rehabilitation and psychosocial support, as well as access to justice. ... [T]hey should be treated individually in terms of the type of response needed and their wishes in this regard should be always respected (para. 31).

The excerpts below give a flavor of the approach adopted by the Myanmar COI. The first report focuses on the situation of the Rohingya ethnic group, and the second report seeks to identify the economic interests that are enabling the Myanmar military to fund and sustain its oppression. These reports are followed by an analysis revealing the extent of fact-finding efforts undertaken by civil society groups working in and on Myanmar.

**DETAILED FINDINGS OF THE UNHUMAN RIGHTS COUNCIL'S INDEPENDENT
INTERNATIONAL FACT-FINDING MISSION ON MYANMAR
UN DOC. A/HRC/42/CRP.5 (2019)**

...

The situation of the Rohingya

2. The situation of the Rohingya continues to be of grave concern to the Mission. The Mission did not document in relation to the last year violations of a similar gravity to the Tatmadaw's "clearance operations" after attacks on police and military posts on 25 August 2017, described in its last report. However, it confirmed that the Rohingya remain the target of a Government attack aimed at erasing the identity and removing them from Myanmar, and that this has caused them great suffering. Additionally, many of the factors that contributed to the killings, rapes and gang rapes, torture, forced displacement and other grave human rights violations by the Tatmadaw and other government authorities that the Mission documented in its 2018 report are still present. This has led to the conclusion that the situation of the Rohingya in Rakhine State has remained largely unchanged since last year. The laws, policies and practices that formed the basis of the Government's persecution against the Rohingya have been maintained. With another year having passed without improvements

⁴¹⁹ For the UN's own response, see UN Doc. A/HRC/49/73 (2022). But cf. Special Advisory Council for Myanmar (composed of former UN mandate-holders on Myanmar), *How the UN Is Failing Myanmar* (3 October 2023).

⁴²⁰ See, for example, the Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence, named the 'Murad Code', after the Nobel Peace Prize laureate, Nadia Murad, who was sexually enslaved by ISIS in 2014; Witness, *Using Video to Support Justice and Accountability for Sexual and Gender-Based Violence* (2021); and K. Bergtora Sandvik and K. Lohne, 'The Struggle against Sexual Violence in Conflict: Investigating the Digital Turn', 102 (913) *Int'l Rev. Red Cross* (2020) 95.

to their dire living conditions, prospects for accountability or legal recognition as citizens of Myanmar, their plight can only be considered as having deteriorated.

3. The Government of Myanmar has made no progress towards addressing the underlying structural discrimination against the Rohingya by amending the discriminatory laws, including the 1982 Citizenship Law. State policies that impose and force Rohingya to accept national verification cards (NVCs) have intensified. The Rohingya continue to perceive the NVCs with scepticism due to their history as a tool of persecution, having been used to disenfranchise and “other” them from the rest of the population.

4. The Mission found that movement restrictions, applied to the Rohingya in a discriminatory and arbitrary manner, touch almost every aspect of the lives of the 600,000 Rohingya remaining in Rakhine State, affecting basic economic, social and cultural rights, including their ability to sustain themselves, obtain an education, seek medical assistance or even pray and congregate.

5. The lack of safe and viable homes and land for Rohingya to return to is further exacerbating their situation. The Mission found that Rohingya villages continue to be bulldozed and razed. An estimated 40,600 structures were destroyed between August 2017 and April 2019, with over 200 settlements almost completely wiped out. Instead, new structures are being built on land that used to be cultivated and lived on by those who fled. Paradoxically, the Mission found that Rohingya have been forced to work in constructing new housing developments, in conditions that amount to forced labour.

6. Against the backdrop of these unbearable conditions, insecurity has been heightened as a result of the conflict between the Arakan Army and the Tatmadaw in northern Rakhine, in areas from which Rohingya were expelled. This has been an additional contributing factor to making a safe, dignified and sustainable return of the Rohingya population impossible at this time.

7. Justice remains elusive for the victims of grave crimes under international law that the Mission documented in its last report, in particular those perpetrated during the 2016 and 2017 “clearance operations”. The Government of Myanmar has not taken the necessary measures to effectively investigate or prosecute those responsible.

8. The cumulative effect of these factors has led the Mission to conclude on reasonable grounds that the Government’s acts continue to be part of a widespread and systematic attack against the remaining Rohingya in Rakhine State, amounting to the crimes against humanity of inhumane acts and persecution.

9. Furthermore, having considered the Government’s hostile policies towards the Rohingya, including its continued denial of their citizenship and ethnic identity, the living conditions to which it subjects them, its failure to reform laws that subjugate the Rohingya people, the continuation of hate speech directed at the Rohingya, its prior commission of genocide and its disregard for accountability in relation to the “clearance operations” of 2016 and 2017, the Mission also has reasonable grounds to conclude that the evidence that infers genocidal intent on the part of the State, identified in its last report, has strengthened, that there is a serious risk that genocidal actions may occur or recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide. Against this background, the Mission deems that the conditions enabling the safe, voluntary, dignified and sustainable return of close to one million Rohingya refugees from Bangladesh do not yet exist. The current conditions makes their return impossible at this time. Because of the absence of positive change over the past two years, the Mission cannot foresee when repatriation will be feasible.

...

**THE ECONOMIC INTERESTS OF THE MYANMAR MILITARY, REPORT BY THE INDEPENDENT
INTERNATIONAL FACT-FINDING MISSION ON MYANMAR
UN DOC. A/HRC/42/CRP.3 (2019)**

Executive summary and key recommendations

3. The Mission is issuing this report on the Tatmadaw's economic interests to assist the Government of Myanmar, United Nations Security Council, Member States, relevant regional and international inter-governmental organizations, investors and businesses, international financial institutions, and the United Nations, its funds, programmes and agencies, in implementing [its] recommendations.

4. The outsize power of the Tatmadaw has affected Myanmar's transition from full direct military dictatorship following the November 2010 and subsequent November 2015 elections. The National League for Democracy, led by Aung San Suu Kyi, won the 2015 election and took over the civilian side of the Government in March 2016. However, as prescribed by the 2008 constitution, the Tatmadaw is an autonomous institution free from any civilian control or oversight. It controls the ministries of defence, home affairs and border affairs, whose ministers are serving military officers selected by the Commander-in-Chief. It retains 25 per cent of the seats in the legislature, giving it the power to veto any constitutional change.

...

6. This report does not provide an exhaustive list of all businesses, individuals and States that provide economic benefit to the Tatmadaw and its senior generals. That was not possible in the time and with the resources available to the Mission. However, it provides an overview and a foundation upon which other investigators and researchers can continue to build. The findings described below are supported with information listed in the annexes to this report. Based on its investigations, the Mission has concluded on reasonable grounds that:

(a) Two Tatmadaw conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), are owned and influenced by senior Tatmadaw leaders, including the Commander-in-Chief Senior General Min Aung Hlaing and the Deputy Commander-in-Chief Vice Senior General Soe Win, responsible for gross violations of international human rights law and serious violations of international humanitarian law. The Mission identified 106 MEHL and MEC owned businesses across diverse sectors of the economy The revenue that these military businesses generate strengthens the Tatmadaw's autonomy

There are strong and persistent business and familial links between the Tatmadaw, its conglomerates MEHL and MEC, and a number of private Myanmar companies and conglomerates, colloquially known as "crony companies".

(b) Human rights and international humanitarian law violations, including forced labour and sexual violence, have been perpetrated by the Tatmadaw in mining areas, particularly in Kachin State, in connection with their business activities. ...

(c) At least 45 companies and organizations provided the Tatmadaw with USD 6.15 million in financial donations ... in support of the "clearance operations" that began in August 2017 against the Rohingya in northern Rakhine. The Mission also found that private companies with enduring links to the Tatmadaw are financing development projects in northern Rakhine in furtherance of the Tatmadaw's objective of re-engineering the region in a way that erases evidence of Rohingya belonging in Myanmar, and preventing their return to access their homeland and communities. ... [T]he Mission has identified private companies with officials who may have made a substantial and direct contribution to the

commission of crimes under international law, including the crime against humanity of “other inhumane acts” and persecution, warranting their criminal investigation.

(d) 14 foreign companies have joint ventures and at least 44 foreign companies have other forms of commercial ties with Tatmadaw businesses. Through such joint venture and commercial relationships, the Mission finds that any foreign business activity involving the Tatmadaw and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations ...

(e) At least 14 foreign companies from seven States have provided arms and related equipment to the Tatmadaw since 2016, after the Tatmadaw’s dismal human rights record was widely and publicly known. Moreover, the public record made it clear that the Tatmadaw used many of the types of arms and related equipment that these entities were providing to commit gross violations of human rights and serious violations of international humanitarian law. Many of these companies and States therefore knew, or ought to have known, that their arms transfers could have a direct and reasonably foreseeable impact on the human rights situation in Myanmar. Among the arms suppliers identified by the Mission, 12 companies are State-owned enterprises.

The Mission also received credible information regarding seven foreign private companies from which the Tatmadaw procured or sought to procure dual-use goods and technology since 2016. The technology includes telecommunications services, tracking and precision systems, unmanned aerial vehicles, and internet and data transmission technology.

7. ... [T]he United Nations Security Council, Member States, relevant regional and international inter-governmental organizations should impose targeted financial sanctions against all Tatmadaw-owned companies, especially MEHL, MEC and their subsidiaries, and do so in a manner that respects human rights and gives due consideration to any negative socio-economic impact of such sanctions on the civilian population. This should be accompanied by a comprehensive arms embargo on Myanmar, with a monitoring and enforcement mechanism.

8. The Mission reiterates its recommendation from its 2018 report that “targeted individual sanctions, including travel bans and asset freezes, could support a reduction in violations of international law This report also indicates areas that deserve greater attention, recalling that investigations leading to the tracing, freezing, seizure and recovery of assets linked to persons responsible for crimes under international law is a critical component in the pursuit of accountability. It is also critical for Member States to exercise jurisdiction to investigate and, if appropriate, prosecute officials of companies who allegedly participated in the commission of serious crimes under international law committed in relation to Myanmar’s human rights crisis.

...

NOTE

In addition to the UN COI, and an ILO Commission set up in 2022 to investigate violations of freedom of association and the prohibition on forced labour, a wide range of other initiatives have focused on this situation.⁴²¹ An illustration of the intermingling of governmental and non-governmental fact-finding is a report funded by the U.S. State Department, which enabled a team of 20 investigators to interview 1,024 Rohingya refugees in camps in Cox’s Bazaar, Bangladesh, in a very short space of time in 2018. The report, by the Public International Law and Policy Group, was

⁴²¹ P. Pillai, ‘A “Patchwork Quilt” of Fact-Finding and International Accountability in Myanmar’, in M. Hasan et al. (eds.), *The Rohingya Crisis: Humanitarian and Legal Approaches* (2022) 163.

published as *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State*, but it also provided the content for an official State Department report entitled *Documentation of Atrocities in Northern Rakhine State* (August 2018). The former version was subsequently cited some 29 times in the International Criminal Court's Pre-Trial Chamber's decision to authorize an investigation into the Situation in Bangladesh/Myanmar (Doc. ICC-01/19, of 14 November 2019).

According to press reports, the first Trump Administration had labeled the situation as 'ethnic cleansing', but was unable to agree on the next steps. But in December 2018, the U.S. House of Representatives voted 394 to 1 to characterize it as 'crimes against humanity and genocide' (Resolution 1091 (116th Congress)). The State Department report, along with reports by 11 different civil society groups, provided the backdrop for this action.⁴²² The Resolution also called upon the Secretary of State to make a determination along the same lines. But Secretary Pompeo refused, reportedly for fear of driving the Myanmar Government 'into China's orbit' and in order not to distract attention from Pompeo's declaration that China was committing genocide against the Uighurs.⁴²³

Under the Biden Administration, Secretary Blinken determined, on 21 March 2022, 'following a rigorous factual and legal analysis', that members of the Burmese military committed genocide and crimes against humanity against Rohingya (<https://www.state.gov/burma-genocide/>). It was only the eighth time since the Holocaust that such a determination had been made by the United States.

Maaïke Matelski et al., in 'Multi-Layered Civil Society Documentation of Human Rights Violations in Myanmar: The Potential for Accountability and Truth-Telling', 14 *J. Hum. Rts. Practice* (2022) 794, review some of the challenges resulting from the fact that so many different fact-finding initiatives have been launched.

3.1 The risk of over-documentation

The risk of over-documentation may arise, particularly when it comes to the collection of statements. Over-documentation entails situations where victims and victim communities are asked to repeatedly tell and retell their stories to different documenters or audiences, often without fully understanding who is taking down their story or for what purpose it will be used. ...

There are two main concerns associated with over-documentation. First, there are concerns related to safety and wellbeing. If there are multiple actors collecting statements from victims and witnesses, they may not all be adhering to best practice when collecting and storing the information. This can potentially put individuals at risk. Likewise, if multiple actors are collecting statements, a process referred to as 'interview fatigue' may arise. The repetition can have a negative impact on the health and wellbeing of those interviewed. Being asked to recount horrific experiences, often to strangers, can re-traumatize the person. Having to do so multiple times can have serious negative effects on a person's mental condition, especially if they are not also given tools and psycho-social support to process their experiences. ...

The re-traumatization can also lead to another concern, which relates to the accuracy of the information provided. Research has shown that the reliability of witness statements deteriorates when recounted multiple times. ...

Unsurprisingly, individuals may start asking for reimbursement for repeatedly telling their stories for use by others. In the long run, this could lead to people

⁴²² M. Martin, 'Burmese Security Forces and Personnel Implicated in Serious Human Rights Abuses and Accountability Options', Congressional Research Service, Report R45388 (5 March 2019). The groups were: Amnesty International, Fortify Rights, Human Rights Watch, Kachin Women's Association in Thailand, Karen Human Rights Group, Legal Aid Network, Network for Human Rights Documentation—Burma, Physicians for Human Rights, Refugees International, Ta'ang Women's Organization, and the Women's League of Burma.

⁴²³ S. Lewis and H. Pamuk, 'Special Report: Pompeo rejected U.S. effort to declare 'genocide' in Myanmar on eve of coup, officials say', *Reuters* (25 March 2021).

becoming what some sociologists have called ‘professional victims’ whose identity becomes centered around victimhood because it generates attention and sometimes much needed resources. ...

3.2 Hierarchy and contestation between documentation efforts

Another complicating factor concerning human rights documentation efforts by CSOs [civil society organizations] is the issue of hierarchy and contestation of information. Inevitably, the question of which human rights violations get taken up by CSOs and their counterparts is dependent not only on the severity of the violations and the trustworthiness of the source, but also on logistics, finances and political context, a process that has been referred to as ‘filtering’. Traditionally marginalized groups, for example those with lower socio-economic status or residing in remote territories, tend to receive less attention than victimized high profile activists. ...

...

As many activists had to flee the country in response to repression, contestation also emerged between local activists and diaspora communities. Transnational activists have combined reporting on human rights violations with advocacy messages that do not always resonate with local needs and priorities in Myanmar, for example by prioritizing political over economic rights, or by calling for punitive measures that may further marginalize local populations. Other hierarchies are also visible with regard to documentation by CSOs in Myanmar. Gender-based violence, for example, is more likely to be viewed as ‘collateral damage of warfare’ than as a serious violation in itself. Activities such as the training offered to local communities by [Karen Human Rights Group] may help to balance existing inequalities but may also perpetuate divisions. It has been observed, for example, that the preferred local treatment of perpetrators of human rights violations may be less focused on punishment when the person is from the same ethnicity as the victims (that is a Burman soldier accused of rape should be tried in court, but for a soldier of the same ethnicity as the victim, this should be dealt with internally, if at all), which shows that local views on justice may vary. Moreover, CSOs that consult local communities may choose to prioritize violations that do not traditionally appear in international justice initiatives, such as arbitrary taxation.

These examples remind us that shared victimhood does not necessarily result in shared experiences in terms of human rights violations, or a uniform agenda in terms of potential responses. ...

In *Crimes in Archival Form: Human Rights, Fact Production, and Myanmar* (2022), Ken MacLean examines fact-finding practices used by a variety of actors in Myanmar.⁴²⁴ After analyzing ‘the investigative decisions made, field methods employed, analytical practices utilized, and advocacy strategies mobilized’ he concludes that persuasion ‘is an inescapable element of human rights documentation from the very start. ... [I]t is not information per se that matters, but rather “what kind of information, produced by whom, and authorized by what symbolic and material powers that make it persuasive”’ (at 3).

Fact-finding ... is fundamentally concerned with documenting “what happened.” But “what happened,” when expressed in idiomatic form, is not always intelligible to influential actors in a position to take action in response to the stated “facts.” The cultural specificity of “what happened” typically needs to be stripped away to recast separate incidents into patterns, such as crimes

⁴²⁴ See also K. MacLean, ‘Digital Human Rights Storytelling and its Palimpsests: (De-)constructed Images of Ethnic Cleansing in Myanmar’, 23 *J. Hum. Rs.* (2024) 000

against humanity, that are then communicated through the frameworks and procedures that international law provides. The process of decontextualization (the removal of idiomatic expression and interpretation) followed by recontextualization (the addition of legalistic expression and interpretation) arguably impoverishes our understanding of how affected populations understand the meaning of what reportedly took place. It does so by making the recontextualized descriptions intellectually inaccessible to the people who experienced and/or witnessed the violations. Conflicts between the resulting “social truth”; “judicial truth,” if legal proceedings occur; and “state truth,” which may or may not accept a degree of responsibility for the violence, are often the result. Unfortunately, the long history of preemptive violence in Myanmar, which has produced conflicting social, judicial, and state “truth” claims, promises to continue to hamper any efforts to reconcile them in the foreseeable future and, especially, in a manner that promotes transitional justice—which, it should be noted, is far from a universal desire.

... [T]he praxis of fact-finding, even in its most basic forms, contains embedded within it a range of epistemological, methodological, and ethical quandaries that warrant careful, well-reasoned, and informed decisions and subsequent critical self-reflection. ... [W]hen these decisions are fully taken into account as they shape data collection and processing, publication, and advocacy, an inescapable and unsettling conclusion presents itself. Human rights “facts” – the determination of what occurred, who bears responsibility for it, and what kinds of action are recommended in response—are quite often fashioned rather than found. The implications of this conclusion are profound, particularly given ongoing technological developments in fact-finding The time has come to not only grapple with how these developments are transforming human rights documentation both for better and for worse in the present. ... (at 211-13)

MacLean’s conclusion as to the challenges confronting fact-finders in their efforts to communicate and persuade is further complicated by an anthropological perspective provided by Amy Doffegnies and Tamas Wells in ‘The Vernacularisation of Human Rights Discourse in Myanmar: Rejection, Hybridisation and Strategic Avoidance’, 52 *J. Contemp. Asia* (2022) 247, at 262:

... Many of the participants in this study [including certain Burmese political leaders, activists and Buddhist monks] frequently engaged in discourse about human rights and played a translation role between, for example, international representatives of aid agencies and grassroots members of their parties, organisations or institutions. This intermediary role did not mean that leaders, activists and monks gave meaning to human rights in homogenous ways and nor did sustained relationships with Western human rights actors always lead to a convergence of meaning around the global referent. Rather the study revealed a splintering of the ways that participants engaged with and gave meaning to the language of human rights. Some participants rejected the language of human rights, others drew on various hybridised meanings in ways that often supported, rather than opposed, the exclusion of Muslim minorities. Meanwhile, some activists and networks strategically avoided the language of human rights in order to continue to work for social justice and what they understood to be the universal and underlying emancipatory aims of human rights as a global discourse. Through describing this variety of meanings attached to human rights the article unsettles common portrayals of Myanmar political actors as either rejecting or endorsing human rights discourse.

This splintering of meanings attached to human rights coincided with a major shift in donor agency and diplomatic attention from military authoritarianism to the marginalisation of religious – and most obviously Muslim – minorities. As the transition progressed, “human rights” was no longer a concept that could be

mobilised in opposition to a military government. For many activists and Buddhist leaders, “human rights” came to be seen as a political tool that could be wielded by international agencies in support of Muslim communities, which in turn brought Myanmar Buddhism “under threat.” At the same time, other activists – who were more sympathetic to Muslim populations – began to avoid the words “human rights” while attempting to promote their universal applicability. For those seeking to use the language of human rights to promote justice in Myanmar, strategic engagement with intermediaries and sensitivity towards divergent meanings of rights, are crucial. More analysis of meanings of human rights could inform local and international considerations on how human rights frameworks can be best approached and deployed to realise their emancipatory intentions.

On 21 December 2022, the UN Security Council adopted its first ever resolution on Myanmar. Previously, many countries had insisted that the matter be left to the regional organization – ASEAN (the Association of Southeast Asian Nations) – which in April 2021 adopted a ‘five-point consensus’. But the military junta largely ignored that effort and civil society groups estimated that between the February 2021 military coup and December 2022, 2,600 people had been killed and 16,000 arrested by security forces.

Twelve Security Council members voted for Resolution 2669 (2022), and three abstained (China, India, and Russia):

The Security Council,

...

Reaffirming its support for the people of Myanmar and its strong commitment to the sovereignty, political independence, territorial integrity and unity of Myanmar,

1. Demands an immediate end to all forms of violence throughout the country, and urges restraint and de-escalation of tensions;
2. Urges the Myanmar military to immediately release all arbitrarily detained prisoners, including President Win Myint and State Counsellor Aung San Suu Kyi;
3. Reiterates its call to uphold democratic institutions and processes ...;
4. Urges all parties to respect human rights, fundamental freedoms and the rule of law;
5. Acknowledges ASEAN’s central role in helping to find a peaceful solution to the crisis in Myanmar in the interests of the people of Myanmar, and encourages the international community to support the ASEAN-led mechanism and process ...;

...

9. Reiterates the necessity for full, safe and unhindered humanitarian access ... ;
10. Underscores the need to address the root causes of the crisis in Rakhine State ... ;
11. Decides to remain seized of the matter.

After the vote (UN Press Release SC/15159 (2022)), China's representative said it preferred a presidential statement rather than a resolution and stressed 'that there is no quick fix for the Myanmar issue and the solution to the conflict depends on Myanmar itself.' He also 'reiterat[ed] China's policy of friendship towards Myanmar'.⁴²⁵ The United States representative said that the resolution 'does not go far enough' and should have addressed 'the regime's severe violations of freedom of religion and belief' and should have called 'for the regime to face justice for the crimes it has reportedly committed.' The representative of Russia said 'the situation in Myanmar does not represent a threat to international peace and security', and that only the situation in Rakhine State should be on the Council's agenda. The representative of India noted its long border with Myanmar and said that 'the complex situation ... calls for quiet, patient diplomacy' and the avoidance of measures such as resolutions that might 'entrench the parties in inflexible positions'.

On 4 August 2023, an ILO Commission of Inquiry issued a detailed report (*Towards Freedom and Dignity in Myanmar*) on the use of forced labour in Myanmar.

QUESTIONS

1. What overall conclusions would you draw from the proliferation of fact-finding initiatives in relation to Myanmar? What are the strengths and weaknesses of the different approaches, and how complementary are they?

2. How do these various initiatives measure up against the critique of 'extractive' approaches to fact-finding in which the flow of information is all one-way (essentially from the South to the North) by Sarah Knuckey et al., in 'Power in Human Rights Advocate and Rightsholder Relationships: Critiques, Reforms, and Challenges', 33 *Hum. Rts. J.* (2020) 1, at 42, in which they emphasize the importance of consultation and participation:

To overcome top-down, extractive, and objectifying fact-finding, advocates have ... [sought to] ensure that rightsholders' expertise about violations, causes of abuse, culture, and context inform investigation processes and outcomes [Ideally] ... fact-finding would typically follow extensive dialogue between rightsholders and advocates

... [W]here advocates themselves undertake [fact-finding, they] ... have worked to promote trust and transparency with rightsholders by fully explaining the purposes of the investigation, the advocate's interest in the issue, information about funders, and how any information the rightsholders share will be used. ... Consultation and reporting back also provide an opportunity for advocates and rightsholders to together strategize [about next steps].

3. Is it possible for a COI to write a report that will satisfy the expectations of all of the various stakeholders, including victims, domestic civil society groups, the state, and various outside actors?

B. NEW TECHNOLOGIES AND FACT-FINDING

In recent years, human rights fact-finding has been transformed by the application of a range of new technologies such as crisis mapping, crowd sourcing, remote sensing, big data analytics and machine learning, video analysis, open-source data mining, forensic architecture, interactive data visualization, cryptographic hashing, and many others. At the end of a very detailed survey, Catherine Harwood observes that COIs 'are not likely to be rendered obsolete by the emergence of new information

⁴²⁵ See generally R. Gowan, 'Accommodation Available: China, Western powers and the Operation of Structural Power in the UN Security Council', 15 *Global Policy* (2024) Suppl. 2, 29, at 33.

technologies or investigative mechanisms. However, their roles and functions may evolve in response to the changing fact-finding landscape. ... [T]he original function of finding facts may be revitalized and complement the narrow focus of criminal mechanisms.⁴²⁶

In the materials that follow we look at a cross section of some of these new technologies and assess their advantages and risks. But first we consider two contrasting case studies, one involving local, low-tech, feminist fact-finding, and the other employing the latest techniques, in response to the killing of a journalist.

Case Study: Femicide in Mexico

Fact-finding does not always have an international dimension, nor is it confined to the use of highly sophisticated techniques or technology. Consider the example described by Catherine D'Ignazio in *Counting Femicide: Data Feminism in Action* (3 November 2022 version of a book in progress, at <https://mitpressonpubpub.mitpress.mit.edu/counting-femicide>

She defines femicide (or femicide) as 'the misogynous and gender-related killing of women' and notes that the term 'is used to denote domestic violence or intimate partner violence that is fatal, and also murders perpetrated where a woman's gender, and her gender subordination, are part of the motivation for the crime.' The book starts by recounting the story of María Salguero, a solo activist, who devotes herself to mapping femicides in Mexico. 'For each femicide, Salguero plots a point on the map and logs up to 300 fields in her database, everything from name, age, whether the victim was transgender, and relationship with the perpetrator; to mode of death, the case status in the judicial system, and whether organized crime was involved. She also includes the full content of the news report where she sourced the information. ... [O]ne of her many goals is to show that each murdered woman or girl had a name and a life and a place and a community.'

D'Ignazio reflects on why such a project is needed:

Official government data on gender violence and femicide are often absent, difficult to access, infrequently updated, contested, and underreported. The reasons for these gaps range from stigma and victim-blaming to matters of legal interpretation and plain old pervasive patriarchy. ... Citizen data monitoring of femicide has stepped into the data gaps that exist in many countries and regions around the world. Such projects have proliferated particularly since a 2015 report from the UN Special Rapporteur on Violence Against Women called for the creation of femicide observatories in every country ...

...

[There are] five major ways that counterdata are used to contest femicide. Activists that engage in repair work use their data to provide direct support and services to relatives and communities who have lost beloved members. ... [C]ounterdata production serves activist efforts to remember and memorialize killed people. Often these take creative forms, like videos, music, plays, and art installations that tell stories that seek to bring life and humanity to individuals, and try not to reduce a woman to her death. Many activists are focused on narrative change efforts to reframe femicide. They use data to communicate about lives lost on social media, or through data journalism. These accounts challenge the cultural stereotypes around the killings of women as isolated events perpetrated by pathological individuals and reframe them as a structural phenomenon and matters of public concern. Counterdata are also used to push to reform existing institutional practices around femicide, and there are

⁴²⁶ C. Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order: Navigating between Principle and Pragmatism* (2019), at 323.

examples of collaboration and communication between government and activist groups around the production of femicide data. In these cases, counterdata and official data begin to mix in fascinating and sometimes uneasy ways. Finally, there are efforts to revolt – to use counterdata to support large-scale mobilizations, usually in conjunction with social movements tied to specific political demands.

Case Study: Killing of a Journalist in the West Bank

A well-known Palestinian-American journalist working for Al Jazeera, Shireen Abu Akleh, was shot and killed on 11 May 2022 while covering an Israeli military operation in the West Bank. The following excerpts reflect the evolving understanding of what happened, how key actors responded, and the central role of fact-finding in the ensuing dispute.

13 May 2022: The initial investigation by the Israeli Defense Forces (IDF) ‘concluded that it is not possible to unequivocally determine the source of the gunfire’ and identified two possible sources. The first was the ‘hundreds of bullets ... fired by Palestinian gunmen from a number of locations. Dozens of bullets were also fired toward IDF vehicles, which is also the direction where Ms. Abu Akleh was, making this a possible source of the gunfire that hit and killed her.’ The second was that ‘during the exchange of fire between the Palestinian gunmen and IDF soldiers, a soldier fired a few bullets from a designated firing hole in an IDF vehicle using a telescopic scope at a Palestinian gunman who was shooting at the aforementioned vehicle. The Palestinian gunman fired multiple barrages of gunfire at the IDF soldier, and there is the possibility that Ms. Abu Akleh, who was near the Palestinian gunman from behind, was hit by the soldier’s fire toward the Palestinian gunmen.’ The IDF expressed its deep condolences over the death and acknowledged the importance of press freedom. It concluded by stating that the ‘IDF will continue to thwart terrorism wherever it is required to and uphold its missions, while continuing its efforts to avoid harming non-combatants.’⁴²⁷

13 May 2022: Four UN Special Rapporteurs demanded ‘a prompt, independent, impartial, effective, thorough and transparent investigation into the killing’.⁴²⁸

26 May 2022: Palestinian Attorney-General, Akram al-Khatib, announced that an investigation by the Palestinian Authority found that the journalist had been intentionally shot dead by an Israeli soldier and that ‘the only shooting was by the occupation forces, with the aim of killing’. The BBC reported that the ‘Israeli defence minister rejected the report, calling it “a blatant lie”’.⁴²⁹

22 June 2022: *The New York Times* published an in-depth investigative story entitled ‘The Killing of Shireen Abu Akleh: Tracing a Bullet to an Israeli Convoy’, with a sub heading: ‘A New York Times investigation found that the bullet that killed a Palestinian-American journalist was fired from the approximate position of an Israeli military vehicle.’⁴³⁰ The Times found no evidence that the person who fired recognized Ms. Abu Akleh and targeted her personally and its inquiry was unable to determine whether the shooter saw that she and her colleagues were wearing protective vests emblazoned with the word ‘Press’.

24 June 2022: The OHCHR issued a report. Its staff had ‘inspected photo, video and audio material, visited the scene, consulted experts, reviewed official communications and interviewed witnesses.’ Its ‘findings indicate that no warnings were issued and no shooting was taking place’ when the journalists arrived. ‘At around 06h30, as four of the journalists turned into the street leading to the camp, wearing bulletproof helmets and flak jackets with “PRESS” markings, several single, seemingly well-aimed bullets were fired towards them from the direction of the Israeli Security Forces. One ... bullet hit

⁴²⁷ IDF Editorial Team, ‘Findings from the Initial Investigation into the Shooting Incident in which the Journalist Shireen Abu Akleh was Killed’, 13 May 2022.

⁴²⁸ ‘UN experts condemn journalist killing amid rising West Bank violence’, *UN Press Release*, 13 May 2022.

⁴²⁹ R. Berg, ‘Palestinian report says Israel deliberately killed Al Jazeera’s Shireen Abu Aqla’, *BBC News*, 27 May 2022.

⁴³⁰ R. Abdulrahim et. al., ‘The Killing of Shireen Abu Akleh: Tracing a Bullet to an Israeli Convoy’, *The New York Times*, 20 June 2022.

Abu Akleh in the head and killed her instantly. Several further single bullets were fired as an unarmed man attempted to approach Abu Akleh's body and another uninjured journalist sheltering behind a tree. Shots continued to be fired as this individual eventually managed to carry away Abu Akleh's body.' The Office concluded that the shots had come from the IDF and not from indiscriminate firing by armed Palestinians, and it 'found no information suggesting that there was activity by armed Palestinians in the immediate vicinity of the journalists.' The report added that "[m]ore than six weeks after the killing ... it is deeply disturbing that Israeli authorities have not conducted a criminal investigation."⁴³¹

24 June 2022: Israeli Finance Minister Avigdor Liberman tweeted that OHCHR's determination 'that the Al Jazeera journalist was killed by IDF gunfire ... is a disgusting allegation that cannot be accepted by us.'⁴³²

26 June 2022: Israeli Defense Minister Benny Gantz said that the 'IDF operates day and night to thwart bloodthirsty terrorists who seek to conduct terror attacks and murder Israeli citizens. At the same time, the IDF takes all the possible measures to prevent harm to uninvolved civilians. In addition, the IDF conducts thorough investigations.'⁴³³

4 July 2022: U.S. State Department spokesperson, Ned Price announced that '[a]fter an extremely detailed forensic analysis, independent, third-party examiners, as part of a process overseen by the U.S. Security Coordinator (USSC), could not reach a definitive conclusion regarding the origin of the bullet'. But he said that after reviewing investigations by the IDF and the Palestinian Authority, the USSC concluded that gunfire from IDF positions was likely responsible for the death of Shireen Abu Akleh. The USSC found no reason to believe that this was intentional but rather the result of tragic circumstances.'

5 September 2022: the same U.S. spokesperson announced that '[t]oday, the IDF reported that it had concluded its investigation ... and stated there is a high possibility that Ms. Abu Akleh was accidentally hit by IDF gunfire. We welcome Israel's review of this tragic incident, and again underscore the importance of accountability in this case.' The following day, the State Department announced that it had pressed Israel to 'closely review its policies and practices on rules of engagement and consider additional steps to mitigate the risk of civilian harm'.⁴³⁴ In response, Israeli Prime Minister Yair Lapid said 'I will not allow an [Israeli military] soldier that was protecting himself from terrorist fire to be prosecuted just to receive applause from abroad'. He added that 'No one will dictate our rules of engagement to us'.⁴³⁵

15 September 2022: U. S. Senator Patrick Leahy (D-Vermont) criticized the State Department response, saying that '[w]hether her killing was intentional, reckless, or a tragic mistake, there must be accountability', adding that 'if it was intentional, and if no one is held accountable, then the Leahy Law must be applied'.⁴³⁶ The 'Leahy law' is legislation that prohibits 'the U.S. Government from using funds for assistance to units of foreign security forces where there is credible information implicating that unit in the commission of gross violations of human rights'.⁴³⁷

19 September 2022: After heated debate, a proposed European Union call for an independent inquiry into the killing was amended to omit the word 'independent', despite a report showing that in 2019 and 2020, only 2% of complaints about IDF violence against Palestinians resulted in prosecutions.⁴³⁸

⁴³¹ OHCHR Press Briefing Notes, 'Killing of journalist in the occupied Palestinian territory', 24 June 2022.

⁴³² E. Fabian, "'Where's the bullet': Israel rejects UN probe blaming reporter's death on IDF", *The Times of Israel*, 24 June 2022.

⁴³³ A. Savir, "'Unfounded": Israel Rejects Latest UN Inquiry into Death of Al Jazeera Reporter', *Jewish Press*, 26 June 2022.

⁴³⁴ State Department Press Briefing, 6 September 2022.

⁴³⁵ 'Israeli PM opposes prosecuting soldier who likely shot Abu Akleh', *Al Jazeera*, 7 September 2022.

⁴³⁶ 'Israeli Investigation of Shireen Abu Akleh's Death Fails to Convince Key U.S. Lawmakers', *Haaretz*, 18 September 2022.

⁴³⁷ 'About the Leahy Law: Fact Sheet', Bureau of Democracy, Human Rights and Labor, 20 January 2021.

⁴³⁸ A. Rettman, 'EU drops call for "independent" probe into Abu Akleh killing', *EUobserver*, 19 September 2022.

20 September 2022: An NGO, Forensic Architecture, released a video reconstructing the killing in minute detail and a report entitled ‘Shireen Abu Akleh: The Extrajudicial Killing of a Journalist’.⁴³⁹ Excerpts follow:

Timeline

At 6:31:06, a video taken by a witness to the incident shows the journalists, including Shireen, slowly walking down the road towards the IOF’s [Israeli occupying forces] position, following standard press protocols for self-identification.

...

At 6:31:07, less than a second after the photograph above was taken, the first round of shooting begins, with six single shots fired at the journalists in rapid succession from the IOF’s position.

[At] 06:31:10, the Al Jazeera camera starts rolling. ... [T]his footage shows Ali running ..., while Shireen hides by the wall.

At 06:31:17 ... a second round begins with 7 shots, again fired in rapid succession. We identified the last moment Shireen is seen still alive, crouching near the wall, after the first shot in this second round.

...

A minute after Shireen is shot, a civilian initially tries to provide aid to Shireen, but holds back from crossing the street for fear of being targeted; when he does manage to cross about a minute later, he is shot at within seconds of entering the shooter’s field of vision, and forced to retreat. After helping journalist Shatha Hanaysha escape, he returns twenty seconds later to try to administer aid to Shireen and is again shot at twice by the IOF.

...

Our investigation is the first to employ a precise digital reconstruction of the incident. Using advanced spatial and audio analysis, we tracked the location and movements of the various key actors throughout the unfolding incident—journalists, civilians, and military vehicles.

We analysed a previously unseen video recorded by an Al Jazeera cameraperson at the scene, directly obtained other videos taken by witnesses to the incident, and gathered other available open-source videos of the events. Altogether we examined, synchronised and geolocated dozens of videos and photographs.

We were given special access to unpublished autopsy documents and examined images of the bullet extracted from Shireen’s head. We identified the bullet, with its distinctive green tip, as an M855 SS109 5.56 x 45mm armour-piercing bullet, the type of munition common to IOF marksmen.

⁴³⁹ Available at <https://forensic-architecture.org/investigation/shireen-abu-akleh-the-targeted-killing-of-a-journalist>

Spatial reconstruction

We commissioned a surveying company to conduct an extensive, professional drone survey of the site and sourced ground photography of the entire length of the road, which allowed us to create a highly accurate 3D photogrammetry model of the scene.

...

By geolocating individual frames from the videos we sourced, we could establish and reconstruct within our digital model the exact positions of Shireen and the other journalists throughout the incident, as well as the position of the military vehicles in relation to them. ...

...

The shots were fired from a hole in the side of an MDT David Toyota armoured vehicle.

...

Identifying the distance between the last frame in which Shireen is seen alive and the first frame in which she is seen lying on the ground allowed us to establish her distance from the shooter at the exact moment she was hit. This study reveals that she was facing away from the marksman, with her 'PRESS' vest fully legible at the moment the fatal gunshot was fired.

Trajectory and dispersion

By reconstructing Ali and Shireen's exact positions when each of them was shot and the bullets' precise points of impact, and modelling the location of four other impact points on a tree at the site of the incident, we were able to trace the trajectory of six of the sixteen shots fired during the incident.

...

In studying the position of these six shots, we can also establish that all shots were aimed above the shoulders with the intent to kill their targets.

...

Optics and visibility

We conducted a visual reconstruction of the IOF marksman's view both digitally and optically. Using our digital model, we simulated how Shireen and the other journalists would appear from the marksman's position 190 metres away when the first shots were fired

...

According to both the digital and optical reconstructions of the shooter's vision, the journalists' press vests would have been clearly visible throughout the incident.

By marking the impact points of the six spatially located shots from the perspective of the IOF marksman, we can see their close proximity to one another, confirming that they were fired in a targeted effort to hit the journalists.

...

Audio analysis

Audio analysis of the videos capturing the incident allowed us to compare the sound signatures of all shots fired during and preceding the incident and trace them back to the IOF marksman's position. In the two minutes before the shooting begins, no shots are fired at all. No other shots in any of the footage analysed came from the vicinity of the journalists.

...

Testimony

With members of Al-Haq on the ground in Jenin, we conducted a 'situated testimony'—an on-site physical re-enactment and witness account-taking—with journalist Shatha Hanaysha, who was standing near Shireen when she was shot and killed. ...

Findings

Shireen and her colleagues were clearly identifiable as journalists when they were shot at. Reconstruction based on digital modelling, physical reconstruction and optical analysis confirms that the journalists followed standard protocols for self-identification and that their large 'PRESS' insignia were clearly visible from the position of the IOF shooter in the moments surrounding the shooting. Furthermore, the autopsy report demonstrated that Shireen was positioned away from the shooter in such a way that her PRESS vest should have been easily legible.

Shireen and her fellow journalists were deliberately and repeatedly targeted, with an aim to kill. We identified the bullet retrieved from Shireen's skull as common to IOF military 'marksmen', whose guns are commonly equipped with an optical scope (Trijicon) that magnifies their vision 4x, and would have made their targets clearly visible. The reconstruction of the timeline of events confirms that the marksman had at least twenty seconds in which to visually assess the journalists before shooting the first round, and eight seconds in which to look at them in between the first and second rounds. Trajectory analysis of shots fired reveals a clear line of fire from the IOF's position toward the group of journalists; close proximity between the gunshots' impact points, suggesting precise aim; and the consistent positioning of those impact points at above-shoulder height, indicating intent to kill.

5 September 2023: The UN Independent Commission of Inquiry called upon Israel to cooperate with the investigation by the U.S. Federal Bureau of Investigation into the killing and with the International Criminal Court's broader investigation (UN Doc. A/78/198).

New Technologies

The following materials look at some of the new technologies being used in human rights fact-finding.

a. Video Evidence

In surveying the role of user-generated content, Jay Aronson, in 'The Utility of User-Generated Content in Human Rights Investigations', in Molly Land and Jay Aronson (eds.), *New Technologies for Human Rights Law and Practice* (2018) 129, begins by quoting a 2011 report by WITNESS, entitled *Cameras Everywhere*:

Video has a key role to play, not just in exposing and providing evidence of human rights abuses, but across the spectrum of transparency, accountability and good governance. Video and other communication technologies present new opportunities for freedom of expression and information, but also pose significant new vulnerabilities. As more people understand the power of video, including human rights violators, the more the safety and security of those filming and of those being filmed will need to be considered at each stage of video production and distribution.

Aronson elaborates:

A wide range of people produce video content and share it through social media, the Internet, semiprivate communication channels like Telegram and Snapchat, or privately via e-mail or physical storage. Conflict events, protests, riots, and other similar events are increasingly being live-streamed as they happen. Some of the creators of this content have been trained in human rights documentation, while others have not. In many cases, damning video will come from the perpetrators themselves, who use the content to boast of their power and accomplishments or seek funding from sympathetic outsiders.

Courts, tribunals, truth commissions, and other fact-finding (or perhaps fact-generating) bodies, as well as journalists and human rights advocates, need to be sensitive to the wide-ranging quality, completeness, and utility of user-generated content. They cannot assume that the content was intentionally created or that the people represented in this material know that their images and activities are being stored, processed, and analyzed for human rights purposes. Extra care must be taken to ensure the privacy, security, and other basic rights of people who produce such content or appear in it. In the case of perpetrator video, they must assume that the content has public relations goals, and they must take care not to spread messages of hate or extremism. Additionally, it is crucial to keep in mind that many war crimes and human rights abuses will continue to leave few electronic traces. Like all other forms of evidence, video is not a magic bullet or panacea that will put an end to atrocities. Nor does it mitigate the need for eyewitnesses and victims to provide testimony and for investigators to visit the scenes of crimes and conduct thorough investigations.

Nonetheless, video has potential value at every stage of a human rights investigation, whether that investigation is designed to feed into advocacy or legal proceedings. Most commonly, video generates leads that can be used to start an investigation. It can also provide evidence to establish that a crime or violation occurred, or it can be used to support a particular factual finding, such as whether a particular weapon was used in a conflict or whether pollution from a particular mining site is polluting a water source. Sometimes, it can also link a particular person, group, government, or company to the violation in question.

But he also warns of the challenges involved:

... Audiences might grow tired of viewing traumatic video and become desensitized to its effects. On the other hand, they might become less likely to believe accounts that are not supported by convincing audiovisual evidence. The persistent creation of falsified media by states, pranksters, and other nefarious actors could also impugn legitimate content. Further, any good defense attorney, government operative, or rights violator can challenge the authenticity of the video or the interpretation of its content (e.g., that victims were indeed dead but were not killed by the claimed perpetrator, or that the victims did not heed warnings to disperse in the moments before the video was shot). They can also offer alternative explanations for what is seen (e.g., that the munitions in question were stolen from the army by a rebel force, or that anti-government forces were dressed up as army personnel). Video evidence cannot always help dispute claims made by perpetrators that their actions were justified on national or internal security grounds, that the victims posed a threat, or that the action captured on video was wrong but the matter has already been dealt with internally.

b. Digital Authentication

Bailey Ulbricht et al., in ‘Digital Eyewitnesses: Using New Technologies to Authenticate Evidence in Human Rights Litigation,’ 74 *Stan. L. Rev.* (2022) 851, explore the benefits of being able to use digital evidence, but also note that it presents challenges in each phase of the evidentiary life cycle:

For example, at the storage phase, securely preserving countless hours of film footage or thousands of photos for years is a monumental logistical challenge. Additionally, retaining proof of human rights violations can entail serious risks: Government forces have tortured and killed civilians in Syria over the contents of their phones. Individuals and civil-society organizations have published videos of human rights violations on YouTube to create an internet record, only for thousands of those videos to be taken down by YouTube's content-

moderation algorithms, complicating efforts to pin down an original, authentic source. These issues at the storage stage are compounded by struggles to find witnesses who can attest to the authenticity of stored evidence, especially given that proceedings often take place years after events and in far-off jurisdictions. Though it is best to involve witnesses in accountability proceedings whenever possible, the international legal community should explore ways to guarantee safe storage so that digital evidence can be authenticated when live testimony is sparse

They then explain how hashing and distributed-ledger technology (DLT) work:

Digital records are given a hash after collection, freezing the data and rendering it nearly impossible to alter without detection. Many organizations then store records and their hashes using DLT, a storage mechanism that uses decentralized systems to protect against hackers and others who might tamper with data over long periods of time. When used together, DLT and hashing have far-reaching applications in human rights advocacy and accountability efforts. Perhaps most important is the potential of these technologies to facilitate the authentication of evidence when witnesses are unavailable, allowing cases previously barred from court to proceed.

c. Satellite Imagery

The value of satellite imagery is explored by Micah Farfour, in ‘The Role and Use of Satellite Imagery for Human Rights Investigations’, in Sam Dubberley, Alexa Koenig and Daragh Murray (eds.), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (2019) 228:

Satellite imagery can provide an unbiased, scientific analysis of an area on the planet. And the methodology used to analyse the imagery can also be replicated to verify analytical findings. The actual interpretation of satellite imagery can lead to certain biases, but in the case of human rights research, many other datasets are typically incorporated to triangulate a responsible understanding of the situation.

A satellite is also able to access visually areas of the globe that are often inaccessible to human rights abuse investigators, such as North Korea, Rakhine State, Myanmar, and Jebel Marra, Sudan. In other instances, satellite imagery can provide a very prompt look into a remote region after, for example, a massacre, before a researcher is able to visit the area.

The ability to look back in time, pinpoint activities geospatially, detect changes unobservable by the human eye, and use high-resolution imagery to see specific items provides an incredible advantage to information collected in human rights investigations. When compared with traditional styles of evidence gathering, which relied heavily on witness testimony, satellite imagery offers a check of visual evidence over time that may run counter to the effects of trauma on a person’s memory of events or the ulterior motives of a perpetrator to insist upon a different sequence of events on the ground. Satellite imagery, in most situations, cannot independently prove an abuse has been committed, but it can add—sometimes essential—information to what may have transpired. Advancements in spatial, spectral, and temporal resolutions, as mentioned earlier, have led to increased and more accurate documentation of situations involving environmental rights, indiscriminate violence, forced relocation, and violence visited upon civilians, along with other human rights abuses.

3.1 Spatial Resolution

The highest spatial resolution of satellite imagery allowed commercially in the United States is 31cm. Before 2014, laws only allowed the public to view imagery at 50cm resolution. Though the technology

is available to capture higher resolutions of satellite imagery, the government restricts the satellite imaging companies.

However, the leap from 50 to 31cm resolution is making satellite imagery into a more robust piece of information difficult to deny. In an increasing number of situations, the higher resolution imagery is making its way into court cases as evidence, such as in the Al- Mahdi case at the International Criminal Court (ICC).

...

3.2 Spectral Resolution

Satellites are measuring the reflectance of light off the surface of the earth in many different wavelengths apart from the visible, red, green, and blue bands. This allows analysts the ability to detect reflectance in other wavelengths invisible to the human eye. Though there are satellite sensors with the ability to measure hundreds of bands, only a few are used regularly in documenting human rights abuses.

...

Places such as the Niger Delta have been horribly polluted by oil spills, which has had a grave impact on the local communities reliant on the land and water. In many spill areas, vegetation has completely died out, and the impact is readily visible in satellite imagery highlighting the NIR [near infrared] band. Information like this is helpful in building cases against the oil companies in the region that allowed oil spills to occur and did not provide sufficient clean-up and the remediation needed to preserve the ecology of the region.

The NIR band is not only helpful in seeing vegetation health, but also highlights areas that have been burned. ...

...

Research has also been conducted to determine areas of potential mass graves using satellite imagery and other remotely sensed data. ...

3.3 Temporal Resolution

In many cases of human rights abuse, there is a delay between when the event occurred and when it comes to light. In some instances, the abuses occurred many years earlier and the people affected may not have been aware of their rights or that information was available to protect their rights in retrospect. In other instances, the abuses might span a long time period where looking at a range of historical data is needed to understand events happening now, including the long-term effects of mining on a village.

Today, with so many commercial satellites covering the globe, capturing a weekly image of a location on the planet is feasible. Compared with the original revisit rate of eighteen days, the better temporal resolutions are leading to more accurate documentation of when events happen, potentially aligning with certain actors being present in an area.

With such a growing library of imagery, events and changes detected can be mapped at a larger scale with more frequency. Geospatial patterns over space and time can be used to better understand the situation and the factors that might be involved. If a group has been committing human rights abuses for some time, it is possible to understand the specific types of people that are at risk and predict sensitive areas for future monitoring. For example, the people in Jebel Marra have been subjected to military operations against them year after year. This knowledge, along with frequent revisit rates of satellites, allows researchers to monitor the areas for potential increases in troops and the potential for further human rights abuses to be committed. This documentation could also be used to show the scale of a problem and to create pressure to protect the population against future attacks.

d. Open-Source Investigations

Open-source investigations are increasingly ubiquitous.⁴⁴⁰ The following materials begin by illustrating the use of this technique in the Ukraine context, and then look at an important effort to set best practices standards.

**HENNING LAHMANN, UKRAINE, OPEN-SOURCE INVESTIGATIONS, AND THE FUTURE OF
INTERNATIONAL LEGAL DISCOURSE
116 AM. J. INT'L L. (2022) 810**

... [T]he digital transformation and the emergence of social media have vastly expanded the volume and types of data circulated through online platforms and other digital infrastructures. Today, novel tools exist to sift, parse, and analyze the aggregated information for evidentiary clues and patterns to poke holes into states' narratives. Widely available and freely accessible digital means of communication can be used to distribute, amplify, and present the findings and conclusions in ways previously unimaginable.

The practice of open-source counter-narration by civil society actors first came to prominence in the aftermath of the downing of Malaysia Air MH17 over eastern Ukraine on July 17, 2014, when the organization Bellingcat used a vast quantity of digital information to establish the responsibility of Russian separatists in the Donbas as well as Russia's complicity. ...

[In 2022, at the beginning of Russia's invasion of Ukraine] after Russia claimed that Ukrainian forces had shelled a kindergarten in the Donbas on February 17, a team of online investigators [including Bellingcat researchers] collaboratively analyzed available photos and video footage to assess the direction of the attack by examining pictures of the crater and spray pattern left by the projectile, demonstrating a separatist-held area as the most likely point of origin. The investigation was subsequently introduced as evidence by the counsel for Ukraine during ... ICJ proceedings [By comparison, an OSCE] Special Monitoring Mission to Ukraine from February 18, which had experts on the ground, ... could merely state that it "assessed the damage as recent but was unable to determine the weapon used or the direction of fire." A New York Times news article also pointed to separatist fabrications but only cited unnamed sources in the U.S. and Ukrainian governments. At a UN Security Council meeting four days after the shelling, the UN under-secretary-general for political and peacebuilding affairs acknowledged that "the United Nations is not in a position to verify the numerous claims and allegations made by various actors." Further revelations about Russia's factual manipulations ensued. On February 20, for instance, a group of open-source investigators discounted a video ostensibly showing a sabotage operation targeting chlorine tanks in the Donbas using an analysis of its metadata and matching the audio with an older YouTube video of military exercises in Finland. A few days later, Bellingcat published an entire online spreadsheet compiling various "dubious" and "debunked" factual claims made by Russia.

What is genuinely novel about this emerging practice of open-source counter-narration and potentially transformative for international legal discourse is the idea of "open verification," meaning that individual pieces of raw information, to the greatest extent possible, ought to remain in the open and accessible so that any interested person can independently check and verify their accuracy and authenticity. ... [C]ounter-narrating a state's justifications thus turns into a social and collective practice of "assembling credibility," ultimately leading to more robust and credible investigatory outcomes.

...

[Conclusion]

...

[W]e should not naïvely take civil society actors engaging in open-source investigations as neutral arbiters of truth by default. The principle of "open verification" seeks to ensure that a narrative's individual evidentiary components can always undergo peer review; yet the narrator's own biases and preconceptions might still be introduced in manifold ways, not least through the investigation's larger

⁴⁴⁰ See S. Crawford-Holland et al, 'Law's Capture of Human Rights Focused Open-source Investigation', 13 *London Rev. Int'l L.* (2025) 93.

framing. Moreover, not all types of evidence are accessible to open-source methods. Finally, any type of publicly available digital information is in principle vulnerable to manipulation and tampering. But if safeguards and best practices can be established, open-source counter-narration has the potential to fundamentally shift the ways we expect international legal discourse to unfold in the future.

**BERKELEY PROTOCOL ON DIGITAL OPEN SOURCE INVESTIGATIONS:
A PRACTICAL GUIDE ON THE EFFECTIVE USE OF DIGITAL OPEN SOURCE INFORMATION IN
INVESTIGATING VIOLATIONS OF INTERNATIONAL CRIMINAL, HUMAN RIGHTS AND
HUMANITARIAN LAW (2022)**

[Jointly developed by the Human Rights Center, University of California Berkeley School of Law and the UN Office of the High Commissioner for Human Rights.]⁴⁴¹

I. Introduction

1. The Berkeley Protocol on Digital Open Source Investigations describes the professional standards that should be applied in the identification, collection, preservation, analysis and presentation of digital open source information and its use in international criminal and human rights investigations. ... [It] comprises both user-generated and machine-generated data, and may include, for example: content posted on social media; documents, images, videos and audio recordings on websites and information-sharing platforms; satellite imagery; and government-published data. ...

3. While a growing number of international criminal and human rights investigators now use the Internet to facilitate their work, no universal references, guidelines or standards for open source investigations currently exist. ...

4. ... As open source investigations can contribute to different types of efforts to ensure accountability, the methodology and documentation requirements outlined in the Protocol may be more rigorous than those traditionally employed in other fields, such as journalism and human rights advocacy. ...

6. Ultimately, the Protocol is designed to assist open source investigators to conduct their work in accordance with a professional methodology that is broadly consistent with legal requirements and ethical norms. ...

8. Open source information ... plays a particularly critical role in international criminal and human rights investigations. This is true for a number of reasons. First, internationally mandated investigations, including those conducted by United Nations commissions of inquiry and fact-finding missions, or those authorized by the International Criminal Court, are dependent on legal and political processes permitting the investigation to take place. Thus, they are often conducted long after the events. Second, often, international investigations may not have access to the physical location at which the incidents under investigation took place, for example, due to a State's refusal to cooperate or grant access. Third, even if granted access to a region or territory, investigators may have limited physical access to the location in question or may be impeded from in situ investigations or in-person interviewing due to concerns about protection. Finally, most investigators will not have full law enforcement powers over the territories in which the alleged crimes or violations occurred, and thus may be unable to collect the necessary information. Even in cases in which there is State cooperation, cross-border evidence collection can be an arduous process, slowed down by cumbersome bureaucratic procedures. All of these factors demonstrate why open source investigation techniques,

⁴⁴¹ For background and analysis, see D. Murray, Y. McDermott, and A. Koenig, 'Mapping the Use of Open Source Research in UN Human Rights Investigations', 14 J. *Hum. Rts. Prac.* (2022) 554.

which can be carried out remotely and conducted contemporaneously as events take place, are both powerful and necessary.

...

10. The Protocol is designed to standardize procedures and provide methodological guidance across disparate investigations, institutions and jurisdictions to assist open source investigators in understanding the importance of:

- (a) Tracing the provenance of online content and attributing it to its original source, where possible;
- (b) Evaluating the credibility and reliability of online sources;
- (c) Verifying online content and assessing its veracity and reliability;
- (d) Complying with legal requirements and ethical norms;
- (e) Minimizing any risk of harm to themselves, their organizations and third parties;
- (f) Enhancing protection of the human rights of sources, including the right to privacy.

...

e. Risks of Digital Fact-Finding

Many challenges lie ahead as human rights actors seek to take advantage of new technologies but also avoid the many pitfalls that await.⁴⁴² Mark Latonero, in ‘Big Data Analytics and Human Rights: Privacy Considerations in Context’, in Molly Land and Jay Aronson (eds.), *New Technologies for Human Rights Law and Practice* (2018) 149 warns of the tensions that need to be resolved when using big data analytics in human rights work. He sees ‘a sustained knowledge gap in this area [which] puts vulnerable populations at greater risk.’ And he also notes that these problems will be compounded once artificial intelligence (AI) comes to be widely used in this context. Ella McPherson identifies a range of risks in this general area:

ELLA MCPHERSON, RISK AND THE PLURALISM OF DIGITAL HUMAN RIGHTS FACT-FINDING AND ADVOCACY
MOLLY LAND AND JAY ARONSON (EDS.), NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE (2018) 188.

I. Introduction

... In theory, now anyone with a cell phone and Internet access can document and disseminate evidence of human rights abuses. But what happens when this theory is put into practice? What happens when ICTs [information and communication technologies] are adopted in empirical realities shaped by unique contexts, distributions of resources, and power relations? ...

...

III. Digital fact-finding and communication risk

Human rights practitioners have adopted ICTs for fact-finding in a variety of ways, including using high-technology information sources like satellite images, drone videos, big data, and statistics as well as open source social media content. ... I focus on practitioners’ use of digital information that documents human rights violations and has been produced and transmitted by civilian witnesses – “civilian” in contrast with professional to highlight their inexpert status, and “witness” as someone who is purposively communicating experienced or observed suffering. Civilian witnesses can be spontaneous or solicited. In the digital age, spontaneous witnesses might use their smartphones to document violations that they then share with broader audiences via social media or messaging apps; sometimes this information is gathered, curated, and connected to human rights NGOs by networks of activists. Solicited witnesses may be answering a human rights NGO’s open call for information made via a digital crowdsourcing project or a digital reporting application.

Digital information from civilian witnesses affords human rights practitioners a number of fact-finding advantages. First, the images and video civilian witnesses produce can provide much more detailed evidence than witness interviews that rely on memory. Second, consulting civilian witnesses can tap wells of knowledge, particularly expertise relating to local contexts unfamiliar to foreign practitioners. Third, a wider incorporation of civilians via ICTs can fire up public enthusiasm about human rights and thus receptivity to advocacy. Fourth, and most important for our concern with pluralism, these new sources can support the variety and volume of voices speaking and being heard on human rights. They supplement interviewing’s traditional co-production of information between witnesses and practitioners with both the more autonomous production of spontaneous digital witnesses and new forms of co-production via solicited digital witnesses. If these witnesses are situated in closed-country contexts or rapidly unfolding events, they might otherwise be inaccessible to human rights practitioners. ...

...

A. Surveillance and Physical Security

⁴⁴² See K. MacLean, ‘Digital Human Rights Storytelling and its Palimpsests: (De-) constructed Images of Ethnic Cleansing in Myanmar’, 23 *J. Hum. Rts.* (2024) 283.

Surveillance, understood broadly as monitoring information about others for purposes including management and control, is a risk that civilian witnesses and human rights practitioners have always faced. Surveillance of their identities, networks, and activities is a key tactic deployed by state adversaries in a “cat-and-mouse” game over truth-claims. Human rights practitioners who pioneered the use of ICTs may have had a momentary advantage in this battle by using these technologies to transmit information quickly and widely. Many state actors, however, have caught up quickly and even surpassed human rights actors in their strategic use of ICTs. The surveillance opportunities ICTs afford center on a metadata paradox. ICTs can both reveal and conceal communication metadata; the first facilitates mass surveillance, while the second facilitates spyware.

ICTs are built to collect metadata on their users, often without users understanding just how significant their data trails are. Many ICT companies routinely collect users’ metadata for reasons ranging from marketing to legal compliance. This profit-driven surveillance produces information about communications that also meets the surveillance imperatives of states. ... Even if the content of these communications remains private, metadata can reveal connections between civilian witnesses and human rights practitioners and, through social network analysis, identify individuals as human rights practitioners.

While mass surveillance depends on ICTs’ revelation of communication metadata, spyware depends on its obfuscation, afforded by ICTs’ complexity. Spyware hides in victims’ communications equipment to track and share information about their activities. ...

B. Deception and Reputational Integrity

Human rights practitioners’ use of digital information from civilian witnesses generates another category of risk: susceptibility to misinterpretation through deception. By dint of their accusations of violations, human rights practitioners often engage in battles over truth-claims with their adversaries. Though the manipulation of truth-claims with an intent to deceive has always been a feature of these battles, human rights practitioners may be more exposed to them in the digital age for several reasons. First, ICTs afford a greater number and variety of sources of information, many of whom are outside of the trusted networks that human rights organizations traditionally consult. Deceptive actors can camouflage themselves among this broader pool of sources. Second, unlike in a traditional face-to-face interview, human rights practitioners using spontaneous or solicited digital information from civilian witnesses are not present at the moment of production. As such, they cannot rely on their direct perceptions of identity clues, communication cues, and contexts to verify civilian witnesses’ accounts. Instead, they must use digitally mediated content and metadata as a starting point, which can be distorted and manipulated. Third, this information is often in image or video format that appears to be amateur. This lends it an aura of authenticity – rooted, perhaps, in a “seeing is believing” epistemology – that may belie manipulation.

Deception through truth-claims manipulation can be divided into at least three categories: outright staging of content, doctoring of content, and doctoring of metadata. ...

... [T]he doctoring of metadata ... involves scraping videos or images from one context and repackaging them as evidence of violations in another context. ...

Though some instances of deception may be malevolent, other instances may be backed by the best of intentions. For example, civilian witnesses may use images from one event to illustrate another, similar event that was not recorded. Nevertheless, using any kind of manipulated information as evidence creates a follow-on risk to the reputations of human rights practitioners and their organizations. For these, credibility is a fundamental asset, not only for the persuasiveness of their advocacy, but also for garnering donations and volunteers, influencing policy-making, and motivating mobilization. Credibility is also a human rights organization’s Achilles’ heel, as it can be damaged in an instant with the publication of truth-claims that others convincingly expose as false. Though the verification of information has always been a cornerstone of human rights work as a truth-claim

profession, information mediated by ICTs is challenging established verification practices. This is not only because of the new sources and formats of information ICTs enable, but also because verifying digital information requires expertise that, though increasingly standardized, is still emergent.

...

VII. Conclusion

Techno-optimism has surfaced in the human rights world, as in many others, based in part on the perceived benefits of ICTs for the pluralism of human rights communication. These benefits have been realized in a number of cases, but the application of ICTs has also materialized risk. ...

Furthermore, the use of ICTs introduces new intermediary actors to the human rights communication chain, and the technical complexity of ICTs makes these actors and their impact on communication more difficult to identify and assess. Of particular note here are new commercial actors with profit motives. To be sure, human rights reporters have interacted with commercial motives before in their communication practices, such as in considering the marketability of newsworthiness decisions. Never before, however, have commercial actors been so influential over and yet so hidden in mediation. Cases in point are the commercial-political surveillance nexus, the lucrative gray market for spyware, and the proprietary, revenue-maximizing algorithms of social media platforms. Incorporating ICTs into human rights fact-finding and advocacy contributes to new risk assemblages for human rights practitioners.

...

C. Ukraine And Future Directions For Fact-Finding

The extent to which the scope of the mandates given to international fact-finding bodies has expanded in recent years is illustrated by the response to the Russian invasion of Ukraine. In March 2022, for example, the Human Rights Council (by a vote of 32-2-13) established ‘an independent international commission of inquiry, comprising three human rights experts, to be appointed by the President of the Human Rights Council ... with the following mandate:

- a) To investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation, and to establish the facts, circumstances and root causes of any such violations and abuses;
- b) To collect, consolidate and analyse evidence of such violations and abuses, including their gender dimension, and to systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, consistent with international law standards, in view of any future legal proceedings;
- c) To document and verify relevant information and evidence, including through field engagement, and to cooperate with judicial and other entities, as appropriate;
- d) To identify, where possible, those individuals and entities responsible for violations or abuses of human rights or violations of international humanitarian law, or other related crimes, in Ukraine, with a view to ensuring that those responsible are held accountable;
- e) To make recommendations, in particular on accountability measures, all with a view to ending impunity and ensuring accountability, including, as appropriate, individual criminal responsibility, and access to justice for victims;
- f) [To report to the Human Rights Council and the General Assembly].

In a blogpost entitled ‘Fact-Finding in Ukraine: Can Anything Be Learned from Yemen?’, on Articles of War, 14 March 2022, Charles Garraway, who was a member of the UN Human Rights Council’s Group of Eminent Experts (GEE), which studied the situation in Yemen from 2017 to 2021, compared that fact-finding exercise with the nascent COI in Ukraine. The establishment of the Yemen GEE was strongly resisted by some Arab States, and it was disbanded in a controversial decision by the Council, despite a strong recommendation that much remained to be done (UN Doc. A/HRC/48/20 (2021)):

[The tension between IHL and IHRL] inevitably affected the methodology of fact-finding. Whereas under “Geneva Law” it is normal to start with the result—for example a torture victim—and work backwards from there, that methodology does not work necessarily for “Hague Law” allegations, particularly the laws on targeting. Most fact-finding has tended to concentrate on the principle of proportionality ... best defined in Article 51(5)(b) of Additional Protocol I ⁴⁴³ However, the fact that a particular object has been hit by an air strike does not tell you whether it was the intended target, and still less what might have been the anticipated military advantage or the expected civilian loss and damage from that particular strike. That is information that could only be gained from the attacking side. ...

...

The Yemen GEE [concentrated] on Article 57 of Additional Protocol I which requires that in the conduct of military operations “constant care shall be taken to spare the civilian population, civilians and civilian objects.” In their first Report, although due to the lack of detailed targeting information on individual strikes, it was not possible to reach definite conclusions on any particular incident, it was possible to look at patterns. These revealed, as a result of the number of civilian casualties, the timing of some attacks, and the choice of weapons, that there were “serious concerns” about the targeting process itself. The GEE went on to say “If there are errors in the targeting process that effectively remove the protections provided by international humanitarian law, these would amount to violations”. ...

[A detailed 2019 legal analysis by the GEE noted] ... that the patterns they had observed had continued “casts a serious doubt about whether the targeting process adopted by the coalition complied with these fundamental provisions of international humanitarian law.”

... [I]t was possible to use the evidence gained from general patterns to identify possible flaws in the targeting process. ... [T]he continuation of the patterns would indicate with increasing clarity that the flaws were continuing, and no remedial steps had been taken

...

Towards More Institutionalized Fact-Finding

In 2001, a highly experienced international fact-finder, Cherif Bassiouni, lamented the absence of standard operating procedures for fact-finding missions:

[N]o manual exists to describe how an investigation should be conducted and there is no standard, though adaptable, computer program to input collected data. Worst of all, there is no continuity. In short, there is nothing to guide,

⁴⁴³ This article describes as indiscriminate ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’

instruct, or assist the heads and appointees to these missions of how to better carry out their mandates. It strains one's belief that in fifty years the most elementary aspects of standardized organization, planning, documentation, and reporting have not been developed. Thus, each mission has to reinvent the wheel ... The results are usually poor or mediocre performance, except where particularly competent persons are appointed to these missions ... [T]here is little consistency and predictability as to the methods and outcomes. ...

The lack of standardized methods, particularly as to empirical research and field investigation, means that there is no basis to test the validity of the research in order to assess the plausibility of the conclusions. It is safe to say that no scientific research methodology would consider the above-described approach as anything but selective, insufficient, unreliable, and, at best, anecdotal.⁴⁴⁴

One proposed solution was to adopt regulations outlining 'the structure, powers and functioning of fact-finding commissions, so that, once the need arises to investigate a situation, all the relevant rules are already in place.'⁴⁴⁵ One response, by the OHCHR was to produce a book entitled *Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and Humanitarian Law: Guidance and Practice* (2015).

An earlier attempt to set up a standing body to carry out fact-finding has so far been unsuccessful. Article 90 of the First Additional Protocol to the Geneva Conventions of 1949 provides for the creation of an International Humanitarian Fact-Finding Commission. It was set up in 1991 as a permanent body of 15 experts. Although 76 states have recognized its competence, its services have only been sought once, by the Organization for Security and Co-operation in Europe in relation to a particular incident occurring in Ukraine in 2017. When a major conflict breaks out, the Commission generally proffers its services, but states have been remarkably reticent to make use of them. Robert Heinsch, in 'The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms?', in Dražan Djukić and Niccolò Pons (eds.), *The Companion to International Humanitarian Law* (2018) 79, has identified four main problems relating to its mandate: (i) an inquiry can only take place with consent from the parties; (2) there was some doubt as to whether its mandate was limited to international armed conflicts, although the Commission has insisted this is not the case; (3) the complexity and perhaps unworkability of the fact that the Commission is authorized to establish facts and make recommendations, but not to conduct a legal evaluation; most commentators consider the two to be inseparably linked; and (4) its findings are confidential unless all parties to the conflict agree otherwise.

In 2022, two major studies called for the creation of some form of 'investigative mechanism' that would be permanent and assuredly independent. One, drafted by a group at Oxford University (Federica D'Alessandra et al., *Anchoring Accountability for Mass Atrocities* (2022)) called for either the establishment of a standing, independent UN investigative support mechanism (ISM) or the establishment of a permanent investigative support division (ISD) within the OHCHR. The second study was prepared by the International Commission of Jurists:

**INTERNATIONAL COMMISSION OF JURISTS, OPTIONS FOR THE ESTABLISHMENT OF A
STANDING INDEPENDENT INVESTIGATIVE MECHANISM (SIIM)
(2022)**

[Note: This report uses the term 'Accountability Mandates' to refer to all UN-mandated investigations with one or more accountability functions.]

UN-mandated investigations have been broadly categorized as being of two types:

⁴⁴⁴ M. C. Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions', 5 *Wash. U. J. L. & Pol'y*. (2001) 35.

⁴⁴⁵ A. Cassese, 'How to Ensure Increased Compliance with International Standards: Monitoring and Institutional Fact-Finding', in *ibid.* (ed.), *Realizing Utopia: The Future of International Law* (2012), 303. Cf. a set of guidelines developed for NGO fact-finding: Raoul Wallenberg Institute and the International Bar Association, *Lund-London Guidelines on International Human Rights Fact-Finding Visits and Reports* (2009).

- a. UN investigative mechanisms tasked with sophisticated forms of evidence gathering (IIM⁴⁴⁶, UNITAD⁴⁴⁷ and the IIMM⁴⁴⁸); and
- b. UN human rights investigations (all other UN mandated investigations).

There has been a misperception that only the former mechanisms carry out criminal investigations into individual criminal responsibility, whereas the latter only monitor, document, report and make recommendations on human rights violations.

However, the ICJ [International Commission of Jurists] considers this categorization of UN-mandated investigations does not reflect reality. Rather, it is more accurate to think of all UN-mandated investigations with at least one accountability function as belonging to the same family and existing on a spectrum, with mandates that weigh more towards traditional human rights investigations and reporting at one end, and UN investigative mechanisms that focus essentially on establishing the evidentiary basis for criminal prosecutions at the other. While in the middle of the spectrum – where most of the Human Rights Council-created Accountability Mandates now operate - there are increasingly sophisticated “*blended*,” or “*mixed*” mandates requiring both human rights and criminal investigative capacity. All these Accountability Mandates address, to some extent, aspects of both State responsibility and individual criminal responsibility but use at least some different working methodologies in the gathering of information and evidence.

The ICJ further considers this dual classification scheme has been unhelpful in addressing many of the challenges ..., particularly regarding the resources and staffing that have been allocated to the various Accountability Mandates. Particularly problematic is the belief that those mandates that are perceived to fall into category b. do not need the same resources and specialist staffing that is required by those mandates in category a., notwithstanding the real requirements of their increasingly complex mandates.

The clearest example is the ... Independent International Commission of Inquiry on Ukraine, whose expansive mandate appears to have borrowed from the mandates of Accountability Mandates at both ends of the spectrum.

The blending of functions has been deliberate for a variety of reasons. UN bodies often act with regard to situations where there are strong allegations of human rights or international humanitarian law violations constituting crimes under international law that warrant an investigation into individual criminal responsibility, particularly where ongoing widespread or systematic violations of human rights and/or international humanitarian law are being committed, and States are unable or unwilling to undertake investigations that meet international law and standards.

Other major factors dictating the design of Accountability Mandates - and the emergence of increasingly mixed mandates - are the powers and political dynamics of the various UN bodies establishing them. ...

...

2. Opportunities and challenges faced by Accountability Mandates

In short, Accountability Mandates, whether mixed or essentially focused on individual criminal responsibility, contribute toward accountability by carrying out investigations where an accountability gap exists, by:

- a. identifying perpetrators;

⁴⁴⁶ The IIM is the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011. It was established in 2016 pursuant to a resolution of the General Assembly (A/71/248).

⁴⁴⁷ UNITAD is the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL. It was set up pursuant to Security Council Res. 2379 (2017).

⁴⁴⁸ The Independent Investigative Mechanism for Myanmar, discussed above.

- b. collecting and preserving evidence for use in national, regional and international legal proceedings, including for use in non-criminal judicial and non-judicial proceedings aimed at providing victims with effective remedies and reparation for violations, before it is lost, destroyed or deteriorates;
- c. monitoring and documenting violations and making recommendations to States and other actors on how to protect and remedy human rights, in the case of those Accountability Mandates with mixed mandates; and
- d. having a deterrent effect against future violations.

However, the ICJ and Oxford have found that nearly all Accountability Mandates face common challenges each time a new one is established, including:

- a. **Political challenges** inside the UN Human Rights Council or other UN bodies to establish or renew a mandate, often against hurdles unrelated to merit;
- b. **Financial challenges**, including at the budget allocation stage;
- c. **Administrative challenges**, relating to the start-up phase of operations, including the need to secure appropriate staffing with the right substantive expertise and resources to adequately fulfill the mandate; and
- d. **System challenges**, to record, store, analyze and preserve massive amounts of digital evidence securely, and the need to develop policies, procedures and protocols to ensure the Accountability Mandates fulfil their functions effectively, efficiently and without doing harm to victims and witnesses.

[The report then proposes two alternative options.]

Option 1: Establish a SIIM

...

A SIIM should be independent of OHCHR and other UN Agencies but linked to them in a consultative and operational capacity - and reliant on them for certain services - in the same way as the IIIM, IIMM and UNITAD. It would have two functions:

- conduct investigations with a view to gathering information and evidence for potential use in criminal and other legal and administrative proceedings; and
- use its capacity to act as a specialist service provider to existing and future UN body-created Accountability Mandates, including relevant fact-finding missions and commissions of inquiry.

Investigation function

The SIIM would conduct its own investigations when its mandate is triggered [by relevant UN bodies or by an independent authority set up for the purpose]

A SIIM would need to put in place the specialized capacity required for when an investigation is warranted into individual criminal responsibility, for example:

- a. digital technology infrastructure and expertise;
- b. witness and victim protection infrastructure and expertise; and
- c. dedicated expertise on international criminal law, forensics and military structures.

This capacity is already in place to varying degrees inside the IIIM, IIMM and UNITAD. A particular area that requires specific resources is “*digitization*”, as the capacity to manage digital data and evidence is one of the biggest challenges facing all Accountability Mandates, demanding experience with existing systems as well as capacity to provide customized solutions.

Once collected and preserved, the material could also be appropriate for use in other legal proceedings before human rights courts, truth commissions, and civil and administrative proceedings.

A SIIM should also have a core group of investigators, analysts, and lawyers, including with thematic expertise in areas such as crimes against or involving children and conflict-related sexual violence. This would help in creating consistency and standing expertise and avoiding duplication and double standards. ...

One of the benefits of a SIIM would be that it would obviate the need for victims to advocate with States for various functions to be included each time a new Accountability Mandate is proposed, some of which may not be feasible in a particular political climate. For instance, it might not always be possible for a mandate to include the “*collection, consolidation and preservation of evidence for use in future legal proceedings*.” This would also mitigate against the challenge of “*selectivity*” where some Accountability Mandates get “*stronger*” mandates than others, much to the puzzlement and frustration of victims.

Option 2: Establish an independent, investigation support service provider

This option would entail the establishment a [sic] stand-alone, independent, investigation support service provider, independent of OHCHR and other UN Agencies, but linked to them and reliant on them for certain services.

Unlike a SIIM envisioned by Option 1, such a model would not conduct its own investigations. Rather, it would simply establish a standing specialized capacity that could be drawn upon when an expert, essentially criminal, or other complex investigation is undertaken by existing and future Accountability Mandates such as fact-finding missions and commissions of inquiry, and UN Special Procedure and treaty body support, upon a request for specialist assistance. For example, it could provide support and services such as those listed above (specialized digital storage capacity and expertise, witness and victim protection infrastructure and expertise, expertise on forensics and military matters, and expertise in international criminal law, including on conflict-related sexual violence).

Its independence should allow for greater nimbleness in responding to the needs of those requesting support as it would not be subject to the bureaucratic constraints that all UN agencies face.

...

QUESTIONS

1. What are the arguments for and against the proposal for regulations outlining the powers, structure and functioning of all UN COIs? Is it possible to develop meaningful guidelines to govern such a broad array of circumstances and challenges? Are existing guidelines so general as to provide little real guidance? Or are the interests of human rights better served by avoiding the constraining effects of excessive professionalization and leaving maximum room for creativity and innovation?
2. In 2009, the Guinean army brutally suppressed demonstrations against the ruling junta, leading to over 150 deaths, hundreds of injuries, widespread sexual assault, and cases of enforced disappearances. The UN, Human Rights Watch, and various other groups produced detailed reports. In response, the government commissioned private consultants, CW Group International, who published a report later that year in Washington DC, entitled *Report of Inquiry: Incident at the National Stadium on 9-28-09 in Conakry, Guinea*. This report challenged the findings of the other sources and largely exonerated the government. Are there circumstances under which you see a legitimate role for private, for-profit, groups in human rights fact-finding?
3. Which of the new technologies do you think might bring about the biggest changes in traditional approaches to fact-finding?
4. Would a SIIM of the type proposed accelerate the move towards a prosecution-oriented human rights regime as opposed to one that seeks to expose and address the deeper structural underpinnings of most atrocity situations?

Chapter 11. Regional Human Rights Systems⁴⁴⁹

In the realm of human rights, regional intergovernmental systems have played a major role. The Council of Europe moved as early as 1950 to adopt the European Convention on Human Rights (ECHR) and various proposals were made in the early 1950s to include human rights in the frameworks that eventually led to the European Union.⁴⁵⁰ It was not until 1969 that the analogous American Convention was adopted, but the Inter-American system began with the adoption of the American Declaration of the Rights and Duties of Man in 1948, and saw steady institutional and normative development thereafter. In 1977, the UN General Assembly (Res. 32/127 (1977)) sought to stimulate the establishment of ‘suitable regional machinery’ in regions where none then existed. Four years later, in 1981, the African Charter of Human and Peoples’ Rights was adopted.

In addition to these three major regional human rights systems, which are the focus of this chapter, various other groups have adopted declarations of human rights and established commissions to promote them.⁴⁵¹ These include the Arab Charter on Human Rights of 2004 overseen by the Arab Human Rights Committee, the Organization of Islamic Cooperation’s 1990 Cairo Declaration on Human Rights in Islam, revised by the 2020 OIC Declaration on Human Rights, and the ASEAN Intergovernmental Commission on Human Rights, established in 2009.⁴⁵² Sub-regional courts have also been important in some contexts.⁴⁵³

The following analysis puts the three major regional systems into broader perspective and emphasises their centrality to the overall international regime.

**ALEXANDRA HUNEEUS AND MIKAEL RASK MADSEN,
BETWEEN UNIVERSALISM AND REGIONAL LAW AND POLITICS:
A COMPARATIVE HISTORY OF THE AMERICAN, EUROPEAN,
AND AFRICAN HUMAN RIGHTS SYSTEMS
16 INT’L J. CONSTIT. L. (2018) 136**

Our approach ... cuts directly against tendencies in recent scholarship to concentrate on the universal system and to emphasize the role of the West in the genesis of human rights institutions. Most scholars who have given a global account of human rights have tended to slight the regional systems and focus instead on the UN-based system, perhaps because it claims the mantle of universality.⁴⁵⁴ It is nevertheless in the regional systems where much—if not most—of the human rights action has unfolded, and not only in recent years but from the very beginning. Most decisively, the regional systems have developed judicial institutions that render binding judgments on the member states. Consequently, they have also come to engage in increasingly dense interaction with domestic courts, becoming far more deeply embedded in national systems than the UN system. To slight them is to distort the history of human rights.

Our comparative regional approach moreover allows us to push back on the tendency to view human rights institutions and international courts as creations of the West that are transplanted, copied, or otherwise vernacularized by the South. It is of course possible to describe the Inter-American Court, for example, as a transplant at a formal and purely institutional level. Yet, such a narrow perspective leaves out how this system—like the European and African ones—is embedded in and responsive to

⁴⁴⁹ See generally C. Roberts, *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American, and African Regional Human Rights Systems* (2023).

⁴⁵⁰ G. de Búrca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’, 105 *Am. J. Int’l L.* 649 (2011).

⁴⁵¹ J. Pevehouse, ‘Regional Human Rights and Democracy Governance’, in T. Börzel and T. Risse (eds.), *The Oxford Handbook of Comparative Regionalism* (2016) 486.

⁴⁵² A. Collins and E. Bon Tai Soon, ‘The Spiral Model, Scope Conditions, and Contestation in the ASEAN Intergovernmental Commission on Human Rights’, 36 *The Pacific Rev.* (2023) 1.

⁴⁵³ See Jo Un Eom and L. Helfer, ‘Human Rights Litigation Before Sub-Regional Courts in East and West Africa’, in N. Jain and M. Versteeg (eds.), *Oxford Handbook of Comparative Human Rights Law* (2024) 000; and O. Okafor et al., ‘On the Modest Impact of West Africa’s International Human Rights Court on the Executive Branch of Government in Nigeria’, 35 *Harv. Hum. Rts. J.* (2022) 169.

⁴⁵⁴ See, e.g., Moyn, who pays very little attention to the early European and American human rights systems; and, when he does, tends to belittle their significance. S. Moyn, *The Last Utopia: Human Rights in History* (2010).

a region with distinct cultural, political, and social contexts. This contextual embeddedness in large part explains the trajectory of the system. ...

... [N]o single actor, state, or region can claim sole authorship of international or regional human rights. This has historic reasons: at the time of the genesis of all three systems, the repertoire of ideas and concepts from which they drew had already emerged in both legal and political discourse—and this influenced both regional and international developments. Thus, the regional systems are neither the consequence of transplants going from the North to the South nor the result of a larger UN or US-driven master plan of international human rights. Rather, the fact that the systems share relatively similar institutional models is revelatory of how these actors have borrowed from and contributed to a collective bank of ideas about international human rights. Where the regional systems differ the most is therefore not in their institutional designs, which are generally rather similar at a formal legal level, but the temporality of when they have managed to turn ideas into actual institutions. Moreover, as our analysis suggests, even similar institutions, for example, Commissions, have sometimes played out differently on the regional terrains due to specific contextual constraints. We consequently argue that the single most decisive factor explaining differences in regional human rights are contextual differences between the regions. Simultaneously, however, the fact that exchange between the systems and the larger international regime have taken place for decades provides countering processes of unification. This ultimately places the regional systems at the crossroads of a universalizing discourse on human rights and the specific constraints derived from local legal and political contexts. ... [I]nternational human rights have provided a global “script” which has been enacted in radically different settings in Europe, Latin America, and Africa and has resulted in a relative diversity of institutions and practices.

* * *

We turn now to explore the oldest of the regional systems.

A. THE EUROPEAN CONVENTION SYSTEM

1. Introduction and Overview

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in 1950 and entered into force in 1953. The ECHR is of particular importance for several reasons: it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; it has generated a more extensive jurisprudence than any other part of the international system; and it applies to almost 25 percent of the nations in the world. Our principal concern in this selective examination of the European Convention is with its evolving institutional architecture, particularly with the European Court of Human Rights (ECtHR) and the manner in which it has performed the judicial function.

Elsewhere in this coursebook, we encounter many cases decided by the ECtHR. But a leaflet published by the Court itself provides a reminder of the potential to confuse this court with other key parts of the overall human rights regime. The second page of the four-page *Court in Brief* is headed ‘NOT TO BE CONFUSED WITH’. It lists thereunder: the Court of Justice of the European Union (CJEU), the International Court of Justice (ICJ), the Universal Declaration of Human Rights (UDHR), and the European Union’s Charter of Fundamental Rights.

The impetus for the adoption of a European Convention came from three factors. It was first a regional response to the atrocities committed in Europe during the Second World War and an affirmation of the belief that governments respecting human rights are less likely to wage war on their neighbours. Second, both the Council of Europe, which was set up in 1949 (and under whose auspices the Convention was adopted), and the European Union (previously the European Community or Communities, the first of which was established in 1952) were partly based on the assumption that the

best way to ensure that Germany would be a force for peace, in partnership with France, the United Kingdom, and other West European states, was through regional integration and the institutionalization of common values. This strategy contrasted strongly with the punitive, reparations-based approach embodied in the 1919 Versailles Treaty after the First World War.

The Preamble to the ECHR refers (perhaps somewhat optimistically, especially at the time) to the ‘European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law ...’. But this statement also points to the third major impetus towards a Convention — the desire to bring the non-Communist countries of Europe together within a common ideological framework and to consolidate their unity in the face of the Communist threat. ‘Genuine democracy’ (to which the Statute of the Council of Europe commits its members) or the ‘effective political democracy’ to which the Preamble of the Convention refers, had to be clearly distinguished from the ‘people’s democracy’ which was promoted by the Soviet Union and its allies.

The European Convention’s transformation of abstract human rights ideals into a concrete legal framework followed a path which was to become familiar in this field. The initial enthusiasm was soon tempered by concerns over sovereignty and a reluctance to take the concept of a state’s accountability too far. Thus, a call by the Congress of Europe in 1948 for the adoption of a Charter of Human Rights to be enforced by a Court of Justice ‘with adequate sanctions for the implementation of this Charter’ went further than West European governments were prepared to go. Instead, the final version of the Convention acknowledges in the Preamble that it constitutes only ‘the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’.

Both during the drafting of the Convention and in the years after its adoption there was considerable reluctance on the part of key states to adopt many of its key provisions. In this regard the most detailed historical analyses have been undertaken in relation to the United Kingdom and it is an instructive example. During the Second World War, Prime Minister Churchill often returned to the theme that the war was being fought ‘to establish, on impregnable rocks, the rights of the individual’, and commentators such as Hersch Lauterpacht insisted that the war was, in large part, about ‘the enthronement of the rights of man’ and the correlative limitation of state sovereignty.⁴⁵⁵ But when victory brought the opportunity to draft a human rights treaty, other considerations would be prominent.

Marco Duranti observes, in *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017) at 392, that human rights in Europe ‘had widely divergent lineages and have served opposing purposes and taken on conflicting valences.’ Contrary to some early accounts, there was no single linear trajectory.

A. W. Brian Simpson, in *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2004) at 347, explains that the British, in common with other major powers such as the United States and the then Soviet Union, followed an ‘export theory of human rights’ according to which ‘human rights were for foreigners, who did not enjoy them, not for the British, who enjoyed them anyway. They were for export.’ Simpson adds that, on the British side, there were mixed motivations for supporting the Convention:

simple and honest humanitarianism, the wish of the officials to honour ministerial statements, ... the belief that violations of human rights could threaten peace, a detestation of the Soviet system, and ... the feeling that there needed to be an international response to the horrors of the recent past, though ... [t]he prominence given to the uniqueness of the destruction of European Jewry is a phenomenon of the 1960s and thereafter ... [The major powers were motivated not by a desire for] self-improvement but self-protection against a return to the oppression ... which might come about through the rise of a new

⁴⁵⁵ See M. Mazower, *Dark Continent: Europe’s Twentieth Century* (1998), 193–4.

totalitarianism. Those who had not suffered occupation never seemed to have fully grasped the importance of this factor.

Duranti's analysis emphasizes the role of 'conservatives operating through transnational assemblies and nongovernmental organizations' as the ones who 'prompted governments to draft the ECHR and decisively shaped its normative content ... [and its] institutional mechanisms ...'. He notes (at 402) that:

Conservatives took advantage of the favorable political conditions present in pan-European assemblies to implement a free-market and social Catholic agenda unachievable in national parliaments. ...

... [T]hey sought to forge a European human rights system that would replace majority rule with the rule of law, the unitary state with a more pluralistic system, the absolute sovereignty of nations and parliaments with greater autonomy for individuals, families, localities, minorities, and civil society. ...

... [Conservatives believed] that the legitimacy of supranational institutions would depend on coupling technocratic expertise with an attention to the cultural and ethical bases of European unity. Rejecting liberal cosmopolitanism and technocracy in favor of a nostalgic Christian internationalism, these conservative Europeanists conceived of human rights using conservative moral frameworks that had emerged in reaction to industrialization, Enlightenment rationalism, and the French Revolution. ... [T]he cultural inheritance of Western Christendom could provide a foundation for uniting the manifold communities in which Europeans formed their ethical obligations.

All the same, the good that the conservative human rights revolution did cannot be readily disentangled from the ill. Appeals to the principles of democracy and human rights provided a perch to attack groups who purportedly did not believe in them. Churchill framed human rights as products of Christian civilization so as to extend democratic freedoms to some peoples while excluding others. Though believing in the necessity of preserving the distinctive attributes of different nations, he fixated on a monolithic, static idea of Europe premised on an essentialist conception of European culture and identity. His aim was to fight the fires of hatred in the region, but in so doing he fanned them.

The conservative politicians who championed a European human rights court believed that colonized peoples were not entitled to the same rights protections as Europeans. So, too, did they hold that communist parties were not to enjoy representation in European organizations of states despite enjoying significant electoral support in much of Western Europe, while states with dubious democratic credentials and former Axis powers were welcomed to the "European family." Their views on women's rights were retrograde; extraordinarily, they included no prohibition on discrimination on the basis of gender in their early drafts of a European human rights treaty, even following the inclusion of such a provision in the Universal Declaration.

The conservative human rights revolution was brimming with other contradictions and rank hypocrisies. Churchill lent his support to rightwing authoritarian regimes in the interests of containing communism. Alexandre Marc and Louis Salleron were disturbingly close to the anti-Semitic, authoritarian Far Right in their own country. François de Menthon and Pierre-Henri Teitgen showed a callous disregard toward the plight of Jewish compatriots and refugees. When David Maxwell Fyfe later assumed the position of home secretary, he set out to curtail the rights of British homosexuals with a zeal that was exceptional even in the intolerant climate of that age. The

conservative mobilization of the language of human rights in the service of reconciliation meant amnesty for right-wing political prisoners and an end to denazification. As much as this may have assisted in the stabilization of continental democracies, it also strengthened the hand of apologists for collaborationist regimes and those refusing to acknowledge widespread complicity in the Holocaust.

Andrew Moravcsik, in 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *Int. Org.* (2000) 217, at 238, explains British concerns:

As W. E. Beckett, legal advisor to the Foreign Office ... put it, "We ... are dead against anything like an international court to which individuals who think they are aggrieved in this way could go." ...

...

... British officials and politicians — most notably in Cabinet discussions — dwelled primarily on the fear that the convention would threaten idiosyncratic (but not unambiguously undemocratic) political practices and institutions in the United Kingdom

The defense of British institutional idiosyncrasy elicited the most violent rhetoric from British politicians and officials. Lord Chancellor Jowitt's official paper criticized the draft convention ... as:

so vague and woolly that it may mean almost anything. ... It completely passes the wit of man to guess what results would be arrived at by a tribunal composed of elected persons who need not even be lawyers, drawn from various European states possessing completely different systems of law, and whose deliberations take place behind closed doors Any student of our legal institutions must recoil from this document with a feeling of horror.

A common complaint was that judicial review would undermine parliamentary sovereignty. Beckett wrote: "It seems inconceivable that any Government, ... would take the risk of entrusting these unprecedented powers to an international court, legislative powers which Parliament would never agree to entrust to the courts of this country which are known and which command the confidence and admiration of the world." ...

The specific issue cited most often by the government's legal authorities was the British policy toward political extremists. ... Lord Chancellor Jowitt's complaint was that "the Convention would prevent a future British government from detaining people without trial during a period of emergency ... or judges sending litigants to prison for throwing eggs at them; or the Home Secretary from banning Communist or Fascist demonstrations."

...

In the minds of British officials, however, the primacy of domestic sovereignty over collective defense of the democratic peace remained unchallenged. The cabinet mandated efforts to water down the force of any agreement in Britain. British representatives ... [called] for the careful enumeration and definition of human rights Foreign Minister Ernest Bevin himself instructed British negotiators to veto any mandatory right of individual petition "even if it [means] being in a minority of one." ...

Having secured these concessions, which essentially rendered the convention unenforceable in Britain, the cabinet unanimously accepted the desirability of signing it... .

Christopher Roberts, in *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American, and African Regional Human Rights Systems* (2023) at 27, adds that ‘the British demanded that the text be more specific; they called for a strengthened role for the Committee of Ministers; they resisted the idea that the Convention might apply to colonial territories; they opposed the idea of strong domestic legal applicability; and they resisted the ability of individuals to bring petitions, and the existence of a court with mandatory oversight. This resistance was successful on all fronts.’

An Overview

This historical review seems a long way from the world of the twenty-first century in which the rights recognized in the Convention form an integral part of domestic law in most European states. More generally, major institutional reforms have helped to move the system closer to that envisaged by the maximalists of the early 1950s. But, as we shall see below, these successes have brought other forms of governmental resistance to the fore.

The Council of Europe was established in 1949 by a group of ten states, primarily to promote democracy, the rule of law, and greater unity among the nations of Western Europe. It represented both a principled commitment of its members to these values and an ideological stance against Communism. Over the years its activities have included the promotion of cooperation in relation to social, cultural, sporting, and a range of other matters. Until 1990, the Council had 23 members, all from Western Europe. Post-Cold War developments, however, prompted most states of Eastern and Central Europe to join, and today it has 46.⁴⁵⁶ Only Belarus, and Russia which was expelled in 2022, are now outside the Council.

The conditions for the admission of a state to the Council of Europe are laid down in Article 3 of its Statute. The state must be a genuine democracy that respects the rule of law and human rights and must ‘collaborate sincerely and effectively’ with the Council in these domains. In practice, such collaboration involves becoming a party to the European Convention on Human Rights. An applicant state must satisfy the Council’s Committee of Ministers that its legal order conforms with the requirements of Article 3. The opinion of the Parliamentary Assembly is sought and the Assembly in turn will appoint an expert group to advise it. A 1994 report concluded that Russia did not meet the requirements,⁴⁵⁷ but it was nonetheless admitted in 1996, despite strong criticism of the decision.

The Rights Recognized

Although the initial moves to create a European Convention pre-dated the UN’s adoption of the UDHR, the text of the latter was available to those responsible for the final drafting of the Convention. Eventually the drafters defined rights in terms similar to the early version of the draft ICCPR. Since the Covenant went through numerous changes before adoption, the formulations used in the two treaties sometimes differ significantly. Several weighty provisions appear in only one or the other. For example, the European Convention contains no provision relating to self-determination or to the rights of members of minority groups (Arts. 1 and 27 of the ICCPR). Each treaty limits freedoms of expression, association, and religion in similar ways (e.g., criteria of public safety or national security), but the European Convention consistently requires that a limitation be ‘necessary in a democratic

⁴⁵⁶ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Türkiye, Ukraine, and the United Kingdom.

⁴⁵⁷ R. Bernhardt et al., ‘Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards’ (7 October 1994).

society' (Arts. 8–11). The derogation clauses (Art. 4 of the ICCPR, Art. 15 of the European Convention) differ with respect to the list of non-derogable provisions.

Article 1 requires the parties to 'secure [these rights] to everyone within their jurisdiction', while Article 13 requires the state to provide 'an effective remedy before a national authority' for everyone whose rights are violated. Compare the more demanding Article 2 of the ICCPR, which refers to states' duty to adopt legislative and other measures to give effect to the recognized rights and to 'develop the possibilities of judicial remedy'.

When the Convention was adopted in 1950, there were several outstanding proposals on which final agreement could not be reached. It was therefore agreed to adopt Protocols containing additional provisions. Since 1952, 16 protocols have been adopted. While the majority are devoted to procedural matters, others have recognized the following additional rights: the right to property ('the peaceful enjoyment of [one's] possessions'), the right to education, and the obligation to hold free elections (Protocol 1 of 1952); freedom from imprisonment for civil debts, freedom of movement and residence, freedom to leave any country, freedom from exile, the right to enter the country of which one is a national, and no collective expulsion of aliens (Protocol 4 of 1963); abolition of the death penalty (Protocol 6 of 1983); the right of an alien not to be expelled without due process, the right to appeal in criminal cases, the right to compensation for a miscarriage of justice, immunity of double prosecution for the same offence, and equality of rights and responsibility of spouses (Protocol 7 of 1984); the general prohibition of discrimination (Protocol 12 of 2000); and abolition of the death penalty, in all circumstances (Protocol 13 of 2002). Acceptance of each of the Protocols is optional.

2. The European Court and its Procedures

The ECHR provides for both individual petitions (Art. 34) and interstate complaints (Art. 33). The latter were once rare, but are now thriving. The former, which may be brought by individuals, legal persons (such as corporations), groups of individuals, or nongovernmental organizations, have grown exponentially in numerical terms since the 1990s.

The Convention makes clear that the primary responsibility for implementation rests with the member states themselves. The implementation machinery of the Convention comes into play only after domestic remedies are considered to have been exhausted. A great many complaints are deemed inadmissible, frequently on the ground that domestic law provides an effective remedy for any violation that may have taken place. Contracting States' obligations under Articles 1 and 13 are to 'secure to everyone' the Convention's rights and to provide 'an effective remedy before a national authority' for violations of those rights. This preference for domestic resolution is also reinforced by the requirement to seek a 'friendly settlement' wherever possible and by the procedures for full government consultation in the examination of complaints.

The remedy given by a domestic court may be pursuant to provisions of domestic law that stand relatively independently of the Convention, although perhaps influenced by it, such as a human rights Act, a code of criminal procedure, or a constitutional provision drafted to be consistent with the Convention. Alternatively, a remedy may be given as a result of the incorporation of the Convention into domestic law, which may be achieved as an automatic consequence of ratification or through the adoption of special legislation.

The Evolution of the ECHR System

The system of considering individual complaints is the hallmark of the ECHR regime. Its evolution from a tentative and optional procedure which was used relatively sparingly to one which is now compulsory and extremely widely used has compelled the Contracting States to undertake a series of fundamental reforms. Driven by a flood of applications, concerns that the system will collapse from overload, and complaints by some states that the Court has over-reached, European governments and the Court itself have been in a constant state of reform since the late 1990s.

When originally devised in the 1950s, and for several decades thereafter, the petition procedure was optional. Only three of the original ten members accepted it from the outset, while many of the rest made clear that they wanted no part of it. For example, it was not until 1981 that France accepted the right of individual complaint for its citizens, and during the 1970s the British Government regularly raised the prospect that it might withdraw its acceptance of the procedure. Until the late 1990s the procedures used were much less 'judicial' than they are today, and were surrounded by safeguards aimed at providing reassurances to governments that they need not fear too much encroachment on their national sovereignty.

Initially, all complaints were first considered by the European Commission on Human Rights ('the Commission'). If a complaint was deemed admissible, an effort had to be made to broker a 'friendly settlement'. In the absence of such a settlement, the Commission reported on the facts and expressed its opinion on the merits of the case. That report went to the Committee of Ministers, a political body, which could endorse or reject it. Where the state concerned had opted to accept the compulsory jurisdiction of the Court, either the Commission or that state could refer the case to the Court for a final, binding adjudication.

Over time, more and more states accepted the compulsory jurisdiction of the Court and acceptance of the complaints procedure itself had become unanimous by 1990. A major reform introduced in 1994 (when Protocol No. 9 entered into force) allowed applicants to submit their case to a screening panel composed of three judges, which decided whether the Court should take up the case. There have since been several waves of reform, considered below. The entire system was streamlined by

Protocol No. 11 of 1994, by which the right of individual petition became compulsory, the Commission ceased to exist (as of October 1999), the Court became full-time and assumed all the relevant functions of the Commission, individuals gained direct access to the Court, and the political (and too often problematic) role played by the Committee of Ministers was limited to matters of enforcement.

Protocol No. 14 came into force in 2014, enabling lower priority and repeat cases to be dealt with by three-judge panels. Between 2010 and 2019, the so-called Interlaken process (involving high-level meetings in Interlaken in 2010, Izmir in 2011, and Brighton in 2012), yielded further procedural refinements and led to the adoption of Protocol No. 15 which added this paragraph to the Convention's preamble:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention

This was a concession to significantly stronger demands put forward by the United Kingdom and Denmark. In principle it only reiterated existing approaches, but in practice the reiteration carried important political significance, as explained below. The official 'explanatory report' on the protocol states that:

7. ... [The new text refers] to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law. ...

...

9. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Protocol No. 16, which entered into force in 2018, enables the Court to issue Advisory Opinions (see below).

In 2025, immigration loomed as a major catalyst to further change in the system. In a letter dated 22 May 2025 nine European heads of government (from Denmark, Italy, Austria, Belgium, the Czech Republic, Estonia, Latvia, Lithuania, and Poland) circulated a letter declaring their firm belief in 'European values, the rule of law and human rights' while calling for a discussion on the challenges posed by 'irregular migration'. The leaders note that although some immigrants to Europe have integrated themselves culturally, others have not, instead 'isolating themselves in parallel societies and distancing themselves from our fundamental values of equality, democracy and freedom. In particular, some ... have chosen to commit crimes.' They note that while 'this concerns only a minority of immigrants, it risks undermining the very foundation of our societies.' In their view, a key question is whether the ECtHR 'has extended the scope of the Convention too far ... , thus shifting the balance between the interests which should be protected.'

In particular, ‘the safety and stability of our own societies should have the highest priority. We believe that:

- We should have more room nationally to decide on when to expel criminal foreign nationals. ...
- We need more freedom to decide on how our authorities can keep track of for example criminal foreigners who cannot be deported from our territories. ...
- We need to be able to take effective steps to counter hostile states that are trying to use our values and rights against us. For example, by instrumentalizing migrants at our borders.’

They concluded by calling for ‘a new and open minded conversation about the interpretation of the [ECHR]. We have to restore the right balance. And our countries will cooperate to further this ambition.’

Interpretative Principles

Steven Greer and Lewis Graham, in ‘Europe’, in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *International Human Rights Law* (4th ed., 2022) 463, at 477 provide an overview of some of the principles developed by the ECtHR:

The Court also applies a number of ‘principles of interpretation’ not found in the text of the Convention The principle of effective protection of individual rights holds that ... rights should be interpreted broadly and exceptions narrowly. This is linked to the principle of non-abuse of rights and limitations, which prohibits states and others from undermining rights by abusing either the rights themselves or their limitations. ... The principle of positive obligations permits the Court to interpret the ECHR so as to impose obligations upon states actively to protect Convention rights, and not merely the negative obligation to avoid violating them.

Armed with the principle of autonomous interpretation, the Court can define some of the Convention’s key terms in order to prevent states conveniently redefining their way around their obligations, for instance, by redesignating crimes as mere ‘administrative infractions’. Similarly, the principle of evolutive, or dynamic, interpretation enables outmoded conceptions of how terms in the Convention were originally understood to be abandoned when significant, durable, and ... pan-European changes in the climate of European public opinion have occurred The twin principles of subsidiarity and supervision ... indicate that the role of the Court is subordinate to that of member states

The principle of proportionality limits interference with Convention rights to that which is least intrusive in pursuit of a legitimate objective, while the closely related doctrine of the margin of appreciation refers to the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their Convention obligations. Pervasive in the ECHR are the closely related principles of legality, the rule of law, and procedural fairness - which seek to subject the exercise of public power to effective, formal legal constraints in order to avoid arbitrariness - and the principle of democracy, which assumes that human rights flourish best in the context of democratic political institutions and a tolerant social climate.

... [B]ecause the Court considers itself less well placed than national authorities to prescribe what should be done, adverse judgments typically declare only that the ECHR has been breached. Where this is the case, an award of compensation, though not automatic, is now the norm. Excluding claims under Article 1 Protocol No 1 (which reflect the value of the property involved) and

other outliers, the average compensation per applicant is in the region of €8,300

....

The Judges

The Court is composed of 46 judges, the same number as there are state parties to the Convention. They are elected in their individual capacity and not as a representative of any state. The position is full-time and salaried and judges cannot engage in any activities that would be incompatible with their independence, impartiality, and demands of their judicial role. They are elected for a non-renewable nine-year term, and must not be over 65 when nominated. The first step in electing a judge is a national selection procedure, in which the State party selects three qualified candidates. Their qualifications, as well as the process followed, are then assessed by the Committee on the Election of Judges to the ECtHR, which interviews the candidates and ranks them. Judges are elected by the 306-member Parliamentary Assembly of the Council of Europe, in a secret ballot.⁴⁵⁸

The plenary Court elects its President and two Vice-Presidents for a three-year period, with the possibility of re-election. Administratively, the Court consists of five geographically and gender-balanced Sections, each with its own President. They work in four formations: (i) a single judge, who may decide only on clearly inadmissible complaints; (ii) a three-judge committee which may rule on admissibility, and on the merits if a case falls clearly within well-established case law; (iii) a Chamber of seven judges may decide cases, by majority vote; and (iv) the Grand Chamber (17 judges, including the Court's President and Vice-President, the Presidents of the five Sections, and a judge with the same nationality as the defendant State. The Grand Chamber hears appeals from a Chamber judgment, and cases relinquished by a Chamber that involves an important or novel question. The Registry, headed by an elected Registrar, provides legal and administrative support to the Court and its 650 staff members play an important role in drafting majority judgments. In 2024, the Court's budget was 85 million euros.

Individual Petitions

Individual petition proceedings under Article 34 begin with a complaint by an individual, group or NGO against a state party. To be declared admissible a petition must not be anonymous, manifestly ill-founded, or constitute an abuse of the right of petition. Domestic remedies must have been exhausted, the petition must be presented within four months of the final decision in the domestic forum, and it must not concern a matter which is substantially the same as one which has already been examined under the ECHR or submitted to another procedure of international investigation or settlement.

The procedure before the Court is adversarial and public and is largely written. Hearings take place only in a very small minority of cases. Individual applicants should be legally represented once the application has been communicated to the respondent state, and legal aid is available. Applications may be submitted in any official state language, but the Court itself operates in English and French.

In 2022, 1,718 cases were the subject of 'friendly settlements.' Although by December 2019, some 10,500 cases had been settled, this procedure is now being pushed much more systematically. Veronika Fikfak, in 'Against Settlement before the European Court of Human Rights', 20 *Int'l J. Const. L.* (2022) 942, describes this as being designed 'to nudge individual victims towards settlement, accelerate proceedings in less contentious cases, and free up time for the Court to dedicate to cases raising new issues.' While cases challenging the undue length of domestic judicial proceedings are the most commonly settled, 20 percent of all settled cases involve Article 3 violations (torture etc.). While 202 such cases had been settled by the end of 2009, 1,392 Article 3 cases were settled between 2010 and 2020. Fikfak warns that the trend may be problematic:

⁴⁵⁸ 'Procedure for the election of judges to the European Court of Human Rights', Parliamentary Assembly Doc. SG-AS (2023) 01rev06 (26 April 2023); and A. Drzemczewski, 'The Election of Judges onto the European Court of Human Rights', in S. Vassiliev et al (eds.), *Governance of International Courts and Tribunals: Institutions, Practices and Norms* (2025) 000.

The motives of the Registry and the interests of the state are in synergy—both want cases to go away, and they are willing to work together to make sure this happens. ... [I]ndividual victims [are affected] in several ways: first, the new default rule that all cases have to go through a settlement phase necessarily acts as a “nudge,” encouraging individuals to settle their cases and renounce the examination of their complaints in substance. Second, the close relationship between the state and the Registry acts to reinforce certain biases that favor the state and its position as a repeat player. ... [S]ettlement provides little or no room for long-term justice. Not only can the settlement remain unenforced, if a unilateral declaration closes a dispute which is part of a general, systemic problem, these infringements will remain hidden and unreported, and they will keep recurring. The settlement has resolved little or nothing.

In seeking to prioritize certain cases, the Court’s ‘Priority Policy’ lists seven categories of applications, in descending order:

- I. Urgent – such as risk to life or health, deprivation of liberty, well-being of a child.
- II. Raising questions capable of having an impact on the effectiveness of the Convention system or an important question of general interest.
- III. Raising issues affecting ‘core rights’ (Articles 2, 3, 4 or 5(1) involving direct threats to physical integrity and dignity.
- IV. Potentially well-founded applications based on other Articles.
- V. Raising issues already dealt with in well-established case-law.
- VI. Problematic admissibility.
- VII. Manifestly inadmissible.

Since 2021 the Court has used a targeted strategy aimed for processing ‘impact’ cases. While these do not concern core Article 2 or 3 rights, they raise issues of considerable relevance for the State concerned and for the Convention system as a whole. Efforts to process them more expeditiously have been successful. Examples cited in the *Court’s Annual Report 2022* (2023) include cases on sexual harassment in the workplace; wheelchair access to public buildings; judges’ freedom of expression; shortcomings of a national minority voting system; and the failure to implement swift and comprehensive desegregation measures in an elementary school.

In 2024, the Court ruled on 36,819 applications, including handing down judgments on 10,829 cases a 56% increase over 2023), and struck out or declared inadmissible 25,990 applications. In January 2025, 60,350 applications were pending. Of those, 68% concerned four countries: Türkiye (21,613 applications); Russia (8,130); Ukraine (7,703); and Romania (3,847). Others were Greece (2,613), Italy (2,141) and Poland (2,050).⁴⁵⁹

In terms of specific violations, well over half of all those found between 1959 and 2022 (12,520 of a total of 21,784) concerned the right to a fair trial (Article 6). There were 4,495 violations relating to Article 3 (torture/inhuman or degrading treatment), 3,115 relating to the right to an effective remedy (Article 13), and 3,810 relating to the right to property (Protocol No. 1).⁴⁶⁰

Interim Measures ⁴⁶¹

The Convention contains no provision authorizing the Court to issue interim measures. Rule 39 of the Rules of Court, as revised, provides that the Court may ‘indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.’ It was originally considered non-binding and in 1991, the Court voted 10-9 against

⁴⁵⁹ Council of Europe, *Analysis of statistics 2024* (2025).

⁴⁶⁰ Council of Europe, *Violations by Article and by State 1959-2022* (2023).

⁴⁶¹ See generally E. Rieter and K. Zwaan (eds.), *Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures* (2021); and F. Palombino, R. Virzo and G. Zarra (eds.), *Provisional Measures Issued by International Courts and Tribunals* (2021).

finding an implied right to order binding interim measures (*Cruz Varas and Others v. Sweden*). But in 2003, following a precedent set by the International Court of Justice in the *LaGrand (Germany v. United States of America)* case (I.C.J. Reports 2001, para. 109), the ECtHR based itself on general principles of international law and the approach adopted by UN treaty bodies and the ICJ to authorize such measures.⁴⁶² In 2005, in *Mamatkulov and Askarov v. Turkey*, the Grand Chamber stated that interim measures could be granted if there is (a) the presence of an imminent risk of (b) irreparable harm to (c) a ‘core right’. In March 2024, Rule 39 was revised to require ‘an imminent risk of irreparable harm to a Convention right.’

This approach has gradually expanded to a range of situations in which applicants would otherwise face a real risk of serious and irreversible harm. The most typical cases are those where, if the expulsion or extradition takes place, the applicants would fear for their lives or would face ill-treatment prohibited by Article 3. Interim measures have also been indicated in relation to the right to a fair trial, the right to respect for private and family life, and freedom of expression. Such measures are not indicated ‘to prevent the imminent demolition of property, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court’s decision as to the fairness of the proceedings; to ensure the holding of a referendum; to prevent the dissolution of a political party; or to freeze the adoption of constitutional amendments affecting the term of office of members of the judiciary.’⁴⁶³

But in recent years, the Court has issued an increasing number of atypical interim measures. In March 2022, for example, it indicated to the Russian Government in the aftermath of the invasion of Ukraine that they ‘should refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops’, and should ensure unimpeded access of the civilian population to safe evacuation routes, healthcare, food and other essential supplies, rapid and unconstrained passage of humanitarian aid and movement of humanitarian workers.⁴⁶⁴

In June 2022, interim measures were granted at the request of an asylum-seeker from Iraq who was facing imminent removal from the United Kingdom to Rwanda under an asylum partnership agreement between those two governments. Immediately before the planned departure of a charter flight to Rwanda the Court indicated that the UK Government should not act until three weeks after the delivery of the final domestic decision in ongoing judicial review proceedings. The removal was subsequently halted.⁴⁶⁵

In response to criticism by some states, there were 1,630 decisions on interim measures in 2024, representing a 38% decrease compared with 2023. 371 requests were granted (a 74% reduction) and requests were dismissed in 347 cases.⁴⁶⁶ But compliance with these measures remains a major problem as indicated by Giulia Gentile and Daria Sartori, in ‘Interim Measures as “Weapons of Democracy” in the European Legal Space’, 1 *Eur. Hum. Rts. L. Rev.* (2023) 18, at 29:

In the ECHR system, interim measures do not benefit from ad hoc supervision by a separate body acting *proprio motu*. The ECtHR itself carries out control over compliance, but it can do so only if the applicant pursues the case further—which is not always the case ... [T]he only power that the ECtHR has when confronted with non-respect of an interim measure is that of declaring, in the final judgment on the case, that a violation of art. 34 ECHR has occurred and ordering the state to pay an “award of just satisfaction” to the applicant. This will have very limited practical consequences, as the final judgment will be

⁴⁶² *Mamatkulov and Abdurasulovic v. Turkey*, Application Nos. 46827/99 and 46951/99, Judgment (6 February 2003), paras. 100–10.

⁴⁶³ ECHR, *Factsheet – Interim measures*, (February 2023), at 3.

⁴⁶⁴ Press Release ECHR 073 (2022) of 4 March 2022.

⁴⁶⁵ Press Release ECHR 199 (2022) of 15 June 2022.

⁴⁶⁶ ECHR, *Analysis of Statistics 2024* (2025).

delivered after quite some years, and the amount of the award is generally so low that states' officials have publicly ridiculed its effectiveness in preventing non-compliance. ...

Pilot Judgments⁴⁶⁷

A major challenge for the ECHR system has been large numbers of 'repetitive cases' which result from a dysfunction in the national legal system. One solution has been the adoption of 'pilot judgments', a procedure that emerged from a cluster of cases involving property rights in Poland (*Broniowski v. Poland* (2004)). After World War II and the redrawing of Poland's eastern border the Government undertook to compensate Polish citizens who had been repatriated and had had to abandon their property. Eventually, there were 78,380 claimants who had not received the compensatory property to which they were entitled. The Court requested the Government to ensure the claimants' property rights, through appropriate legal and administrative measures, or provide them with equivalent redress in lieu. As a result, Poland passed an appropriate new Law in 2005 and the Court found that the law and the compensation scheme were effective and struck out remaining applications.

The procedure was codified in Rule 61 of the Rules of Court. The Court can adopt such a procedure in situations involving 'the existence of a structural or systemic problem or other similar dysfunction' giving rise to multiple similar applications. It first seeks the views of the parties to determine the suitability of this approach in the circumstances, and gives priority attention to all applications included under the umbrella of the pilot judgment. In its judgment the Court identifies the nature of the systemic problems and the type of remedial measures that must be taken. It can prescribe a time limit for this purpose. The Court may adjourn its examination of all similar applications pending the adoption of the prescribed remedial measures, but may resume its examination at any time 'where the interests of the proper administration of justice so require'.

The procedure has been applied successfully in many instances, but it can also fail dismally, as pointed out by Angelika Nussberger in *The European Court of Human Rights* (2020) 172:

... [In] *Yuriy Nikolayevich Ivanov v Ukraine* (2009) ... an army veteran had complained of the prolonged non-enforcement of judgments ordering the authorities to pay him retirement payment arrears. This complaint revealed the systemic problem that Ukraine generally failed to honour judgment debts. In the Court's pilot judgment Ukraine was ordered to introduce an effective remedy affording adequate and sufficient redress. It failed to do so, and the number of applications grew exponentially. In the follow-up case *Burmych v Ukraine* the Court was already confronted with 12,143 similar applications ... [T]he Court ... decided to strike out all the cases. It held that it had discharged its function [by] identifying the systemic shortcoming, finding a violation ... and giving guidance as to the general measures to be taken. ... [Thus] the Committee of Ministers supervising the execution of the pilot procedure [should] deal with all the remaining cases. ...

This can be seen as a measure of self-defence or as a declaration of bankruptcy. In any case it shows the limits of the Court's capacity to cure human rights violations where the states concerned refuse to cooperate.

Third Party Interventions

Since 1998, the Convention has given Contracting Parties the right to submit a third party observation if one of its nationals is an applicant in a case, a right invoked only ten times up until 2023, and may request permission to do so in any other case before the Court. Kanstantsin Dzehtsiarou, in 'Conversations with Friends: "Friends of the Court" Interventions of the States Parties to the

⁴⁶⁷ J. Czepek, 'The Application of the Pilot Judgment Procedure and Other Forms of Handling Large-Scale Dysfunctions in the Case Law of the European Court of Human Rights', 20 *Int'l Community L. Rev.* (2018) 347.

European Convention on Human Rights’, 43 *Legal Studies* (2023) 381 calculates that states have intervened in 11 per cent of cases before the Grand Chamber. Since 2005 this has states intervening on average in three such cases each year. By comparison, NGOs, academics, and other international actors (such as the OHCHR) have intervened in 124 cases, or 30 per cent of the total.

Supervision of Judgments and the Situation of Russia

Article 46 of the ECHR obliges Contracting States to ‘abide by the final judgment of the Court’, and the task of ensuring that this happens is entrusted to the Committee of Ministers which meets quarterly to review progress. In principle, it is for the State to decide the means by which it will comply with a judgment, but it must notify the Committee first through a plan and then an ‘action report’. Once all necessary measures have been taken, the Committee closes the report. National parliaments, NGOs, national ombudsmen, and other actors can play a role in the process.⁴⁶⁸

In its annual report entitled *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2024* (2025) at 12, the Committee notes that it ‘successfully closed its supervision of the execution of 894 cases (including 161 leading cases requiring specific and often wide-ranging measures by states to guarantee non-repetition of the violations)’.

Nevertheless, there were still 3,916 cases pending full execution, although 40% concern Russia, which has ceased all cooperation. If a question of interpretation is thought to be hindering execution, the Committee may seek a clarifying ruling from the Court. Where a State refuses to abide by a final judgment, the Committee can refer the matter to the court. If the latter then finds a violation of Article 46, the case returns to the Committee to consider what might be done. An example of this procedure, only the second time it has been invoked, appears below. If all else fails, the Committee might consider proposing that the State’s voting rights in the Council of Europe be suspended or that it be expelled altogether. Neither option is attractive in practice.

The first case in which infringement proceedings have been taken was against Azerbaijan in 2019.⁴⁶⁹ The second case, against Türkiye, involved Mehmet Osman Kavala, described by the Court as ‘a businessman, [and] human-rights defender in Türkiye [who] has been involved in setting up numerous [NGOs] ... active in the areas of human rights, culture, social studies, historical reconciliation and environmental protection.’ He was detained on 18 October 2017 on suspicion of attempting to overthrow the government and the constitutional order through force and violence. After convoluted proceedings at the national level, a Chamber of the ECHR in 2019 found a violation of Articles 5 (right to liberty and security) and 18 (limitation on use of restrictions on rights) of the ECHR. It held that ‘the authorities had been unable to demonstrate that the applicant’s initial and continued pre-trial detention had been justified by reasonable suspicions based on an objective assessment of the acts attributed to him’. Following that judgment, a Turkish court acquitted Mr Kavala on the charge of attempting to overthrow the government and ordered his provisional release. However, he was then rearrested on new charges, including military and political espionage. The ECtHR concluded that the true purpose of his detention was ‘reducing him to silence’. The Committee of Ministers raised the case repeatedly with the Government, but to no avail, and in February 2022, it referred the case to the Court. In *Proceedings Under Article 46 § 4, in the Case of Kavala v. Türkiye*, the ECHR Grand Chamber judgment of 11 July 2022 held that Türkiye violated Article 46:

173. ... [T]he Court considers that the measures indicated by Türkiye do not permit it to conclude that the State Party acted in “good faith”, in a manner compatible with the “conclusions and spirit” of the *Kavala* judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court found to have been violated in that judgment.

⁴⁶⁸ ECHR, ‘Guide on Article 46 of the European Convention on Human Rights: Binding force and execution of judgments’ (31 August 2022).

⁴⁶⁹ *Proceedings Under Article 46 § 4 in the Case of Ilgar Mammadov v. Azerbaijan* (Application no. 15172/13) Grand Chamber, (29 May 2019).

In response, Türkiye stated that ‘the ECtHR has unfortunately failed to meet our expectations by the decision ... and once again called into question the credibility of the European human rights system.’ It called upon the Committee of Ministers to set ‘aside its previous biased and selective approach, [act] in common sense and [avoid] certain circles’ efforts to politicize the matter.’⁴⁷⁰ In 2025, the Committee of Ministers was still seeking implementation.

The harshest penalty is expulsion from the Council of Europe, which happened to Russia in 2022. James L. Bischoff, in ‘Introductory Note ... on Russia’s Exclusion ...’, 62 *Int’l Legal Mat.* (2022) 295 explains the process:

... Under Article 8 [of the Statute], the Committee of Ministers may, by a two-thirds majority, suspend a member’s “rights of representation” if the state “has seriously violated Article 3” [committing it to respect the principles of the rule of law and human rights]. ...

Russia launched its full-scale invasion of Ukraine on February 24, 2022. The same day, the Committee of Ministers [condemned] the invasion. On February 25, the Committee voted 42 to 2 ... to suspend Russia’s rights of representation ..., finding a “serious violation” of Article 3. On March 1, the [ECHR] issued interim measures calling on Russia to refrain from military attacks against civilians and civilian objects in Ukraine. On March 3, the Committee ... [specified] the bodies in which Russia could no longer participate and [clarified] that suspension did not relieve Russia of its financial obligations, nor did it end the European Court’s jurisdiction over Russia.

On March 10, as evidence of atrocities mounted, the Committee of Ministers sought the views of the Parliamentary Assembly on “potential further use of Article 8.” ... Apparently seeing the writing on the wall, Russia filed a letter [on March 15] with the CoE Secretary-General conveying its decision to withdraw – as Greece’s military junta had done in 1969 to successfully avoid expulsion – and to denounce the ECHR. ...

... [O]n March 15, the Parliamentary Assembly found by ... 216 to 0 ... that “the Russian Federation has committed serious violations of the Statute ...” and “can therefore no longer be a member”

... In a consensus resolution on March 16, the Committee of Ministers noted [Russia’s] March 15 letter but proceeded under Article 8 to end Russia’s membership immediately, rather than wait for its withdrawal to take effect.

The resolution did not explain how Article 8 could be read to permit immediate expulsion of a member that has already announced its withdrawal. ...

... [Under Article 8, the] sanction of expulsion would appear to become available only if the Committee requests withdrawal and the member refuses. ... On this reading, assuming Russia’s March 15 withdrawal letter was valid, expulsion should have been unavailable and the withdrawal would have taken effect at the end of 2022. ...

... [But] the Committee ... proceeded directly to expulsion, an interpretation that seems rooted in member states’ determination not to allow Russia to exploit the rules to delay the consequences of its actions. ... Russia thus became the only state ever expelled from the CoE. On March 23, the Committee ...

⁴⁷⁰ Spokesperson of the Ministry of Foreign Affairs, Ambassador Tanju Bilgiç, ‘QA-19: Statement in Response to a Question Regarding the Decision by the ECtHR on the Execution of the Kavala Judgment’, (11 July 2022).

[clarified that Russia] could not remain a party to CoE conventions such as the ECHR that are closed to nonmembers of the CoE.

The European Court, in turn, declared that Russia would cease to be a party to the ECHR on September 16, interpreting an ambiguous provision of the ECHR as providing a six-month period of continued party status even after a member's expulsion from the CoE. The European Court clarified that it remained competent to "deal with" petitions alleging violations committed before September 16. Numerous petitions have since been filed despite dim prospects for Russia's participation in proceedings or compliance. ...

Since 3 March 2022, the Russian authorities have ceased all communication with the Department for the Execution of Judgments. In 2024, the Court transmitted 301 judgments against the Russian Federation to the Committee for supervision of their execution. These included two interstate cases: *Georgia v. Russia (IV)* and *Ukraine v. Russia (re Crimea)*.⁴⁷¹

QUESTION

1. There is a judge on the Court from every one of the contracting states and if that judge cannot serve on a case involving her home state, an ad hoc judge of that nationality is nominated. Commentators have argued that the nationality link for international judges is 'contrary to standard conceptions of independence and impartiality', as well as 'anachronistic and self-defeating'.⁴⁷² What are the consequences in terms of professionalism and judicial independence of retaining the nationality link?
2. Do you agree with a former Vice-President of the ECtHR that 'execution is crucial—judgments that are not implemented are not worth the paper they are written on'?⁴⁷³
3. It has been suggested, in the wake of Russia's expulsion/withdrawal that the 'inflexibility of the CoE system of sanctions reflects the - rather old-fashioned - state-centric structure of international law, which traditionally relies on state consent and sovereignty. It is now time to [design] more resilient, effective, and efficient international human rights regimes'.⁴⁷⁴ What would such a regime look like?

⁴⁷¹ *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2024* (2025), Ch. VII.

⁴⁷² T. Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed', 45 *Cornell Int'l. L. J.* 77 (2012), at 183.

⁴⁷³ Nussberger, at 156.

⁴⁷⁴ K. Dzehtsiarou and V. Tzevelekos, 'The Aggression Against Ukraine and the Effectiveness of Inter-state Cases in Case of War', 3 *Eur. Conv. Hum. Rts. L. Rev.* (2022) 165.

3. The Interstate Procedure: Article 33

Article 33 of the revised Convention contains a procedure by which one or more states may allege breaches of the Convention by another state party. Unlike the traditional approach to such cases under the international law of state responsibility for injury to aliens (Ch. 2B, above), it is not necessary for an applicant state to allege that the rights of its own nationals have been violated.

In general, states are reluctant to set in motion a formal condemnation procedure when they do not have a direct stake in the matter or when they perceive a serious risk of antagonizing the target state through what will be seen as a hostile act. One predictable result of such litigation would be the filing of a countersuit. There have so far been some 30 inter-State cases, but the Court's docket has been especially crowded in recent years.

Between 1956 and 1999, the former Commission considered 17 interstate applications, the most significant of which addressed only seven different situations: (1) *Greece v. United Kingdom* (1956, 1957) relating to the declaration of a state of exception in Cyprus (then a British colony); (2) *Austria v. Italy* (1960) concerning the murder trial of six members of the German-speaking minority in the South Tyrol; (3) *Denmark, Netherlands, Norway and Sweden v. Greece* (1967, 1970) relating to the coup d'état carried out by the Greek colonels in 1967; (4) *Ireland v. United Kingdom* (1971, 1972) relating to the state of emergency in Northern Ireland; (5) *Cyprus v. Turkey* (1974, 1975, 1977, 1996) cases arising out of the Turkish armed intervention in Cyprus; (6) *Denmark, France, the Netherlands, Norway and Sweden v. Turkey* (1982), alleging violations, including torture, by the military government. A settlement approved by the Commission was widely criticized on the ground that it was not based on respect for human rights; and (7) *Denmark v. Turkey* (1997) alleging torture of a Danish citizen during detention by Turkish authorities, and resulting in a friendly settlement.

Inter-state cases are initially heard by a seven-judge Chamber that includes those judges elected in respect of the applicant and respondent States. Rule 39 interim measures have often been granted. As of April 2023, Chamber and/or Grand Chamber hearings have been held in: (i) *Cyprus v. Turkey*; (ii) *Georgia v. Russia (I) and (II)* (Chamber and GC in each case); and *Slovenia v. Croatia* (GC) involving proceedings brought by a Slovenian bank to collect debts owed by Croatian companies.

In July 2025, there were 14 inter-state cases pending before the Court:⁴⁷⁵

Slovakia v. Belgium: lodged on 27 February 2025, relating to the death of a Slovak national following an incident involving the Belgian police at the Brussels-Charleroi airport.

Ireland v. United Kingdom (III): lodged on 17 January 2024, relating to the UK's Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

Georgia v. Russia (IV): lodged in 2018, relating to the human rights situation between Georgian-controlled territory and Abkhazia and South Ossetia.

Ukraine v. Russia: A Grand Chamber case: (i) *Ukraine v. Russia (re Crimea)*, based on applications lodged in 2014, 2015 and 2018. In addition: (ii) a Chamber case about a 2018 Kerch Strait naval incident involving the capture of Ukrainian sailors; and (iii) a 2021 case about targeted assassinations of perceived opponents of Russia.

Russia v. Ukraine: a 2021 case brought by Russia alleging killings, abductions, forced displacement, and restrictions on the use of the Russian language, as well as interruptions to the water supply in Crimea and Ukraine's alleged responsibility for the deaths of those on MH17 because it failed to close its airspace.

⁴⁷⁵ <https://www.echr.coe.int/inter-state-applications>

Liechtenstein v. the Czech Republic: a 2020 case concerning the latter's classification of Liechtenstein citizens as having German nationality for the purposes of a decree relating to the confiscation of property after World War II.

Armenia, Azerbaijan, Türkiye: Seven cases related to the 2020 conflict between Armenia and Azerbaijan/Nagorno Karabakh alleging widespread human rights violations of the Convention.

In inter-state cases, the ECtHR can award compensation ('just satisfaction'). In *Georgia v. Russia (I)* – involving Russia's collective expulsion of Georgians in 2006-07 – Russia had to pay Georgia 10,000,000 euros in non-pecuniary damage to be distributed to some 1,500 victims. In *Georgia v. Russia (II)*, the Grand Chamber, recalling its approach in *Varnava and Others v. Turkey*, explained its approach to damages:

"224. ... [T]here is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity ... and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. ... In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."

In its judgment of 28 April 2023, the Grand Chamber ruled that Russia had to pay Georgia a total of almost 130 million euros in relation to specified claims on behalf of affected individuals.

Kanstantsin Dzehtsiarou and Vassilis P. Tzevelekos, in 'The Aggression Against Ukraine and the Effectiveness of Inter-state Cases in Case of War', 3 *Eur. Conv. Hum. Rts. L. Rev.* (2022) 165 note some of the challenges that such cases pose for the ECtHR:

... *Resource Implications*

... inter-state cases, especially in the context of military confrontation, require the Court to examine and assess an enormous amount of evidence, witnesses, and claims concerning a major number of victims. The Court is expected to establish facts that are highly contested and which often require onsite visits. Such visits are difficult and costly ... Each of such cases involves hundreds of volumes of documents and other relevant materials. The ECtHR needs to review these materials, establish their authenticity, and make rulings on their basis. This task is time and resource consuming.

... The Court might not have the capacity to process even a relatively low number of inter-state applications. [Since] a well-resourced special ‘court’ ... to exclusively deal with this type of [case] is unlikely to happen any time soon ... the Court has to admit its limited capacity

... [In] *Georgia v Russia (II)*, the Court ... stated:

... Having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date.

...

The challenge of inter-state cases is in the fact that they can ‘overwhelm’ the Court. The ECtHR can easily spend all its resources on a handful of inter-state cases. ... [The only available option is for the Court to] choose how to deal with such applications. It has been argued that the Court can be active in suggesting friendly settlements in some cases, allowing counter-claims, and endorsing more adversarial proceedings which would place a higher burden on the parties to the case rather than on the Court itself.

... *Legitimacy and Effectiveness*

Apart from resource implications, inter-state applications are politically sensitive and confrontational ... [and] require a lot of dedication and careful decision-making. ...

... [First] the Court can be accused of applying varying standards in its decision making depending on the respondent state. ...

Second, inter-state cases last for years; often, when the judgment in an inter-state case is delivered, the key effects that it produces are rather ‘symbolic’, establishing the liability of a state, and the potential allocation of monetary compensation to the victims. Such delayed judgments can only serve to a limited extent any purposes of conflict resolution or prevent new conflicts in the future. For instance, ... *Georgia v Russia (II)* was delivered in 2021 and dealt with the situation that happened in August 2008. ...

Third, the implementation of inter-state judgments is problematic, and every unimplemented judgment can undermine the reputation of an international tribunal. Even ... establishing the appropriate remedies can prove to be a challenge. ... [In inter-state cases which are highly sensitive and compensation amounts are high] it is unlikely that these judgments will easily be executed. ...

4. The Court’s Jurisdiction

The ECtHR cannot consider an application unless it ascertains that it has jurisdiction over the case. If an event occurred prior to the state becoming a party to the ECHR and has no continuing dimension, if the state whose conduct is complained about is not a party to the Convention, and so on, the Court will have no jurisdiction. One of the most controversial and complex issues currently subject to debate is the extent to which the Court has jurisdiction over events which occur beyond the territory of a Contracting Party. The issue of extraterritorial jurisdiction arises in connection with situations which

have become increasingly common. They include, to take the examples dealt with below, situations in which a military strike is launched from within the legal space (*l'espace juridique*) of the Council of Europe but results in damage outside that area, actions taken by armed forces of one state operating in the territory of another which may or may not be a member of the Council of Europe, and the responsibility of a state contributing troops to a UN or other multilateral peacekeeping force under the auspices of the UN Security Council.

These issues highlight tensions that arise as the Court's approach evolves in response to challenges that were not foreseen at the time of drafting the ECHR. The Court has often affirmed the importance of a dynamic, evolutive or teleological approach to interpretation, but in relation to territorial jurisdiction it seems surprisingly reticent to adopt such an approach. The challenges discussed below also underscore the impact of globalization and the extent to which it remains possible to defend the notion that the Convention is essentially designed to uphold the human rights of those within the *espace juridique*. As boundaries become ever more porous and European states deepen their involvement in complex ways in neighbouring countries and beyond, such a restrictive notion will be increasingly challenged.

The most contentious of the cases below is *Banković*, decided in 2001, in which forces operating under the control of the North Atlantic Treaty Organization (NATO) fired a missile which killed and injured civilians in the course of an air strike on a television station. The Court rejected jurisdiction in that case but subsequently adjusted its position in the *Issa* case which follows. That case concerns the acts of Turkish Government troops in neighbouring Iraq which resulted in the killing of a number of individuals. Next is *Al-Skeini and Others v. United Kingdom* in which, after extensive litigation in the British courts, the ECtHR was called upon to determine whether six individuals killed by UK forces as the occupying power in an area of Iraq in 2003 could be considered to fall under the UK's ECHR jurisdiction. Finally, the 2021 Grand Chamber case of *Georgia v. Russia (II)* suggests that while *Banković* still reigns, its approach continues to be strongly contested within the Court.

BANKOVIĆ AND OTHERS V. BELGIUM AND OTHERS

EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 52207/99 (12 DECEMBER 2001)

[On 23 April 1999 a missile launched from a NATO forces aircraft hit a building in Belgrade housing the master control room of RTS, which operated three television channels and four radio stations. In total 24 targets were hit in the Former Republic of Yugoslavia (FRY) on the same night, including three in Belgrade. The applicants in the case included one person injured and five relatives of some of the 16 persons killed in the RTS attack. The respondent governments were all NATO members who were party to the ECHR: Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom.

After considering a range of issues the Court concluded that 'the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extra-territorial act [of firing a missile], capable of falling within the jurisdiction of the respondent States.' Before addressing the jurisdiction issue, the Court noted the applicable rules of interpretation. The framework is that reflected in the rules set out in the Vienna Convention on the Law of Treaties (VCLT). The Court also noted that 'it must remain mindful of the Convention's special character as a human rights treaty', as well as interpreting it 'as far as possible in harmony with other principles of international law of which it forms part'.]

(b) The meaning of the words "within their jurisdiction"

59. As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and

consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.

...

61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.

62. ... [In terms of state practice] no State has indicated a belief that its extraterritorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention ...

63. Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words “all persons residing within their territories” with a reference to persons “within their jurisdiction” with a view to expanding the Convention’s application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States.

64. It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court’s case-law. ...

65. However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection as opposed to the question, under discussion in the *Loizidou* case (*preliminary objections*), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 “solely” in accordance with the *travaux préparatoires* or finding those *travaux* “decisive”; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).

66. Accordingly, and as the Court stated in the *Soering* case:

“Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to ‘securing’ (*reconnaître* in the French text) the listed rights and freedoms to persons within its own ‘jurisdiction’. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.”

(c) *Extra-territorial acts recognised as constituting an exercise of jurisdiction*

67. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.

68. Reference has been made in the Court’s case-law, as an example of jurisdiction “not restricted to the national territory” of the respondent State (the *Loizidou* judgment (*preliminary objections*), at § 62), to situations where the extradition or expulsion of a person by a Contracting State may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and/or 6) and hence engage the responsibility of that State under the Convention.

However, the Court notes that liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad.

...

70. Moreover, in that first *Loizidou* judgment (*preliminary objections*), the Court found that, bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party was capable of being engaged when as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory. The obligation to secure, in such an area, the Convention rights and freedoms was found to derive from the fact of such control whether it was exercised directly, through the respondent State's armed forces, or through a subordinate local administration. The Court concluded that the acts of which the applicant complained were capable of falling within Turkish jurisdiction within the meaning of Article 1 of the Convention.

...

In its subsequent *Cyprus v. Turkey* judgment, the Court added that since Turkey had such "effective control", its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey's "jurisdiction" under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus.

71. In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

...

73. Additionally, the Court notes that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.

(d) Were the present applicants therefore capable of coming within the "jurisdiction" of the respondent States?

74. The applicants maintain that the bombing of RTS by the respondent States constitutes yet a further example of an extra-territorial act which can be accommodated by the notion of "jurisdiction" in Article 1

75. In the first place, the applicants suggest a specific application of the "effective control" criteria developed in the northern Cyprus cases... . The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction". Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words "within their jurisdiction" in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that

advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949.

Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State.

76. Secondly, the applicants' alternative suggestion is that the limited scope of the airspace control only circumscribed the scope of the respondent States' positive obligation to protect the applicants and did not exclude it. The Court finds this to be essentially the same argument as their principal proposition and rejects it for the same reasons.

...

79. Fifthly and more generally, the applicants maintain that any failure to accept that they fell within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection.

80. The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties. It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system.

It is true that, in its above-cited *Cyprus v. Turkey* judgment (at § 78), the Court was conscious of the need to avoid "a regrettable vacuum in the system of human-rights protection" in northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

...

4. *The Court's conclusion*

82. The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.

...

ISSA AND OTHERS V. TURKEY**EUROPEAN COURT OF HUMAN RIGHTS, CHAMBER JUDGMENT, APPLICATION NO. 31821/96
(16 NOVEMBER 2004)**

[The case was brought by six Iraqi nationals, who were shepherds and complained of the alleged unlawful arrest, detention, ill-treatment, and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995. The Turkish Government responded that while a military operation had taken place in this region at the relevant time, its forces had not been within ten kilometres of the area where the alleged violations occurred.]

II. Whether the applicants' relatives came within the jurisdiction of Turkey

...

B. The Court's assessment

...

68. ... [T]he concept of "jurisdiction" within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there ("extra-territorial act") may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.

69. According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action — whether lawful or unlawful — that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.

70. It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.

71. Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating — whether lawfully or unlawfully — in the latter State Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

2. Application of the above principles

72. In the light of the above principles the Court must ascertain whether the applicants' relatives were under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the latter's extraterritorial acts.

73. In this connection, the Court notes that it is undisputed between the parties that the Turkish armed forces carried out military operations in [the relevant area at the time]... .

74. The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States).

75. However, notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq... .

76. The essential question to be examined in the instant case is whether at the relevant time Turkish troops conducted operations in the area where the killings took place. The fate of the applicants' complaints in respect of the killing of their relatives depends on the prior establishment of that premise. The Government have vigorously denied that their troops were active in or around Azadi village in the Spna area. The reasonableness of that assertion must be tested in the light of the documentary and other evidence which the parties have submitted to the Court, having regard to the standard of proof which it habitually employs when ascertaining whether there is a basis in fact for an allegation of unlawful killing, namely proof "beyond reasonable doubt", it being understood that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

...

81. On the basis of all the material in its possession, the Court considers that it has not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question, and, more precisely, in the hills above the village of Azadi where, according to the applicants' statements, the victims were at that time.

3. The Court's conclusion

82. In the light of the above, the Court is not satisfied that the applicants' relatives were within the "jurisdiction" of the respondent State for the purposes of Article 1 of the Convention... .

AL-SKEINI AND OTHERS V. UNITED KINGDOM

EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 55721/07 (7 JULY 2011)

[Following the invasion of Iraq in March 2003 by the United States, the United Kingdom, and other coalition members, the United States and the United Kingdom, became occupying powers in May 2003. The United Kingdom was put in charge of the South East, including the province of Al-Basrah, with responsibility for maintaining security and supporting the civil administration. This case was brought by the relatives of six persons killed during that period. Three of the victims were shot dead by British soldiers; one was fatally wounded in an exchange of fire between a British patrol and unknown gunmen; one was beaten by British soldiers and forced into a river, where he drowned; and one, Baha Mousa, died of asphyxiation at a British military base, with 93 separate bodily injuries. The two principal issues before the Court were (1) whether it had jurisdiction over events in Iraq, as a non-party to the Convention and (2) whether the UK Government had fulfilled its Article 2 obligation to carry out an effective investigation into the killings. In relation to the latter, it held that there had been a violation, although it tailored the test to the circumstances ('the authorities must take the reasonable steps available to them'). The following excerpt concerns only the jurisdiction issue.

In the United Kingdom, the then House of Lords⁴⁷⁶ held that the death of Baha Mousa was within the UK's jurisdiction by analogizing a prison 'with the extra-territorial exception made for embassies'. In relation to the other five victims, killed by UK soldiers on patrol, the House of Lords followed *Banković* in concluding that they were not within the UK's jurisdiction.]

...

⁴⁷⁶ [2007] UKHL 26.

1. Jurisdiction

...

(b) *The Court's assessment*

(i) *General principles relevant to jurisdiction under Article 1 of the Convention*

...

(a) *The territorial principle*

...

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. [E]ach case ... must be determined with reference to the particular facts.

(β) *State agent authority and control*

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory

134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.

135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government... .

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV, the Court held that "directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory". In *Issa and Others v. Turkey*, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 86–89, 30 June 2009, the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* [GC], no. 3394/03, §67, ECHR 2010-... , the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".

(γ) *Effective control over an area*

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration. Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.

...

(δ) *The Convention legal space ("espace juridique")*

141. The Convention ... does not ... purport to be a means of requiring the Contracting States to impose Convention standards on other States.

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space". However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction.

...

(iii) *Conclusion as regards jurisdiction*

149. [F]ollowing the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

...

CONCURRING OPINION OF JUDGE BONELLO

...

5. Up until now, the Court has, in matters concerning the extra-territorial jurisdiction of Contracting Parties, spawned a number of "leading" judgments based on a need-to-decide basis, patchwork case-law at best. Inevitably, the doctrines established seem to go too far to some, and not far enough to others. As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different facts...

...

7. ... [T]he judicial decision-making process in Strasbourg has, so far, squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more

universal application. A considerable number of different approaches to extra-territorial jurisdiction have so far been experimented with by the Court on a case-by-case basis, some not completely exempt from internal contradiction.

...

16. In my view, the one honest test, in *all* circumstances (including extra-territoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State. All the rest seems to me clumsy, self-serving alibi hunting, unworthy of any State that has grandiosely undertaken to secure the “universal” observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d’être* should be to ensure that those obligations are not avoided or evaded. The Court has, in the present judgment, thankfully placed a sanitary cordon between itself and some of these approaches.

...

* * *

A related issue, addressed by the Court in a judgment issued on the same day as *Al-Skeini*, is whether actions taken by national forces in furtherance of a binding UN Security Council resolution could be evaluated for compliance with the ECHR. In *Al-Jedda v. United Kingdom* (App. No. 27021/08, judgment of 7 July 2011) the Court unanimously rejected the government’s claim that the internment action impugned in the application was attributable to the UN and not to the United Kingdom.

The Court ... noted that, at the time of the invasion in March 2003, there was no UN Security Council (UNSC) resolution providing for the allocation of roles in Iraq if the existing regime was displaced. In May 2003 the US and the UK, having displaced the previous regime, assumed control over the provision of security in Iraq; the UN was allocated a role in providing humanitarian relief, supporting the reconstruction of Iraq and helping in the formation of an Iraqi interim government, but had no role as regards security. The Court did not consider that subsequent UNSC Resolutions altered that position. As the UNSC had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force, Mr Al-Jedda’s internment was not attributable to the UN. It took place within a detention facility in Basrah City, controlled exclusively by British forces. He was therefore within the authority and control of the UK throughout ...⁴⁷⁷

GEORGIA V. RUSSIA (II)

EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 38263/08 (21 JANUARY 2021)

[In August 2008, following a period of tension, provocation and incidents between Georgia and Russia, Russia invaded and occupied the disputed territories of Abkhazia and South Ossetia. During the active phase of the conflict, Russian troops also invaded areas of undisputed Georgian territory (the ‘buffer zone’). Georgia alleged that acts committed by Russian armed forces in the course of the invasion violated several articles of the Convention and Protocols. The Court examined the case in terms of two separate time periods: (i) the active phase of hostilities during the five-day war after the intervention by the Russian armed forces (from 8 to 12 August 2008); and (ii) the occupation phase after the cessation of hostilities (ceasefire agreement of 12 August 2008). The key issue concerned the jurisdiction of the Court.]

⁴⁷⁷ ECtHR, Factsheet on Extra-territorial Jurisdiction of ECHR States (December 2011). 4.

IV. ACTIVE PHASE OF HOSTILITIES DURING THE FIVE DAY WAR (FROM 8 TO 12 AUGUST 2008)

105. The applicant Government submitted that the military operations (bombing, shelling, artillery fire) by the Russian armed forces and/or South Ossetian forces during the conflict had breached Article 2 of the Convention.

A. Jurisdiction

...

3. *The Court's assessment*

(a) *General principles ...*

113. The present case marks the first time since the decision in *Banković and Others* ... that the Court has been required to examine the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict, the existence of which is not disputed by the parties.

114. However, the Court's case-law on the concept of extraterritorial jurisdiction has evolved since that decision, in that the Court has indicated, inter alia, that the rights under the Convention could be "divided and tailored" and has introduced a nuance into the concept of the Contracting States' "legal space" In addition, it has established a number of criteria for the exercise of extraterritorial jurisdiction by a State, which must remain exceptional

115. The two main criteria established by the Court in this regard are that of "effective control" by the State over an area (spatial concept of jurisdiction) and that of "State agent authority and control" over individuals (personal concept of jurisdiction)

...

(b) *Application of the above principles to the facts of the case*

125. In the present case the Court is required to examine whether the conditions applied by the Court in its case-law to determine the exercise of extraterritorial jurisdiction by a State may be regarded as fulfilled in respect of military operations carried out during an international armed conflict.

126. In ... the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot generally speak of "effective control" over an area. ...

...

130. In most of the cases that it has examined since its decision in *Banković and Others*, the Court has found that the decisive factor in establishing "State agent authority and control" over individuals outside the State's borders was the exercise of physical power and control over the persons in question

131. Admittedly, in other cases concerning fire aimed by the armed forces/police of the States concerned, the Court has applied the concept of "State agent authority and control" over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention

132. However, those cases concerned isolated and specific acts involving an element of proximity.

133. By contrast, the active phase of hostilities which the Court is required to examine in the present case in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to put the Georgian army hors de combat and to establish control over areas forming part of Georgia.

134. [The Court quotes in detail from para. 75 of *Banković and Others*].

...

136. The Court sees no reason to decide otherwise in the present case. The obligation which Article 1 imposes on the Contracting States to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention is, as indicated above, closely linked to the notion of “control”, whether it be “State agent authority and control” over individuals or “effective control” by a State over a territory.

137. In this connection, the Court attaches decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no “effective control” over an area as indicated above (see paragraph 126), but also excludes any form of “State agent authority and control” over individuals.

138. The Court therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict.

...

140. That said, the Court is sensitive to the fact that such an interpretation of the notion of “jurisdiction” in Article 1 of the Convention may seem unsatisfactory to the alleged victims of acts and omissions by a respondent State during the active phase of hostilities in the context of an international armed conflict outside its territory but in the territory of another Contracting State, as well as to the State in whose territory the active hostilities take place.

141. However, having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date.

142. If, as in the present case, the Court is to be entrusted with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, it must be for the Contracting Parties to provide the necessary legal basis for such a task.

143. The Court reiterates in this connection that this does not mean that States can act outside any legal framework; as indicated above, they are obliged to comply with the very detailed rules of international humanitarian law in such a context.

144. Having regard to all those factors, the Court concludes that the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention. Accordingly, this part of the application must be declared inadmissible, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

[The Court did, however, find that Russia exercised effective control over South Ossetia, Abkhazia and the buffer zone during its occupation of these areas from 12 August to 10 October 2008, and that events in those areas were therefore within its jurisdiction. After examining considerable evidence regarding the actions of Russian troops in this period, the Court found that Russia had committed violations of the Convention and Protocols in respect of the systematic killing of civilians and torching and looting of houses after the cessation of hostilities; arbitrary detention of Georgian civilians; ill-treatment and torture of prisoners of war; refusal to allow Georgians displaced by the invasion to return; and failure to investigate or provide remedies in respect of these violations.]

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA, WOJTYCZEK AND CHANTURIA

...

II. The question of jurisdiction during armed conflicts

6. ... It is obvious that combat is a different army mission from rescue operations or policing. Yet there can be no doubt that the use of the army to combat insurgents in a civil war is a form of exercise of public power and therefore of exercise of jurisdiction (*ultima ratio regum*). From the perspective of State power, the use of the army for fighting against the troops of another State is exactly the same in nature as the use of troops for fighting against insurgents in a civil war. Both situations are forms of exercise of State sovereignty and at the same time of exercise of public power over the persons affected. An order to bomb specific targets in a city is an act of public power, not only in respect of the troops which will execute it but also over the persons who are in the city in question and who will suffer.

...

8. To sum up this part of our opinion: the victims of the alleged human rights violations in the instant case committed during the active phase of the hostilities (8 to 12 August 2008) fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention.

III. The reasoning adopted by the majority

9. The instant judgment is based upon a series of assumptions and arguments with which we disagree.

...

We disagree with [the statement in para. 125]. In the present case the Court was required to establish whether there was a jurisdictional link between the persons affected by the actions of the respondent State, identified in the application submitted by Georgia, and the respondent State. As rightly stated in paragraph 115 of the judgment, “[t]he two main criteria established by the Court in this regard are that of ‘effective control’ by the State over an area (spatial concept of jurisdiction) and that of ‘State agent authority and control’ over individuals (personal concept of jurisdiction) ‘State agent authority and control’ over individuals and ‘effective control’ over an area are the main types of jurisdictional link, yet they are not the only ones.

Secondly, ... [w]e do not see why proximity [para. 132] should be relevant. In any event, we note that the criterion of proximity is fulfilled in the instant case, the military operations having been carried out close to an area under the effective control of the respondent State. More importantly, if jurisdiction has been established in respect of “isolated and specific acts”, it is obvious that the respondent State exercises jurisdiction within the meaning of Article 1 when it undertakes a large-scale operation involving innumerable acts with far reaching consequences (*argumentum a fortiori*).

Thirdly, ... [w]e disagree with [the position stated in para. 137]. As shown above, the very conduct of modern military operations presupposes certain forms of “State agent authority and control” over individuals. If the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos makes it necessary to exclude any form of “State agent authority and control” over individuals, then it is not possible to apply international humanitarian law.

Fourthly, ... [w]e are simply astonished by [the arguments in para. 141]. In our view, the role of this Court consists precisely in dealing in priority with difficult cases characterised by “the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances”. Moreover, “the fact that such situations are predominantly regulated by legal norms other than those of the Convention” should not be an obstacle for the application of the Convention. Furthermore, we are not proposing that the Court should “develop its case-law beyond the understanding of the notion of ‘jurisdiction’ as established to date” but rather that it should confer more consistency on the general principles established in the case-law and apply those principles in a more coherent way.

...

VI. Conclusion

15. ... It is true that the scope of a State's jurisdiction in armed conflict is limited but its legal existence cannot be denied. ...

... [T]o deny the jurisdiction of belligerent States over civilian populations in an area of military combat in an international conflict undermines the very logic of international humanitarian law, which, precisely, shifts civilians to the core of the military decision-making process and places them in complex legal relationships with the belligerent States, even before the first bullets are fired.

...

Partly Dissenting Opinion of Judge Pinto De Albuquerque

...

27. In my view, large-scale military operations outside national territory are no less the expression of State power than targeted policing operations within the State's borders, and the conduct of hostilities abroad is no less a State prerogative than any law-enforcement activity on national territory. In principled terms, engaging in an armed conflict is no less a State function than controlling borders. Hence the Court cannot evade this principle with the argument that "the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos" excludes jurisdiction. If detaining, injuring or killing a person abroad triggers jurisdiction, [as the Court accepted in other cases]... killing many more people cannot exclude jurisdiction, at least personal jurisdiction, regardless of any element of proximity between the State agents and the targeted population. It is not because the State acts far away from its borders that it can do abroad what it cannot do at home. ...

28. The absence of an Article 15 derogation has obviously nothing to do with jurisdiction, as the Court itself has previously admitted. The Court cannot give away its own *Kompetenz-Kompetenz* under Article 1 of the Convention just because the Contracting Parties have simply ignored Article 15. [For relevant state practice under Article 15, See Banković, para. 62, above.] Confusing the jurisdictional issue and the issue of the law applicable to the facts, as the majority do in the present judgment, only diverts from the fundamental question of the irrationality of the majority's position that the graver the State military conduct, the less intensive the Strasbourg oversight. Nor does it help to argue that the Court's jurisdiction should be determined by the practical difficulties it may face when dealing with a "large number of alleged victims and contested incidents", or with "the magnitude of the evidence produced", in sum, with "the difficulty in establishing the relevant circumstances". It is inconceivable that the Court should delimit its jurisdiction not in accordance with the legal criteria set out in the Convention, but in view of possible future procedural and technical complications in gathering and evaluating evidence. Moreover, the Court itself has long since adopted rather successful techniques of evidence-gathering and evaluation in complicated military situations

29. Equally unconvincing is the argument that the Court should not delve into "such situations [that] are predominantly regulated by legal norms other than those of the Convention", since it is oblivious to the patent fact that the majority themselves compare and contrast Convention-based substantive obligations and obligations derived from international humanitarian law

...

30. In sum, the Court will face a gargantuan task to restore the damage to its credibility caused by this judgment. The revival of *Banković and Others* ... is indeed deeply regrettable in the eyes of the victims

...

Partly Dissenting Opinion of Judge Chanturia

A. A closer look at the majority's arguments

...

14. What the majority have done was not merely resuscitate the otherwise lifeless *Banković* precedent (for which the Court was heavily criticised, and probably rightly so, in the past); they took a step backwards by deviating from the spatial concept of extraterritorial jurisdiction introduced by the very same *Banković* case on which the majority themselves relied. In *Banković and Others* the Court at least

attempted to justify its position by coming up with the “legal space” argument. By contrast, in the present case the majority failed to give due consideration to the fact that the applicant and respondent States were both High Contracting Parties to the Convention at the material time of the events, and that the shelling and bombing during the active phase of the hostilities had clearly occurred within the legal space (*espace juridique*) of the Convention

B. An issue with the approach to extraterritorial jurisdiction during an international armed conflict

1. Methodology

...

33. In my opinion, the fallacy of the methodology applied by the majority started with the separation of the active phase of the military conflict between Georgia and Russia from the subsequent period of occupation

34. It would have been more logical and compatible with the scope of the application as lodged by the applicant State to examine, for the purposes of determining the issues of jurisdiction, attributability and imputability, the active phase of the conflict not as a distinct, instantaneous event detached from the historical background but rather as a part of a continuing situation which included both the events that had occurred prior to the outbreak of the military conflict and those which happened afterwards.

...

Note: On 9 July 2025 the Grand Chamber delivered a 500-page judgment in *Ukraine and the Netherlands v. Russia* (nos. 8019/16, 43800/14, 28525/20 and 11055/22). The case focused on alleged violations during the conflict that began in Ukraine in 2014, up until September 2022 when Russia ceased to be a party to the ECHR, and on the shooting down of flight MH17 over eastern Ukraine on 17 July 2014. All passengers, including many Dutch nationals, were killed. The Court held unanimously that the conflict had involved patterns of violations of many Convention rights by Russia, and that the downing of MH17 breached international humanitarian law principles of distinction and precaution, and amounted to a prohibited indiscriminate attack (para. 461).

On the key issue of jurisdiction, the court adopted a more expansive approach than in *Banković* and did not rely on *Georgia v. Russia* (II) notion of chaos::

361. The reality of the extensive, strategically planned military attacks perpetrated by Russian forces across Ukrainian sovereign territory between 2014 and 2022, carried out with the deliberate intention and indisputable effect of assuming authority and control, falling short of effective control, over areas, infrastructure and people in Ukraine, is wholly at odds with any notion of chaos (compare *Georgia v. Russia* (II) ...). ... In these circumstances, the Russian Federation exercised, through its de jure and de facto armed forces, authority and control over individuals affected by its military attacks up until 16 September 2022. Such individuals therefore fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention. ...

5. The European Court in Action: Some Illustrative Cases

The role of the European Court is of particular importance for several reasons. First, in quantitative terms, is the fact that it now has the final say in relation to the interpretation of the human rights standards applicable in relation to 46 different nations and covering some 675 million people. Second, its caseload has expanded exponentially over the past two decades and this has important consequences in terms of the quantity and range of case law or jurisprudence being generated. This, in turn, is inevitably an important reference point, acknowledged or not, for the work of the other

leading human rights adjudicatory organs such as the African and Inter-American Courts and the ICCPR Committee.

Third, in qualitative terms, the jurisdiction of the Court now spans a diverse array of cultural contexts, political systems, social perspectives, and levels of economic development. As a result, where once it might have been portrayed as a Court whose docket covered only a rather limited range of issues, and often not necessarily those which were seen to be the most pressing, today it is confronted on a daily basis with virtually the full range of human rights challenges of the utmost importance within the societies concerned. A fourth reason for its importance is the crucial role it now plays both as a constitutional court in its own right, and in relation to national constitutional courts, across the whole of Europe. This role has been further enhanced by its capacity to provide Advisory Opinions, when requested, and by the increased emphasis it now places on active engagement with national constitutional courts. While it does not enjoy formal hierarchical superiority vis-à-vis the highest court in the EU, the Court of Justice of the European Union, the latter now gives careful attention to the normative pronouncements of the ECtHR, even though the EU's proposed accession to the Convention has so far failed to eventuate.

The decisions below explore some of the characteristic problems that arise when international tribunals decide human rights issues that may deeply affect the internal order of states. The cases excerpted are, however, limited in scope. They deal with the right to life, democracy, and the independence of the judiciary. The focus here is narrow because there are many ECtHR cases scattered elsewhere throughout this coursebook.

The differences between the handling of complaints within the UN system by a body such as the ICCPR Human Rights Committee and the European Court are striking. Of course, deep and often disputed moral and political premises inform the work of both types of body and sometimes enter into explicit debate. But the Court's opinions take the traditional forms of the law — the facts of the dispute, argument about the interpretation of the text and related argument about the policies or principles involved, reflection on the institutional role of the Court in relation to national political orders, the ultimate decision applying the Convention in a decision binding the states parties, and possible recourse to a political body if a state does not comply with the Court's decision. From this point of view, a study of the European Court's decisions best illustrates the promise of an international (regional) *legal* order brought to bear on national human rights issues.

a. The Right to Life

Article 2 of the Convention states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The cases that follow serve to highlight just a few of the very complex issues that have arisen in relation to the right to life. Recall that in Chapter 4 we saw the Indian Supreme Court relying heavily on this right in order to render a range of economic and social rights justiciable, and in Chapter 9 we saw the

ICCPR Committee proposing an expansive approach to the right to life in a couple of its General Comments. Although the ECHR recognizes no social rights (other than the right to education in Protocol No. 1), and the ECtHR has been rather conservative in relation to such matters, it has also developed jurisprudence under Article 2 that would support a much more robust notion of positive obligations in certain areas, such as in relation to the environment and climate change. Compare the ways in which it has approached the right to life in four representative cases.

MCCANN AND OTHERS V. UNITED KINGDOM
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 18984/91 (27 SEPTEMBER 1995)

[Three members of the Provisional IRA [Irish Republican Army] were shot dead on 6 March 1988 in Gibraltar by the British Army's 'special forces', the Special Air Service (SAS). The UK, Spanish, and Gibraltar authorities had been alerted to a planned terrorist attack, and were tracking the members of the group with a view to arresting them at the appropriate time. One of the group was seen parking a car and then joined the other two. It was decided to arrest them and the SAS soldiers on the scene were alerted. Fearing that they would be armed and were trying to detonate remote control devices, the soldiers shot them at close range. No weapons or detonator devices were found on the bodies of the suspects; nor did the car that had been observed contain any explosive device, although another car did. A Gibraltar jury returned verdicts of lawful killing, and judicial review was refused. The applicants claimed a violation of ECHR Article 2. The Court rejected as unsubstantiated the contention that the killings had been premeditated either by the soldiers or their superior officers.]

...

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, ... that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in [Article 2(2)] of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.

201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

(3) Control and organisation of the operation

202. ... [I]t had been the intention of the authorities to arrest the suspects at an appropriate stage

203. It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar ... if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation

204. [T]he Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to

the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

205. The Court [observes] that the danger to the population of Gibraltar — which is at the heart of the Government's submissions in this case — in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the authorities knew that there was no bomb in the car — which the Court has already discounted — or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C, and D it was considered likely that the attack would be by way of a large car bomb. A number of key assessments were made. In particular, it was thought that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted.

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous [although] they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility.

In addition, at the briefings or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture. It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted.

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the inquest, of which the competent authorities must have been aware, over-simplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a "suspect car bomb" was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb. It is recalled that while Soldier G had experience in car bombs, it transpired that he was not an expert in radio communications or explosives

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car bomb which, according to the assessments that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

211. However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. [A]ll four soldiers shot to kill the suspects Against this background, the

authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. ... [I]t is not clear whether [the soldiers] had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement.

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2[a]

...

FOR THESE REASONS, THE COURT

Holds by *ten votes to nine* that there has been a violation of Article 2 of the Convention;

...

FINOGENOV AND OTHERS V. RUSSIA
EUROPEAN COURT OF HUMAN RIGHTS, CHAMBER JUDGMENT, APPLICATIONS NOS.
18299/03 AND 27311/03 (20 DECEMBER 2011)

[On 23 October 2002, 40 Chechen separatists seized over 900 people in a Moscow theatre and held them hostage for three days. The theatre was also booby-trapped and 18 suicide bombers were positioned among the hostages. The terrorists demanded, *inter alia*, the withdrawal of Russian troops from Chechnya. The Federal Security Service (FSB) set up a ‘crisis cell’ to negotiate and free the hostages. Although several hostages were released, others were killed. The applicants believed that further negotiations were possible, but the authorities felt that all hostages might be killed. At around 5 a.m. on 26 October security forces pumped an unknown narcotic gas into the building and then stormed it. All the terrorists were killed and the majority of the hostages were freed. But 125 of them died either on the spot or in hospital. The applicants claimed that the rescue operation was chaotic in almost every respect.

Subsequently, the Moscow City Prosecution Office (MPO) opened a criminal investigation. An accomplice to the terrorists was convicted but the MPO repeatedly refused to investigate the actions of the authorities during the crisis. The investigation concluded that the 125 hostages had died from a combination of individual weaknesses and chronic illnesses, exacerbated by the stress of three days of captivity, and that the gas used had at best had an ‘indirect effect’ on their demise. The death of the hostages was therefore attributed to ‘natural’ factors and not the use of the gas by the FSB.]

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

...

C. The Court’s assessment

...

1. Whether the case falls within the ambit of Article 2 of the Convention

...

201. ... [T]he general conclusion of the expert report ... is difficult to accept. It is unthinkable that 125 people of different ages and physical conditions died almost simultaneously and in the same place because of various pre-existing health problems... .

202. ... [I]t is safe to conclude that the gas remained a primary cause of the death of a large number of the victims.

203. In sum, the present case is about the use of a dangerous substance (no matter how it is described) by the authorities within a rescue operation which resulted in the death of many of those whom the authorities were trying to liberate and in mortal danger for many others. The situation is thus covered by Article 2... . The Court has now to examine whether the use of force was compatible with the requirements of this provision.

...

4. Standard of scrutiny to be applied

...

212. The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, and recognises the complexity of this problem [as well as the particular problems faced by Russia].

213. ... The hostage-taking came as a surprise for the authorities... . so the military preparations for the storming had to be made very quickly and in full secrecy. It should be noted that the authorities were not in control of the situation inside the building. In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.

214. In contrast, the subsequent phases of the operation may require a closer scrutiny by the Court; this is especially true in respect of such phases where no serious time constraints existed and the authorities were in control of the situation.

...

5. The use of force

(a) Decision to storm

...

219. The question is whether [the Government's] aims could have been attained by other, less drastic, means... .

220. [G]enerally speaking, there is no necessity to use lethal force "where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence"... . [T]he situation in the present case was quite different: the threat posed by the terrorists was real and very serious. The authorities knew that many of the terrorists ... were well-trained, well-armed and dedicated to their cause ... ; that the explosion of the devices installed in the main auditorium would probably have killed all of the hostages; and that the terrorists were prepared to detonate those devices if their demands were not met.

...

226. In sum, the situation appeared very alarming. Heavily armed separatists dedicated to their cause had taken hostages and put forward unrealistic demands. The first days of negotiations did not bring any visible success; in addition, the humanitarian situation (the hostages' physical and psychological condition) had been worsening and made the hostages even more vulnerable. The Court concludes that there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the "lesser evil" in the circumstances. Therefore,

the authorities' decision to end the negotiations and storm the building in the circumstances did not run counter to Article 2 of the Convention.

(b) Decision to use the gas

...

228. [The Court's case law and relevant UN Principles] indicate that laws and regulations on the use of force should be sufficiently detailed and should prescribe, inter alia, the types of arms and ammunition permitted.

229. The legislative framework for the use of the gas in the present case remains unclear... The exact formula of the gas was not revealed by the authorities; consequently, it is impossible for the Court to establish whether or not the gas was a "conventional weapon", and to identify the rules for its use. In the circumstances the Court is prepared to admit that the gas was an ad hoc solution, not described in the regulations and manuals for law-enforcement officials.

230. ... [But the] general vagueness of the Russian anti-terrorism law does not necessarily mean that in every particular case the authorities failed to respect the applicants' right to life. Even if necessary regulations did exist, they probably would be of limited use in the situation at hand, which was totally unpredictable, exceptional and required a tailor-made response ...

231. The Court will now move to the applicants' main argument. They claimed that the gas had been a lethal weapon which was used indiscriminately against both terrorists and innocent hostages. That claim deserves the most serious consideration, since "the massive use of indiscriminate weapons ... cannot be considered compatible with the standard of care prerequisite to an operation involving use of lethal force by state agents". The Court observes that the German Constitutional Court in a judgment of 15 February 2006 found incompatible with the right to life, as guaranteed by the German Constitution, a law authorising the use of force to shoot down a hijacked aircraft believed to be intended for a terrorist attack. It found, inter alia, that the use of lethal force against the persons on board who were not participants in the crime would be incompatible with their right to life and human dignity... .

232. In the present case, however, the gas used by the Russian security forces, while dangerous, was not supposed to kill [A]lthough the gas was dangerous and even potentially lethal, it was not used "indiscriminately" as it left the hostages a high chance of survival, which depended on the efficiency of the authorities' rescue effort. The hostages in the present case were not in the same desperate situation as all the passengers of a hijacked airplane.

...

235. Another of the applicants' argument was that the concentration of the gas had been grossly miscalculated, and that the risks to the hostages' life and limb associated with its use outweighed the benefits The Government claimed that the gas dosage had been calculated on the basis of an "average person's reaction". The Court notes that even that dose turned out to be insufficient to send everybody to sleep In any event, the Court is not in a position to evaluate the issue of the dosage of the gas... .

236. In sum, the Court concludes that the use of gas during the storming was not in the circumstances a disproportionate measure, and, as such, did not breach Article 2 of the Convention.

6. Rescue and evacuation operation

237. ... [Was the operation] planned and implemented in compliance with the authorities' positive obligations under Article 2 of the Convention, namely whether the authorities took all necessary precautions to minimise the effects of the gas on the hostages, to evacuate them quickly and to provide them with necessary medical assistance

...

265. In other words, many important factual details in this case are missing. That being said, the Court stresses that its role is not to establish the individual liability of those involved in the planning and coordination of the rescue operation. The Court is called upon to decide whether the State as a whole complied with its international obligations under the Convention, namely its obligation to “take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life”.

266. The Court acknowledges that in such situations some measure of disorder is unavoidable. It also recognises the need to keep certain aspects of security operations secret. However, in the circumstances the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, belated beginning of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics. The Court concludes that the State breached its positive obligations under Article 2 of the Convention.

7. Effectiveness of the investigation

...

i. Whether the official investigation was “effective”

273. The present case clearly falls into the category of cases where the authorities must investigate the circumstances of the victims’ deaths [T]he events in issue “lay wholly, or in large part, within the exclusive knowledge of the authorities” in the sense that it was virtually impossible for the applicants to obtain any evidence independently from the authorities. In such circumstances the authorities were under an obligation to carry out an effective official investigation in order to provide a “satisfactory and convincing” explanation of the victims’ deaths and the degree of the authorities’ responsibility for it.

274. The Court stresses that it is not concerned with the investigation into the terrorist act itself. In this part the investigation appeared to be quite ample and successful The question is whether the investigation was equally successful in examining the authorities’ own actions during the hostage crisis.

275. The Court notes that the investigation was opened and continued under Articles 205 (“Terrorist acts”) and 206 (“Hostage-taking”) of the Criminal Code. Negligence by the authorities cannot be characterised under either of those two provisions

276. Although the investigation is not yet formally completed, the prosecution repeatedly decided that, as regards the authorities’ alleged negligence, there was no case to answer. The first decision in that sense was taken ... slightly over one month after the events

277. [While the investigation did address some relevant questions] in some other respects [it] was manifestly incomplete. First and foremost, the formula of the gas has never been revealed by the FSB to the domestic investigative authorities, despite the latter’s request to that end, although the investigative team included FSB officers and most of the experts in the case were also from the FSB, and thus, at least in theory, could have been trusted.

...

279. The Court is surprised by the fact that ... all of the crisis cell’s working papers were destroyed. In the Court’s opinion those papers could have been an essential source of information about the planning and conduct of the rescue operation The Government did not explain when those papers were destroyed, why, on whose authority and on what legal basis Even assuming that some of them might have contained sensitive information, indiscriminate destruction of all documents ... was not justified.

280. Amongst others, the investigators did not try to establish certain facts which, in the Court’s opinion, were relevant and even crucial for addressing the question of the authorities’ alleged negligence

281. Lastly, the investigative team was not independent [T]he members of the investigative team and the experts whose conclusions were heavily relied on by the lead investigator had conflicts of interests, so manifest that in themselves those conflicts could have undermined the effectiveness of the investigation and the reliability of its conclusions.

282. Other elements of the investigative process are probably also worthy of attention (such as the limited access to the materials of the case by the victims' relatives, and their inability to formulate questions to the officially appointed experts and examine witnesses). However, the Court does not need to examine these aspects of the proceedings separately. It has sufficient evidence to conclude that the investigation into the authorities' alleged negligence in this case was neither thorough nor independent, and, therefore, not "effective". The Court concludes that there was a breach of the State's positive obligation under Article 2 of the Convention on this account.

OSMAN V. UNITED KINGDOM
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO.
87/1997/871/1083 (28 OCTOBER 1998)

[A schoolteacher named Paul Paget-Lewis developed an obsession with Ahmet Osman, a teenage schoolboy. After a long series of incidents in which Paget-Lewis was suspected but never charged, he shot and wounded Ahmet and killed his father Ali Osman. Ahmet's mother and the wife of Ali complained that the authorities had failed to appreciate and act on a series of clear warning signs that Paget-Lewis represented a serious threat to the family's physical safety.]

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

B. The Court's assessment

...

2. As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice

[Where the authorities are alleged to have violated their positive obligations] it must be established to [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged

reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 [I]t is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

On the above understanding the Court will examine the particular circumstances of this case.

...

121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis [The police] cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the Court concludes that there has been no violation of Article 2 of the Convention in this case.

...

CARTER V. RUSSIA

EUROPEAN COURT OF HUMAN RIGHTS, CHAMBER JUDGMENT, APPLICATION NO. 20914/07 (21 SEPTEMBER 2021)

[On 23 November 2006, Alexander Litvinenko, a Russian political exile and businessman living in the United Kingdom, died of acute radiation syndrome caused by ingesting polonium 210. Litvinenko was a former member of the KGB and FSB (the security agency of the USSR and Russia respectively) who fled to the UK in 2000 after making statements to international media alleging that he had received unlawful orders from his FSB superiors. He became a vocal critic of corruption within Russia's political and intelligence infrastructure.

Litvinenko also undertook private security work, which involved liaising with contacts in Russia. One of these contacts was Andrey Lugovoy, another former FSB officer. After meeting with Lugovoy in the UK a number of times during October and November 2006, Litvinenko became severely ill from radiation poisoning. Radiation contamination was found in hotel rooms in which Lugovoy and his associate, Mr Kovtun, had stayed, as well as in a teapot from which Litvinenko had drunk during a meeting.

The UK police investigated the poisoning and charged Lugovoy and Kovtun with Litvinenko's murder; however, Russia refused to extradite the men on the ground that extradition of nationals is prohibited by its Constitution. In response, Russia's Prosecutor General launched its own criminal investigation, but brought no charges. In 2007, despite having no previous political experience, Lugovoy was made a member of Russia's parliament and acquired parliamentary immunity. Notably, in these proceedings the Russian government failed to produce any documents requested by the Court relating to its own investigation of the affair.

In 2016, the UK published the results of an inquiry into the affair which found, to the criminal standard of proof ('beyond reasonable doubt'), that Litvinenko had been intentionally poisoned by Lugovoy and Kovtun by polonium placed in a teapot during their meeting.

The applicant, Litvinenko's widow, claimed before the Court that her husband's murder was carried out under the direction or with the acquiescence or connivance of the Russian state, and that Russia had failed to effectively investigate his murder. She asserted that this amounted to a violation of Articles 2 (the right to life) and 3 (the prohibition on torture) of the Convention.]

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

111. The applicant complained under Articles 2 and 3 of the Convention that her husband, Mr Litvinenko, had been murdered in a particularly painful manner by Mr Lugovoy (with others) while acting as an agent for, or in connivance with, or with the knowledge and support of, the Russian authorities, and that the Russian authorities had failed to conduct an effective investigation into the murder. The Court will consider this complaint from the standpoint of the right to life

...

B. The Court's assessment

3. *Merits*

(a) Procedural obligation under Article 2⁴⁷⁸

[The Court found that Russia's investigation was ineffective and inadequate, and that the procedural limb of Article 2 had therefore been violated. Although Russia claimed to have taken some steps to establish the facts of the case, such as conducting interviews and carrying out polonium testing, no documentation to support any investigation was submitted to the Court. Further, the Court noted that the Russian government appeared to have attempted to thwart the UK inquiry by failing to make evidence and witnesses available. The Court dismissed Russia's argument that it had not been able to further investigate the matter because of the UK authorities' failure to comply with requests for legal assistance, noting that Russia had already exonerated Lugovoy and Kovtun of their involvement in Litvinenko's murder at the time it requested assistance and indicated that it was not investigating other suspects.]

...

(b) Substantive obligation under Article 2 of the Convention

149. At the time he was poisoned Mr Litvinenko was in the United Kingdom and therefore not present in an area over which the Russian State exercised "effective control". It remains therefore to be established whether the Russian State can be held accountable for the alleged violation of his right to life under the personal concept of jurisdiction.

150. ...[T]he fate of the applicant's complaint about the assassination of her husband depends on the answers to the following two interrelated questions: (i) whether the assassination of Mr Litvinenko amounted to the exercise of physical power and control over his life in a situation of proximate targeting, and (ii) whether it was carried out by individuals acting as State agents. The Court will establish the facts on the basis of the evidence available in the case-file.

(i) Evaluation of evidence by the Court

151. In assessing evidence in cases concerning an alleged violation of the right to life, the Court has adopted the standard of proof "beyond reasonable doubt". However, it has not borrowed the approach of the national legal systems that use that standard, since its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. ...

⁴⁷⁸ The Court held that it had jurisdiction over the procedural violation of Article 2 since Russia had instituted an investigation into Litvinenko's death. [ed.]

152. In addition, the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account

153. The Court has found a violation of Article 2 where a *prima facie* case had been made that an individual was killed by State agents and the Government failed to provide any other satisfactory and convincing explanation of the events. It also found that it could draw inferences from the Government's conduct in respect of the investigation documents It has not, however, found a violation in cases where the applicant's allegations are tenable but the circumstances of the death nevertheless remain a matter of speculation and assumption

(ii) Establishment of the facts

154. In the present case, the circumstances of Mr Litvinenko's death are no longer a "matter of speculation and assumption". It has been established, beyond reasonable doubt, that he was poisoned with polonium 210, a rare radioactive isotope. It has been further established, also beyond reasonable doubt, that the poison was administered by Mr Lugovoy and Mr Kovtun.

...

(α) Whether Mr Lugovoy and Mr Kovtun exercised physical power and control over the life of Mr Litvinenko in a situation of proximate targeting

158. ... [T]he Court's inquiry will first address the issue whether the assassination of Mr Litvinenko amounted to the exercise of physical power and control over his life in a situation of proximate targeting.

159. The evidence of premeditation strongly indicates that the death of Mr Litvinenko had been the result of a planned and complex operation involving the procurement of a rare deadly poison, the travel arrangements for Mr Lugovoy and Mr Kovtun, and multiple attempts to administer the poison. Mr Litvinenko was not an accidental victim of the operation or merely adversely affected by it; the possibility that he may have ingested polonium 210 by accident is not borne out by the evidence. On the contrary, repeated and sustained attempts to put poison in his drink demonstrate that Mr Litvinenko was the target of the planned operation for his assassination.

160. The Court further notes that the evidence has established, beyond reasonable doubt, that Mr Lugovoy and Mr Kovtun knew that they were using a deadly poison rather than a truth serum or a sleeping pill. When putting the poison in the teapot from which Mr Litvinenko poured a drink, they knew that, once ingested, the poison would kill Mr Litvinenko. The latter was unable to do anything to escape the situation. In that sense, he was under physical control of Mr Lugovoy and Mr Kovtun who wielded power over his life.

161. In the Court's view, the administration of poison to Mr Litvinenko by Mr Lugovoy and Mr Kovtun amounted to the exercise of physical power and control over his life in a situation of proximate targeting. That being so, if this act was imputable to the respondent State, the Court considers that it was capable of falling within the jurisdiction of that State

(β) Whether Mr Lugovoy and Mr Kovtun acted as State agents

...

166. While there existed a theoretical possibility that the assassination of Mr Litvinenko might have been a "rogue operation" not involving State responsibility, the information needed to corroborate this theory lies wholly, or in large part, within the exclusive knowledge of the Russian authorities which moreover asserted exclusive jurisdiction over Mr Lugovoy and Mr Kovtun by invoking the constitutional protection against extradition. In these circumstances, the burden of proof was shifted onto the authorities of the respondent State which were expected to carry out a meticulous investigation into that possibility, identify those involved in the operation and determine whether or not Mr Lugovoy's and Mr Kovtun's conduct was directed or controlled by any State entity or official, which is a factor indicative of State responsibility

167. The Government, however, have not made any serious attempt either to elucidate the facts or to counter the findings arrived at by the United Kingdom authorities. ...

168. Most significantly, ... the Russian authorities failed to carry out an effective investigation themselves. ...

169. ... Noting the Government's failure to displace the prima facie evidence of State involvement, the Court cannot but conclude that Mr Litvinenko was poisoned by Mr Lugovoy and Mr Kovtun acting as agents of the respondent State. The act complained of is attributable to that State.

170. ... [T]he Court has accepted that when they poisoned Mr Litvinenko, Mr Lugovoy and Mr Kovtun were acting as agents of the respondent State and that they exercised physical power and control over his life in a manner sufficient to establish a jurisdictional link with the respondent State for the purposes of Article 1 of the Convention. Accordingly, the Government's objection of inadmissibility *ratione loci* must be dismissed.

[The Court awarded the applicant EUR100,000 in non-pecuniary damages and EUR 22,500 in legal fees. As the applicant did not specify an amount claimed for pecuniary damages, the Court did not make an award under this head.]

...

QUESTIONS

1. How do you respond to the claim in the dissenting judgment in *Banković* that 'an order to bomb specific targets in a city is an act of public power', and should therefore be treated as an exercise of jurisdiction for the purposes of the ECHR?

2. Should the Court's approach to "proximate targeting" in *Carter* apply to all rights, such as the right to privacy, rather than only to the right to life?

2. Do you agree with Nigel Biggar, who argues in *What's Wrong with Rights?* (2020) at 330 that:

[An] ill-effect of rights-fundamentalism, whether judicial or philosophical, is that, when applied to military affairs, it places unreasonable and demoralizing burdens on troops, and undermines their military effectiveness. And since it is only liberal governments that pay attention to rights-rhetoric, partly because they half-believe it and partly for electoral reasons, it is only their militaries that are weakened. Thus, rights-fundamentalism increases the prospect of the military victory of the enemies of liberal rights. ...

By way of background, the United Kingdom Government announced plans on 4 October 2016 to derogate from the ECHR to ensure that its armed forces would not be constrained by its human rights obligations in future overseas operations. Prime Minister Theresa May said: 'We will repay [our Armed Forces] with gratitude and put an end to the industry of vexatious claims that has pursued those who served in previous conflicts.' On 22 June 2022, the Government introduced 'The Bill of Rights Bill', which provided that there would be no right 'to bring proceedings, or rely on a Convention right, in relation to an act (or proposed act) of a public authority which is done (or is proposed to be done) outside the British Islands in the course of overseas military operations.' Several months later, the Bill was withdrawn.

b. Democracy and Political Participation

The following materials address the links between political participation, elections, and democratic government.⁴⁷⁹ They focus on two of a significant number of cases decided by the European Court since 1998 involving the banning or dissolution of political parties in Turkey, and on an Advisory Opinion relating to Lithuania given by the Court in 2022 in relation to bans restricting the right of individuals to run for elected office.

The literature in this area often distinguishes between ‘procedural’ and ‘militant’ democracy.⁴⁸⁰ Procedural approaches are comparatively permissive and do not seek to limit the political rights even of those seeking to undermine or overthrow the constitutional order. They will, of course, use the criminal law in individual cases of transgression but will not ban political parties. Militant democracy, on the other hand, refers to an approach which seeks to place certain core foundational values beyond the reach of the democratic process. This might involve legislative restrictions on the rights to freedom of expression, participation, and assembly of those who seek to undermine democracy. The classic example of militant democracy is the post-World War II German Basic Law. Article 79(3) prohibits amendments to the basic principles included in Articles 1 (dignity of man) and 20 (democratic, federal, and social state based on the rule of law). In addition, anti-democratic parties may be disbanded (Art. 21(2)); anti-democratic associations dissolved (Art. 9(2)); those seeking to subvert the liberal democratic order may lose their individual freedoms (Art. 18); and citizens have the right to resist attempts, including by the public authorities, to abolish the constitutional order (Art. 20(4)).⁴⁸¹

The Code of Good Practice in Electoral Matters (Doc. CDL-AD(2002)023rev2-cor-e) adopted in 2002 by the Venice Commission, provides that the withdrawal of political rights ‘may only be imposed by express decision of a court of law’. But it adds (para. 6) that ‘[t]he conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.’

The dilemma is simple:

Must a democratic system stand idly by and watch antidemocratic forces gather strength? Must liberal constitutions, because they support tolerance and openness, function as suicide pacts, preventing effective self-defense? ...

The correct answer is “no”. Constitutional democracies can and do act preemptively; for instance, by banning extremist parties while they are still relatively weak. Endangered democracies can curtail freedom of speech, freedom of association, and associated political rights to vote and compete for office and still remain recognizably liberal and democratic. To be sure, honest debate remains possible about the most effective and least restrictive ways of defending democracy against its most virulent enemies. And there is another important question that remains unanswered: What constitutional obstacles can be put in place to prevent political incumbents from opportunistically invoking the defense of democracy against antidemocratic forces as a justification for cracking down on perfectly legitimate political rivals?⁴⁸²

⁴⁷⁹ There are, of course, many other dimensions. See ECtHR, ‘Factsheet – Right to vote’ (November 2022); and E. Shattock, ‘Free and Informed Elections? Disinformation and Democratic Elections Under Article 3 of Protocol 1 of the ECHR’, 22 *Hum. Rts. L. Rev.* (2022) 1; and M. Hailbronner and L. Kujus, ‘Representation Reinforcement in the European Court of Human Rights’, 14 *Global Constitutionalism* (2025) 396.

⁴⁸⁰ L. Vinx, ‘Democratic Equality and Militant Democracy’, 27 *Constellations* (2020) 685. For its (ir)relevance at the international level see: Ming-Sung Kuo, ‘Militant Democracy Unmoored? The Limits of Constitutional Analogy in International Law’, 35 *Eur. J. Int’l. L.* (2024) 411.

⁴⁸¹ G. Capoccia, ‘Militant Democracy: The Institutional Bases of Democratic Self-Preservation’, 9 *Ann. Rev. L. & Soc. Sci.* (2013) 207.

⁴⁸² S. Holmes, ‘Book Review’, 4 *Int’l. J. Const. L.* (2006) 586.

While many of the cases in this area relate to those promulgating forms of fascism or communism that have been seen to be subversive of democracy, the rise of populist authoritarian and other illiberal parties over the past decade have given renewed relevance to many of the debates.

A collection of essays edited by Anthoula Malkopoulou and Alexander S. Kirshner, *Militant Democracy and Its Critics: Populism, Parties, Extremism* (2019) reflects the diverse responses to such ‘militancy’. Stefan Rummens, in ‘Resolving the Paradox of Tolerance’, *ibid.*, at 112, argues in favour of giving more leeway to extremist actors in the informal public sphere, on the “periphery” of the political system, while being increasingly intolerant of such actors at the “core” of decision-making, such as those in parliament or government, to ensure that extremist views “are never translated into actual legislation or policies.”

Jan-Werner Müller, in ‘Individual Militant Democracy’, *ibid.*, at 32, urges caution:

Something like a permanent banishment of an individual from the polity – literally or figuratively, in the case of a complete forfeiture of political rights – cannot be justified. However, not all participation rights are equally important. There is a space for temporarily restricting some rights as a result of a pattern of action that suggests a particularly resourceful individual is intent on undermining or destroying democracy outright. Some forms of impeachment – when impeachment is also forward-looking, taking into account the damage that might be done in the future by an irresponsible office-holder abusing their powers – can be justified in similar fashion.

... [Such measures should leave open] the possibility of anti-democratic actors changing their minds (or, rather, changing their conduct – the depths of their character are not the issue, and in a sense not our business). ... [T]he most plausible approach is to disaggregate the general interest in political participation and restrict rights (or otherwise exclude from the political process) selectively and temporarily only.

Finally, András Sajó, in ‘Militant Constitutionalism’, *ibid.*, at 203, warns that legal approaches might not hold the key in such contexts:

The institutions of militant constitutionalism may work against populism in conditions of social inertia but not where populists systematically mobilise hatred and disparagement against the institutions; where democracy is understood simply as regular voting and where constitutional freedoms are not cherished, democracy will fail. A democracy cannot be sustained in the absence of (reasonable) democrats. And it cannot be sustained when people believe that they are still good democrats even as they work to undermine it.

The ECtHR has considered a significant number of relevant cases, involving a diverse range of countries.⁴⁸³ We turn now to look at two classic cases, along with a more recent example from Lithuania which also illustrates the operation of the Court’s relatively new advisory opinion jurisdiction.⁴⁸⁴

⁴⁸³ For a summary see ECtHR, ‘Factsheet – Political parties and associations’ (May 2022).

⁴⁸⁴ See E. Albanesi, ‘The European Court of Human Rights’ Advisory Opinions Legally Affect Non-ratifying States’, 28 *Eur. Pub. L.* (2022) 1; T. Moonen and L. Lavrysen, ‘Abstract but Concrete, or Concrete but Abstract? A Guide to the Nature of Advisory Opinions Under Protocol No 16 to the ECHR’, 21 *Hum. Rts. L. Rev.* (2021) 752; and K. Lemmens, ‘Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?’, 15 *Eur. Const. L. Rev.* (2019) 691.

UNITED COMMUNIST PARTY OF TURKEY V. TURKEY
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO.
133/1996/752/951 (30 JANUARY 1998)

...

7. The United Communist Party of Turkey ('the TBKP'), the first applicant, was a political party that was dissolved by the Constitutional Court. Mr Nihat Sargin and Mr Nabi Yagci, the second and third applicants, were respectively Chairman and General Secretary of the TBKP. They live in Istanbul.

8. The TBKP was formed on 4 June 1990. On the same day, its constitution and programme were submitted to the office of Principal State Counsel at the Court of Cassation for assessment of their compatibility with the Constitution and Law no. 2820 on the regulation of political parties.

9. On 14 June 1990, when the TBKP was preparing to participate in a general election, Principal State Counsel at the Court of Cassation ('Principal State Counsel') applied to the Constitutional Court for an order dissolving the TBKP. He accused the party of having sought to establish the domination of one social class over the others ... of having incorporated the word 'communist' into its name ... of having carried on activities likely to undermine the territorial integrity of the State and the unity of the nation ... and of having declared itself to be the successor to a previously dissolved political party, the Turkish Workers' Party... .

[The following excerpts from the opinion concern almost exclusively the principal charge of undermining the unity of the nation. In omitted portions, the opinion found the other three grounds inadequate to justify interference with the right of association under Article 11.]

In support of his application Principal State Counsel relied in particular on passages from the TBKP's programme, mainly taken from a chapter entitled 'Towards a peaceful, democratic and fair solution for the Kurdish problem'; that chapter read as follows:

...

The TBKP will strive for a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples may live together of their free will within the borders of the Turkish Republic, on the basis of equal rights and with a view to democratic restructuring founded on their common interests.

...

10. On 16 July 1991 the Constitutional Court made an order dissolving the TBKP, [resulting in the liquidation of the party, the transfer of its assets to the Treasury, and the banning of its founders and managers from holding similar office in any other political body].

...

As to the allegation that the TBKP's constitution and programme contained statements likely to undermine the territorial integrity of the State and the unity of the nation, the Constitutional Court noted, inter alia, that those documents referred to two nations: the Kurdish nation and the Turkish nation. But it could not be accepted that there were two nations within the Republic of Turkey, whose citizens, whatever their ethnic origin, had Turkish nationality. In reality the proposals in the party constitution covering support for non-Turkish languages and cultures were intended to create minorities, to the detriment of the unity of the Turkish nation.

Reiterating that self-determination and regional autonomy were prohibited by the Constitution, the Constitutional Court said that the State was unitary, the country indivisible and that there was only one nation... .

...

AS TO THE LAW

*I. Alleged Violation of Article 11 of the Convention*⁴⁸⁵

...

25. ... [P]olitical parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system, there can be no doubt that political parties come within the scope of Article 11.

...

27. ... [A]n association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State

[W]hile it is in principle open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions.

28. The Preamble to the Convention refers to the 'common heritage of political traditions, ideals, freedom and the rule of law', of which national constitutions are in fact often the first embodiment

...

30. The political and institutional organization of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional or merely legislative

...

32. It does not, however, follow that the authorities of a State in which an association, through its activities, jeopardizes that State's institutions are deprived of the right to protect those institutions. In this connection, the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11, which the Court considers below

...

37. Such an interference [by Turkey with Article 11] will constitute a breach of Article 11 unless it was 'prescribed by law', pursued one or more legitimate aims under paragraph 2 and was 'necessary in a democratic society' for the achievement of those aims.

...

(b) Legitimate aim

...

41. [T]he Court considers that the dissolution of the TBKP pursued at least one of the 'legitimate aims' set out in Article 11: the protection of 'national security'.

(c) Necessary in a democratic society'

42. The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.

43. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.

As the Court has said many times, there can be no democracy without pluralism... .

⁴⁸⁵ Article 11 provides that:

(1) Everyone has the right to freedom of ... association with others, including the right to form and to join trade unions. ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security ... or for the protection of the rights and freedoms of others.

...

45. Democracy is without doubt a fundamental feature of the European public order... . The Court has ... pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society.

... The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it ...

.

46. Consequently, ... only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11(2) exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts

47. When the Court carries out its scrutiny, [it does not have] to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'

2. Application of the principles to the present case

...

49. The Government pointed out that ... faced with a challenge to the fundamental interests of the national community, such as national security and territorial integrity, the Turkish authorities had not in any way exceeded the margin of appreciation conferred on them by the Convention.

...

51. The Court notes at the outset that the TBKP was dissolved even before it had been able to start its activities and that the dissolution was therefore ordered solely on the basis of the TBKP's constitution and programme, which ... contain nothing to suggest that they did not reflect the party's true objectives and its leaders' true intentions. Like the national authorities, the Court will therefore take those documents as a basis for assessing whether the interference in question was necessary.

...

55. The second submission accepted by the Constitutional Court was that the TBKP sought to promote separatism and the division of the Turkish nation

56. The Court notes that although the TBKP refers in its programme to the Kurdish 'people' and 'nation' and Kurdish 'citizens', it neither describes them as a 'minority' nor makes any claim — other than for recognition of their existence — for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population. On the contrary, the programme states: 'The TBKP will strive for a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples may live together of their free will within the borders of the Turkish Republic, on the basis of equal rights and with a view to democratic restructuring founded on their common interests'. With regard to the right to self-determination, the TBKP does no more in its programme than deplore the fact that because of the use of violence, it was not 'exercised jointly, but separately and unilaterally', adding that 'the remedy for this problem is political' and that '[i]f the oppression of the Kurdish people and discrimination against them are to end, Turks and Kurds must unite'.

...

57. The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned

...
 59. The Court is also prepared to take into account the background of cases before it, in particular the difficulties associated with the fight against terrorism

...
 61. Regard being had to all the above, a measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society. It follows that the measure infringed Article 11 of the Convention.

...

REFAH PARTISI (THE WELFARE PARTY) AND OTHERS V. TURKEY
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NOS. 41340/98, 41342/98, 41343/98 AND 41344/98 (13 FEBRUARY 2003)

[Four applications were submitted by the Turkish Welfare Party (Refah) and three of its members in May 1998. They alleged that the dissolution of Refah by the Turkish Constitutional Court and the suspension of certain political rights of the party leaders breached Articles 9, 10, 11, 14, 17, and 18 of the ECHR and Articles 1 and 3 of Protocol No. 1. The case was first heard by a Chamber. In July 2001 it held by a vote of four to three that there had been no violation of Article 11 and that it was unnecessary to examine the other alleged breaches. In December 2001, after a request by the applicants, the case was referred to the Grand Chamber.]

THE FACTS

...
 11. Refah took part in a number of general and local elections. In the local elections in March 1989 Refah obtained about 10% of the votes ...

Ultimately, Refah obtained approximately 22% of the votes in the general election of 24 December 1995 and about 35% of the votes in the local elections of 3 November 1996.

The results of the 1995 general election made Refah the largest political party in Turkey... . On 28 June 1996 Refah came to power by forming a coalition government with the centre-right... . According to an opinion poll carried out in January 1997, ... Refah might obtain 67% of the votes in the general election to be held roughly four years later.

B. Proceedings in the Constitutional Court

...
 12. On 21 May 1997 Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a “centre” (*mihrak*) of activities contrary to the principles of secularism. In support of his application, he referred to the following acts and remarks by certain leaders and members of Refah.

– Whenever they spoke in public Refah’s chairman and other leaders advocated the wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities, whereas the Constitutional Court had already ruled that this infringed the principle of secularism enshrined in the Constitution.

– At a meeting on constitutional reform Refah’s chairman, Mr Necmettin Erbakan, had made proposals tending towards the abolition of secularism in Turkey. He had suggested that the adherents of each religious movement should obey their own rules rather than the rules of Turkish law.

– On 13 April 1994 Mr Necmettin Erbakan had asked Refah’s representatives in the Grand National Assembly to consider whether the change in the social order which the party sought would be “peaceful or violent” and would be achieved “harmoniously or by bloodshed”.

– At a seminar held in January 1991 in Sivas, Mr Necmettin Erbakan had called on Muslims to join Refah, saying that only his party could establish the supremacy of the Koran through a holy war (jihad) and that Muslims should therefore make donations to Refah rather than distributing alms to third parties.

...

– Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic system. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. Refah, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed.

– On 8 May 1997 a Refah MP, Mr Ibrahim Halil Çelik, had said in front of journalists in the corridors of the parliament building that blood would flow if an attempt was made to close the “*Imam-Hatip*” theological colleges

...

THE LAW

I. Alleged Violation of Article 11 of the Convention

[The Court considered whether the interference had been ‘prescribed by law’ and had been in pursuance of a ‘legitimate aim’. It responded affirmatively on both issues.]

...

3. “Necessary in a democratic society”

...

98. [T]he Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (see *Communist Party (KPD) v. Germany*, no. 250/57, Commission decision of 20 July 1957, Yearbook 1, p. 222). In view of the very clear link between the Convention and democracy, no one must be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole.

In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.

100. The Court reiterates, however, that the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation. Although it is not for the Court to take the place of the national authorities, which are better placed than an

international court to decide, for example, the appropriate timing for interference, it must exercise rigorous supervision embracing both the law and the decisions applying it, including those given by independent courts. Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases Provided that it satisfies the conditions set out in paragraph 98 above, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.

...

(ε) The appropriate timing for dissolution

102. In addition, the Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may “reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime” (see the Chamber’s judgment, § 81).

103. ... A Contracting State may be justified under its positive obligations in imposing on political parties, which are bodies whose *raison d’être* is to accede to power and direct the work of a considerable portion of the State apparatus, the duty to respect and safeguard the rights and freedoms guaranteed by the Convention and the obligation not to put forward a political programme in contradiction with the fundamental principles of democracy.

(ζ) Overall examination

104. In the light of the above considerations, the Court’s overall examination ... must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society”.

105. ... [T]he Court must [also] take account of the historical context in which the dissolution of the party concerned took place and the general interest in preserving the principle of secularism in that context in the country concerned to ensure the proper functioning of “democratic society”.

(ii) Application of the above principles to the present case

...

(a) Pressing social need

The appropriate timing for dissolution

...

108. The Court ... considers that at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme.

...

110. While it can be considered, in the present case, that Refah’s policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate... .

In short, the Court considers that in electing to intervene at the time when they did in the present case the national authorities did not go beyond the margin of appreciation left to them under the Convention.

...

The main grounds for dissolution cited by the Constitutional Court

116. The Court considers on this point that among the arguments for dissolution pleaded by Principal State Counsel at the Court of Cassation those cited by the Constitutional Court as grounds for its finding that Refah had become a centre of anti-constitutional activities can be classified into three main groups: (i) the arguments that Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) the arguments that Refah intended to apply sharia to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (iii) the arguments based on the references made by Refah members to the possibility of recourse to force as a political method. The Court must therefore limit its examination to those three groups of arguments cited by the Constitutional Court.

(a) The plan to set up a plurality of legal systems

...

119. The Court sees no reason to depart from the Chamber's conclusion that a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system. In its judgment, the Chamber gave the following reasoning:

"70 ... the Court considers that Refah's proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.

The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.

Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms...

Secondly, such a system would undeniably infringe the principle of non discrimination between individuals as regards their enjoyment of public freedoms... ."

(b) Sharia

122. ... [After examining the various comments attributed to Refah leaders the Court accepted] the Constitutional Court's conclusion that these remarks and stances of Refah's leaders formed a whole and gave a clear picture of a model conceived and proposed by the party of a State and society organised according to religious rules.

123. The Court concurs in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

"72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. ... It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of

private and public life in accordance with religious precepts... . In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention."

124. The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting State may oppose such political movements in the light of its historical experience.

125. The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy.

...

(d) The possibility of recourse to force

...

130. The Court considers that, whatever meaning is ascribed to the term "jihad" used in most of the speeches mentioned above (whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved), there was ambiguity in the terminology used to refer to the method to be employed to gain political power. In all of these speeches the possibility was mentioned of resorting "legitimately" to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.

131. Furthermore, the Court endorses the following finding of the Chamber:

"74 While it is true that [Refah's] leaders did not, in government documents, call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members of [Refah] who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah's leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it."

Overall examination of "pressing social need"

132. ... [Taking account of the factors above the Court concluded that the dissolution order] may reasonably be considered to have met a "pressing social need".

Proportionality of the measure complained of

133. After considering the parties' arguments, the Court sees no good reason to depart from the following considerations in the Chamber's judgment:

"82. ... [A]fter [Refah's] dissolution only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party. The 152 remaining MPs continued to sit in Parliament and pursued their political careers normally The Court considers in that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality"

4. The Court's conclusion regarding Article 11 of the Convention

135. Consequently, following a rigorous review to verify that there were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a "pressing social need" and were "proportionate to the aims pursued". It follows that Refah's dissolution may be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2.

136. Accordingly, there has been no violation of Article 11 of the Convention. [The Court therefore concluded that there was no need to examine the same issues in relation to the other provisions of the Convention cited by the applicants.]

...

CONCURRING OPINION OF JUDGE KOVLER

...

[The judge agrees that there is no violation of Article 11.] What bothers me about some of the Court's findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" ... , "totalitarian movements" ... , "threat to the democratic regime" ... , etc., whose connotations, in the context of the present case, might be too forceful.

I also regret that the Court, in reproducing the Chamber's conclusions (paragraph 119 of the judgment), missed the opportunity to analyse in more detail the concept of a plurality of legal systems, which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status Admittedly, this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of such a compromise from the outset.

This general remark also applies to the assessment to be made of sharia, the legal expression of a religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system

ADVISORY OPINION REQUESTED BY THE LITHUANIAN SUPREME ADMINISTRATIVE COURT EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, REQUEST NO. P16-2020-002 (8 APRIL 2022)

[From 2009-2012, both Ms N.V. (at that time sitting as a regional court judge) and her brother were central figures in a high-profile child custody case that received extensive media coverage and online attention in Lithuania. This case involved claims by Ms N.V.'s brother, Drąsius Kedys, that his child had been trafficked by her mother to a paedophile ring which, he alleged, included a prominent Lithuanian politician and a judge.⁴⁸⁶ While none of these allegations were ever accepted by Lithuanian courts, Kedys' claims of corruption and paedophilia generated substantial popular outrage against a political system perceived as corrupt, as well as support for Kedys himself. Attention on the case and the conspiracy theories surrounding it heightened over the next three years as each of the two individuals Kedys identified, as well as Kedys himself, were killed in mysterious circumstances.

Ms N.V., a vocal supporter of her brother's claims, was given temporary guardianship of his daughter following his death in 2010. After a court dismissed the allegations of abuse, however, Ms N.V. was later ordered to return her niece to the girl's mother. She refused to do so. In May 2012, police attended

⁴⁸⁶ See 'Moral panic of the decade: former judge's extradition rekindles 10-year-old story', *Lithuanian National Radio and Television* (8 November 2019); S. Daniunaite, 'Extradition of judge Neringa Venckienė who alleges a paedophile ring in Lithuania', *Lithuania Tribune* (14 August 2019).

Ms. N.V.'s house in Garliava to carry out the court's order, but were obstructed by Ms. N.V. and crowds of supporters outside her house who attempted to prevent the removal of the child.⁴⁸⁷

The *Drašos kelias* (Way of Courage) party grew out of this movement of popular support for Kedys, after whom it is named, and Ms N.V. The latter was elected to the Seimas in October 2012, thus acquiring immunity. In early 2013, the Seimas agreed to lift that immunity so that she could be prosecuted for criminal acts stemming from the Garliava protest. She immediately fled to the United States.

In June 2014, Ms N.V. was impeached in absentia for failing to perform her duties as a member of the Seimas and her mandate as a member of parliament revoked. She was arrested in the United States in February 2018 and extradited to Lithuania in November 2019 to face criminal prosecution.

In 2020, Ms N.V. asked to be registered as a candidate for the October 2020 Seimas elections, but was refused by the Electoral Commission (CEC) on the basis that her impeachment made her permanently ineligible for a parliamentary mandate under Article 2 § 5 of the Law on Elections to the Seimas. Ms. N.V. challenged this decision before Lithuania's Supreme Administrative Court. The Lithuanian court in turn requested an advisory opinion from the Court on the operation of Article 3 of Protocol No. 1 to the Convention, which relates to the right to free elections. This decision also had implications for Constitutional revisions proposed in order to execute an earlier judgment of the Grand Chamber of the Court in *Paksas v. Lithuania*. That case involved a former President of Lithuania, removed from office on 6 April 2004 following impeachment for gross violations of the Constitution. On 15 July 2004 the Seimas amended the Law on Elections to the effect that any official who had been removed from office in impeachment proceedings was permanently disqualified from being a member of parliament.

In a judgment of 6 January 2011 ..., the Court held that the permanent and irreversible nature of Mr Paksas' disqualification from holding parliamentary office was a disproportionate restriction and that therefore there had been a violation of Article 3 of Protocol No. 1.]

I. PRELIMINARY CONSIDERATIONS

60. Under Article 1 § 1 of Protocol No. 16, designated highest courts or tribunals may request the Court to give advisory opinions on "questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention and the Protocol's thereto". ... [Such bodies] may do so "only in the context of a case pending before it".

61. ...[T]he aim of the advisory opinion procedure is to further enhance the interaction between the Court and national authorities and thereby reinforce the implementation of the Convention, in accordance with the principle of subsidiarity. The aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court guidance on Convention issues when determining the case before it. The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it. It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case

62. ...[Advisory opinions] must be confined to points that are directly connected to the proceedings pending at domestic level. Their value also lies in providing the national courts with guidance on questions of principle relating to the Convention that are applicable in similar cases

...

⁴⁸⁷ *ibid.*

II. THE QUESTIONS ASKED BY THE SUPREME ADMINISTRATIVE COURT

...

A. The second question asked by the Supreme Administrative Court

68. The Court considers that the Supreme Administrative Court is asking, in substance, which criteria are to be applied by a competent Lithuanian court in the assessment of whether, in the concrete circumstances of a given case, the ban preventing a former member of the Seimas who has been removed in impeachment proceedings from standing for election to the Seimas has become disproportionate with the consequence that it breaches Article 3 of Protocol No. 1.

...

2. *Relevance of these principles to the facts relating to the present advisory opinion*

90. The Court refers to its finding in *Paksas* according to which in assessing the proportionality of a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question. The need for such a possibility is linked to the fact that the assessment of this issue must have regard to the historical and political context in the State concerned; since this context is capable of evolving, not least in terms of the perceptions which voters may have of the circumstances that led to the introduction of such a general restriction, the initial justification for the restriction may subside with the passing of time... .

91. The Court also observes that under Article 3 of Protocol No. 1 to the Convention, States have a wide margin of appreciation in regulating the right to stand for election. In particular, they enjoy considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, and the criteria may vary according to the historical and political factors peculiar to each State However, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of a country and in the choice of the legislature Moreover, even if legitimate considerations may provide justification for restrictions on the right to stand for election, such restrictions may become incompatible with Article 3 of Protocol No. 1 when applied long after the threat to democracy which had justified their earlier application has ceased to be relevant in light of the greater stability enjoyed by the country concerned, for example by reason of its full European integration The Court has also recognised that, with the passage of time, general restrictions on electoral rights become more difficult to justify, thus requiring restrictive measures to be individualised Thus, the margin of appreciation enjoyed by the States in this field is not unlimited, and it remains for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been met

92. It follows from this that the reference in *Paksas* ... to the weight to be attached to the existence of a time-limit and the possibility of reviewing the ban in question is not necessarily to be understood as requiring these two elements to be combined. Nor does it specify whether the time-limit applicable in a given case should be set in the abstract or on a case-by-case basis. What matters in the end is for the ban in question to remain proportionate within the meaning of the *Paksas* judgment. This can be achieved by way of an appropriate legislative framework or judicial review of the duration, nature and extent of such a ban as applicable to the person concerned, performed on the basis of objective criteria and having regard to the particular circumstances of that person as they present themselves at the time of the review. The Court notes in this context that the findings in *Paksas* that a lifelong disqualification, on account of its permanent and irreversible nature, was a disproportionate restriction does not in itself imply that a decision to refuse to allow a person to stand for election, at the time of such a refusal, will necessarily amount to a disproportionate restriction. Whether that is the case will depend on an individual assessment of the refusal and the specific circumstances of the case based on objective criteria, including the individual's past and current behaviour.

...

94. ...[T]urning to the criteria which are relevant in deciding [whether impeachment should justify a ban on running for office], in the Court's opinion they should be objective in nature and allow relevant

circumstances connected not only with the events which led to the impeachment of the person concerned, but also – and primarily – with the functions sought to be exercised in the future by that person to be taken into account in a transparent way. This is because the purpose of the impeachment and the subsequent ban is not primarily to impose another sanction on the person concerned in addition to a criminal sanction which may already have been imposed, but to protect parliamentary institutions. The relevant criteria should therefore be identified mainly from the perspective of the requirements of the proper functioning of the institution of which that person seeks to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned ...

95. This comes down to evaluating the objective impact which that person's potential membership of the institution concerned would have on the latter's functioning, having regard to such considerations as the past and current behaviour of the person who has been removed from office in impeachment proceedings and the nature of the wrongdoing which led to his or her impeachment, but also – and more importantly – the institutional and democratic stability of the institution concerned, the nature of the latter's duties and responsibilities, and the likelihood of the person in question having the potential to significantly disrupt the functioning of that institution, or indeed of democracy as a whole in the State concerned. Aspects such as that person's loyalty to the State, encompassing his or her respect for the country's Constitution, laws, institutions and independence, may also be relevant in this respect It is in the light of all those aspects that a determination should be made as to the appropriate and proportionate length of a ban precluding persons who have been removed from office in impeachment proceedings from being eligible for any function to which the ban applies.

96. Lastly, the procedure leading to such a determination in an individual case should be surrounded by sufficient safeguards designed to ensure respect for the rule of law and protection against arbitrariness. This will include the need for the procedure to be held before an independent body and for the person concerned to be heard by the latter and be provided with a reasoned decision

...

QUESTION

How does the jurisprudence of the ECtHR measure up against the view that Europe needs to be militant in defending its democracy? Consider the view of Gerald Neuman, in 'Impeachment, Disqualification, and Human Rights', 54 *Colum. Hum. Rts. L. Rev.* (2023) 627, at 671, that the ECtHR's approach 'seems to rest on excessive confidence in the ability of a threatened democracy to maintain the independence of a politically salient court or other adjudicatory body.'

c. Judicial Independence and the Rule of Law

A key battlefield in the fight against authoritarian, illiberal and populist governments is the independence of the judiciary. The range of such measures was outlined by Margaret Satterthwaite, UN Special Rapporteur on the independence of judges and lawyers (UN Doc. A/HRC/53/31 (2023)), at para. 19:

[Concerns include] ... new limits on courts' jurisdiction to review the legality of executive or parliamentary action or reforms to the nature or composition of courts – particularly high courts – that effectively diminish their independence and ability to remedy human rights violations. These may include politically strategic reductions in the size of the highest court, arbitrary removal of judges or reductions in their terms, or the subjection of judges to early retirement in a manner that politicizes their role. Alternatively, such situations may include the appointment or retention of judges seen as favourable to those in other branches of government through a politicized expansion of the size of the highest court, the arbitrary abolishment of a retirement age or extension of terms, or the irregular creation of extraordinary chambers. [Other problems arise when] the process or rules around selection and appointment are altered in a way that reduces the focus on potential judges' capability and integrity and increases the role of candidates' presumed or stated political affiliations. ... Even seemingly neutral rules of judicial administration may be politicized and used as tools to discipline or reward judges for their decisions. ...

The cases below examine responses by the ECtHR to situations in Turkey and Poland.

TURAN V. TURKEY

EUROPEAN COURT OF HUMAN RIGHTS, CHAMBER JUDGMENT, APPLICATION NO. 75805/16 AND 426 OTHERS (4 APRIL 2022)

[On 15-16 July 2016, members of the Turkish armed forces attempted to carry out a coup against the National Assembly, government and President of Turkey. In the aftermath, the Turkish government commenced criminal investigations into persons suspected of being members of or linked to the organization allegedly responsible for the coup (referred to as FETÖ/PDY). Many of these were members of the judiciary, thousands of whom were charged as members of an armed terrorist organisation in the weeks following the coup attempt.

The applicants were a group of 427 judges and prosecutors who had been arrested and detained on suspicion of associations with FETÖ/PDY. The government justified their arrest and detention in accordance with provisions of the ordinary law applicable to cases of discovery *in flagrante delicto*, and on the basis that the crime with which they were charged was a 'continuing offence'. The applicants countered that their detention breached special rules of procedure under domestic law which imposed specific requirements in relation to the arrest and pre-trial detention of members of the judiciary. On this basis, they asserted that their detention was in violation of Article 5 § 1 of the Convention, which requires that any deprivation of liberty be in accordance with a procedure prescribed by law.]

80. [The Court] reiterates ... that where the "lawfulness" of detention is at issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. This primarily requires any arrest or detention to have a legal basis in domestic law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The Court must further ascertain in this connection whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein, notably the principle of legal certainty...

...
 82. The Court notes, moreover, that it has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary ... , the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention

...
 [The Court held that the pre-trial detention of the applicants was unlawful and constituted a violation of Article 5 § 1. However, it held by six votes to one that there was ‘no need to examine the admissibility and merits of the applicants’ remaining complaints under Article 5 of the Convention’. These included individual applicants’ claims that they had been detained absent reasonable suspicion that they had committed an offence, that courts had not provided relevant and sufficient reasons for decisions, that their pre-trial detention had been excessively long, that reviews of their detention did not comply with procedural safeguards, and that they lacked effective domestic remedies to obtain compensation.]

...
 98. ... Having regard to the significance and implications of [the Court’s finding that the applicants’ detention was not prescribed by law], which goes to the heart of the protection afforded under Article 5 and entails a violation of one of the core rights guaranteed by the Convention, and to the accumulation of thousands of similar applications on its docket concerning detentions in the aftermath of the attempted coup d’état in Turkey, which puts a considerable strain on its limited resources, the Court considers – as a matter of judicial policy – that it is justified in these compelling circumstances to dispense with the separate examination of the admissibility and merits of each remaining complaint raised by each individual applicant under Article 5. The Court also points out in this connection that an individualised examination of the remaining complaints brought by each applicant would significantly delay the processing of these cases, without a commensurate benefit to the applicants or contribution to the development of the case-law. It notes furthermore that it has already addressed the legal issues raised by these complaints for the most part It is precisely within this exceptional context that the Court, guided by the overriding interest to ensure the long-term effectiveness of the Convention system, which is under threat by the constantly growing inflow of applications ..., decides not to examine the applicants’ remaining complaints under Article 5.

CONCURRING OPINION OF JUDGE KOSKELO, JOINED BY JUDGE RANZONI

108. The present judgment is remarkable in an unusual and highly problematic sense. The Court concludes, in effect, that it is faced with a situation that renders it unable to fulfil its function, and this conclusion is reached, moreover, in the context of core aspects of core rights enshrined in Article 5 of the Convention. ...

109. I have voted in favour of this extraordinary outcome, reluctantly and with great misgivings. Why so?

110. It is well established that there are situations where complaints raised under different provisions of the Convention rely on a factual basis and on legal arguments which present similarities, to the extent that the Court may be justified in considering that, once a violation is found under one provision, it is not necessary to separately examine the issue from the standpoint of another provision also invoked by the applicant. The present joined cases, however, do not fall into that category of situations because, in this instance, the Court refrains from examining all other complaints raised under Article 5 apart from the issue of lawfulness. ... The issues raised under those complaints and the complaints based on the lack of lawfulness are not “overlapping”. In fact they concern Convention safeguards which are distinct and fundamentally important.

...

116. The decision not to examine the applicants' other complaints raised under Article 5 of the Convention thus has a critically novel quality. I have nonetheless arrived at the conclusion that the time has come to acknowledge the reality as it presents itself: if alleged violations occur on a large scale and the rights concerned are no longer protected through domestic remedies, even the international supervision entrusted to the Court reaches its practical limits. ... In circumstances where it has become clear that the complaints cannot, and therefore will not, be processed within a reasonable time-frame, or without paralysing the Court's activity more generally, it is better to make this impasse transparent rather than maintain illusions about the situation. Any further conclusions remain for other bodies to consider.

PARTLY DISSENTING OPINION OF JUDGE KÜRIS

1. I voted against point 5 of the operative part of the judgment. At the same time, I agree with the outcome, because, hard as I try, I am unable to propose any pragmatic alternative to the majority's audacious decision to terminate the examination of the numerous applicants' complaints My disagreement thus concerns not the very outcome but the wording of operative point 5: had it been worded without using the formula "no need to examine", which it now contains, and had it thus corresponded to the reasoning intended to substantiate it (paragraph 98 of the judgment), I would have voted for it Regrettably, the formula "no need to examine" is certainly not adequate for the extraordinary situation in which the Court has found itself in the present case. That formula had to be avoided – and it could have been avoided at no cost. It is most unfortunate. It is faulty. It is misleading, because its employment in the operative part suggests that the respective complaints are not meritorious.

But they certainly are.

...

38. There is a risk that some may read this judgment ... as a signal that a member State can escape responsibility for violating the Convention *en masse*, since the Court may be flooded with complaints against that State to such an extent that it becomes unable to cope with them and decides not to examine them.

To be frank: if a regime decides to go rogue, it should *do it in a big way*. And if responsibility can be escaped by "doing it big", why not give it a try?

GRZĘDA V. POLAND

EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 43572/18 (15 MARCH 2022)

[In 2017, Poland's government announced reforms that would in effect increase the power of the Minister for Justice to change the internal organization of the courts and to appoint and dismiss court presidents and vice-presidents.

The same year, the lower house of Parliament (Sejm) approved another amendment (the 2017 Amending Act) transferring the power to elect the National Council of the Judiciary (NCJ), the body tasked by the Constitution with safeguarding the independence of courts and judges as well as evaluating and nominating judges, to the lower house of Parliament controlled by the governing party. Following the passage of this law, Parliament terminated the appointment of all NCJ members appointed under earlier regulations.

While this case concerns the application of the 2017 Amending Act, it is also relevant to understand the broader context of legislative reforms introduced by the government which increased the executive's power over the courts. These included measures creating two new disciplinary and review chambers within the Supreme Court and enhancing the power of the Minister of Justice over judicial discipline, including the power to sanction judges who questioned the lawfulness of judicial

appointments made by the new NCJ. Several disciplinary investigations were opened into judges who opposed the government's reforms.]

...

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

172. The applicant complained that he had been denied access to a court in order to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the NCJ. He had been elected as a member of this body for a four-year term... and had the right to remain in office for the duration of that term The applicant claimed that the premature termination of his term of office had violated the Constitution and breached the rule of law. He relied on Article 6 § 1 of the Convention, of which, the relevant part, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

...

A. Admissibility

...

[The Court considered the submissions of several third-party interveners in relation to questions of the rule of law and judicial independence, including Amnesty International and the International Commission of Jurists, the Polish Judges' Association Iustitia, the Commissioner for Human Rights of the Republic of Poland, and the UN Special Rapporteur on the Independence of Judges and Lawyers.]

...

(d) The Court's assessment

(i) General principles

...

261. As regards public servants employed in the civil service, according to the criteria established in *Vilho Eskelinen and Others* ... the respondent State cannot rely before the Court on an applicant's status as a civil servant to exclude the protection embodied in Article 6 unless two conditions are fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer. It is also for the respondent State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the Article 6 guarantees of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent State to demonstrate, first, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified

...

The second condition of the Eskelinen test

[The Court considered whether the exclusion of the applicant's access to a court was justified on objective grounds in the State's interest.]

...

298. ... [T]he Preamble to the Convention ... declares the rule of law to be part of the common heritage of the Contracting Parties The Committee of Ministers has also taken the view that judicial independence constitutes a fundamental aspect of the rule of law

299. The Court reiterates that, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is not only expressly mentioned in the Preamble but is also inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application Section 6 of the 2017 Amending Act cannot be regarded as such an instrument since it was directed at a specific group of fifteen clearly identifiable persons – judicial members of the NCJ elected under the previous regulation, including the applicant – and its primary purpose was to remove them from their seats on that body. It was a one-off statutory amendment that terminated *ex lege* the constitutionally prescribed tenure of the NCJ's judicial members. The Court has already held that laws which are directed against specific persons are contrary to the rule of law

300. ... [T]he present case is closely related to judicial independence, since the dispute at issue concerns a judicial member of the NCJ [I]ts very *raison d'être* and its task of safeguarding judicial independence require that the NCJ enjoy autonomy *vis-à-vis* the political branches of State power. The Court accepts the view of the third-party interveners that the removal, or threat of removal, of a judicial member of the Council during his or her term of office has the potential to affect the personal independence of that member in the exercise of his or her NCJ duties By extension, the Council's mission to safeguard judicial independence may also be adversely affected, and this would raise a number of rule-of-law issues, including those pertaining to the safeguarding of rights enshrined in and protected by the Convention.

301. ... First, all Contracting Parties to the Convention have explicit, formal guarantees of judicial independence in their laws, whether of constitutional or of statutory rank. Second, judicial independence is a *sine qua non* for the right to a fair hearing under Article 6 of the Convention. Third, judicial independence is operationalised in the persons who are vested with judicial power.

302. ... [T]he Court has ... emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if judges are to be successful in carrying out their duties Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary ..., the Court must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy

303. Given the role played by judicial councils, the same considerations should apply as regards the tenure of judges, such as the applicant in the present case, who are elected to serve on them because of their status and in view of the need to safeguard judicial independence, which is a prerequisite to the rule of law. ...

304. As regards the regulation of the NCJ under domestic law, the Court notes that this body is constitutionally mandated to safeguard the independence of the courts and judges (Article 186 § 1 of the Constitution). In the Court's view, the effective exercise of this essential role is only possible when the council in question is sufficiently independent from the executive and legislative powers.

...

306. One of the key manifestations of the NCJ's role of safeguarding judicial independence is its exclusive competence to propose candidates for appointment at every level of the judiciary and to every type of court. To make it perfectly clear, this covers both initial appointments to judicial office, and every promotion to a higher level of the judiciary. Formally, the President of the Republic appoints judges, but he may only do so on the basis of proposals submitted by the NCJ

307. While there exists a widespread practice, endorsed by the Council of Europe, to put in place a judicial council as a body responsible for the selection of judges, the Convention does not contain any explicit requirement to this effect. In the Court's view, whatever system is chosen by member States, they must abide by their obligation to secure judicial independence. Consequently, where a judicial council is established, the Court considers that the State's authorities should be under an obligation to

ensure its independence from the executive and legislative powers in order to, inter alia, safeguard the integrity of the judicial appointment process. ...

308. The Court has held that “independence” refers to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties The Court has also discerned a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers

309. ... [T]here exists a clear link between the integrity of the judicial appointment process and the requirement of judicial independence in Article 6 § 1

...

322. ... [T]he Court finds that the fundamental change in the manner of electing the NCJ’s judicial members, considered jointly with the early termination of the terms of office of the previous judicial members ..., means that its independence is no longer guaranteed [T]he NCJ’s independence was determined precisely by the rule that its judicial members were elected by judges for a constitutionally prescribed term of office.

323. ... [T]he Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary However, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies. ...

...

325. ... [T]he Court concludes that the second condition of the Eskelinen test, namely that the applicant’s exclusion from access to a court be justified on objective grounds in the State’s interest, has not been met.

...

327. Members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective

...

B. Merits

...

4. *The Court’s assessment*

...

(c.) *Application of the general principles to the present case*

...

348. The Court notes that the whole sequence of events in Poland ... vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice’s control over the courts and increasing his role in matters of judicial discipline. As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant’s case is one exemplification of this general trend.

349. Having regard to the foregoing, the Court finds that on account of the lack of judicial review in this case the respondent State impaired the very essence of the applicant’s right of access to a court

...

...

* * *

The program of judicial reforms introduced by Poland's governing Law and Justice Party between 2015 and 2022 was the subject of public protests, as well as a number of challenges in the Polish and European courts. In 2021, the European Commission found that the new disciplinary regime imposed on judges undermined the independence of the judiciary and 'was incompatible with the primacy of EU law'.⁴⁸⁸ The Court of Justice of the European Union granted interim measures, requiring Poland to suspend the new disciplinary regime or pay penalties of 1,000,000 euros per day.

The Polish government, however, resisted pressure from Europe to reverse course. Following the interim measures decision, the Minister of Justice applied to Poland's reconstituted Constitutional Court (an institution whose independence from the ruling party was questionable) for holdings that Article 6 § 1 of the Convention was unconstitutional under Polish law. In February 2023, the government informed the European Court of Human Rights that it would not comply with the orders to reinstate judges who opposed its reforms.⁴⁸⁹ But in December 2023, following elections, the new Polish Government began the process of dismantling the measures previously adopted and seeking to restore the independence of the judiciary.

For details about the European Union's response to the situation in Poland before the change of government, see Ch. 11A 7, below.

QUESTIONS

1. Consider Toby Collis's comment in '*Turan and Others v Turkey* and the Limits of Judicial Policy to Address Judicial Overload', at StrasbourgObservers.com (18 January 2022), that:

Perhaps the Court should be lauded at least for its candour and transparency However, by justifying its disposal of the complaints by reason of the impossibility of its situation, the Court has exposed itself to charges of injustice, illegitimacy, and of failure to discharge its core responsibility of ensuring the right to individual petition.

2. Consider the following comment by Mathieu Leloup and David Kosař, in 'Sometimes Even Easy Rule of Law Cases Make Bad Law', 18 *Eur. Const. L. Rev.* (2022) 753, at 779:

... [T]he *Grzęda* case was ... not that complex. The main novelty – the question whether judges should receive a similar protection for their membership in a judicial council as in their normal adjudicatory role ... [was straightforward]. ... [I]t is unfortunate that the majority used this case to so sweepingly criticise the entirety of the Polish judicial reforms. In doing so, it unnecessarily ventured into very difficult and contentious territory

6. Evaluating the System

Despite the effectiveness of the various waves of reform, the Court inevitably faces considerable pressure to change its approach in a variety of ways. Many observers see the problems as flowing primarily from the great success of the system and see the solutions consisting largely of administrative reforms and enhanced political will. Others identify deeper political problems because various states feel that the system has become too intrusive and that it is starting to 'bite' in ways that they are not willing to accept. In some states, there has been a populist dimension to this resentment at being

⁴⁸⁸ *Grzęda v. Poland* (App. No. 43572/18), Judgment (15 March 2022), para. 25.

⁴⁸⁹ A. Ptak, 'Poland informs European court it will not comply with order to reinstate judges', *Notes from Poland*, (17 February 2023).

‘dictated to by Strasbourg’; in others the problem may lie with the self-proclaimed illiberal character of some of the governments.

The following excerpts reflect on the ways in which the Court has responded to these various pressures. Laurence Helfer and Erik Voeten, in ‘Walking Back Human Rights in Europe?’, 31 *Eur. J. Int’l L.* (2020) 797 discern caution and even regression in some of the Court’s pronouncements. They analyse all separate opinions attached to Grand Chamber judgments between 1999 and 2018 and identify the ‘walking back dissents’, or those that assert that the Grand Chamber has overturned prior rulings or settled doctrine in a way that favours the respondent government.

... Beginning in the mid-2000s ... the member states, especially the established democracies that have long been the ECtHR’s staunch supporters, began to impose new restrictions on disfavoured groups, especially immigrants, criminal defendants and suspected terrorists. They also publicly criticized the Court for expanding rights and freedoms too far and for giving insufficient deference to governments. First hesitantly and then more frequently after 2012, the Grand Chamber started to narrow its interpretation of the Convention, especially in cases against consolidated democracies.

What the ECtHR has not done – at least not explicitly – is overturn its prior case law in a rights-restrictive direction. ... Instead, the Grand Chamber may be achieving the same result indirectly by purporting to reconcile earlier rights-protective rulings with later decisions that are more favourable to respondent states. ...

The rise of what we label as ‘walking back dissents’ reveals that some members of the ECtHR themselves believe that the Grand Chamber is overturning prior judgments in a regressive direction. It also suggests that the Court is, in fact, constricting human rights in Europe. We show that walking back dissents have increased in both absolute and percentage terms over the last two decades, with the sharpest uptick following the 2012 Brighton Declaration. We also find that such dissents are especially common in cases against established democracies, and in cases – often brought by prisoners, immigrants and suspected terrorists – whose Convention protections have provoked significant backlash against the Court.

... [T]wo plausible explanations ... [are, first], the Grand Chamber may be responding to political signals from the member states Second, the ECtHR may be tacitly taking account of the growing number of member states that have restricted the rights of certain disfavoured individuals and minority groups, in effect applying the living instrument and European consensus doctrines in reverse. ... [Another possible factor might be] the appointment of judges who favour more restrained interpretations of human rights. ...

...

... Grand Chamber judgments that walk back human rights, even tacitly, are normatively and jurisprudentially fraught. Most obviously, such rulings have immediate adverse effects for the thousands of vulnerable individuals who seek legal redress from the Court. But the rulings also have consequences beyond the litigants. When the ECtHR expounds the meaning of a particular right or freedom, its interpretation has ripple effects across the [then] 47 member states, all of which have incorporated the Convention into domestic law, and across national judiciaries, many of whose members give significant weight to ECtHR rulings when interpreting rights or freedoms in their respective constitutions. Pro-government rulings that disappoint these actors risk undermining the Court’s influence and its legitimacy.

At the same time, the ECtHR depends upon the political, institutional and financial backing of the member states, especially established democracies. When that support wanes, it is ... perilous for the ECtHR to 'double down' on a strategy of expanding rights and freedoms. ... [It is] not unreasonable for Strasbourg judges to consider the criticisms expressed by governments and to take account of regressive trends in national laws and policies.

...

On the one hand, tacit overturning has real costs. It undermines the consistency and predictability of ECtHR case law and risks inconsistent treatment of similarly situated litigants. It also generates separate opinions that expose normative fractures among the judges over foundational principles. ...

Yet tacit overturning may also have advantages. Studies of national and international courts have found that judges issue vague or ambiguous rulings when faced with political uncertainty. Vagueness can 'provide state officials with a measure of discretion ...'. ...

In the ECtHR context, ambiguity may reduce compliance pressures on all member states. ...

Alec Stone Sweet, Wayne Sandholtz, and Mads Andenas, in 'The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018', 21 *L. & Prac. Int'l Cts. & Trib.* (2022) 244, push back against the thesis of Helfer and Voeten:⁴⁹⁰

The [ECtHR] is the most active and influential human rights court in the world. Since the 1990s, it has received, annually, more individual applications, produced more rulings on the merits, and is cited more often than any other court in the world. High courts as diverse as the Canadian Supreme Court, the Hong Kong Court of Final Appeal, and the Colombian and South African Constitutional Courts routinely consider the jurisprudence of the ECtHR, when they adjudicate domestic charters of rights. The Inter-American Court of Human Rights and the various African regional courts virtually never issue an important judgment without consulting the relevant rulings of the European Court. Indeed, the case law of the ECtHR is today a focal point for inter-judicial coordination within a rights-based commons of global scope and significance.

The prominence of the Strasbourg Court rests on its jurisprudence, which features a steadfast commitment to maximizing the effectiveness of the European Convention on Human Rights (ECHR) within national legal orders. Its success ultimately depends on the willingness of national judges to enforce the Convention which is, in turn, contingent upon the tolerance of legislative and executive officials of highly intrusive modes of judicial scrutiny. ...

...

Between 2010 and 2018, the Member States of the Council of Europe staged a series of extraordinary "High Level Conferences", the purpose of which was to evaluate the Court's performance and potential reforms. The agenda was dominated by two issues: (i) how to deal with a chronically overloaded docket ...; and (ii) whether to dismantle the components of judicial supremacy that had been established through the ECtHR's precedents. The latter question had been placed on the agenda by those seeking to force or persuade the Court to soften

⁴⁹⁰ The debate, which largely concerns competing methodological approaches, is developed in A. Stone Sweet, W. Sandholtz and M. Andenas, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten', 32 *Eur. J. Int'l L.* (2021) 897; followed by a rejoinder by Helfer and Voeten, at 32 *Eur. J. Int'l L.* (2021) 907.

review and to grant more deference to the policy preferences of governments.

...

... Helfer and Voeten concede that the High Level Conferences did not induce the ECtHR to roll back protections explicitly; they nonetheless accuse the Court of having done so surreptitiously, betraying its own doctrinal commitments while lying about it. We reject these claims. ...

...

7 Conclusion.

There are several clear reasons for the failure of States and reformers to curb the powers of the Court. First, the decision-rules governing treaty revision (consensus-based unanimity) are protective of the Court and its authority. Second, only a small minority of States were committed to rolling back the ECtHR's progressive jurisprudence. A majority of States recognized and supported the Court's achievements, which include helping to maintain peace in Europe, bolstering transitions to rights-based democracy, operating a system of monitoring and enforcement of human rights, and raising standards of protection. Third, States proved willing to pay the tax for these collective goods, which entails tolerating enhanced supervision of their own rights-regarding activities. Of course, they may well protest judgments finding violations in sensitive policy areas, and high court judges will be unhappy with rulings they would not have produced on their own. For its part, the ECtHR has noted and responded to these reactions, while maintaining its core commitments.

...

Although the Court has been beset by regular political "crises" well before the High Level Conferences, the latter provided fora in which some Member States could express their dissatisfactions with the regime. British governments at times even threatened to abolish the 1999 Human Rights Act and to withdraw from the Court. Still, the efforts of the United Kingdom at Brighton, and of Denmark at Copenhagen, failed. In the end, the interpretation and application of subsidiarity and margin of appreciation remain in the hands of the Court.

A former Judge on the Court, Paul Lemmens, in 'The European Court of Human Rights—Can There Be Too Much Success?', 14 *J. Hum. Rts. Prac.* (2022) 169, explains the judicial techniques the Court has used in response to the various criticisms:

... Faced with accusations of activism and challenges to its legitimacy, the Court has opted for a course of action in line with its subsidiary role within the Convention system. ... [T]he Court has entered a new phase, which can be defined as the 'age of subsidiarity'. It is not a completely new age, but to some extent a return to the roots of the Convention system. What is new ... is the emphasis on what is called a 'process-based' review. This starts with a review of the procedural guarantees offered to the parties in administrative and judicial proceedings. ... The Court holds that the decision-making process leading to measures of interference with the rights of a given individual must be fair and such as to afford due respect to the interests safeguarded to the individual by the Convention. ...

However, the process-based review, as it operates nowadays ... [is] related to the substance of the decision taken at the domestic level. ... [T]he domestic authorities must strike a fair balance between the rights of the individual and the general interests pursued by the public authorities. Such balancing is a matter for which the authorities enjoy a 'margin of appreciation' It is not for the Court

to decide what is the best policy in a given field. What counts is that, whatever policy choice is made, a 'fair' balance is struck.

...

...[A]n unsatisfactory balancing exercise will lead to the conclusion that the end result is disproportionate and constitutes a (substantive) violation of the applicant's rights.

[Where there has been] a satisfactory balancing exercise ... the Court regularly states that it would require 'strong reasons' to substitute its own view for that of the national authorities. ...

... [T]he process-based review, characterized by the fact that the Court respects to a considerable degree the balancing exercise appropriately undertaken by the national authorities, is an answer to the criticism that it received from a number of governments and that culminated in the Brighton Declaration. Does this answer mean that the level of human rights protection is lowered? ...

Looking only at what the Court does in the cases brought before it, is missing the complete picture. The general idea behind the Court's approach is to strengthen the 'shared responsibility' between national authorities and itself. ... The more the national authorities display 'due diligence' in the application of the Convention principles, the more deference the Court will show to them; conversely, the more defective the national process is, the more interventionist the Court will be. ...

4. Outlook and prospects

...

In order to remain relevant, [the Court] will have to enjoy the confidence not only of a large majority of the States parties to the Convention, but also of the citizens of Europe. This means that it must drive and not look back, allow for a margin of appreciation but at the same time insist on respect for the principles of the Convention, act vigorously (and in a timely manner) where governments ignore the Convention and go against its basic principles, and pay special attention to the rights of the most vulnerable and powerless persons.

Responding to Lemmens, Stefanie Schmahl, in 'The European Court of Human Rights—Can There Be Too Much Success? A Comment', 14 *J. Hum. Rts. Prac.* (2022) 191 emphasizes the importance of judicial self-restraint, the subsidiarity principle and the margin of appreciation, all of which have important implications for the Court's role:

By transferring the interpretation of the [ECHR] to an independent international authority, States relinquish part of their power. They will only accept this transfer of power permanently if the judicial interpretation by the Strasbourg Court remains consistent, comprehensible and plausible. The Court should therefore not act as a human rights 'trendsetter' or a 'judicial activist'. In the vast majority of cases, the Court has respected this barrier. ... The common ground has to be legally based on the overwhelming agreement of the Contracting States and not on international or European soft law instruments, as convincing in substance as they might be. Human rights are not an 'optimization programme' for which there are no limits, since this would transgress the regulatory function of the law and the limit of law-making, which is first and foremost entrusted to the democratically legitimized legislator.

4. Conclusion

Overall, three principles are decisive[:]the judicial self-restraint of the Court, the subsidiarity principle and a margin of appreciation ... If the Court ventures too far beyond the wording of the treaty, it risks that its judgments will not be implemented in the national legal orders

7. The Broader European Institutional Context

a. The European Union

The origins of the European Union lie in the Treaty of Paris of 1952 establishing the European Coal and Steel Community (ECSC) and subsequently in the two Treaties of Rome of 1957 creating the European Economic Community (EEC) and the European Atomic Energy Community. Upon the entry into force in 1993 of the Treaty on Economic Union these communities became the European Union, and the Treaty of Paris expired in 2002. From six founding members in 1957 the EU had 27 in 2023, following the exit of the United Kingdom in 2020.

The impetus for the first step of creating the ECSC came essentially from a desire to ensure that the heavy industries of the Ruhr, which had underpinned Germany's military might in two World Wars, would be 'contained' within an intergovernmental structure bringing together West Germany and its former antagonists. The expansion into an EEC in 1957 was an attempt to promote closer economic integration within Europe for both federalist and economic reasons. While the adoption of a bill of rights based on the ECHR had been proposed in the early 1950s, none of the subsequent treaties contained such a bill or a list of enumerated rights. The 1957 treaties were more concerned with the freedom of the marketplace than the rights of individuals. The latter were seen to be appropriately protected at the national level.

The Court of Justice of the European Union (CJEU), which is the judicial organ of the EU, was known as the European Court of Justice (ECJ) until 2009. In the absence of a bill of rights, the Court began in 1969 to evolve a specific doctrine of human rights, the original motivation for which probably owed more to a desire to protect the primacy of EC law over national law than to any concern to provide extended protection to individuals. Over the years during which the human rights doctrine has evolved, the Court has identified several different normative underpinnings for 'the general principles of EC law' of which human rights (referred to by the European Court of Justice as 'fundamental rights') were one category. These normative underpinnings include certain provisions of the Treaty of Rome, the constitutional traditions of the member states, and international treaties accepted by member states. The European Court of Justice has applied this concept of human rights to the actions of the Community itself, and, with certain qualifications, to the actions of the member states.⁴⁹¹ The Court's jurisprudence was subsequently reflected in the Treaty on European Union (TEU or 'Lisbon Treaty'), which entered into force in 2009. Relevant provisions include:

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

...

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall

⁴⁹¹ See P. Alston, M. Bustelo, & J. Heenan (eds.), *The EU and Human Rights* (1999).

contribute to ... the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 6

...

2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The resulting state of the law has been summarized thus:

- ii. There are three formal sources for EU human rights law listed in Article 6 TEU. [They are: the EU Charter of Fundamental Rights; the ECHR; and 'general principles of EU law'.] ... These three sources overlap, creating some legal confusion, and other sources of international human rights law have occasionally been invoked by the ECJ.
- iii. The CJEU has made it clear in recent years that the Charter is now the principal basis on which the EU Courts will ensure that human rights are observed, and the proportion of cases in which the CJEU has drawn on ECHR case law has declined since the coming into force of the Charter.
- iv. Article 6(2) TEU declares that the EU shall accede to the ECHR. ... However, the CJEU dealt a surprising blow to the prospects for EU accession when it ruled in 2014 that the long-negotiated draft Agreement on Accession of the EU to the ECHR was incompatible with the EU Treaties and with the autonomy of the EU legal order in several fundamental ways.
- v. EU human rights standards ... are binding on the EU and its institutions and bodies in all of their activities, and on the Member States when they act within the scope of EU law ... ⁴⁹²

The TEU also provides (Art. 7) for the suspension of certain EU membership rights if 'a serious and persistent breach' of human rights is deemed to exist within a member state. But the EU has been reluctant even to take such measures, as demonstrated in the cases of Poland and Hungary. Gráinne de Búrca, in 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments', 20 *Int'l J. Con. L.* (2022) 13, notes that reports by the Venice Commission, the EU Commission, and judgments of the Court of Justice of the EU, *inter alia*, confirm that Poland and Hungary have undermined the EU's basic values by:

- (i) Poland and Hungary subjecting the courts to political control ...;
- (ii) establishing government-approved disciplinary procedures ... and using these to discipline or terminate the appointment of judges who question aspects of the government's agenda ...;
- (iii) repressing and de-funding civil society groups who challenge or question aspects of governmental policy ...;

⁴⁹² P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (7th ed., 2020), 430.

- (iv) exercising increasing control over media freedom and dismantling media pluralism ...;
- (v) smearing and harassing critics, including through civil and criminal defamation actions, and repressing freedom of expression ...;
- (vi) repression of particular disfavored groups and minorities, including LGBTQ+ communities ..., targeting asylum seekers ...;
- (vii) using the apparatus of law and order, and in particular the public prosecution offices, in a highly selective way to protect ruling elites; refusing to investigate prominent cases of corruption and illegality, and using the police and powers of prosecution to discipline and harass political opponents ...;

...

Nevertheless, Craig and de Búrca note that both states retain full EU membership, with all their rights and privileges intact. Because of a ‘notable *political* unwillingness to confront Poland or Hungary in a robust way’, there has been ‘little by way of response from the Council of Ministers, the European Union’s main intergovernmental institution.’ In response to the question of why there has been such reticence, she suggests: (i) the typical reluctance of states within international organizations to sanction one another; (ii) institutions of democracy or the rule of law have been weakened or undermined in other member states in recent times; (iii) a belief that ‘tough confrontation ... will not help to resolve the problem of growing authoritarianism’; (iv) the shadow of Brexit; and (v) a ‘fear of driving states like Hungary closer towards actors like Russia, creating further geopolitical instability’.

The gamble that EU member states are taking in failing to confront Hungary and Poland is that the nature of the European Union itself will gradually change, both with the breakdown of mutual trust and mutual recognition on which the internal market and the area of judicial cooperation depends, and with the spread of authoritarianism both within the EU institutions and in other member states. Even the values themselves—the meanings given to democracy, the rule of law, and human rights within EU law and policy—are constantly weakened and eroded by the toleration of and the failure to challenge authoritarian practices. The temptation to stand back and let things unfold.

b. The Venice Commission

The European Commission for Democracy through Law, known as the ‘Venice Commission’ was established in 1990 under an agreement among 18 Council of Europe member states. It has since become a major player in offering analysis and advice on a wide range of issues. Its 2002 Statute provides that it is ‘an independent consultative body’, designed to promote the rule of law and democracy. Its prime function, described in its *Annual Report of Activities 2022 (2023)* 7, is to provide constitutional assistance to member states, mainly in the form of Opinions. At the request of a constitutional court or the ECtHR, it may also provide amicus curiae briefs on comparative constitutional and international law issues.

c. The Organization for Security and Co-operation in Europe (OSCE)

The Conference on Security and Co-operation in Europe (CSCE) opened in 1973 and concluded in August 1975 with the signing of the Final Act of Helsinki (known as the Helsinki Accord) by the 35 participating states (including all European states except Albania, plus Canada and the United States). The Soviet Union sought formal recognition of its European frontiers, while the West sought concessions primarily in relation to security matters. Human rights were of only secondary concern. In 1995 the CSCE became the OSCE, and by 2023 it had 57 member states.

In 2011, the OSCE had over 2,800 staff and an annual budget of 151 million euros. In 2022, the staff was down to 152 and the budget was 23 million euros.⁴⁹³ Its principal institutions are its Secretariat in Vienna, the Office for Democratic Institutions and Human Rights (ODIHR) based in Warsaw, a Representative on Freedom of the Media based in Vienna, and a High Commissioner on National Minorities based in The Hague. The OSCE has been especially active in electoral observation.⁴⁹⁴

8. Other Human Rights Conventions Adopted by the Council of Europe

a. The European Social Charter⁴⁹⁵

Although economic and social rights were reflected in the post-Second World War constitutions of France, Germany, and Italy, they were not included in the European Convention. One of the key drafters, Pierre-Henri Teitgen, explained this decision in 1949 on the grounds that it was first necessary ‘to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalisation of social democracy.’ These rights were subsequently recognized in the European Social Charter of 1961.

The core ESC system consists of the original Charter of 1961 and a revised Charter of 1996. As of 2023, 42 of the 46 Council of Europe member states have ratified one or the other treaty (the exceptions are Liechtenstein, Monaco, San Marino and Switzerland). Only 16 states have accepted the collective complaints procedure.

The Charter and its Additional Protocol of 1988 guarantee a series of ‘rights and principles’ with respect to employment conditions and ‘social cohesion’. The former relate to non-discrimination, prohibition of forced labour, trade union rights, decent working conditions, equal pay for equal work, prohibition of child labour, and maternity protection. Among the latter are: health protection; social security; and certain rights for children, families, migrant workers, and the elderly. These rights are not legally binding *per se*. The legal obligations designed to ensure their effective exercise are contained in Part II, which details the specific measures to be taken in relation to each of the rights. Part III reflects the principle of progressive implementation tailored to suit the circumstances of individual states. Each contracting party must agree to be bound by at least five of seven rights which are considered to be of central importance. It must also accept at least five of the other rights as listed in Part II.

Part IV provides for a monitoring system based on the submission of regular reports by contracting parties. The reports are examined by the European Committee of Social Rights, whose 15 independent expert members hold seven sessions per year of one week each. Its assessments of compliance and non-compliance are then considered by the Parliamentary Assembly and a Governmental Committee. Finally, on the basis of all these views, the Committee of Ministers may make specific recommendations to the state concerned. The Additional Protocol providing for collective complaints entered into force in July 1998. By December 2022, a total of 223 complaints against 16 different countries had been registered (57 concerned France, 39 Italy, and 23 Greece). 17 complaints were registered in 2022. A comprehensive overview is provided in the Council of Europe’s *Digest of the Case Law of the European Committee of Social Rights* (2022).⁴⁹⁶

b. The European Convention for the Prevention of Torture

⁴⁹³ OSCE, *Democracy and Human Rights in the OSCE: Office for Democratic Institutions and Human Rights, Annual Report* (2023) 7.

⁴⁹⁴ OSCE, *Handbook on Observing the Work of Election Management Bodies* (2023).

⁴⁹⁵ See S. Angeleri and C. Nivard, *The European Social Charter: A Commentary* (2022); and K. Lukas, *The Revised European Social Charter: An Article by Article Commentary* (2021). The European Union also plays an important role in relation to social rights: S. Garben, ‘The European Pillar of Social Rights: An Assessment of its Meaning and Significance’, 21 *Camb. Y.B. Eur. Leg. Stud.* (2019) 101.

⁴⁹⁶ C. O’Cinneide, ‘The European System(s) of Social Rights Protection’, in J. Dugard et al. (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (2020) 48; and K. Lukas and C. O’Cinneide, ‘Gender Equality within the Framework of the European Social Charter’ in R. Cook (ed.), *Frontiers of Gender Equality: Transnational Legal Perspectives* (2023) 219.

In 1987, the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) which emphasizes prevention. It has been ratified by all 46 states. The ECPT can include states that are non-members of the Council of Europe: following Russia's departure from the Council, notably, it continued to be a party to the Convention.

The Convention establishes a Committee for the Prevention of Torture (CPT) which is composed of 46 independent experts. Its function is 'to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons' from torture, inhuman or degrading treatment (Art. 1). The Convention is not concerned solely with prisoners but with any 'persons deprived of their liberty by a public authority'. Each state party is required to permit the Committee to visit any such place within the state's jurisdiction (Art. 2), unless there are exceptional circumstances (which will rarely be the case). Most visits are routine and scheduled well in advance, but there is also provision for ad hoc visits with little advance notice (Art. 7).

The Committee undertakes some 15-18 visits per year, ranging in length from a few days to two weeks.⁴⁹⁷ In 2022 there were seven periodic and nine ad hoc visits, totalling 140 days. It meets *in camera* and its visits and discussions are confidential; as, in principle, are its reports. The latter, however, may be released, either at the request of the state concerned or if a state refuses to cooperate and the Committee decides by a two-thirds majority to make a public statement. Most reports are released. An indication of the scope of its mandate is provided by this description of issues to which particular attention was paid in 2022 (*32nd General Report of the CPT* (2023) 7):

... persons detained by the police, to patients and residents held in psychiatric establishments and social care homes (Croatia), patients in psychiatric wards of civil hospitals and non-autonomous elderly persons accommodated in nursing homes (Italy), life-sentenced prisoners (Latvia), persons detained over terrorist offences and those deprived of their liberty under immigration legislation (Netherlands), foreign nationals detained in Border Guard establishments, remand prisoners, and forensic psychiatric patients (Poland), women held in prisons, persons held on remand and patients held in psychiatric or forensic establishments (Portugal), persons undergoing "compulsory health treatment" (involuntary psychiatric hospitalisation) and residents in a home for the elderly (San Marino).

c. Framework Convention for the Protection of National Minorities

Despite the importance of national minorities within Europe and discussions about appropriate measures since 1949, the issue proved too controversial and complex for the Council of Europe to adopt specific standards until 1994, when the Framework Convention was adopted. In part, the impetus was the adoption of the 1992 UN Declaration on Rights of Persons Belonging to Minorities, and the development of non-binding standards and promotional activities in this field by the CSCE. The Council sought to avoid longstanding controversies by, among other things, confining the Convention to programmatic obligations that are not directly applicable and that leave considerable discretion about implementation to the state concerned. International supervision is undertaken by the Committee of Ministers of the Council based upon periodic reports to be submitted by states parties. The Convention entered into force in February 1998 and as of 2024 had been ratified by 39 states.

The Convention does not define a 'national minority', leaving each state to define which groups are covered. But the state's definition is required to be non-discriminatory, made in good faith, and consistent with general principles of international law. It applies the principle of 'free self-identification', according to which individuals have the right to decide for themselves whether they

⁴⁹⁷ See generally: C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (2018).

wish to be treated as belonging to a national minority, as long as that decision is based on objective criteria connected with their identity, such as their religion, language, traditions and cultural heritage.⁴⁹⁸

B. THE INTER-AMERICAN SYSTEM

The Inter-American human rights system consists of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). They apply the standards contained in the originally non-binding American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969). The relationship between the Declaration and the Convention is broadly comparable to that between the UDHR and the two International Covenants. Similarly, many of the techniques that are used by the Commission and Court will be familiar from our study of the UN and ECHR systems. By the same token, the Inter-American system is distinctive in many ways.

1. Background and Institutions

During the first half of the twentieth century, Latin American states took important initiatives designed to protect the rights of women, workers, and indigenous peoples. These initiatives were developed in parallel with an emphasis on the principles of non-intervention and the equality of states. The latter preoccupations came in response to persistent interventions over the years by the United States, often under the pretext of providing diplomatic protection for its nationals. In 1944 the Inter-American Juridical Committee prepared a draft declaration of rights, an initiative that was viewed both as a means to promote international protection and to eliminate the pretexts for U.S. intervention.

a. History of the Organization of American States

In May 1948 the ninth Inter-American Conference, held in Bogotá, established the Organization of American States (OAS). Its predecessor organizations date back to the International Union of American Republics of 1890. The 1948 Charter entered into force in 1951 and has been amended several times since. The United States saw the organization as a bulwark against communism, while Latin American states had more complex reasons for supporting it.

Article 2 of the Charter declares the purposes of the Organization to be:

to strengthen the peace and security of the continent; to promote and consolidate representative democracy, with due respect for the principle of nonintervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states; to provide for common action on the part of those States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote by cooperative action, their economic, social and cultural development, and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states.

Its principal organs are the General Assembly that meets annually as well as in additional special sessions if required, the Meeting of Consultation of Ministers of Foreign Affairs that considers urgent matters, the Permanent Council, and the General Secretariat. The latter two organs are based in Washington DC.

At the 1948 Bogotá Conference, Uruguay pressed for the inclusion of human rights in the OAS Charter and the creation of an Inter-American court, while others insisted on nothing more than a non-binding declaration. Mexico and the United States took the lead in opposing the creation of

⁴⁹⁸ See *Framework Convention for the Protection of National Minorities, Collected Texts* (10th ed., 2023); and *Compilation of Thematic Commentaries of the Advisory Committee* (2nd ed., 2018).

institutional arrangements. The result was the American Declaration of the Rights and Duties of Man, adopted seven months before the UN's UDHR and two-and-a-half years before the European Convention. But it was to take much longer before there was a regional treaty monitored by an effective supervisory machinery. The Inter-American Commission on Human Rights was created in 1959 and the American Convention on Human Rights was adopted in 1969. It entered into force in 1978.

In 2001, the Inter-American Democratic Charter was adopted. It recognized that '[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it' (Art. 1), declared the 'effective exercise of representative democracy [to be] the basis for the rule of law' (Art. 2) and defined representative democracy to include essential elements such as 'respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections ..., the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government' (Art. 3). The Charter also lays down various procedures to be followed when democracy is threatened. Thus, for example, '[i]n the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state' the OAS Permanent Council may be convoked and may initiate diplomatic initiatives. If necessary, the General Assembly can also act and can suspend the membership rights of the state concerned, although this does not affect that state's human rights obligations (Arts. 20–1).

Stefano Palestini, in 'Why is the Collective Protection of Democracy in the Americas Doomed to Fail?', *Rev. Democ.* (4 October 2021) is critical of the IADC in practice:

Since its adoption in 2001, 38 political crises have been brought to the attention of the OAS. ... In 42 percent of the cases, the OAS member states arrived at the conclusion that the crisis at stake did not amount either to an "interruption of the democratic order" or an "alteration of the constitutional regime" and hence there was no enforcement. ... In a series of crises, the IADC was not enforced because the most powerful member states simply decided against it.

...

A relationship of tutelage emerges in which big states are perceived as the enforcers and small states the targets. In fact, with the partial exception of Venezuela a medium state in which the IADC has been enforced four times, the more frequent targets of the IADC have all been relatively small states like Bolivia (4), Nicaragua (3), and Ecuador (2). ...

As of 2025 there were 33 member states of the OAS, of which 23 were parties to the American Convention on Human Rights⁴⁹⁹ (Trinidad and Tobago withdrew in 1998 in disagreement over the death penalty; Venezuela in 2013, alleging that the Court admitted politicized cases, failed to respect the exhaustion of domestic remedies rule, and overreached vis-à-vis the domestic constitutional order; and Nicaragua while still a party refuses all cooperation.) Twenty states have recognized the jurisdiction of the Court to consider contentious cases against them.⁵⁰⁰ Although the United States signed the Convention in 1978, it has yet to ratify, and neither has Canada. Cuba remains, technically, a member of the OAS, but its Communist government has been excluded from participation in the Organization's work since 1962. As we shall see below, these facts have not prevented the Inter-American Commission from scrutinizing the human rights records of the relevant states. The two major human rights bodies within the OAS are the Commission and the Court.

⁴⁹⁹ Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, and Uruguay.

⁵⁰⁰ Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

b. The Commission

The Commission's principal roles are to consider individual petitions, monitor country situations, and develop thematic analyses of key issues. The Court's primary function is to consider contentious cases brought to it by States or referred by the Commission. But it also plays an important role in providing 'advisory opinions,' prescribing 'provisional measures' in urgent cases where people are at risk of irreparable damage, and promoting and monitoring compliance with its judgments and other orders.

Petitions may be filed by individuals alleging that any OAS Member State has violated the human rights guaranteed in applicable instruments. If the Commission finds the state responsible, it may make detailed recommendations to the state, and will monitor compliance. In the case of States that have accepted the contentious jurisdiction of the Court, either generally or for a particular case, non-compliance may lead the Commission to refer the case to the Court, which in turn can adopt a judgment that is legally binding for the state concerned.

The Commission was created in 1959 in the shadow of the Cuban revolution. It first met in 1960, began onsite visits in 1961, and was authorized to hear complaints in 1965. It consists of seven independent expert members, each from a different state, elected for a four-year term, renewable once. Its main function is to promote respect for and defence of human rights. States Parties to the Convention undertake in Article 43 to provide it with information it requests 'as to the manner in which their domestic law ensures the effective application' of the treaty. Commissioners are part-time and unpaid, but each takes responsibility as a 'thematic rapporteur' for an issue such as human rights defenders, persons of African descent and indigenous peoples, or the rights of the child. Each Commissioner also acts as a 'country rapporteur,' with lead responsibility for 3-6 countries. In addition, there are two separate independent special rapporteurs dealing with (i) Freedom of Expression and (ii) Economic, Social, Cultural, and Environmental Rights. The mandates of these rapporteurs are reviewed every three years, and may be terminated or renewed.

The Commission usually meets for four sessions of one to two weeks each year, with occasional additional 'extraordinary' sessions. In 2022, sessions were hybrid, thus enabling virtual as well as in-person participation. In that year, 56 public hearings were held, the great majority of which were focused on a specific country situation. When public hearings are held on the admissibility or merits of individual cases, which is entirely discretionary, one commentary notes that:

they ordinarily last one hour and are not dedicated primarily to taking live evidence from witnesses. When witnesses do appear, they ordinarily give a brief statement and are not subject to examination or cross-examination. Thus, as currently structured, the Commission's fact-finding process in individual cases cannot be termed judicial. While one might imagine enhancing the procedures of the Commission to enable it to become the authoritative judicial fact-finder of the system, doing so would require significant changes that we do not foresee in the near future.⁵⁰¹

The *Strategic Plan 2023-2027* identifies nine strategic objectives: 1) to increase access to inter-American justice, particularly for persons in historical situations of exclusion; 2) to strengthen the protection of persons by States when faced with the risk of serious, imminent and irreparable harm to human rights; 3) to promote compliance with the recommendations and standards of the inter-American human rights system; 4) to increase the capacity of the IACHR to have an impact on the prevention of human rights violations and on the timely response to human rights crises ...; 5) to deepen the awareness of human rights defenders of their rights ...; 5) deepen the awareness of state agents of the structural problems that give rise to human rights violations in the hemisphere; 6) strengthen the capacity of state agents and civil society organizations ...; 7) increase access to IACHR mechanisms by historically excluded persons, civil society organizations, and States; 8) improve IACHR mechanisms with a focus on gender, intersectionality, and results-based management; and 9) improve the management of

⁵⁰¹ J. Cavallaro and S. Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court,' 102 *Am. J. Int'l L.* 678 (2008), at 778.

human talent, as well as financial, administrative, and technological resources, with a human rights approach.

c. The Court

The Court's principal functions are to decide contentious cases, issue advisory opinions which may be requested by the Commission, OAS organs, and OAS Member States, and prescribe provisional measures. It has seven judges, elected by the States Parties, for a six-year term, renewable once. They must be qualified to exercise 'the highest judicial functions.' In 2015, none were female; in 2024, three were. In 2024, the Court met for eight regular sessions over a period of 22 weeks. It also met in one special sessions, and held two sessions away from San José (in Barbados and Chile).

During 2024, the Court delivered 38 judgments, including 31 on preliminary objections, merits, reparations, and costs, and seven interpretation judgments. It also issued 16 orders on provisional measures and monitored 44 active provisional measures. It retains jurisdiction over a case until full compliance is achieved. As of 31 December 2024, the Court had 44 cases pending resolution. It also had a staff of 73 permanent officials,⁵⁰² and a 2024 budget of US\$8.3 million, of which 65% came from the regular budget of the OAS.

The IACtHR has been at the forefront of a movement to develop more detailed, structural, and tailored remedial measures. Many of its judgments finish with a long list of orders directed primarily to the state concerned. This gives rise to concern that such onerous requirements will discourage compliance and be ignored by some states. Precisely to counteract such problems, the Court has developed an intensive and original system for monitoring compliance, something which was not envisaged in the Convention, but which the Court has argued to be 'inherent in the exercise of its jurisdictional powers'.

The Court's judgments generally call for the state to report on measures taken within one year. The Court then follows up by issuing orders, holding hearings, and sometimes undertaking visits to the state. Separate judgments against the same state might be joined for monitoring purposes. According to the Court's *Annual Report 2023* (2024) at 81, this allows common issues to be discussed, facilitates discussions among the representatives of victims, encourages more 'dynamic participation' by state officials, and brings disputed issues to the fore. In its Decision 1/19 (2019) the Court has also sought to broaden the discussions further by providing that other entities such as domestic courts and domestic human rights groups can play a role in encouraging the adoption of appropriate measures. Any such engagements are then noted on the relevant webpage of the Court. At the end of 2024, 322 cases were subject to monitoring compliance, entailing the monitoring 1,755 measures of reparation.

Advisory opinions are designed 'to clarify the meaning, purpose and rationale' of the provisions in question to enable Member States and OAS organs to meet their 'international obligations fully and effectively, and to define and implement public policies in the area of human rights' (Advisory Opinion No. OC-21/14, Series A, No. 21 (19 August 2014), para. 29).⁵⁰³ As of June 2025, the Court had issued 32 advisory opinions, and several others have been requested. The latter include a request by Mexico in 2022 concerning 'the activities of private arms companies and their impact on human rights'; a request by Argentina in 2023 relating to the nature and scope of care for others as a human right (the Milei government sought unsuccessfully to withdraw this request in 2024); and a request by Guatemala in 2024 as to whether States are obliged to guarantee and promote democracy as a human right. Advisory Opinion 32/25 of May 29, 2025 (Series A No. 32) addressed the critical issue of state obligations for responding to the climate emergency (for details, see Ch 15B, below).

Other recent Advisory Opinions have dealt with:

⁵⁰² Pablo González Domínguez, 'The Role of the Secretariat in the Inter-American Court of Human Rights: A Comparative Analysis', 116 *Am. J. Int'l L. Unbound* (2022) 390.

⁵⁰³ See generally W. Arcvalo Ramirez and A. Rousset Siri, 'Compliance with Advisory Opinions in the Inter-American Human Rights System,' 117 *AJIL Unbound* (2023) 298.

- Differentiated approaches with respect to certain groups of persons in detention (Advisory Opinion OC-29/22, Series A, No. 29 (30 May 2022));
- Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights (OC-28/21);
- Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective (OC-27/21);
- Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations (OC-26/20);
- The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (OC-25/18);
- Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (OC-24/17);
- The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity (OC-23/17); and
- Entitlement of legal entities to hold rights under the Inter-American Human Rights System (OC-22/16).

The Court has so far rejected five requests for Advisory Opinions. The most recent was in 2017, when it rejected one submitted by the Commission for an opinion relating to due process rights in the context of impeachment proceedings. This was triggered by the process against President Rousseff of Brazil. The Court pointed out that advisory opinions should not address an actual or potential contentious case, be used to obtain an indirect ruling on a domestic dispute, be used as an instrument of internal political debates, relate exclusively to a matter already disposed of in the Court's jurisprudence, or seek to resolve factual issues.

The type of issue brought to the Court in contentious cases has evolved significantly over the years. Initially the decision to submit cases to the Court was entirely at the discretion of a reluctant Commission, and between 1979 and 1986 it transmitted no contentious cases. But in 2001, the Commission's new Rules of Procedure put in place a presumption that cases would be submitted to the Court where a State had failed to implement the Commission's recommendations. This virtually tripled the Court's workload, forcing it to significantly adapt its procedures.

The history of military dictatorships in Latin America during the 1970s and 1980s ensured that all but two of the cases decided by the court dealt with state-sanctioned acts of violence such as torture and disappearances. The Court was thus able to generate an important and innovative body of jurisprudence on these issues, as illustrated by its first and arguably most important judgment in the *Velásquez Rodríguez* case. The Court's role began to change significantly not just because the end of the dictatorship era brought new types of challenges, but also because of the changing landscape of constitutionalism in Latin America. The result was the emergence of 'a transnational network of lawyers who advance a liberal vision of constitutional law that emphasizes judicial power, rights-based review, and Dworkinian-style interpretive practices, and who embrace the view that constitutional rights are grounded not only in positive domestic law but also in international human rights instruments.'⁵⁰⁴ This in turn has enhanced the power of the Court and its jurisprudence at the national level. Before examining this evolution more fully, we consider the basic elements of the regime, including the rights recognized and the different regimes that apply according to the ratification record of the state concerned, as well as exploring some examples of the role played by the Commission.

d. Rights Recognized in the American Declaration and Convention

⁵⁰⁴ A. Huneeus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority,' 79 *L. & Contemp. Probs.* 179 (2016), at 181.

In terms of rights, the American Declaration on the Rights and Duties of Man (adopted on 2 May 1948) is similar in content to the Universal Declaration (adopted on 10 December 1948), although the approach to economic and social rights differed importantly. But what especially distinguishes the American Declaration are ten articles setting out the duties of the citizen: the duty ‘so to conduct himself in relation to others that each and every one may fully form and develop his personality’; to ‘aid support, educate and protect his minor children’; to ‘acquire at least an elementary education’; to vote in popular elections; to ‘obey the law and other legitimate commands of the authorities’; to ‘render whatever civil and military service his country may require for its defence and preservation’; to cooperate with the state with respect to social security and welfare; to pay taxes; and to work. By comparison, the UDHR says only that ‘Everyone has duties to the community in which alone the free and full development of his personality is possible’ (Art 29(1)).⁵⁰⁵

The process of drafting an inter-American treaty began in 1959. The result was the American Convention on Human Rights of 1969 (also known as the Pact of San José, Costa Rica) which contains 26 rights and freedoms, 21 of which are formulated in similar terms to the provisions of the ICCPR. Consider some comparisons:

- (1) Article 27 of the ICCPR, which recognizes the rights of members of minority groups, has no counterpart in the American Convention.
- (2) The five provisions which are in that Convention but not in the ICCPR are the right of reply (Art. 14), the right to property (Art. 21), freedom from exile (Art. 22(5)), the right to asylum (Art. 22(7)), and prohibition of ‘the collective expulsion of aliens’ (Art. 21(9)).
- (3) Some provisions in the American Convention express the same general idea as in other human rights treaties but do so in a distinctive manner — for example, Article 4 (1) on the right to life provides that the right ‘shall be protected by law and, in general, from the moment of conception’.
- (4) Article 23 on participation in government contains the same rights and requirements as the analogous Article 21 of the UDHR and Article 25 of the ICCPR.

When the Convention was adopted in 1969 it was decided not to have a separate treaty relating to economic, social, and cultural rights but rather to include a general provision (Art. 26) in the following terms:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively by legislation or other means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The OAS Charter, as amended, sets up an Inter-American Council for Education, Science and Culture, as well as an Economic and Social Council, both of which are supposed to set standards, consider reports made by states, and make recommendations. In response to the ineffectiveness of that machinery, the OAS adopted, in 1988, an Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador). It obliges parties to adopt measures, ‘to the extent allowed by their available resources, and taking into account their degree of development’, for the progressive achievement of the rights listed. The Protocol became effective in 1999 and had, as of June 2025, 18 states parties.

The rights recognized in the Protocol are similar to those in the International Covenant on Economic, Social and Cultural Rights, although the formulations differ significantly. The Protocol does not recognize the rights to adequate clothing and housing or to an adequate standard of living (Art. 11 of the ICESCR), but it does include the right to a healthy environment, the right to special protection in

⁵⁰⁵ On duties in human rights instruments generally, see Chapter 6, above.

old age, and the rights of persons with disabilities, none of which are explicitly recognized in the ICESCR.⁵⁰⁶

2. The Standards to be Applied to Different States

In recent years the Commission has sought to transcend the problem that different standards apply to different states by promoting ‘universal ratification’ within the Americas of the Convention and other relevant human rights treaties.⁵⁰⁷ But the pattern of ratifications is very uneven and results in a somewhat complex architecture for the inter-American system. A key question concerns the implications of a state’s non-ratification of the Convention. For the Commission:

First, it may represent a significant constraint on the full exercise of citizenship and the development of standards, public policies, and measures intended to protect and ensure everyone’s enjoyment of rights, essential elements for an inclusive democracy. It maintains the door shut to a protection system of a complementary nature which may be vital for persons in a specific situation of vulnerability and thus subject to violations of their human rights, such as those affected by poverty and historical situations of discrimination. Second, it limits the effectiveness of discourse on human rights as expressed by those States that have not ratified, as well as their regional and international leadership on these subjects. Third, it constitutes an obstacle to OAS regional integration goals and to sustainable opportunities for multilateral cooperation in the Americas and at the international level.⁵⁰⁸

The Commission has also noted that fewer petitions are submitted, fewer hearings requested, and fewer invitations for on-site visits are received in the case of states that have not ratified the Convention. The Commission and the Court have, however, acted to ensure that minimum standards will still apply, as illustrated by the especially significant examples of Cuba and the United States, neither of which has ratified the Convention.

Cuba

The coming to power of the Communist government in 1959 provided a major impetus to develop the OAS’s human rights activities. The challenge was to reconcile Cuba’s suspension from the Organization with a desire to monitor and report on the human rights situation. This excerpt explains the legal analysis by which this was achieved:

Cuba is a member state of the Organization of American States since July 16, 1952... The Commission has maintained that the Cuban State “is juridically answerable to the Inter-American Commission in matters that concern human rights” inasmuch as it “is party to the first international instruments established in the American hemisphere to protect human rights” and because “Resolution VI of [January 31, 1962] excluded the Government of Cuba, not the State, from participating in the inter-American system.” In this connection the IACHR stated: ... it was not the intention of the Organization of American States to leave the Cuban people without protection. That Government’s exclusion from

⁵⁰⁶ For a comprehensive analysis, see *Compendium on Economic, Social, Cultural and Environmental Rights: Inter-American Standards*, OEA/Ser.L/V/II., Doc. 465, 31 December 2021).

⁵⁰⁷ These include: the Convention to Prevent and Punish Torture (1985), the Protocol to Abolish the Death Penalty (1990), the Convention on Forced Disappearance of Persons (1994), the Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), the Convention on the Elimination of All Forms of Discrimination against Persons with Disability (1999), the Convention against All Forms of Discrimination and Intolerance (2013), the Convention against Racism, Racial Discrimination and Related Forms of Intolerance (2013), and the Convention on Protecting the Human Rights of Older Persons (2015).

⁵⁰⁸ *Considerations Related to the Universal Ratification of the American Convention and other Inter-American Human Rights Treaties*, OAS/Ser.L/V/II.152, Doc. 21 (14 August 2014), para. 13.

the regional system in no way means that it is no longer bound by its international human rights obligations.⁵⁰⁹

After the resumption of diplomatic ties between the USA and Cuba, President Raúl Castro Ruz participated in the OAS General Assembly in April 2015, thus marking the first occasion in history when all 35 OAS heads of state and government had come together. The Commission continues to issue regular reports on Cuba, including one in 2020, supplemented by a 50-page analysis in its *Annual Report 2022* (Chapter IV.B). The latter observed ‘the failure to uphold the essential elements of representative democracy and its institutions, as well as the lack of provisions to ensure the separation of powers and the absence of guarantees of judicial independence, are persistent structural factors that profoundly affect the exercise of human rights and fundamental freedoms in Cuba.’ But the Commission’s report also notes (paras. 220-21) that while it has often called for ‘the lifting of the U.S. economic blockade on account of its impact on the Cuban people and their rights’, ‘the blockade “does not release the State of Cuba from its ... international obligations”’. It also noted UN General Assembly resolution 77/7 (2022) which called for the end of the economic embargo and was adopted by 185 votes in favour to 2 against (Israel, United States), with 2 abstentions (Brazil, Ukraine).

USA

The United States has signed, but not ratified, the American Convention. Its official position is that the American Declaration is clearly non-binding. It is a ‘noble statement of human rights aspirations’ which ‘lacks the precision necessary to resolve complex legal questions’. ‘It would seriously undermine the process of international lawmaking ... to impose legal obligations on states through a process of “reinterpretation” or “inference” from a non-binding statement of principles.’ It is hardly surprising then, given (1) the willingness of the United States to apply to other nations the Universal Declaration of Human Rights, the status of which is very similar, and (2) the enthusiasm of the United States for holding its Latin American neighbours to their human rights obligations, that other states within the inter-American system were keen to clarify the status of the American Declaration. The Advisory Opinion below does not focus specifically on the United States, but its target is fairly clear.

ADVISORY OPINION OC-10/89

INTER-AMERICAN COURT OF HUMAN RIGHTS, INTERPRETATION OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN WITHIN THE FRAMEWORK OF ARTICLE 64 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS, REQUESTED BY THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA (14 JULY 1989)

...

2. [In February 1988, the Government of Colombia sought an advisory opinion on] the following question:

Does Article 64 authorize the Inter-American Court of Human Rights to render advisory opinions at the request of a member state or one of the organs of the OAS, regarding the interpretation of the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in Bogotá in 1948?

...

30. Article 64(1) of the Convention authorizes the Court to render advisory opinions “regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.” ...

...

33. [It is clear] that the Declaration is not a treaty as defined by the Vienna Conventions [on the law of treaties]. because it was not approved as such

⁵⁰⁹ IACHR Annual Report 2006, para. 54.

34. Here it must be recalled that the American Declaration was adopted by the Ninth International Conference of American States (Bogotá, 1948) through a resolution adopted by the Conference itself. It was neither conceived nor drafted as a treaty

...

[As noted] on September 26, 1949, by the Inter-American Committee of Jurisconsults ...:

It is evident that the Declaration of Bogotá does not create a contractual juridical obligation, but it is also clear that it demonstrates a well-defined orientation toward the international protection of the fundamental rights of the human person

35. The mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration.

36. In fact, the American Convention refers to the Declaration in paragraph three of its Preamble which reads as follows:

Considering that these principles have been set forth in the Charter of the Organization of the American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.

And in Article 29(d) which indicates:

... No provision of this convention shall be interpreted as:

...

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

From the foregoing, it follows that, in interpreting the Convention in the exercise of its advisory jurisdiction, the Court may have to interpret the Declaration.

37. ... [T]o determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.

38. The evolution of the here relevant “inter-American law” mirrors on the regional level the developments in contemporary international law and specially in human rights law, which distinguished that law from classical international law to a significant extent. That is the case, for example, with the duty to respect certain essential human rights, which is today considered to be an *erga omnes* obligation

39. The Charter of the Organization refers to the fundamental rights of man in [various provisions] ... but it does not list or define them. The member states of the Organization have, through its diverse organs, given specificity to the human rights mentioned in the Charter and to which the Declaration refers.

40. This is the case of Article 112 of the Charter ...:

There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

Article 150 of the Charter provides as follows:

Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission's Statute ... [adopted in 1979]:

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
2. For the purposes of the present Statute, human rights are understood to be:
 - a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
 - b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Articles 18, 19 and 20 of the Statute enumerate these functions.

42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS... .

43. Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signalled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

44. In view of the fact that the Charter of the Organization and the American Convention are treaties with respect to which the Court has advisory jurisdiction by virtue of Article 64(1), it follows that the Court is authorized, within the framework and limits of its competence, to interpret the American Declaration and to render an advisory opinion relating to it whenever it is necessary to do so in interpreting those instruments.

QUESTIONS

1. Is the Commission's rationale for continuing to examine the human rights situation in Cuba convincing?
2. On the basis of the Court's Advisory Opinion, what is the legal status of the American Declaration, and how would you compare it in that respect with the Universal Declaration?

3. The Commission at Work

Over the years, the Inter-American Commission has evolved significantly in terms of its techniques. Its early emphasis was on country reports. A 1980 report on Argentina at the height of the problem of disappearances remains a classic in terms of effective fact-finding and follow-up. As recounted by Tom Farer, one of its members, the Commission, '[w]ith the grudging consent of the military government, ... roamed the country, recording thousands of denunciations of the regime's exterminatory assault on left-wing insurgents and anyone suspected of assisting them, whether materially or intellectually.' It 'privately interviewed hundreds of political prisoners and secured testimony from the fortunate few who ... had been released.' In Farer's assessment, the resulting report 'began the process of regime de-legitimation which culminated in the restoration of democracy four years later.'⁵¹⁰

The continuing evolution of the approach adopted by the Commission and the Court from that early phase until 2020 is traced by Christopher Roberts, in *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American and African Regional Human Rights Systems* (2022) 147:

[F]our sets of cases – concerning the reform of repressive public order systems, indigenous peoples' rights, violence against women, and the rights of marginalized groups – were at the forefront of the system's ongoing development of a progressive and assertive approach to its work in the new millennium. That approach had multiple, interrelated characteristics, including the tendency on the part of both the Commission and the Court to adopt a wide-angled perspective, taking in broader structural issues; the assertion of the strength and hierarchical supremacy of human rights law, understood as having a degree of force on the national as well as on the international legal level; a willingness to prescribe sweeping, multifaceted, and forceful remedial measures; and a recognition of the interrelationship between rights and democracy, and of the need for rights work to be focused on rewriting the fundamental rules of society, with the aim both of addressing past wrongs, and of achieving more inclusive political cultures going forwards. In sum, the period saw the system continuing to evolve from its past focus on calling out widespread and serious violations, to a new emphasis on combatting structural forms of violence and inequality within societies.

We now consider briefly each of the main functions the Commission currently performs, within the constraints of its personnel and budget. In 2024, 154 people worked for it (79 staff, 70 consultants and 5 associate staff). Its regular budget allocation was US\$10.65 million, with 'additional' voluntary funds of \$11.3 million, for a total of 22.1 million. In 2024 the United States contributed \$6 million in additional funds.

a. Individual Complaints

The number of complaints received annually by the Commission has grown steadily. In 1997 there were 435, in 2001 there were 885, and by 2024 there were 2,883. Of those, 859 were from Colombia, 749 from Mexico, 222 from Brazil, 194 from Argentina, 159 from Peru, and 79 from the United States. One of the major developments in recent years has been the rapid diminution in the Commission's backlog in dealing with complaints. In 2015, for example, 9,673 complaints were pending evaluation. At that time, the Commission was rejecting around 75 percent as not having met the procedural requirements. Following Resolution 1/16 (2016), designed to reduce the backlog, it was systematically reduced. In part this also reflected a higher rejection rate, which reached 86 percent in 2024. In that year, the Commission approved 133 admissibility reports (of which 74 were admitted) and 121 reports on the merits, and referred 26 cases to the Court.

⁵¹⁰ T. Farer, 'I Cried for you, Argentina', 38 *Hum. Rts Q.* (2016) 851.

b. Precautionary Measures

One of the most significant but also controversial activities of the Commission is the issuance of precautionary measures. These are the inter-American system's equivalent of the interim measures adopted by the ICCPR Committee (Ch. 9, above). Just as with the Covenant, the Inter-American Convention makes no provision for such measures, but the Commission argued that they are inherent in its other powers. Article 25 of the Commission's Rules of Procedure provides that:

... in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case. The measures may be of a collective nature to prevent irreparable harm to persons or groups of persons. In this regard, the number of precautionary measures granted does not reflect the number of persons protected by their adoption. Moreover, ... the granting of such measures and their adoption by the State shall not constitute a prejudgment on the violation of the rights protected

The Commission's *Annual Report 2024* notes that it received 1,412 new requests for precautionary measures in 2024, and evaluated 95% of them. It granted and/or extended 77 precautionary measures for the protection of more than 7,430 individuals and identifiable groups. Overall 5.45% of requests were granted or extended.

Perhaps the most controversial example of such measures was an order made in 2011 in relation to the building of a dam in Brazil:

On April 1, 2011, the IACHR granted precautionary measures for the members of [11 specified] indigenous communities The request for precautionary measure alleges that the life and physical integrity of the beneficiaries is at risk due to the impact of the construction of the Belo Monte hydroelectric power plant. The [Commission requested that Brazil] immediately suspend the licensing process for the [plant] and stop any construction work from moving forward until certain minimum conditions are met. The State must (1) conduct consultation processes, in fulfillment of its international obligations — meaning prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement — in relation to each of the affected indigenous communities that are beneficiaries of these precautionary measures; (2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to the project's Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics...⁵¹¹

Brazil deemed the proposed measures 'precipitous and unwarranted', severed formal relations with the Commission, recalled its OAS ambassador, and froze its annual US\$800,000 contribution to the IACHR. A key Senator stated that the request 'threatens Brazilian sovereignty'. Critics of the project noted that it had been controversial since 1975, would flood nearly 200 square miles in the Amazon and displace 50,000 people, and lead to the disappearance of 1,000 species of plants and animals. Protests had been led by FUNAI (the National Indian Foundation of Brazil), Amazon Watch, the vocalist Sting and movie director James Cameron. For its part, the Brazilian Government claimed that it would be the world's third largest dam, provide thousands of construction jobs, supply electricity to

⁵¹¹ PM 382/10 — Indigenous Communities of the Xingu River Basin, Pará, Brazil, in *Annual Report of the IACHR* (2012), Chap. III.

23 million homes, and be a source of clean and renewable energy. It was said to be the first of as many as 70 dams scheduled for construction in the region.⁵¹²

Another example is Precautionary Measure No. 731–18 (16 August 2018) concerning Migrant Children affected by the ‘Zero Tolerance’ Policy regarding the United States of America:

1. On June 18, 2018, [the Commission] received a request for precautionary measures presented by the National Commission of Human Rights of Mexico, the Ombudsman's Office of Colombia, the Ombudsman's Office of Ecuador, the Attorney General's Office of Guatemala, the National Commissioner of Human Rights of El Salvador, the National Commissioner of Human Rights of Honduras, ... in favor of migrant children that had been detained and separated from their families in the United States as a result of the implementation of the “Zero Tolerance” policy [pursued by the Trump Administration]. Among other conditions, the applicants allege that the separation of parents from their children could cause irreparable harm to their rights, particularly in the context of the children's best interest.

...

3. After analyzing the factual and legal allegations submitted by the parties, the Commission concludes that the rights to family life and personal integrity, as well as the right to identity of the children ... are *prima facie* in a situation of risk. ...

...

VI. DECISION

39. The Commission considers that this matter meets *prima facie* the requirements of seriousness, urgency and risk of irreparable harm set forth in Article 25 of its Rules of Procedure. Consequently, the Commission requests that the United States:

- a) Adopt the necessary measures to protect the rights to a family life, personal integrity, and identity of the proposed beneficiaries. Particularly, assuring that these rights are protected through the reunification of the children with their biological families and in support of the children's best interests;
- b) Adopt the necessary measures, while the reunification is carried out, to immediately guarantee an appropriate, free, and regular communication between the beneficiaries and their families[;] ... provide medical and psychological assistance ... [and] provide interpreting services when necessary
- c) In case any of the proposed beneficiaries was deported separately from their children, adopt immediately the necessary measures in the framework of international cooperation to guarantee their reunification, taking into account the child's best interest and the necessary support and care;
- d) Suspend any migration procedure that may result in the separation of the children from their parents;

⁵¹² See generally L. Birns and K. Soltis, ‘Controversy in the Amazon: Brazil Disregards the Inter-American Commission on Human Rights at Potentially Great Cost’, *Council on Hemispheric Affairs* (9 June 2011), at www.coha.org/controversy-in-the-amazon/.

In a commentary on this measure, and by way of contrast to Brazil's response, Berta Esperanza Hernández-Truyol, in 58 *Int'l Leg. Mat.* (2019) 371, noted that the Commission's intervention had, in practice, complemented the resistance shown by U.S. domestic courts in relation to these particular policies.

c. Interstate Complaints

The American Convention establishes an optional interstate complaints procedure (Arts. 45–51), but to date it has only been used twice. Assuming the states in question have recognized the Commission's competence for this purpose, and if the complaint is deemed admissible, the Commission will seek to reach a friendly settlement (Art. 48). If a settlement is not reached, the Commission shall report and may 'make such proposals and recommendations as it sees fit' (Art. 50). In March 2007 the Commission presented its first report on such a complaint.⁵¹³ It concerned allegations of systematic discrimination against Nicaraguan citizens resident in Costa Rica. The complaint was deemed inadmissible by virtue of the complainant's failure to submit the complaint within six months of its having been notified of a final decision being handed down in Costa Rica. Nonetheless, the Commission took the opportunity, in a 69-page judgment, to explore the applicable procedures, develop its jurisprudence on admissibility in such cases, exculpate Costa Rica in relation to some of the most serious charges, acknowledge Costa Rica's admission of the existence of discrimination and xenophobia in its territory, and to conclude by condemning 'all acts of discrimination or xenophobia against migrant persons of any origin' and recalling the 'obligation of states to protect individuals against discrimination, whether this occurs within the public sphere or among private parties'.

In October 2010, the Commission declared an application by Ecuador against Colombia to be admissible. It resulted from the killing of an Ecuadorian national during a military operation by Colombian forces on Ecuadorian territory to fight guerrilla fighters. Ecuador alleged violations of the rights to life, humane treatment, judicial guarantees, and judicial protection. The Commission rejected Colombia's claims that international humanitarian law should apply and that domestic remedies had not been exhausted.⁵¹⁴ The case was resolved through a friendly settlement.

One explanation, offered by Jorge Contesse, in 'Inter-States Disputes under the Inter-American Human Rights System', 13 *Int'l Hum. Rts. L. Rev.* (2024) 74, for the paucity of interstate complaints is that Latin American states resort to advisory opinions as a 'covert' interstate dispute mechanism.

d. Country Reports

In many cases, country visits by the Commission are undertaken by a single Commissioner in the framework of a 'working visit'. The outcome is a detailed press release outlining any major problems identified. But such visits do not count as an 'in loco' visit by the Commission, which requires the participation of at least two commissioners. Between October 1961 and 2021, the Commission undertook 102 such country visits.

A January 2020 visit to Chile is an example of a visit involving all seven Commissioners, as well as the Special Rapporteurs on Freedom of Expression and on Economic, Social, Cultural and Environmental Rights. It was scheduled in the aftermath of the 2019 social unrest involving mass demonstrations and what the Commission found to be a disproportionate response by the security forces to the 'democratic and legitimate expressions of its population'. The visit resulted in a 125-page report appended to the Commission's 2022 Annual Report. In addition, the latter report provides details of the measures taken by the Government in response to the Commission's extensive recommendations (Chapter IV.A, paras. 209-37).

⁵¹³ Report No. 11/07, Interstate Case 01/06, *Nicaragua v. Costa Rica* (8 March 2007).

⁵¹⁴ Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina (Ecuador – Colombia)* OEA/Ser.L/V/II.140, Doc. 10 (21 October 2010).

The Commission has adopted a detailed set of ‘General Guidelines’ on the follow-up of its recommendations and decisions (OEA/Ser.L/V/II.173, Doc. 177 (30 September 2019)).

Chapter IV of the Annual Report is entitled ‘Human Rights Developments in the Region’. Part A provides an overview of the human rights situation in each country. For example, in 2024 the entry on the United States provides this introductory overview to a nine-page analysis:

803. Regarding challenges, the IACHR emphasizes ongoing concerns about persistent patterns of racism, institutional and structural inequalities, the continued application of the death penalty, the frequency of mass shootings, gun-related violence, and excessive use of force by law enforcement in the United States. The Commission also expresses concern regarding restrictive migration and asylum policies, legislative restrictions on reproductive rights and transgender protections.

804. The State did not respond to the request for information to prepare this chapter.

Chapter IV.B contains ‘special reports’ which, in 2024, were directed at Cuba, Nicaragua, and Venezuela. Inclusion in Part B is considered an unwelcome ‘honour’ for any state. Traditionally, the Commission has sought to apply five criteria in selecting countries for this purpose: (1) states ruled by governments that have not come to power through secret, genuine, periodic, and free elections; (2) states in which human rights ‘have been, in effect, suspended totally or in part, by virtue of the imposition of exceptional measures’; (3) states which commit ‘massive and grave violations’; (4) ‘states that are in a process of transition from any of the above three situations’; and (5) where ‘temporary or structural situations’, such as major institutional crises, ‘seriously affect the enjoyment of fundamental rights’.

e. Friendly Settlements⁵¹⁵

The Commission’s first approved friendly settlement was not until 1985, but by 1994 it had become a well-established part of proceedings. When it revised its Rules of Procedure in 2001, governments were strongly incentivized to consider such a settlement in order to avoid a virtually automatic referral of the case to the Court. As a result, friendly settlements were achieved in response to 27 percent of admissible petitions between 2001 and 2018 (compared to 15 percent in 1992-2000).⁵¹⁶

Since 2003, the Commission has also innovated by introducing ‘compliance agreements’. Unlike friendly settlements, these are negotiated only after the Commission has issued its ‘merits report’ and its recommendations, but before that report is acted upon by the Court. This technique is reported to have significantly increased compliance rates.⁵¹⁷

In 2024, 19 new friendly settlement agreements were signed, and 13 reports approving friendly settlements were published. Under the *Strategic Plan 2023-2027* (at 60) the Commission has undertaken to strongly promote friendly settlements, to promote negotiation processes, to encourage compliance agreements, and to reduce the existing backlog of settlement processes.

An example of a potentially far-reaching settlement is the following (*Annual Report 2022*, at 126):

Report No. 305/22, Petition 1256 05, Ivana Emilce Rosales, Argentina: the case relates to the international responsibility of the Argentine State due to the alleged violation of [a range of human rights] ... to the detriment of Ivana Emilce Rosales and her daughters Mayka and Abril, by virtue of an arbitrary, discriminatory judicial decision during the criminal investigation for attempted

⁵¹⁵ IACHR, *Impact of the Friendly Settlement Procedure* (2nd ed, 2018) OEA/Ser.L/V/II.167, Doc. 31 (1 March 2018).

⁵¹⁶ F. Parente, ‘Settle or Litigate? Consequences of Institutional Design in the Inter-American System of Human Rights Protection’, 17 *Rev. of Int’l Org.* (2022) 39.

⁵¹⁷ A. Pérez-Liñán et al., ‘Compliance Agreements in the Inter-American Human Rights System’, *Max Planck Institute, MPIL Research Paper*, Series No. 2021-26 (2021).

homicide in a context of gender violence of which Ivana and her daughters, Mayka and Abril, were victims. ... The friendly settlement agreement [was] signed on September 23, 2021

[It] contains several measures, including (a) holding an official public ceremony to acknowledge international responsibility; (b) the publication of the friendly settlement agreement; ... (e) the provision of legal assistance to enable Abril to change her paternal surname; (f) the granting of a house; (g) economic compensation; (h) the creation of the Ivana and Mayka Rosales Comprehensive Protection Center for victims of gender violence; (i) measures to provide free, comprehensive, expert legal representation to victims of gender violence; ... and (l) the implementation of a National Registry of Gender Violence. ...

As is also the case in relation to the ECHR system, friendly settlements in the Inter-American system have been relatively neglected by scholars. One recent analysis, by Jorge Contesse, in ‘Settling Human Rights Violations’, 60 *Harv. Int’l L. J.* (2019) 317, identifies advantages including enabling governments to avoid ‘naming and shaming’ associated with litigation, obtaining reparations more quickly for victims, and alleviating the backlog of cases. But he also identifies four key problems:

- (1) the misperception that settling human rights violations is normatively inferior than obtaining judicial decisions;
- (2) the unnecessary exclusion of third parties from the settlement process;
- (3) the inconsistent function of individual commissioners and underutilization of their institutional participation in settlements; and
- (4) the difficulty of adequately enforcing settlement terms post-resolution.

Contesse concludes that disputes concerning individual violations should be treated differently to those seeking structural remedies. In particular, the Commission could ‘explore ways to give voice to all interested and potentially affected parties’, such as enabling the submission of *amicus curiae* briefs, or involving them in thematic hearings (at 365).

It is relevant in that regard to note that the Commission does have a range of rapporteurships that are shared among its members including posts dealing with rights related to: Indigenous Peoples (established in 1990); Women (1994); Human Mobility (1996); the Child (1998); Human Rights Defenders (2011); Persons Deprived of Liberty (2004); Afro-Descendants and against Racial Discrimination (2005); Lesbian, Gay, Bisexual, Trans and Intersex Persons (2014); Memory, Truth and Justice (2019); Older Persons (2019); and Persons with Disabilities (2019). There are also external experts appointed as Special Rapporteur for Freedom of Expression (since 1997) and Special Rapporteur on Economic, Social, Cultural and Environmental Rights (since 2014).

f. Backlash

The rapid evolution of the system and the key role played by the Commission has given rise to instances of backlash. Most notably, after Brazil’s rejection of the Belo Monte Dam precautionary measures, the OAS established a ‘Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the [Inter-American system]’. One month later, on 29 July 2011, the Commission modified its Belo Monte order. And following recommendations by the Working Group, the Commission amended 13 of its Rules of Procedure. On precautionary measures, the resolution defined the terms ‘serious,’ ‘urgent,’ and ‘irreparable harm,’ spelled out information required from applicants, specified the procedures to be followed and the elements to be taken into account in evaluating the situation, specified the form that orders should take, and provided that they could be reconsidered at any time.

Soon after, Venezuela, Ecuador, and Bolivia launched a concerted attack on the Commission in June 2012, alleging persistent bias against left-leaning governments. Another attack came in a 23 April 2019 Declaration in Asunción by the governments of Argentina, Brazil, Chile, Colombia and Paraguay. Again, the stated goal was constructive: to improve ‘the operability, functionality and effectiveness of the Inter-American Human Rights System’, but the approach adopted was very similar to that taken by the United Kingdom and Denmark in their pushback against the European system:

1. They emphasize that the principle of subsidiarity, which underlies the legal requirements for admissibility of a petition, has a twofold dimension. ... [I]t assumes that the State concerned has the obligation to investigate any violation of the Convention that occurs in its territory, and ... that the State concerned has the right to have its own jurisdictional system resolve the situation before being submitted to an international instance.
2. They consider that the legitimate space of autonomy available to States to ensure all persons subject to their jurisdiction, through their own democratic processes, the rights and guarantees enshrined in the Convention in accordance with their constitutional systems must be respected.
3. They also consider that, in the context of the measures taken to reduce the procedural backlog at the Commission, the rights of the defence, legal certainty and procedural equality must be guaranteed.
4. They stress the importance of a strict application of the sources of international human rights law and the recognition of the margin of appreciation of the States in the fulfilment of the obligations established in the Convention. They also recall that the resolutions and judgments of the organs of the inter-American system have effect only for the parties to the litigation.
5. They emphasize the importance of due knowledge and consideration of the political, economic, and social realities of the States by the organs of the inter-American human rights system. In this context, they underscore the need for the forms of reparation to be duly proportionate and to respect both the constitutional and legal systems of the States, as well as the requirements of the rule of law.

In response, Amnesty International accused the group of ‘seeking to impose constraints on the actions of the regional Inter-American mechanism in their own interests and so put the rights of victims at risk’ (AMR 01/0294/2019 (6 May 2019)). While the relevant claims made little overt headway, it is clear that a significant message was sent to the Commission and that it was heard. The *Strategic Plan 2023-2027* envisages: i) streamlining processes and progressive reduction of the procedural backlog; ii) strengthening and expansion of friendly settlements; iii) prioritization of petitions and cases to ensure more timely justice and the development of standards with a structural impact; and iv) expansion of management capacity.

QUESTIONS

1. What factors should the Commission take into account in considering precautionary measures such as those issued in relation to Brazil in 2011 and the United States in 2019?
2. How would the overall inter-American system change if the Commission were to implement the approach proposed by the five governments in the Asunción Declaration?

4. The Inter-American Court in Action⁵¹⁸

Although its functions are comparable, the Inter-American Court plays a more restricted role than its European counterpart. In particular, acceptance of its contentious jurisdiction is not compulsory for States parties to the Convention and it can only hear cases referred to it by States parties or the Commission. Initially the Court and the Commission saw each other as rivals. The Commission, established over two decades earlier, was very reluctant to refer contentious cases to the Court. The situation changed only in the late 1980s, beginning with the referral of three cases involving enforced disappearances in Honduras. The principal case, *Velásquez Rodríguez*, appears below. It was the first contentious case initiated by an individual that involved systemic state violence. Outside as well as inside the inter-American system, it has proved to be one of the most influential and cited decisions of an international human rights tribunal.

Today, the Commission and Court have a far more harmonious and reinforcing relationship. In 2024, the Commission submitted 26 cases to the Court's jurisdiction, and it had 60 active cases that had been processed by the Court, generally with important contributions from the Commission.

VELÁSQUEZ RODRÍGUEZ CASE **INTER-AMERICAN COURT OF HUMAN RIGHTS, SER. C, NO. 4 (29 JULY 1988)**

[This case arose out of a period of political turbulence, violence, and repression in Honduras. A petition to the Commission in 1981 alleged that Angel Manfredo Velásquez Rodríguez was arrested without warrant in 1981 by members of the National Office of Investigations (DNI) and the G-2 of the Armed Forces. The 'arrest' involved his seizure by seven armed men dressed in civilian clothes and driving an unlicensed car. Eyewitnesses reported his later detention, 'harsh interrogation and cruel torture'. Police and security forces continued to deny the arrest and detention. Velásquez had disappeared. The petition alleged that this conduct, attributable to Honduras, violated several articles of the American Convention on Human Rights.

In 1986, Velásquez was still missing, and the Commission concluded that the Government of Honduras 'had not offered convincing proof that would allow [it] to determine that the allegations are not true'. The Commission referred the matter to the Court since Honduras had recognized its contentious jurisdiction. The Court held closed and open hearings, called witnesses, and requested the production of evidence and documents. The statement of facts below is taken from the Court's opinion and consists both of its independent findings and its affirmation of some findings of the Commission.

The Commission presented witnesses to testify that there were numerous cases of disappearances between 1981 and 1984, that these were 'imputable to the Armed Forces of Honduras and enjoying the acquiescence of the Government of Honduras', and that there were at the time no effective domestic remedies to protect such kidnapped persons. Several witnesses testified that they were kidnapped, imprisoned in clandestine jails, and tortured by members of the Armed Forces. Explicit testimony described the severity of the torture — including beatings, electric shocks, hanging, burning, drugs, and sexual abuse — to which witnesses had been subjected. Several witnesses indicated how they knew that their captors and torturers were connected with the military. Testimony indicated that 'somewhere between 112 and 130 individuals were disappeared from 1981 to 1984'.

The President of the Committee for the Defense of Human Rights in Honduras testified about the existence of a unit in the Armed Forces that carried out the disappearance, giving details about its organization and commanders. A former member of the Armed Forces testified that he had belonged to the battalion carrying out the kidnapping, and claimed that he had been told of the kidnapping and

⁵¹⁸ For a thorough analysis of the jurisprudence of the IACtHR, see L. Hennebel and H. Tigroudja, *The American Convention on Human Rights: A Commentary* (2022). More generally, see N. Zúñiga, *The Inter American Court of Human Rights: The Legitimacy of International Courts and Tribunals* (2023).

later torture and killing of Velásquez. All such testimony was denied by military officers and the Director of Honduran Intelligence.

The Commission also presented evidence that domestic judicial remedies were inadequate. Courts were slow and judges were often ignored by police. Authorities denied detentions. Judges charged with executing the writs of *habeas corpus* were threatened and on several occasions imprisoned. Law professors and lawyers defending political prisoners were pressured not to act; one of the two lawyers to bring a writ of *habeas corpus* was arrested. In no case was the writ effective in relation to a disappeared person.

In view of threats against witnesses it had called, the Commission asked the Court to take provisional measures contemplated by the Convention. Soon thereafter, the Commission reported the death of a Honduran summoned by the Court to appear as a witness, killed 'on a public thoroughfare [in the capital city] by a group of armed men who ... fled in a vehicle'. Four days later the Court was informed of two more assassinations, one victim being a man who had testified before the Court as a witness hostile to the government. After a public hearing, the Court decided on 'additional provisional measures' requiring Honduras to report within two weeks: (1) on measures that it adopted to protect persons connected with the case; (2) on its judicial investigations of threats against such persons; and (3) on its investigations of the assassinations.]

...

[VII]

...

123. Because the Commission is accusing the Government of the disappearance of Manfredo Velásquez, it, in principle, should bear the burden of proving the facts underlying its petition.

124. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared... .

126. ... If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.

127. The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court, nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment.

...

130. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. ...

131. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress any information about the kidnapping or the whereabouts and fate of the victim.

...

134. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect

the victims and to provide for the reparation of damages resulting from the acts of the States responsible.

135. In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.

136. The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.

...

138. The manner in which the Government conducted its defense would have sufficed to prove many of the Commission's allegations by virtue of the principle that the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law. This result would not hold under criminal law, which does not apply in the instant case ...

...

[IX]

147. The Court now turns to the relevant facts that it finds to have been proven. They are as follows:

- a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again... .
- b. Those disappearances followed a similar pattern... .
- c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel, police or persons acting under their orders... .
- d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:
 - i. The victims were usually persons whom Honduran officials considered dangerous to State security... . [Omitted paragraphs deal with arms used, details of the kidnappings and interrogations, denials by officials of any knowledge about the disappeared person, and the failure of any investigative committees to produce results.]
- e. On September 12, 1981, between 4:30 and 5:00 p. m., several heavily armed men in civilian clothes driving a white Ford without license plates kidnapped Manfredo Velásquez from a parking lot in downtown Tegucigalpa. Today, nearly seven years later, he remains disappeared, which creates a reasonable presumption that he is dead... .
- f. Persons connected with the Armed Forces or under its direction carried out that kidnapping... .
- g. The kidnapping and disappearance of Manfredo Velásquez falls within the systematic practice of disappearances referred to by the facts deemed proved in paragraphs a–d.

...

[X]

149. Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use, not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.

150. The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.

151. The establishment of [the UN Working Group on Disappearances in 1980] is a clear demonstration of general censure and repudiation of the practice of disappearances

152. Within the inter-American system, the [OAS] General Assembly ... and the Commission have repeatedly referred to the practice of disappearances and have urged that disappearances be investigated and that the practice be stopped

153. International practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology

...

155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention. [Every person has 'the right to personal liberty and security', 'arbitrary arrest or imprisonment' are prohibited, and procedural rights must be respected.] ...

156. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention. [No one 'shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment'.] ...

157. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention. [Every person has 'the right to have his life respected... No one shall be arbitrarily deprived of his life.'] ...

158. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of that treaty in that it implies a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention

...

[The part of the Court's opinion examining the obligation of a state not only to respect individual rights (such as by not 'disappearing' the government's opponents), but also to ensure free exercise of rights (such as by protecting those expressing political opinions against violence by private, nongovernmental actors), appears above.]

[XII]

...

190. During this proceeding, the Commission requested the payment of compensation, but did not offer evidence regarding the amount of damages or the manner of payment. Nor did the parties discuss these matters.

191. The Court believes that the parties can agree on the damages. If an agreement cannot be reached, the Court shall award an amount. The case shall, therefore, remain open for that purpose. The Court reserves the right to approve the agreement and, in the event no agreement is reached, to set the amount and order the manner of payment.

[In the concluding paragraphs, the Court unanimously declared that Honduras violated Articles 4, 5, and 7 of the Convention, all three read in conjunction with Article 1(1); and unanimously decided that Honduras was required to pay fair compensation to the victim's next of kin.]

* * *

Various judgments of the Inter-American Court are reproduced in chapters throughout this casebook. For that reason, the following materials do not seek to provide a comprehensive overview of its jurisprudence or evolution. Instead, the focus is on three issues: the development of the 'conventionality control doctrine (analysed by Jorge Contesse); the significance of the Court's approach to monitoring compliance and the structural orientation of its analyses (Rene Urueña); and its approach to the rights of indigenous peoples.

**JORGE CONTESSE, HUMAN RIGHTS AS TRANSNATIONAL LAW
116 AJIL UNBOUND (2022) 313**

...

International Law as Constitutional Law

At the end of the 1980s, many Latin American countries began the transition to become constitutional democracies. Many adopted new constitutions, while some reformed existing constitutions. States that experienced a sort of "new constitutional beginning," and which did so through new legal regulations, made an explicit commitment to international human rights law. If one reviews the new constitutions adopted at that time—Brazil in 1988, Colombia in 1991, and Peru in 1993—or the important constitutional reforms that other countries carried out, such as Chile in 1989 or Argentina in 1994, all of them provided that international human rights law would now form an integral part of constitutional law.

This step was key to what would become the use of international law by domestic courts, especially constitutional courts. With varying intensity, national courts started incorporating in their reasoning international human rights norms that subsequently gave rise to a common law in Latin America, the so-called *ius constitutionale commune*. This phenomenon would crystallize, as I show in the following section, with the Inter-American Court's adoption of the doctrine of conventionality control, thus cementing Latin America international human rights law as constitutional law.

In the mid-1990s, a Peruvian district court declared the country's amnesty law unconstitutional for violating due process and affecting the rights of the victims of a massacre that occurred in November 1991 under Alberto Fujimori's regime—"the Barrios Altos massacre." Interestingly, in its ruling, the court determined that the unconstitutionality of the amnesty law stemmed not only from its incompatibility with the Peruvian Constitution, but also with the Universal Declaration of Human Rights and the American Convention on Human Rights. International law was unequivocally now part of Peru's domestic law.

At the same time, the Constitutional Court of Colombia, established by the 1991 Constitution, created one of its most important doctrines: the "block of constitutionality." Under this doctrine, the Colombian Court found that it should not only take into account the norms of the national Constitution, but also the norms and principles of international human rights law. According to the court, international human rights norms, "without appearing formally in the articles of the

constitutional text, are used as parameters for the control of the constitutionality of laws,” thus generating a single normative “block” to be used by the Constitutional Court.

A few years later, the Chilean courts—known for their reticence toward the use of international law and especially their acquiescence to the military dictatorship of Augusto Pinochet—did the same with the self-amnesty laws passed by the Pinochet regime. Resorting to the Geneva Conventions, the Chilean Supreme Court modified its prior interpretation of self-amnesty laws which had rejected all efforts to hold accountable those responsible for serious human rights violations. With the new interpretation, the Chilean Court determined that international law (in this case, international humanitarian law) took precedence over domestic law.

....

Constitutional Law as International Law

... [T]he Inter-American Court of Human Rights ... progressively took on the role of a type of regional constitutional court. ...

... [In] *Barrios Altos v. Peru* ... the Inter-American Court determined that Peru was responsible for the lack of proper investigation and punishment of those responsible for the Barrios Altos massacre. [The Court declared] that self-amnesty laws “lack legal effect,” pursuant to which [it] ordered the reopening of the investigations by the national courts.

... [T]he claim that such incompatibility [with the Convention] renders these laws “devoid of legal effect” is what ... turned the Inter-American Court into a sort of regional constitutional court. Declaring a national law inapplicable—or null and void—is typically a decision that a *domestic* (that is, “constitutional”) court may take, not one that is left to the decision of an *international* tribunal.

... [I]n 2006 [it] issued another landmark judgment: *Almonacid-Arellano v. Chile*, in which [it] created its doctrine of “conventionality control.” According to this doctrine, all national judges are directly bound to follow the norms of the Convention and the interpretations of the Inter-American Court. ... Thus, the separation between international law and constitutional law progressively unravels, as the Court seems to understand national judges as genuine “inter-American judges.”

RENE URUEÑA, COMPLIANCE AS TRANSFORMATION: THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS AND ITS IMPACT(S) RAINER GROTE ET AL. (EDS.), RESEARCH HANDBOOK ON COMPLIANCE IN INTERNATIONAL HUMAN RIGHTS LAW (2021) 225

3.2 A New Approach: Compliance as Transformation

... [F]our things are noteworthy in [the compliance] initiatives. First, their sheer volume. The organs of the IASHR clearly think that they themselves are primarily responsible for supervising compliance with their remedial orders and have developed a wide range of tools to do so. The IASHR represents, in this sense, a clear choice for a legalized system of compliance – in sharp contrast with more political systems of compliance review, such as the European system of human rights. ...

The second ... is the wide variety of orders. ... Many of the tools created to supervise orders from the system are different in the Commission and the Court, and the standards applied by each institution (and by the same institution in different moments) often vary. This may be a consequence of the piecemeal fashion in which most of these mechanisms have emerged. ...

Third, ... the System conceives of compliance monitoring as part of a wider process of transformation. ... Most of the supervising mechanisms ... seem to be less concerned with enforcing certain orders, but rather with creating cognitive frameworks and domestic political dynamics that will, eventually, lead to the wider compliance with its orders. ... [Through] informational requirements ... on-site visits

and decentralized compliance hearings ... the System is striving to create the cognitive and political frameworks that will facilitate local pressure towards compliance, usually by domestic civil society groups. ... [T]he organs in the system use compliance monitoring mechanisms as a tool to open spaces of dialogue with local stakeholders, in order to work in tandem with civil society, and change, through the process of compliance monitoring, the very conditions that prevent compliance.

... In most traditional readings of compliance with international judicial decisions, both the judicial decision and the context of implementation are read as static, and compliance is read as a mechanical process in which the political 'leverages' in the context of implementation are activated, in order to achieve behavioural changes in the addressees of the decision. ...

The Inter-American approach ... rejects the idea that the judicial decision is already crystallized, or carved in stone. ... An order by the IASHR is ... the first (and fundamental) statement in a conversation, defining the scope and limits of the possibilities of implementation, but lacking the details of concrete policy, whose definition fall within the scope of competence of the state. Moreover, the IASHR questions the idea that the context of implementation is static. ... [Instead, the regime] creates a continuum between the decision (or order) and the shaping of the conditions for its implementation, reading the latter as essentially malleable. ... [T]he question of compliance is not only whether there are tools to 'force' the state to comply (what kind of leverage is there to induce, for example, domestic prosecution of perpetrators? Is there an active domestic judiciary? Is there a powerful civil society?) but also how can this very decision be used to mobilize such tools and change the equation towards compliance (how can the local judiciary use this decision to bring about compliance with it? How can civil society mobilize around this decision?). This essentially dynamic process of compliance monitoring draws its inspiration from domestic models of transformative constitutionalism in Latin America. In particular, the Colombian Constitutional Court has adopted a nuanced strategy of compliance supervision

... Compliance review [is thus] part of a dialectic process of interaction with domestic civil society, in which compliance is not an end in itself, but a process of transformation in which domestic pro-rights constituencies, including civil society organizations, national human rights institutions, and domestic tribunals, use the process of compliance to push for social transformation.

QUESTION

The facts of a case before the IACtHR are contested. What method does the Court employ to resolve them? Does it employ such traditional notions of the law of evidence in systems of national law as burdens of proof (burdens of persuasion) or presumptions? For example:

- (a) What is the relevance to the Court's finding of Honduran responsibility of the Court's use of terms like (the Honduran) 'practice' or 'policy', or the characterization of disappearances as 'systemic'?
- (b) What is the significance of the Court's observation that the state 'controls the means to verify acts occurring within its territory'? Is the Court threatening the state with an adverse finding if it fails to make that effort?

THE RIGHTS OF INDIGENOUS PEOPLES

The Inter-American Court has played an especially important role in relation to the rights of indigenous peoples. It is estimated that some 50 million indigenous people in Latin America belong to 500 different ethnic groups, with the largest populations living in Mexico, Guatemala, Peru and

Bolivia. They make up 8 percent of the region's total population, but 17 percent of the population living in extreme poverty.

In 2016, the Court reviewed its own jurisprudence in the context of Advisory Opinion OC-22/16 (26 February 2016): 'Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System ...'. The Court affirmed that 'legal entities', such as corporations, are not entitled to claim the rights recognized in the American Convention, regardless of whether domestic State law defines them as cooperatives, companies or firms. It then continued to examine the situation in relation to indigenous peoples. Based on a review of its own case law, as well as various domestic and international legal sources, the Court held that "indigenous and tribal communities are entitled to some of the rights protected under the Convention and, therefore, can access the inter-American system."

SAWHOYAMAXA INDIGENOUS COMMUNITY V. PARAGUAY
INTER-AMERICAN COURT OF HUMAN RIGHTS, SER. C, NO. 146 (29 MARCH 2006)

...

73. Having assessed [all the evidence] ... the Court finds the following facts to be proven:

...

73(1) Towards the end of the 19th century vast stretches of land in the Paraguayan Chaco were acquired by British businessmen through the London Stock Exchange as a consequence of the debt owed by Paraguay after the so-called War of the Triple Alliance. The division and sale of such territories were made while their inhabitants, who, at the time, were exclusively Indians, were kept in full ignorance of the facts.

...

73(2) The economy of the indigenous peoples in the Chaco was mainly based on hunting, fishing, and gathering, and therefore, they had to roam their lands to make use of nature ...

73(3) Over the years, and particularly after the Chaco War between Bolivia and Paraguay (1933–1936), the non-indigenous occupation of the Northern Chaco which had started by the end of the 19th century was extended. The estates that started settling in the area used the Indians who had traditionally lived there as workers, who thus became farmhands and employees of new owners. Although the indigenous peoples continued occupying their traditional lands, the effect of the market economy activities into which they were incorporated turned out to be the restriction of their mobility, whereby they ended by becoming sedentary.

73(4) Since then, the lands of the Paraguayan Chaco have been transferred to private owners and gradually divided. ...

73(5) The Sawhoyamaxa ("from the place where coconuts have run out") Community is an indigenous community, typical of those traditionally living in the Paraguayan Chaco that has become sedentary

...

...

73(8) [In 2006], the Community has 407 members, grouped in approximately eighty-three dwelling places.

73(9) The lands claimed ... are within the lands which they have traditionally occupied and which are part of their traditional habitat.

73(10) The lands claimed are suitable for the Indigenous Community members to continue with their current subsistence activities and to ensure their short and mid-term survival, as well as the beginning of a long-term process of development of alternative activities which will allow their subsistence to become sustainable.

[The Court considered several issues including whether the plea of non-exhaustion of domestic remedies could be invoked at this late stage, whether the existing indigenous land-claim administrative procedure was effective, and whether the time taken to consider claims had been reasonable. It reached negative conclusions on each issue.]

[Right to property — Article 21]

...

116. Article 21 of the American Convention declares that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. ...

117. In analyzing [Article 21] in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe ... Article 21 in accordance with the evolution of the Inter-American system ... The State ratified Convention No. 169 and incorporated its provisions to domestic legislation by Law No. 234/93.

118. ... [T]he close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture ..., must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.

119. [Article 13 of Convention No. 169 requires states to] respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

120. Likewise, this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land “is not centered on an individual but rather on the group and its community.” This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21. ... Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 ... illusory for millions of persons.

121. Consequently, the close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element deriving therefrom, must be secured under Article 21 ... [In the Court’s jurisprudence] “property” as used in Article 21, includes “material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value”.

122. The Paraguayan Constitution recognizes the existence of indigenous peoples as groups which have preceded the formation of the State, as well as their cultural identity, the relation with their respective habitat and their communal characteristics of their land-tenure system, and further grants

them a series of specific rights which serve as basis for the Court to define the scope of Article 21 of the Convention.

123. On the other hand, Article 3 of Law No. 43/89 points out that settlements of indigenous communities are “constituted by a physical area made up of a core of houses, natural resources, crops, plantations, and their environs, linked insofar as possible to their cultural tradition]”

...

125. The State has pointed out that it “does not deny its obligation to restore rights to these peoples,” but the members of the Sawhoyamaya Community “claim title to a piece of real estate based exclusively on an anthropologic report that, worthy as it is, collides with a property title which has been registered and has been conveyed from one owner to another for a long time.” Likewise, the State fears that, would [the] claim by the Community be granted, “it would be convicted for the ‘sins’ committed during the [C]onquest” (inner quotation marks as used in the original text), and that this could lead to the “absurd situation in which the whole country could be claimed by indigenous peoples, for they are the primitive inhabitants of the stretch of territory that is nowadays called Paraguay.”

126. [T]he Court will proceed to examine, in the first place, whether possession of the lands by the indigenous people is a requisite for official recognition of property title thereto. In the event that possession not be a requisite for restitution rights, the Court will analyze, in the second place, whether enforcement of said rights is time-restricted. Finally, the Court will address the actions that the State must take to enforce indigenous communal property rights.

i) The possession of the lands

127. Acting within the scope of its adjudicatory jurisdiction, the Court has had the opportunity to decide on indigenous land possession in three different situations. On the one hand, in the *Case of the Mayagna (Sumo) Awas Tingni Community*, the Court pointed out [in 2001] that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration. On the other hand, in the *Case of the Moiwana Community*, the Court considered [in 2005] that the members of the N’djuka people were the “legitimate owners of their traditional lands” although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them. In this case, the traditional lands have not been occupied by third parties. Finally, in the *Case of the Indigenous Community Yakye Axa*, the court [in 2005] considered that the members of the Community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualize those lands and transfer them on a for no consideration basis.

128. The following conclusions are drawn from the foregoing: 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights. The instant case is categorized under this last conclusion.

129. Paraguay acknowledges the right of indigenous peoples to claim restitution of their lost traditional lands

...

iii) Actions to enforce the rights of the community members over their traditional lands

135. [W]hen a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender

alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.

136. Nevertheless, the Court can not ... decide that Sawhoyamaxa Community's property rights to traditional lands prevail over the right to property of private owners or *vice versa*, since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties. This power is vested exclusively in the Paraguayan State. Nevertheless, the Court has competence to analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community.

137. ... [T]he [three] arguments put forth by the State to justify non-enforcement of the indigenous people's property rights have not sufficed to release it from international responsibility. ...

138. [First] ... the fact that the claimed lands are privately held by third parties is not in itself an "objective and reasoned" ground for dismissing *prima facie* the claims by the indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society ... to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other

139. [The same rationale applies to the second argument which suggests] that indigenous communities are not entitled, under any circumstances, to claim traditional lands when they are exploited and fully productive, viewing the indigenous issue exclusively from the standpoint of land productivity and agrarian law, something which is insufficient for it fails to address the distinctive characteristics of such peoples.

140. [The third argument is that the owner's right is protected under a bilateral agreement between Paraguay and Germany which, because of its treaty status, has become part of the law of the land.] ... [T]he Court has not been furnished with the aforementioned treaty [but it is said to allow] ... for capital investments made by a contracting party to be condemned or nationalized for a "public purpose or interest", which could justify land restitution to indigenous people [The] enforcement [of such bilateral treaties] should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.

...

142. Finally, it is worth recalling that, under Article 1(1) of the Convention, the State is under the obligation to respect the rights recognized therein and to organize public authority in such a way as to ensure to all persons under its jurisdiction the free and full exercise of human rights.

143. Even though the right to communal property of the lands and of the natural resources of indigenous people is recognized in Paraguayan laws, such merely abstract or legal recognition becomes meaningless in practice if the lands have not been physically delimited and surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right by the members of the Sawhoyamaxa Community are lacking. The free development and transmission of their culture and traditional rites have thus been threatened.

144. For the aforementioned reasons, the Court concludes that the State violated Article 21 of the American Convention, to the detriment of the members of the Sawhoyamaxa Community, in relation to Articles 1(1) and 2 therein.

[Right to juridical personality — Article 3]

...

187. In the instant case, neither the Commission nor the representatives have alleged the violation of Article 3 of the American Convention. However, from the facts of the case, it ... appears that there has been no registration or official documentation of the existence of several members of the indigenous Sawhoyamaxa Community. The Court considers that the parties have had the opportunity of addressing such situation [sic], thus, it is pertinent to examine the obligations stemming from Article 3 of the American Convention which provides as follows:

“Every person has the right to recognition as a person before the law.”

...

192. The above mentioned members of the Community have remained in a legal limbo in which, though they have been born and have died in Paraguay, their existence and identity were never legally recognized, that is to say, they did not have personality before the law. Indeed, the State, in the instant proceeding before the Court, has intended to use this situation for its own benefit. In fact, at the time of referring to the right to life, the State alleged:

If neither the existence of these persons nor even their death has even been proved, it is not possible to claim liability from anyone, lest [sic] the State, where are their birth and death certificates?

...

194. On the basis of the above considerations, and notwithstanding the fact that other members of the Community may be in the same situation, the Court finds that the State violated the right to personality before the law enshrined in Article 3

[Reparations]

[Based on Article 63(1), the Court ordered ‘the State [to] adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands’ and required it to consider the possibility of purchasing or acquiring those lands, or to make available alternative lands, selected with the Community’s agreement. This was to be completed within three years.]

219. Non-pecuniary damage may include distress and suffering caused directly to the victims or their relatives [which] may only be compensated [either] by paying an amount of money or delivering property or services [or] through public actions or works

235. ... [T]he State shall, within a reasonable time, enact into its domestic legislation ... the legislative, administrative and other measures necessary to provide an efficient mechanism to claim the ancestral lands of indigenous peoples enforcing their property rights and taking into consideration their customary law, values, practices and customs.

...

236. [The State shall publish parts of the judgment in the media and on radio in appropriate languages and on a regular basis.]

...

248 The Court shall monitor full compliance with this Judgment and shall consider the instant case closed upon full compliance by the State with the provisions therein. Within a year ... the State shall submit to the Court a report on the measures adopted to comply herewith

* * *

The Sawhoyamaxa case also illustrates the fact that litigation in a regional human rights court is very often only one part of a much more complex ongoing process. Joel E. Correia, in ‘Adjudication and

Its After Effects in Three Inter-American Court Cases Brought against Paraguay: Indigenous Land Rights', 111 *Erasmus L. Rev.* (2018) 43, traced the aftermath of the IACtHR ruling:

... [The] Sawhoyamaya decided to reoccupy their communal territory because the Paraguayan state systemically delayed implementing the IACtHR judgment and its recommendations for land restitution. In 2013, 7 years following the IACtHR judgment, community members from Sawhoyamaya reoccupied their communal territory and embarked on an intensive advocacy campaign with the assistance of Tierraviva and Amnesty International. To the surprise of the community and Tierraviva, the Paraguayan Senate approved a Law 5124 in 2014 to expropriate 14,404 hectares of land to the community.

The law of expropriation, like the IACtHR judgment, was a remarkable legal victory that bolstered the community's claim to its communal territory. Despite the momentous victory, state officials refused to force the landowners to accept payment for the 14,404 hectares, surrender the title to the property, or vacate ranch buildings contained therein. Moreover, the Paraguayan Supreme Court entertained two challenges made by the landowner to question the constitutionality of Law 5124 because he argued the land was 'rationally exploited' and therefore ineligible for expropriation. ... [The result is that the] Sawhoyamaya enjoys de facto usage of their land but limited de jure protection because the property technically remains under the legal control of the ranching company that refuses to cede the title.

QUESTION

What could be done, at the institutional level, to improve the prospects that IACtHR judgments in cases relating to indigenous peoples are implemented in practice? In a chapter devoted to 'remedies for violations of indigenous rights', Kent Roach in *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (2021) 454-515, calls on the Court itself and national courts to pay more heed to the communities themselves in devising remedies. How might that help?

C. THE AFRICAN SYSTEM

The youngest of the regional systems, but the one covering the largest number of states, is the African one. The African Charter on Human and Peoples' Rights was adopted in 1981, entered into force in 1986, and as of 2024, had 54 states parties (all of the members of the African Union, except for Morocco).⁵¹⁹

In discussing rights and duties (Ch. 6B, above), the African Charter served to illustrate a human rights regime that was more duty-oriented than the universal human rights system or the two other regional systems. These materials do not repeat that discussion, but instead focus on the work of the two principal institutions, the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights. Nor do they address the broader issue of Africa's influence in shaping the overall international regime.⁵²⁰

⁵¹⁹ See R. Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (2019).

⁵²⁰ See D. Nault, *Africa and the Shaping of International Human Rights* (2020); M. Izarali, O. Masakure and B. Ibhawoh (eds.), *Expanding Perspectives on Human Rights in Africa* (2019).

1. The African Union

In 1963 the Organization of African Unity was established as the official regional body of African states. It was inspired by the anti-colonial struggles of the late 1950s, and was primarily dedicated to the eradication of colonialism. The emergent African states created through it a political bloc to facilitate intra-African relations and to forge a regional approach to Africa's relationships with external powers. In 2001 the OAU was replaced by the African Union (AU). Today, all 55 African states are members of the AU, with Morocco which withdrew in 1984 after the organization recognized Western Sahara, having re-joined in 2017.

For a variety of reasons, especially its experience of colonialism, the OAU Charter attached major importance to 'unity and solidarity' among African states, and defence of 'their sovereignty, their territorial integrity and independence'. Thus, the inviolability of territorial borders, expressed through the principle of non-interference in the internal affairs of member states, was one of the OAU's central creeds. But concern at its failure to react to various gross violations of human rights committed by dictators like Idi Amin in Uganda, Jean-Bédél Bokassa in the then Central African Empire, and Francisco Macias Nguema in Equatorial Guinea, combined with a growing recognition of the importance of human rights, led the OAU to adopt, in 1981, the African Charter on Human and Peoples' Rights.⁵²¹

This development, in addition to the steady accumulation of national constitutions within Africa which contained detailed human rights provisions, facilitated the inclusion of a wide range of human rights objectives and principles in the AU Charter, unlike the OAU Charter which had said very little. Thus, among the AU's objectives, listed in Article 3, are to '(e) encourage international cooperation, taking due account of the UN Charter and the UDHR and to '(h) promote and protect human and peoples' rights'. Similarly, Article 4 lists key AU principles, including: non-interference in internal affairs; the AU Assembly's 'right ... to intervene in a Member State ... in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; promotion of gender equality; 'respect for democratic principles, human rights, the rule of law and good governance'; promotion of social justice; respect for the sanctity of human life; and 'condemnation and rejection of unconstitutional changes of governments'.

While the AU Charter does not contain any human rights requirements relating to admission to the Union, it does provide for the possible suspension of certain institutional rights or the imposition of sanctions upon states that fail to comply with AU decisions and policies (Art. 23(2)). In addition, governments that 'come to power through unconstitutional means shall not be allowed to participate' in AU activities (Art. 30).

The OAU also adopted several other important human rights instruments. The best known is the Protocol to the Charter on the Rights of Women in Africa (2003) (the 'Maputo Protocol').⁵²² As of 2024 it had 42 ratifications. The Protocol defines 'discrimination against women' to include 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.' It has detailed provisions dealing, *inter alia*, with 'harmful practices' ('all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity' (Art. 5)), violence against women (Art. 4), equality in and after marriage (Arts. 6 and 7), the right to political participation (Art. 9), protection of women in armed conflicts (Art. 11), health and reproductive rights (Art. 14), and widow's rights (Art. 20). Its implementation is to be overseen in the same way as the African Charter.

⁵²¹ For a compilation of all key AU human rights documents, see *Compendium of African Human and Peoples' Rights Law* (2022).

⁵²² L. Chenwi, 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)', in C. Binder et al. (eds.), *Elgar Encyclopedia of Human Rights* (2022) 104.

Other instruments include the African Charter on the Rights and Welfare of the Child (1990), with 50 ratifications as of 2024; the Protocol on the Rights of Older Persons (2016), with 11 ratifications; and the Protocol on the Rights of Persons with Disabilities (2018) with 8 ratifications. The African Committee of Experts on the Rights and Welfare of the Child has been very active, although its activities are not covered below.⁵²³

2. The African Commission

The 11 members of the Commission are elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by parties to the Charter. They serve (Art. 31) ‘in their personal capacity’. Article 45 defines the mandate or functions of the Commission to be: (1) to ‘promote Human and Peoples’ Rights’; (2) to ‘ensure the protection’ of those rights; (3) to ‘interpret all the provisions of the Charter’ when so requested by states or AU institutions; and (4) to perform other tasks that may be committed to it by the Assembly. Thus, its three main functions are promotion, protection, and interpretation.

Promotion includes (Art. 45) undertaking ‘studies and researches on African problems in the field of human and peoples’ rights’, as well as organizing seminars and conferences, disseminating information, encouraging ‘local institutions concerned with human and peoples’ rights’, giving its views or making recommendations to governments, and formulating principles and rules ‘aimed at solving legal problems related to human and peoples’ rights ... upon which African Governments may base their legislation.’ Under Article 46 the Commission ‘may resort to any appropriate method of investigation’.

Before surveying the Commission’s various activities, it is helpful to get a sense of what it sees as the main challenges. In reviewing the ‘state of human rights in Africa’ in its *Strategic Framework 2021-2025* (2020) at 7, the Commission began by recalling that ‘Africa has developed an impressive array of normative and institutional frameworks on human rights ...’ It added:

Over the past few decades, Africa has built an extensive body of instruments and policies to push forward the women’s rights agenda ... [although] women’s rights continue to be undermined by inadequate implementation, institutional barriers, discriminatory and patriarchal social norms and practices, as well as by violence and intimidation. ...

The continent has recorded significant gains over the years ... [yet] challenges related to slow compliance, implementation of and reporting on continental and regional commitments by Member States persist. ... Human rights defenders ... continue to face widespread harassment, intimidation, abuse and death threats. ...

... Extra-judicial killings are prevalent in countries where freedom of expression is unjustly restricted by the State – where there is little room for dissent. ... [Political] rights have often been restricted under the guise of security concerns, attempts to curb defamation as well as fake news. This has led to, in some cases, complete internet and telecommunication shutdowns and in others, partial blockades of online spaces and platforms, taxes on social media, shutdowns of media houses and/or restrictions on their operation, surveillance and censorship. This is particularly the case during elections. Electoral related violence and unrest has often exacerbated and/or triggered human rights violations.

...

⁵²³ For more information, see the website of the ACERWC at www.acerwc.africa/en.

While armed groups and violent extremist elements wreak havoc ..., counter-terrorism laws and practices that entail extra-judicial killings, arbitrary arrest and detention, disappearances and torture, can be equally counter-productive. ...

Similarly, in its 2022 annual report to the AU's Heads of State and Government, the Commission identifies many 'areas of concern',⁵²⁴ including: the largest number of military coups in Africa in over a decade in less than a year between April 2021 and February 2022; the low level of women's representation in parliaments and decision-making bodies in most African countries; persistence of the death penalty in some countries; the fact that only 16 African countries have ratified the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty; non-ratification of numerous international and regional treaty instruments; lack of legislation to regulate online violence against women in many African countries; persistence of police brutality, excessive use of force and the resulting culture of impunity within the police force in many countries, particularly in Kenya; illegal practices by law enforcement and security officials, including arbitrary arrests, excessive use of force, torture, cruel and inhumane treatment, and the state of detention facilities in Nigeria; the challenge of prison overcrowding, the lack of disaggregated data on prison overcrowding in most states and the dilapidated state of prisons, most of which are over half a century old; restriction of civic space, criminalization of bloggers, and restrictions on Internet access in some countries, which continue to impede the independence and freedom of journalists and interest groups.

Amnesty International highlights another major challenge which it describes as a 'chronic lack of cooperation by African states with the three regional human rights bodies, a pattern of lack of political will that is reflected in their indifference and open hostility.' The same report is also critical of the calibre of some of the Commissioners. This is reflected in 'the lack of enough candidates to allow for meaningful, genuine, competitive and merit based election. ... [Elections] have almost always attracted unacceptably low numbers of nominations. Importantly, national nomination processes have often lacked transparency and openness. They have been historically shrouded in secrecy and rarely based on merit.' Rachel Murray also notes that 'more needs to be done to ensure those appointed to this important and influential position are individuals with the necessary experience, commitment and credibility.'⁵²⁵

The Commission engages in many activities that are comparable to those used by other inter-governmental human rights bodies.⁵²⁶ The following list provides an overview of its work, drawing mainly on its 2022 annual report.

1. State reporting

States are required by the Charter (Article 62) to report to the Commission every two years. In 2022, only 12 of 54 states were up to date with their reports. 24 had three or more reports outstanding, meaning that they had not reported for at least six years. Six states have never reported, and five of those have been a party to the Charter since at least 1986.

2. Individual complaints

In 2022 there were 220 communications pending. During that year, 18 were admitted, nine were declared admissible and seven inadmissible, 13 were struck-off, and two removed from its roll. There were 12 decisions on merits.

3. Interstate complaints

The interstate complaints procedure contained in the Charter (Articles 47-52) has been used 'only three (or maybe four)' times by States. The only complaint to reach the merits phase was Communication 227/99 (2003), Democratic Republic of Congo v Burundi, Rwanda and Uganda.⁵²⁷

⁵²⁴ ACHPR, *52nd and 53rd Combined Activity Reports* (2023), para. 54.

⁵²⁵ R. Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (2019) 609.

⁵²⁶ See generally 24/2 *African Hum. Rts. L. J.* (2024) for a Special Issue on implementation of African Commission decisions.

⁵²⁷ *ibid.*, 656.

4. Provisional measures

Only one is reported upon for 2022 and that was objected to on various grounds by the target state, Ethiopia.

5. Urgent appeals

In 2022 the Commission sent 23 ‘letters of concern and urgent appeal’. Only Algeria, the addressee of two of the letters, responded.

6. Fact-finding missions

In 2022, the Commission sent no fact-finding missions. In 2021 it decided to establish a Commission of Inquiry into the human rights situation in Tigray, Ethiopia (Res. 482 (EXT.OS/XXXII) 2021), but efforts to reach agreement with the government were unsuccessful.

7. Statements

The Commission’s 2021 report (para. 61) provides an example of a thematic statement which addressed the ‘Human Rights Situation in the context of the COVID-19 pandemic’. Attention was drawn to issues such as: ‘i. Limited access of vaccines to low-income countries and communities ...; and the refusal to temporarily waive the COVID-19 patents ...’; ‘ii. Human rights abuses reported in the context of continuing states of emergency, disaster and calamity declared in many State Parties in relation to the COVID-19 pandemic ...’; ‘iii. The excessive use of force by law enforcement officers in the implementation of COVID-19 response measures ...’; ‘iv. The continued restrictions on freedom of expression and of the press, and the often-lengthy detention of civil society activists, as well as the unjustified prosecution of journalists under the guise of enforcing COVID-19 regulations’; ... ‘viii. The increased rate of girls being raped in many African countries due to the imposition of lockdown measures’ ...

8. Publication of guidelines

Recent examples include: Guidelines on adhering to human and peoples’ rights under the African Charter in the context of states of emergency or disaster (2023); Guidelines on Shadow Reports of the African Commission on Human and Peoples’ Rights (2022); Guidelines on the protection of all persons against enforced disappearances in Africa (2022); Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019); Guidelines on the Right to Water in Africa (2019); State Reporting Guidelines and Principles on Articles 21 And 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment (2018); Principles on the Decriminalisation of Petty Offences in Africa (2018); Guidelines on Access to Information and Elections in Africa (2017); and Guidelines on Combating Sexual Violence and its Consequences in Africa (2017).

9. Special Rapporteurs and Working Groups

Special mechanisms include:

- Special Rapporteurs on: Freedom of Expression and Access to Information; Prisons, Conditions of Detention and Policing in Africa; Human Rights Defenders and Focal Point on Reprisals in Africa; Refugees, Asylum Seekers, Internally Displaced Persons and Migrant in Africa; and Rights of Women in Africa.
- Committees for: Prevention of Torture in Africa (and its 2022 Alert and Reporting Mechanism on Situations of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); and Protection of the Rights of People Living with HIV
- Working Groups on: Economic, Social and Cultural Rights; Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced

Disappearances in Africa; Indigenous Populations/Communities and Minorities in Africa; Rights of Older Persons and People with Disabilities; and Extractive Industries, Environment and Human Rights Violations in Africa; and Fair Trial.

Assessing Compliance

Commentators on the African system have long pointed out that a focus on formal compliance fails to capture the full impact of the processes that take place around regional human rights institutions.⁵²⁸ Nevertheless, a 2007 study by Frans Viljoen and Lirrette Louw⁵²⁹ found that:

[T]he attempt to chart compliance empirically and analytically is fraught with methodological difficulties. The most important of these is the Commission's failure to enunciate clear and specific remedies, leaving an unreliable yardstick for measuring compliance. Even when the yardstick is clearer, linking the steps toward compliance to the required remedial action often remains a matter of causal conjecture.

Our analysis of cases of full and clear noncompliance suggests that the most important factors predictive of compliance are political, rather than legal. The only factor relating to the treaty body itself that shows a significant link to improved compliance is its follow-up activities. This finding lends support to arguments for a fully developed and effectively functional follow-up mechanism in the secretariat of the Commission, the consistent integration of follow-up activities into the Commission's mandate, and the appointment of a Special Rapporteur on follow-up ...

The authors conclude that while the AU Charter has brought significant improvements in institutional arrangements, it still remains to be seen whether the AU will take effective action based on the opportunities available to it. In a 2022 update, one of the authors notes that little has changed since the 2007 study was published.⁵³⁰

The Commission, in its *Strategic Framework 2021-2025* (2020) at 7, observed that:

... [C]hallenges to implementation ... [include] weak, ineffective institutions, limited political will and action to enforce human rights and freedoms as well as to technical blockades. It is also important to note that financial resources remain [inadequate]. ... Africans are not sufficiently aware of key AU instruments such as the Charter. This is exacerbated by limited translation of these texts into local languages, which undermines local ownership. The conflation of these factors leads to poor human rights education and subsequently low legal literacy and citizen demand for rights.

It is widely accepted that one of the most important factors in predicting the impact of judgments is social mobilization.⁵³¹ But this starting point raises the issue of the effectiveness of the African regional institutions in building constituencies, educating the populace, and facilitating the involvement of civil society actors within the system.

⁵²⁸ O. Okafor, *The African Human Rights System: Activist Forces and International Institutions* (2007) 285.

⁵²⁹ F. Viljoen & L. Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004', 101 *Am. J. Int'l L.* (2007) 1, at 32.

⁵³⁰ L. Louw, 'Member States' Compliance with the Recommendations of the African Commission on Human and Peoples' Rights', in A. Adeola (ed.), *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen* (2022) 165.

⁵³¹ V. Ayeni, 'Beyond Compliance: Do Decisions of Regional Human Rights Tribunals in Africa Make a Difference?', in A. Adeola (ed.), *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen* (2022) 71.

Relations with NGOs and NHRIs

According to Rachel Murray, ‘NGOs and CSOs have been crucial to the successes of the African human rights system. They have helped develop the standards ...; they have worked closely with the [Commission and Court] to enhance their working procedures and practices’.⁵³² She adds (at 13) that if ‘the credibility and legitimacy of a human rights system at the regional or international levels is measured in terms of its openness and level of engagement with civil society and non-governmental organisations, then the African Commission would score very well.’

By 2023, under its Resolution 361 on the Criteria for Granting and Maintaining Observer Status to Human Rights NGOs in Africa, the Commission had granted Observer Status to 544 NGOs. But this impressive figure masks tensions that first arose after its 2014 Resolution 275, on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. The AU and many states reacted negatively and in 2015 the AU called on the Commission to withdraw the observer status that it had granted to the Coalition of African Lesbians (CAL). Eventually the Commission complied.⁵³³ In 2023, it rejected applications from three NGOs on the grounds that ‘sexual orientation is not an expressly recognised right or freedom under the African Charter, and [is] contrary to the virtues of African values, as envisaged by the African Charter’. In reporting the decision, the International Service for Human Rights warned that it ‘could seriously undermine and question the integrity and impartiality of the protection mechanism’ and ‘could potentially constrain NGOs wishing to collaborate with the Commission’.⁵³⁴

In 2022, the Commission adopted Guidelines on Shadow Reports. In principle, such an initiative would seem to be designed to encourage the submission of civil society reports that provide information that will add to and often contradict claims made by governments. These reports have played an especially important role in the context of the UN treaty bodies, where their content and orientation is not specifically regulated. The African Commission’s guidelines provide that (para. 3):

- a. The Shadow Report should be concise, specific, and clearly structured. It should use simple and free flowing language.
- b. The Shadow Report must contain reliable, and objective information that is supported by a body of evidence including court cases, official reports, NHRIs annual reports, academic research, surveys, NGO reports, news articles. Sources used in the Report must be clearly cited, where at all possible, and up-to-date statistical information should be provided.
- c. The Shadow Report should be accompanied by copies of the relevant provisions of the principal legislative, judicial, administrative, and other texts referred to in the report, where applicable.
- ...
- e. The Shadow Report should be submitted at least 30 days prior to the examination of the State Report.
- f. The report should not include abusive, insulting, or defamatory language against individuals, institutions, or other entities.
- ...

The Commission has recognized the importance of the 47 national Human Rights Institutions (NHRIs) that exist in Africa. But it also notes that ‘although they have increased the profile of human

⁵³² R. Murray, *The African Charter on Human and Peoples’ Rights: A Commentary* (2019) 643.

⁵³³ See S. Ayele Dersso, ‘The Future of Human Rights and the African Human Rights System’, 40 *Nordic J. Hum. Rts.* (2022) 28.

⁵³⁴ International Service for Human Rights, *Outcomes of the 73rd session of the African Commission* (13 December 2022), at <https://ishr.ch/latest-updates/outcome-of-the-73rd-session-of-the-african-commission/>.

rights on the continent, they face challenges such as duplication of mandates with other State institutions, inadequate resources and lack autonomy considering that most are dependent on the executive branch for their financing.⁵³⁵ At the same time, civil society actors have suggested that the Commission needs the targeted support of NHRIs in order to protect its autonomy.⁵³⁶

3. The African Court on Human and Peoples' Rights

When the African Charter was adopted in 1981, a clear decision was taken to opt for a Commission rather than a Court as the principal institutional arrangement. Negotiations to establish a Court continued, however, and in 1998 the OAU Assembly adopted a Protocol to the African Charter on Human and Peoples' Rights to establish an African Court on Human and Peoples' Rights. The Protocol entered into force in 2004, after 15 states parties to the Charter had ratified it.

As of 2025, the Protocol had been ratified by 34 Member States of the African Union, namely: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Democratic Republic of Congo, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Libya, Lesotho, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Zambia.

But, of those, only eight currently accept the Court's jurisdiction to receive cases directly from individuals and NGOs: Burkina Faso, Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger and Tunisia. The latter's withdrawal will take effect in March 2026.

As of July 2025, the Court's website reported a total of 372 cases received. Although it finalized 260 cases with 272 judgments and 177 orders), almost half of those were dismissed as being inadmissible. The most cases came from Tanzania (156), Benin (44), Côte d'Ivoire (41), Mali (36), Tunisia (25), Rwanda (17), and Burkina Faso (12). Those figures perhaps help to explain why, since 2016, five States have withdrawn their Declaration to allow individuals and NGOs to file cases before the Court: Rwanda (2016), Tanzania (2019), Benin (2020) Côte d'Ivoire (2020), and Tunisia (2025). These withdrawals represented a considerable setback for the Court. In total, 46 percent of the Court's cases have come from Tanzania, the country that hosts the Court. At the time of its withdrawal, 28 of the Court's 70 judgments related to Tanzania. We consider below some of the explanations for the withdrawal.

On 27 June 2014, the African Union adopted the 'Malabo Protocol' to the Protocol on the Statute of the Court. If it enters into force, it would transform the Court into the African Court of Justice and Human Rights and would grant it a wide-ranging criminal jurisdiction, in addition to that prescribed by the Charter. As of 2024, 15 states have signed the Malabo Protocol, but none has ratified. The background to this initiative is described in Chapter 16B 4, below. A 2017 report by Amnesty International suggests why there has been no movement:

With a jurisdiction covering three areas of international law, it is questionable whether the new court ... will have the capacity to effectively and efficiently deliver on its mandate. The proposed Court will have jurisdiction over 14 crimes ... [including] unconstitutional changes of government and illicit exploitation of natural resources. ... Yet, the proposed ACJHR will have only 6 judges dedicated to the International Crimes Section ⁵³⁷

The African Court on Human and Peoples' Rights is based in Arusha, Tanzania, and consists of 11 judges 'elected in an individual capacity'. No two judges may be nationals of the same state (Art. 11). Its membership is to include 'representation of the main regions of Africa and of their principal legal traditions', and in the election of judges the Assembly 'shall ensure that there is adequate gender

⁵³⁵ ACHPR, *Strategic Framework*, 2021-2025 (2020) 9.

⁵³⁶ L. Murugu Mute, *Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: Leveraging the Roles of National Human Rights Institutions* (2021).

⁵³⁷ *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court: Snapshots*, Index No. AFR 01/6137/2017 (2017).

representation' (Art. 14). Judicial independence is to be fully ensured (Art. 17). All judges must be from Africa and a judge must not sit in a case concerning his or her own state of nationality. The President of the Court works full time, while the other ten judges work on a part-time basis. In 2025, five were women.

The Court's jurisdiction extends to cases and disputes 'concerning the interpretation and application' of the Charter, Protocol, 'and any other relevant human rights instrument ratified by the States concerned' (Art. 3). Although the Court's Rules of Procedure provide for third party interventions, they have only occurred in the context of advisory opinions. At the request of a member state of the OAU or the AU, the Court may give its advisory opinion 'on any legal matter related to the Charter or any other relevant human rights instruments', provided that the matter is not then being examined by the Commission (Art. 4). Of 16 requests, the Court has only accepted five (and finalized four), with the rest being 'struck out'.⁵³⁸ They are:

- No 001/2021, on the application of the principle of regional rotation in the election of the bureau of the Pan African Parliament (PAP);
- No 001/2020, on the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis;
- No 001/2018, on the compatibility of Vagrancy Laws with the African Charter;
- No.002/2013, on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the ACtHPR; and
- No 001/2024, on the compatibility of the death penalty with the African Charter.

In 2025, the Pan African Lawyers Union requested an Advisory Opinion on the obligations of states with respect to the climate change crisis. The request has not yet been considered by the Court.

If the Court finds a violation, 'it shall make appropriate orders to remedy the violation' (Art. 27). States parties to the Protocol 'undertake to comply with the judgment in any case to which they are parties ... and to guarantee its execution' (Art. 30). The OAU Council of Ministers is to 'monitor' a judgment's execution (Art. 29). In 2024, the Court's annual budget was US\$11,656,000, of which 94% came from Members States and 6% from 'international partners' (Doc. EX.CL/1574(XLVI) (2025) p. 11.

The Case Law of the Court

One author has argued that the African Court can be seen as a 'continental (super) constitutional court'.⁵³⁹ In support of this thesis he notes several relevant judgments:

ADEM K ABEBE, 'HORIZONTAL' COMPLIANCE WITH DECISIONS OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
ADEROMOLA ADEOLA (ED.), COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA: ESSAYS IN HONOUR OF FRANS VILJOEN (2022) 169

...
 In its first judgment on merits,⁵⁴⁰ the African Court found unconstitutional the provision banning independent candidates from local, parliamentary and presidential elections in Tanzania. ... [T]he Supreme Court of Appeal ... ruled that all provisions of the Tanzanian Constitution could be amended as long as the prescribed procedure was followed [thereby rejecting] any implied limits on the power of amendment

⁵³⁸ See generally, C. A. Odinkalu, 'Advice without Consent?: Assessing the Advisory Jurisdiction of the African Court on Human and Peoples' Rights', 45 *Hum. Rts. Q.* (2023) 365.

⁵³⁹ A. Abebe, 'Taming Regressive Constitutional Amendments: The African Court as a Continental (super) Constitutional Court', 17 *Int. J. Const. L.* (2019) 89.

⁵⁴⁰ *Mitikila and Others v Republic of Tanzania*, Application Nos. 009/2011 and 011/2011 (14 June 2013).

... The [African] Court ruled that the ban on independent candidacy violated the individual right to equal protection of the law and the prohibition against discrimination, the right to association, which specifically includes the right not to associate, and the right to political participation guaranteed in the African Charter. The Court also held that Tanzania did not satisfactorily argue that the ban on independent candidacy served a legitimate interest. In any case, the Court found that the absolute ban on independent candidacy was disproportional to any stated aim of fostering national unity and solidarity. ...

In a case against Cote d'Ivoire,⁵⁴¹ the Court was confronted with the question of the compatibility of the Composition of the Independent Electoral Commission with continental standards, notably guarantees of independence and impartiality of election management bodies in the African Charter on Democracy, Elections and Governance and the ECOWAS Protocol on Good Governance and Democracy. The Court ruled that the composition of the Commission with representatives of political parties and office-holders violated the principle of impartiality. It also ruled that the disproportionate representation of the ruling party and the head of executive in the Commission, compared to representatives of opposition groups, violated not only the independence and impartiality of the Commission but also the principle of equality before the law. ...

In another case involving Burkina Faso,⁵⁴² the African Court found that legal provisions providing for sentences of imprisonment for the crime of defamation were incompatible with the African Charter, therefore necessitating non-custodial sentences. Four of the Court's judges added dissenting opinions finding the crime of defamation incompatible with the freedom of expression, thus suggesting that civil suits should replace criminal defamation laws. ... In addition, the Court ruled that the requirements to hold a press-card, which can be equated to licensing requirements, to practise journalism were incompatible with the freedom of expression. This was in addition to finding violations of the rights of the specific journalist imprisoned for defamation and granting of an order for compensation.

In 2019, the African Court found that the inclusion of mandatory death penalty sentences in Tanzania in relation to certain crimes, which requires judges to impose death sentences if the material facts of murder have been proven, was found to be 'automatic and mechanical' and, therefore, incompatible with the right to life, and also principles of fairness, due process and judicial independence.⁵⁴³ ... A few days before the official delivery of the judgment, the Tanzanian government submitted a letter to the AU withdrawing the [Article 34(6)] declaration allowing individuals and NGOs to submit cases before the Court. ...

* * *

The death penalty case was, however, only one of a number of reasons why Tanzania might have opted to withdraw its Article 34(6) declaration. A 28 October 2019 press release by Amnesty International, 'Tanzania: Climate of fear, censorship as repression mounts', provides a broader explanation:

[A new] report by Amnesty International, "The price we pay: Targeted for dissent by the Tanzanian State" and [another] by Human Rights Watch, "As long as I am quiet, I am safe: Threats to Independent Media and Civil Society in Tanzania" were researched and documented separately but their findings were similar.

...

⁵⁴¹ *Actions Pour la Protection des Droits de L'Homme (APDH) v. The Republic of Cote d'Ivoire*, Application No. 001/2014, Judgment (18 November 2016).

⁵⁴² *Konaté v. Burkina Faso*, Application No 004/2013, Judgment (5 December 2014).

⁵⁴³ *Ally Rajabu and Others v. United Republic of Tanzania*, Application No. 007/2015, Judgment (28 November 2019).

They found that the president and senior government officials frequently made anti-human rights statements, at times followed by cracking down on individuals and organizations. The remarks, coupled with arbitrary arrests and threats to deregister non-governmental groups, has stifled independent reporting by journalists and public discussions on human rights violations ahead of the upcoming elections.

Both organizations found that Tanzanian authorities undermined the rights to freedom of expression and association by enforcing new and existing repressive laws and regulations governing media, non-governmental organizations, and political parties.

Another perspective is provided by Nicole De Silva and Misha Plagis, in 'NGOs, International Courts, and State Backlash against Human Rights Accountability: Evidence from NGO Mobilization against Tanzania at the African Court on Human and Peoples' Rights', 57 *L. & Soc. Rev.* (2023) 36. They analyze the role of NGOs in promoting strategic litigation against the Tanzanian Government:

How does state backlash against human rights accountability, which may occur at the domestic and/or international levels, influence whether and how NGOs use international courts for their human rights advocacy? We develop a new two-level framework for explaining how specific forms of state backlash against human rights accountability can influence whether and how NGOs strategically litigate at IHRCs. ... Our framework focuses on the potential for backlash at two levels (domestic and international) and its consequences for NGOs, as key human rights defenders and IHRC constituencies.

... [W]e empirically analyze the impact of Tanzania's two-level backlash tactics on NGOs' mobilization at the African Court ... [W]e provide an overview of cases of NGO participation in litigation against Tanzania at the African Court. From this, we select three cases of NGO-led litigation ...

...

Abolishing the death penalty

[This analysis focuses on the case noted in the article above by Abebe.]

Rights of persons with albinism

PWA face a range of human rights issues including discrimination, special health and educational needs, harmful traditional practices, violence (e.g., killings, ritual attacks), witchcraft-related trade and trafficking of body parts, infanticide, and child abandonment. In recent decades, given a surge in violence against them, PWA in Tanzania received significant attention and advocacy from media, local and international NGOs, and international organizations. Under tremendous pressure to protect PWA and their human rights, the Tanzanian government introduced some protective measures ...

...

[A complaint was filed with the African Court in 2020, shortly before the expiry of the one-year grace period after which Tanzania's withdrawal became fully effective.]

Rights of pregnant schoolgirls and mothers

In 2017, the Tanzanian government announced that it would enforce a law, which had existed since 2002, allowing pregnant schoolgirls to be expelled or excluded from school and denying them the right to study in public schools. By

one estimate, over 8000 girls are expelled from school in Tanzania each year, while other pregnant girls stop attending school because they fear expulsion or stigma. ... NGOs have advocated for the inclusion of pregnant schoolgirls and young mothers in regular education at public schools, but they had limited domestic political opportunities for this advocacy and were subject to targeted domestic-level state backlash. In 2017, President Magufuli accused these NGOs of being used by foreign agents, and Tanzania's Home Affairs Minister threatened to rescind the registration of organizations advocating on this issue.

...

[A complaint was also filed with the African Court in this case in 2020.]

...

Conclusion

...

... NGOs' persistent human rights advocacy in the face of state backlash is a double-edged sword. On the one hand, it counters the state backlash objective of regressing to a previous condition, and it continues to support the development of international human rights law and the pursuit of human rights accountability. On the other hand, NGOs' continued mobilization amid state backlash may also risk further, more extreme state backlash, potentially drawing in a wider set of states and having deleterious systemic effects—internationally on the relatively nascent international judiciary, and domestically on already vulnerable human rights defenders. ...

Rwanda has also been much criticized for its human rights record, but when it withdrew its declaration in 2016 it focused solely on one case. Its official letter to the Court (24 February 2016) stated:

CONSIDERING that a Genocide convict who is a fugitive from justice has ... secured a right to be heard by the Honourable Court, ultimately gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens;

CONSIDERING that the Republic of Rwanda, in making [its] Declaration never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;

CONSIDERING that Rwanda has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;

NOW THEREFORE, ... withdraws the Declaration ... and shall make it afresh after a comprehensive review.

4. The African Court in Action

The materials that follow provide examples of the Court's case law. The first case was brought by the Commission against Kenya and involves indigenous peoples' rights. The second concerns the functioning of the courts and the democratic system in Tunisia. And the third is an example of an Advisory Opinion which addresses the problem of vagrancy laws, or what is sometimes called the criminalization of poverty.

Kenya has not made the declaration under Article 34(6) of the Charter permitting individuals and accredited NGOs to bring cases before the Court. The following case against Kenya was brought instead by the African Commission. To date, only three such cases have been brought. Under its 2010 Rules of Procedure, the African Commission could refer communications to the African Court: (a) when a respondent state has manifestly refused to comply with a decision of the African Commission; (b) when a respondent state has not complied with provisional measures issued by the African Commission; (c) when a communication reveals a situation of serious or massive violations of human rights; and (d) at any stage of the examination of a communication if the African Commission deems necessary. This rule was amended in 2020 and the relevant Rule 130 says only that the Commission may refer cases when it has not yet decided on admissibility. In the view of Amnesty International it is now ‘unclear under what specific circumstances would the Commission make a referral’. The rule also introduces ‘additional hurdles in the referral process’ which ‘potentially [foreclose] any real prospects of more cases ever [being] referred to the African Court by the African Commission.’⁵⁴⁴

AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS V. REPUBLIC OF KENYA
AFRICAN COURT OF HUMAN RIGHTS, APPLICATION NO. 006/2012, JUDGMENT (26 MAY 2017)

[The Applicant is the African Commission and the Respondent is the Republic of Kenya. The case was brought to the Commission on 14 November 2009 through a Communication from the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI), both acting on behalf of the Ogiek Community of the Mau Forest. On 23 November 2009, the Commission issued an Order for Provisional Measures requesting Kenya to suspend implementation of an eviction notice issued in October 2009.]

On 12 July 2012, following the lack of response from the Respondent, the Commission seised this Court with the present Application

A) Facts of the Matter

... The Applicant alleges that the Ogieks are an indigenous minority ethnic group in Kenya comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest Complex, a land mass of about 400,000 hectares

...
 The Applicant states that the eviction notice was issued on the grounds that the forest constitutes a reserved water catchment zone, and was in any event part of government land The Applicant states further that the Forestry Service’s action failed to take into account the importance of the Mau Forest for the survival of the Ogieks, and that the latter were not involved in the decision leading to their eviction. The Applicant contends that the Ogieks have been subjected to several eviction measures since the colonial period, which continued after [Kenya’s] independence According to the Applicant, the October 2009 eviction notice is a perpetuation of the historical injustices suffered by the Ogieks.

The Applicant further avers that the Ogieks have consistently raised objections to these evictions with local and national administrations, task forces and commissions and have instituted judicial proceedings, to no avail.

[On 15 March 2013, the Court issued an Order for Provisional Measures, and on 24 September 2014 granted leave to MRGI to intervene. On 27-28 November 2014 the Court held a public hearing, at which all parties were represented. The Court dismissed several jurisdictional challenges and found that domestic remedies had been exhausted.]

...

⁵⁴⁴ Amnesty International, *The State of African Regional Human Rights Bodies and Mechanisms*, 2019-2020, Index No. AFR 01/3089/2020 (2020), 20.

V. ON THE MERITS

... [T]he Applicant alleges violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the Charter.
 ... [T]he Court will commence with the alleged violation of Article 14 [‘[t]he right to property shall be guaranteed’].

...

[But the central issue, on which all others hinge, is] whether or not the Ogieks constitute an indigenous population. ...

A. The Ogieks as an Indigenous Population

...

The Applicant argues that the Ogiek are an “indigenous people”

...

The Respondent’s position is that the Ogieks are not a distinct ethnic group but rather a mixture of various ethnic communities. During the Public Hearing however, the Respondent admitted that the Ogieks constitute an indigenous population in Kenya but that the Ogieks of today are different from those of the 1930s and 1990s having transformed their way of life through time and adapted themselves to modern life and are currently like all other Kenyans.

The Court’s Assessment

The Court notes that the concept of indigenous population is not defined in the Charter. For that matter, there is no universally accepted definition of “indigenous population” in other international human rights instruments. [It notes, however, the work of the African Commission’s Working Group on Indigenous Populations/Communities and of the UN Sub-Commission’s Rapporteur on Minorities.]

...

From the foregoing, the Court deduces that for the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

These criteria generally reflect the current normative standards to identify indigenous populations in international law. The Court deems it appropriate, by virtue of Article 60 and 61 of the Charter, which allows it to draw inspiration from other human rights instruments to apply these criteria to this Application.

... [Reports before the Court] affirm the Applicant’s assertion that the Mau Forest is the Ogieks’ ancestral home. The most salient feature of most indigenous populations is their strong attachment with nature, particularly, land and the natural environment. Their survival in a particular way depends on unhindered access to and use of their traditional land and the natural resources thereon. In this regard, the Ogieks, as a hunter-gatherer community, have for centuries depended on the Mau Forest for their residence and as a source of their livelihood.

The Ogieks also exhibit a voluntary perpetuation of cultural distinctiveness, which includes aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions through self-identification and recognition by other groups and by State authorities, as a distinct group. Despite the fact that the Ogieks are divided into clans made up of patrilineal lineages each with its own name and area of habitation, they have their own language, albeit currently spoken by very few and more importantly, social norms and forms of subsistence, which make them distinct from other neighbouring tribes. They are also identified by these neighbouring tribes, such as the Maasai, Kipsigis and Nandi, with whom they have had regular interaction, as distinct ‘neighbours’ and as a distinct group.

The records before this Court show that the Ogieks have suffered from continued subjugation, and marginalisation. Their suffering as a result of evictions from their ancestral lands and forced assimilation and the very lack of recognition of their status as a tribe or indigenous population attest to the persistent marginalisation that the Ogieks have experienced for decades.

In view of the above, the Court recognises the Ogieks as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.

...

Alleged violation of Article 14 of the Charter

Applicant's Submission

The Applicant contends that the failure of the Respondent to recognise the Ogieks as an indigenous community denies them the right to communal ownership of land as provided in Article 14 of the Charter. ...

...

The Court's Assessment

Article 14 of the Charter provides as follows:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

The Court observes that, although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective.

The Court is also of the view that, in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is, the right to transfer it (*abusus*).

However, to determine the extent of the rights recognised for indigenous communities in their ancestral lands as in the instant case, the Court holds that Article 14 of the Charter must be interpreted in light of the applicable principles especially by the United Nations.

In this regard, Article 26 of the [UN Declaration on the Rights of Indigenous Peoples of 2007], provides as follows:

“1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

It follows in particular from Article 26 (2) of the Declaration that the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the

right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land.

... [S]ince the Court has already held that the Ogieks constitute an indigenous community, it holds, on the basis of Article 14 of the Charter read in light of the above-mentioned [UN] Declaration, that they have the right to occupy their ancestral lands, as well as use and enjoy the said lands.

However, Article 14 envisages [restrictions] provided that such restriction is in the public interest and is also necessary and proportional.

... [T]he Respondent's public interest justification for evicting the Ogieks from the Mau Forest has been the preservation of the natural ecosystem. Nevertheless, it has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area. ... [T]he Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.

... [T]he Court holds that by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land as defined above and as guaranteed by Article 14 of the Charter read in light of the [UN Declaration].

Alleged violation of Article 2 of the Charter

Applicant's Submission

The Applicant submits that Article 2 of the Charter provides a non-exhaustive list of prohibited grounds of discrimination and that the expression "or other status", widens the list to include statuses not expressly noted. The Applicant notes that any discrimination against the Ogiek Community would fall within the definition of "race", "ethnic group", "religion" and "social origin" referred to in Article 2. ...

... The Applicant stresses that the Respondent has, since independence, been pursuing a policy of assimilation and marginalisation, presumably in an attempt to ensure national unity and, in the case of land and natural resource rights, in the name of conservation of the Mau Forest. According to the Applicant, while such aims of national unity or conservation may be legitimate and serve the common interest, the means employed, including the non-recognition of the tribal and ethnic identity of the Ogieks and their corresponding rights is entirely disproportionate to such an aim and, is ultimately counterproductive to its achievement. ...

The Court's Assessment

Article 2 of the Charter provides that:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, birth or any status."

...

In terms of Article 2 of the Charter, while distinctions or differential treatment on grounds specified therein are generally proscribed, ... not all forms of distinction can be considered as discrimination. A distinction or differential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have objective and reasonable justification and, in the circumstances where it is not necessary and proportional.

...

In so far as the Ogieks are concerned, the Court notes from the records available before it that their request for recognition as a tribe goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933, asserting that “they [the Ogieks] were a savage and barbaric people who deserved no tribal status” and consequently, the Commission proposed that “they should become members of and be absorbed into the tribe in which they have the most affinity”. The denial of their request for recognition as a tribe also denied them access to their own land as, at the time, only those who had tribal status were given land as “special reserves” or “communal reserves”. This has been the case since independence and is still continuing. In contrast, other ethnic groups such as the Maasai, have been recognised as tribes and consequently, been able to enjoy all related rights derived from such recognition, thus proving differential treatment.

The Court accordingly finds that, if other groups which are in the same category of communities, which lead a traditional way of life and with cultural distinctiveness highly dependent on the natural environment as the Ogieks, were granted recognition of their status and the resultant rights, the refusal of the Respondent to recognise and grant the same rights to the Ogieks, due to their way of life as a hunter-gatherer community amounts to ‘distinction’ based on ethnicity and/or ‘other status’ in terms of Article 2 of the Charter.

...

[T]he Court finds that the Respondent, by failing to recognise the Ogieks’ status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes, violated Article 2 of the Charter.

Alleged violation of Article 4 of the Charter

Applicant’s Submission

... The Applicant contends that forced evictions may violate the right to life when they generate conditions that impede or obstruct access to a decent existence.

The Court’s Assessment

Article 4 of the Charter stipulates that:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”

... Contrary to other human rights instruments, the Charter establishes the link between the right to life and the inviolable nature and integrity of the human being. The Court finds that this formulation reflects the indispensable correlation between these two rights.

The Court notes that the right to life under Article 4 of the Charter is a right to be enjoyed by an individual irrespective of the group to which he or she belongs. The Court also understands that the violation of economic, social and cultural rights (including through forced evictions) may generally engender conditions unfavourable to a decent life.³⁹ However, the Court is of the view that the sole fact of eviction and deprivation of economic, social and cultural rights may not necessarily result in the violation of the right to life under Article 4 of the Charter.

The Court considers that it is necessary to make a distinction between the classical meaning of the right to life and the right to decent existence of a group. Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life.

In the instant case, it is not in dispute between the Parties that that the Mau Forest has, for generations, been the environment in which the Ogiek population has always lived and that their livelihood depends on it. As a hunter-gatherer population, the Ogieks have established their homes, collected and produced food, medicine and ensured other means of survival in the Mau Forest. There is no doubt that their eviction has adversely affected their decent existence in the forest. According to the Applicant, some members of the Ogiek population died at different times, due to lack of basic necessities such as food, water, shelter, medicine, exposure to the elements, and diseases, subsequent to their forced evictions. The Court notes however that the Applicant has not established the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result. The Applicant has not adduced evidence to this effect.

In view of the above, the Court finds that there is no violation of Article 4 of the Charter.

Alleged violation of Article 8 of the Charter

Applicant's Submission

The Applicant contends that the Ogieks practise a monotheistic religion closely tied to their environment and that their beliefs and spiritual practices are protected by Article 8 of the Charter and constitute a religion under international law. ...

...

Respondent's Submission

The Respondent contends that the Applicant has failed to adduce evidence to show the exact places where the alleged ceremonies for the religious sites of the Ogieks are located. They argue that the Ogieks have abandoned their religion as they have converted to Christianity and that the religious practices of the Ogieks are a threat to law and order, thereby necessitating the Respondent's interference, to protect and preserve law and order. The Respondent contends that the Ogieks are free to access the Mau Forest, except between 6 p.m. and 9 a.m. and that they are prohibited from carrying out certain activities, unless they have a licence permitting them to do so.

The Court's Assessment

Article 8 of the Charter ... requires State Parties to fully guarantee freedom of conscience, the profession and free practice of religion. The right to freedom of worship offers protection to all forms of beliefs regardless of denominations: theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. ...

The Court notes that, in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. ...

... The Mau Forest constitutes [the Ogiek's] spiritual home and is central to the practice of their religion. It is where they bury the dead according to their traditional rituals⁴⁵, where certain types of trees are found for use to worship and it is where they have kept their sacred sites for generations.

...

Article 8 of the Charter however allows restrictions on the exercise of freedom of religion in the interest of maintaining law and order. Though the Respondent can interfere with the religious practices of the Ogieks to protect public health and maintain law and order, these restrictions must be examined with regard to their necessity and reasonableness. The Court is of the view that, rather than evicting the Ogieks ..., there were other less onerous measures that the Respondent could have put in place ... [including] sensitisation campaigns to the Ogieks on the requirement to bury their dead in accordance with the requirements of the Public Health Act

... [T]he Respondent has not submitted any evidence to support its position that the adoption of Christianity means a total abandonment of the Ogiek traditional religious practices. Even though some members of the Ogieks might have been converted to Christianity, the evidence before this Court show that they still practice their traditional religious rites. Accordingly, the alleged transformation in the way of life of the Ogieks and their manner of worship cannot be said to have entirely eliminated their traditional spiritual values and rituals.

... The Court therefore finds that the Respondent is in violation of Article 8 of the Charter.

Alleged violation of Articles 17(2) and (3) of the Charter

Applicant's Submission

The Applicant, citing [the Commission's] own jurisprudence in the Endorois Case avers that "Culture could be taken to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics". On the basis of this, the Applicant submits that the cultural rights of the Ogieks have been violated ...

The Applicant maintains that the Ogieks should be allowed to determine what culture is good for them rather than the Respondent doing so. ...

...

Respondent's Submission

... The Respondent urges the Court to bear in mind the intricate balance between the right to culture and environmental conservation for future generations.

Furthermore, the ... Ogieks ... life style has metamorphosed and the cultural and traditional practices which made them distinct no longer exist, thus, the group itself no longer exists and it cannot therefore claim any cultural rights. [They] no longer live as hunters and gatherers, thus, they cannot be said to conserve the environment. They have adopted new and modern ways of living, including building permanent structures, livestock keeping and farming which would have a serious negative impact on the forest if they are allowed to reside there.

The Court's Assessment

Article 17 of the Charter provides:

- "1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values Recognised by the community shall be the duty of the State".

The right to culture ... is to be considered in ... both its individual and collective nature. It ensures protection, on the one hand, of individuals' participation in the cultural life of their community and, on the other, obliges the State to promote and protect traditional values of the community.

Article 17 of the Charter protects all forms of culture and places strict obligations on State Parties to protect and promote traditional values. In a similar fashion, the Cultural Charter for Africa obliges States to adopt a national policy which creates conditions conducive for the promotion and development of culture. ...

The protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.

The Court notes that in the context of indigenous populations, the preservation of their culture is of particular importance. ...

The UN Declaration on Indigenous Peoples, states that "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" and States shall provide effective mechanisms to prevent any action that deprives them of "their integrity as distinct peoples, or of their cultural values or ethnic identities". ...

... [T]he Court notes ... that the Ogiek population has a distinct way of life centred and dependent on the Mau Forest Complex. As a hunter-gatherer community, they get their means of survival through hunting animals and gathering honey and fruits, they have their own traditional clothes, their own language, distinct way of entombing the dead, practicing rituals and traditional medicine, and their own spiritual and traditional values

... [Evidence shows] that the Ogieks have been peacefully carrying out their cultural practices until their territory was encroached upon by outsiders and they were evicted from the Mau Forest. Even in the face of this, the Ogieks still undertake their traditional activities: traditional wedding ceremonies, oral traditions, folklores, and songs. They still maintain their clan boundaries in the Mau Forest and each clan ensures the maintenance of the environment within the boundary it is allocated. ...

...
The Court therefore finds that the Respondent has violated the right to culture of the Ogiek population

... .

...
[The Court's analysis of alleged violation of Article 21 (the right to freely dispose of their wealth) and Article 22 (the right to development) is excerpted above, in Chapter 4.]

Alleged violation of Article 1 of the Charter

...

The Court's Assessment

Article 1 of the Charter declares that

"The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

...

... [T]he Respondent has violated article 1 of the Charter by not taking adequate legislative and other measures to give effect to the rights enshrined under article 2, 8, 14, 17 (2) and (3), 21 and 22 of the Charter.

...

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS V. REPUBLIC OF KENYA
AFRICAN COURT OF HUMAN RIGHTS, APPLICATION NO. 006/2012, JUDGMENT
(REPARATIONS) (23 JUNE 2022)

...
VIII. OPERATIVE PART

160. ... The Court unanimously ...

i. Dismisses all the Respondent State's objections;

On pecuniary reparations

ii. *Orders* the Respondent State to pay the sum of KES 57 850 000 [just under US\$500,000], free from any government tax, as compensation for the material prejudice suffered by the Ogiek;

iii. *Orders* the Respondent State to pay the sum of KES 100 000 000 [US\$835,000] ... as compensation for the moral prejudice suffered by the Ogiek;

On non-pecuniary reparations

iv. *Orders* the Respondent State to take all necessary measures, legislative, administrative or otherwise to identify, in consultation with the Ogiek and/or their representatives, and delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty, the Ogiek's use and enjoyment of the same.;

v. *Orders* the Respondent State, where concessions and/or leases have been granted over Ogiek ancestral land, to commence dialogue and consultations between the Ogiek and their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with all applicable laws. Where it proves impossible to reach a compromise, the Respondent State is ordered to compensate the concerned third parties and return such land to the Ogiek;

vi. *Orders* that the Respondent State must take all appropriate measures, within one (1) year, to guarantee full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition to the Ogiek language and Ogiek cultural and religious practices;

vii. *Dismisses* the Applicant's prayer for a public apology;

viii. *Dismisses* the Applicant's prayer for the erection of a monument to commemorate the human rights violations suffered by the Ogiek;

ix. *Orders* the Respondent State to take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development, conservation or investment projects on Ogiek ancestral land;

x. *Orders* the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as ordered in this judgment;

xi. *Orders* the Respondent State to adopt legislative, administrative and/or any other measures to give full effect to the terms of this judgment as a means of guaranteeing the non-repetition of the violations identified;

xii. *Orders* the Respondent State to take the necessary administrative, legislative and any other measures within twelve (12) months of the notification of this judgment to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as compensation in this case;

xiii. *Orders* the Respondent State, within twelve (12) months of notification of this judgment, to take legislative, administrative or any other measures to establish and operationalise the Committee for the management of the development fund ordered in this Judgment;

On implementation and reporting

xiv. *Orders* that the Respondent State must, within six (6) months [publish both reports in the Government Gazette and on a government website];

xv. *Orders* the Respondent State to submit, within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of all the Orders herein;

xvi. *Holds*, that it shall conduct a hearing on the status of implementation of the orders made in this judgment on a date to be appointed by the Court twelve (12) months from the date of this judgment.

IBRAHIM BEN MOHAMED BEN IBRAHIM BELGUITH V. REPUBLIC OF TUNISIA **AFRICAN COURT OF HUMAN RIGHTS, APPLICATION NO. 017/2021, JUDGMENT (22 SEPTEMBER 2022)**

[By way of background to this case, Human Rights Watch notes that President Kais Saied, who was elected in 2019, ‘granted himself extraordinary powers in July 2021, claiming they were needed to deal with a crisis of governance. He suspended much of the post-revolutionary Constitution of 2014 and dissolved the Parliament [The authorities subsequently took] a range of repressive measures against opponents, critics, and political figures’. In July 2022, before the Court judgment below, a new Constitution was approved by 94.6 percent of voters in a referendum. The *New York Times* observed that ‘the referendum ... was undercut by mass boycotts, voter apathy and a setup heavily tilted toward Mr. Saied.’ It reported that the result cemented one-man rule and dealt a ‘body blow to a democracy built with immense effort and high hopes after the overthrow of the country’s dictator’ at the start of the Arab Spring in 2011.⁵⁴⁵

The broader significance of the case is illustrated by developments in various other African states in the months before and after the judgment. Between 2020 and September 2023, nine successful coups occurred in Africa.]

...

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

⁵⁴⁵ Vivian Yee, ‘Tunisians Approve New Constitution That Undercuts Democracy’, *New York Times*, July 26, 2022.

3. The Applicant alleges in his Application that the President of the Respondent State, abrogated the Constitution, halted the democratic process and arrogated to himself more powers by promulgating the following presidential decrees:

[No. 69, No. 80, No. 109, No. 117, No. 137 and No. 138.]

4. The Applicant asserts that the above decrees unlawfully terminated the functions and appointment of the Head and members of Government, and suspended the powers of Parliament and the provisions of the Constitution, except the preamble and Chapters I and II.

...

VII. MERITS

...

A. Alleged violation of the right to have one's cause heard

...

92. The Applicant further avers that the Presidential Decree No. 2021-117 violates the right to be heard before the courts by stipulating in its Article 7 that decrees issued by the President of the Republic are not subject to appeal.

...

94. The Respondent State did not respond on the alleged violation of this right.

95. The Court notes that, Article 7(1)(a) of the Charter provides that:

Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

...

97. The Court emphasises that Article 7(1)(a) of the Charter makes it clear that the existence of a competent tribunal is a *sine qua non* to the enjoyment of the right to be heard, including the right to appeal. This must be read together with Article 26 of the Charter which imposes on State Parties the obligation to establish and improve appropriate national institutions for the promotion and protection of human rights and freedoms and to guarantee the independence of the courts.

...

100. [A]t the time the Application was filed before this Court, the Constitutional Court [authorized by Law No. 50 of 2015] had not been operationalised. The Court notes that there was also no other Court or authority in the Respondent State that could consider constitutional disputes relating to the powers of the President. ...

101. As a result, it is evident that the Applicant was not able to challenge the constitutionality of the Presidential decrees. This in effect left him with no legal avenue to seek a remedy for his grievances and deprived him of his right to be heard.

102. In view of the foregoing, the Court holds that the Respondent State violated the Applicant's right to be heard contrary to Article 7(1)(a) of the Charter as read together with Article 26 of the Charter.

B. Alleged violation of the people's right to self-determination and the right to political participation

...

106. [T]he Applicant submits that the Respondent State has violated his and Tunisian peoples' right to political participation and right to self-determination contrary to its obligations under Articles 13 and 20 of the Charter.

107. The Respondent State did not respond to both alleged violations.

108. The Court notes that the Applicant alleges violations of both the right to self-determination and the right to political participation, which are guaranteed in Articles 13 and 20 of the Charter. The Court acknowledges in this regard the fundamental importance of the individual's right to political participation under Article 13 and to the peoples' free determination of their political status within the terms of Article 20 (1) of the Charter.

109. However, the Court finds that in the instant Application, the main issues raised by the Applicant relate to the right to political participation, and thus, the Court limits its determination to this aspect of the Applicant's allegation. In the circumstances of this case and considering the nature the Applicant's submissions, the Court does not find it necessary to consider the allegation relating to the violation of the right to self-determination.

...

113. ... [T]he exceptional measures taken by the Respondent State were implemented within the framework of Presidential decrees issued by a democratically elected President owing to certain situations. The decrees were passed in accordance with Article 80 of the Respondent State's Constitution (2014), which provided that:

In the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state, the President of the Republic may take any measures necessitated by the exceptional circumstances, after consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People and informing the President of the Constitutional Court. The President shall announce the measures in a statement to the people.

...

116. The Court notes that there is nothing on record showing that the substantive conditions of an imminent danger to the nation's institutions or the security and independence of the country or the abovementioned procedural requirements were met before the President issued the decrees in question.

...

117. Furthermore, the Court finds that the decrees in question disproportionately disrupted the work of the government including that of elected institutions such as the House of People's Representatives.

...

118. In this vein, the Court notes that the Respondent State was under an obligation to consider other least restrictive measures to deal with the said dispute prior to taking such drastic measures as the suspension of the powers of Parliament, and limiting the immunity of its members The Respondent State's failure to do so made the adopted measures not only disproportionate in relation to the stated goals but also with the Respondent State's own Constitutional dispensation.

119. Accordingly, the Court finds that the Respondent State's restrictive measures were neither adopted in accordance with the law nor were they proportionate for the purpose for which they were adopted.

120. Consequently, the Court holds that the Respondent State has violated the right of the people to participate in the conduct of public affairs contrary to Article 13 (1) of the Charter.

...

VIII. REPARATIONS

129. The Court notes that in the present case, the Applicant does not seek pecuniary reparations because, according to him, even if it is present, real and continuous, the material harm caused by the violations, is not personal or direct, and that he has no standing to seek compensation on behalf of the Tunisian people.

130. However, the Applicant requests the Court to order the Respondent State to repeal all the decrees mentioned in paragraph 3 of this judgment in order to guarantee the human rights set out, by taking the following measures:

- i. Adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, including the speedy establishment of the Constitutional Court and the removal of all legislative, regulatory, political and realistic impediments hindering it;
- ii. Pass laws that criminalize participation in, and support of, unconstitutional change of power;
- iii. Adopt laws that guarantee the inculcation of democratic culture among the people, especially young people;
- iv. Provide procedural avenues and effective solutions to remedy violations of the Constitution, pending the establishment of the Constitutional Court, such as obliging it to submit to the Court a report on judgment enforcement procedures and guarantees of non-repetition.

131. The Respondent State does not address the issue of reparations and only requests that the case be declared inadmissible and be dismissed on the merits.

...

XI. OPERATIVE PART

For these reasons, THE COURT *Unanimously*,

...

On Merits

- i. *Finds* that the Respondent State violated the Applicant's [rights under Article 7(1)(a), Article 13(1), and Article 1, of the Charter]

...

On Reparations

- iv. *Orders* the Respondent State to repeal [each of the challenged] Presidential Decrees ... and to return to constitutional democracy within two (2) years from the date of notification of this judgment.
- v. *Orders* the Respondent State to take all measures necessary for the operationalisation of an independent Constitutional Court and remove all legal impediments thereto within two (2) years from the date of notification of this judgment.

On implementation and reporting

- vi. *Orders* the Respondent State to report to the Court, within six (6) months ...

[*Note:* On November 2024, in *Samia Zorgati v. Republic of Tunisia* (Application 016/2021), the Court held that two 2022 decree-laws dissolving the High Judicial Council and the legislature violated Tunisia's obligation to guarantee the independence of the judiciary and the legislature. Tunisia was ordered to repeal the law and restore the Council within six months. These two cases appear to have triggered Tunisia's decision to withdraw its declaration under Article 34(6).]

ADVISORY OPINION NO. 001/2018

**AFRICAN COURT OF HUMAN RIGHTS, ON THE COMPATIBILITY OF VAGRANCY LAWS WITH
THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND OTHER HUMAN RIGHTS
INSTRUMENTS APPLICABLE IN AFRICA, REQUESTED BY THE PAN AFRICAN LAWYERS UNION
(PALU) (4 DECEMBER 2020)**

I. THE AUTHOR

1. This Request for Advisory Opinion ... was filed by the Pan African Lawyers Union [PALU].

...

4. According to PALU “[m]any countries abuse [vagrancy laws] to arrest and detain persons where there has been no proof of a criminal act.” PALU submits, therefore, that these laws are overly broad and confer too wide a discretion on law enforcement agencies to decide who to arrest which impacts disproportionately on vulnerable individuals in society. PALU also submits that arrests for violation of vagrancy laws contribute to congestion in police cells and prison overcrowding. It is PALU’s further submission that the manner in which vagrancy offences are enforced is contrary to the basic principles of criminal law i.e. it undermines the presumption of innocence and thereby threatens the rule of law.

5. PALU, therefore, requests for an opinion from the Court on [four] questions

...

A. Compatibility of vagrancy laws and the Charter

38. ... PALU has requested the Court to provide an opinion on:

Whether vagrancy laws and by-laws, including but not limited to, those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have visible means of subsistence and cannot give good account of him or herself violate [Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter].

39. ...

Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person’s deportation to another area, violate Articles 5, 12, 18 of the Charter.

40. ...

Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without a warrant simply because the person has no “means of subsistence and cannot give a satisfactory account” of him or herself, violate Articles 2, 3, 5, 6 and 7 of the Charter.

iii. The Court’s position

...

58. Although many countries have had vagrancy laws on their statute books, there have always been nuances across legal systems in terms of the formulation of the offences and the manner of enforcement. In this Advisory Opinion, therefore, the Court remains alive to the fact that the term “vagrancy” is often used in a generic sense to allude to various offences commonly grouped under this umbrella including but not limited to: being idle and disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer.

59. From a sociological perspective, it has been suggested that there were three main reasons that motivated the adoption of vagrancy laws. First, to curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to land owners and industrialists whilst limiting the presence of undesirable persons in the cities; second, to reduce the costs incurred by local municipalities and parishes to look after the poor; lastly, and to prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials. ...

60. ... [I]n the Penal Codes of at least eighteen (18) African countries, a vagrant is defined as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession. In at least eight (8) African countries; a “suspected person or reputed thief who has no visible means of subsistence and cannot give a good account” of him or herself commits an offence of being a “rogue” or a “vagabond”. The Court also notes that in South Africa, for instance, by-laws prohibit a person without a fixed abode from loitering or sleeping in a public amenity, public space or in the beach. The Court further notes that in at least three (3) African countries, the offence of being an idle and disorderly person is defined to include someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself.

61. ... [T]he Court observes that other African countries ... have repealed some of their vagrancy laws [and that] courts, in some African countries, have also nullified some vagrancy laws for being unconstitutional. ...

...

a. Vagrancy laws and the right to non-discrimination and equality

...

66. [T]he right to non-discrimination under Article 2 of the Charter, is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3. ...

...

70. [T]he Court notes that vagrancy laws, effectively, punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other rights including more specifically their socio-economic rights. Vagrancy laws, therefore, serve to exacerbate their situation by further depriving them of their right to be treated equally before the law.

71. The Court also notes that while an eternal attribute of all good laws is that they must always be clear and precise, vagrancy laws often employ vague, unclear and imprecise language. Common terminology used in framing vagrancy offences include expressions such as “loitering”, “having no visible means of support” and “failing to give a good account of oneself”. Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws. This, automatically, makes vagrancy laws prone to abuse, often to the detriment of the marginalized sections of society.

72. The Court recalls that the status of an individual is one of the prohibited grounds for discrimination under Article 2 of the Charter. In relation to the application of vagrancy laws, no reasonable justification exists for the distinction that the law imposes between those classified as vagrants and the rest of the population except their economic status. The individual classified as a vagrant will, often times, have no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary. The arrest of persons classified as vagrants, clearly, is largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets.

73. The Court further recalls that the right to equality before the law requires that “all persons shall be equal before the courts and tribunals”. ... [L]aws with discriminatory effects towards the marginalized sections of society are not compatible with both Articles 2 and 3 of the Charter.

74. The Court also recalls that any arrest without a warrant requires reasonable suspicion or grounds that an offence has been committed or is about to be committed. Notably, where vagrancy-related offences are concerned, most arrests are made on the basis of an individual's underprivileged status and the inability to give an account of oneself. In this context, therefore, arrests are substantially connected to the status of the individual Arrests without a warrant for vagrancy offences, therefore, are also incompatible with Articles 2 and 3 of the Charter.

75. In light of the above, the Court holds that vagrancy laws, both in their formulation as well as in their application, by, among other things, criminalizing the status of an individual, enabling the discriminatory treatment of the underprivileged and marginalized, and also by depriving individuals of their equality before the law are not compatible with Articles 2 and 3 of the Charter. The Court also finds that arrests for vagrancy-related offences, where they occur without a warrant, are not only a disproportionate response to socio-economic challenges but also discriminatory since they target individuals because of their economic status.

b. Vagrancy laws and the right to dignity

76. Under Article 5, the Charter provides as follows:

Every individual shall have the right to the respect of the dignity inherent in a human being

...

79. The Court also recalls that the Commission in *Purohit and Moore v. The Gambia* concluded that the use of the words “lunatics” and “idiots” to refer to persons with mental disabilities dehumanizes and denies them their dignity. In the same vein, the Court notes that vagrancy laws commonly use the terms “rogue”, “vagabond”, “idle” and “disorderly” to label persons deemed to be vagrants. These terms, the Court holds, are a reflection of an outdated and largely colonial perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status.

80. The Court also holds that the application of vagrancy laws often deprives the underprivileged and marginalized of their dignity by unlawfully interfering with their efforts to maintain or build a decent life or to enjoy a lifestyle they pursue. ... Consequently, the Court finds that vagrancy laws are incompatible with the notion of human dignity as protected under Article 5 of the Charter.

81. The Court also holds that labelling an individual as a “vagrant”, “vagabond”, “rogue” or in any other derogatory manner and summarily ordering them to be forcefully relocated to another area denigrates the dignity of a human being. If the implementation of such order is accompanied by the use of force, it may also amount to physical abuse. The Court thus finds that the forcible removal of persons deemed to be vagrants is not compatible with Article 5 of the Charter.

...

c. Vagrancy laws and the right to liberty

83. The Court notes that Article 6 of the Charter provides that:

Every individual shall have the right to liberty and the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrary arrested or detained.

...

85. ... [I]n practice, the enforcement of these laws often results in pretextual arrests, arrests without warrants and illegal pre-trial detention. This exposes vagrancy laws to constant potential abuse.

86. The Court concedes that arrests under vagrancy laws may, ostensibly, satisfy the requirement that the deprivation of freedom must be based on reasons and conditions prescribed by law. Nevertheless,

the manner in which vagrancy offences are framed, in most African countries, presents a danger due to their overly broad and ambiguous nature. One of the major challenges is that vagrancy laws do not, *ex ante*, sufficiently and clearly lay down the reasons and conditions on which one can be arrested and detained to enable the public to know what is within the scope of prohibition. In practice, therefore, many arrests for vagrancy offences are arbitrary.

...

d. Vagrancy laws and the right to fair trial

88. Article 7 of the Charter provides ...:

b) the right to be presumed innocent until proved guilty by a competent court or tribunal

...

92. The Court observes that because vagrancy laws often punish an individual's perceived status, such as being "idle", "disorderly" or "a reputed thief", which status does not have an objective definition, law enforcement officers can arbitrarily arrest individuals without the sufficient level of *prima facie* proof that they committed a crime. Once they are taken into custody, such arrested persons would have to explain themselves to the law enforcement officer(s) to demonstrate that, for example, they were not idle or disorderly, are not a reputed thief or that they practice a trade or profession. ...

93. ... [F]orcing a suspect to explain himself/herself may be tantamount to coercing a suspect to make self-incriminating statements. Law enforcement officers may exert undue pressure on suspected criminals by pretextually arresting them under vagrancy laws and then soliciting incriminatory evidence even in relation to crimes not connected to vagrancy.

...

e. Vagrancy laws and the right to freedom of movement

95. The Court recalls that Article 12 of the Charter provides, so far as is material, that:

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

...

99. ... [A]ny limitation of the freedom of movement must ... be provided by law, ... be necessary to protect national security, public order, public health or morals or the rights and freedom of others [and] be consistent with the other rights recognized in the Charter. ...

100. ... [While vagrancy law limitations are prescribed by law, they fail] to satisfy the second and third conditions. This is because vagrancy laws are not necessary for any of the purposes for which they are often cited. ...

101. The Court is also mindful that even if vagrancy laws contribute to the prevention of crimes in some cases, other less-restrictive measures such as offering vocational training for the unemployed and providing shelter for the homeless adults and children are readily available for dealing with the situation of persons caught by vagrancy laws. ...

102. [T]he enforcement of vagrancy laws, generally, is incompatible with the right to freedom of movement as guaranteed under Article 12 [as is] forced relocation

f. Vagrancy laws and the right to the protection of the family

...

104. The Court notes that underlying Article 18 of the Charter is the responsibility of Member States to take care of the physical and moral health of the family. ...

105. The Court observes that arrests and detentions under vagrancy laws may result in the forcible removal of the suspected “vagrants” from their families. Due to this, other family members that rely on those arrested under vagrancy laws, most notably children, the elderly and the disabled may suffer from the deprivation of financial and emotional support. ...

[The following two sections of the Opinion are omitted:

B. Vagrancy laws and the Children’s Rights Charter

C. Vagrancy laws and the Women’s Rights Protocol]

D. The obligations of State Parties to the Charter in respect of vagrancy laws

...

ii. The Court’s position

...

152. The Court observes that there are two dimensions to PALU’s final question and these are, first, whether an obligation to amend vagrancy laws exist and, second, the precise nature of this obligation.

153. ... [T]he Court holds that Article 1 of the Charter, Article 1 of the Children’s Rights Charter and Article 1 of the Women’s Rights Protocol obligates all State Parties to, inter alia, either amend or repeal their vagrancy-laws and by-laws to bring them in conformity with these instruments. This would be in line with the obligation to take all necessary measures including the adoption of legislative or other measures in order to give full effect to the Charter, the Children’s Rights Charter and the Women’s Rights Protocol.

154. ... [T]his obligation requires all State Parties to amend or repeal all their vagrancy laws, related by-laws and other laws and regulations so as to bring them in conformity with the provisions of the Charter, the Children’s Rights Charter and the Women’s Rights Protocol.

...

* * *

In a Case Note in 117 *Am. J. Int’l L.* (2023) 121, Jacqueline W. Mwangi puts the Advisory Opinion into context:

In sociopolitical contexts where colonial legacies pervade law and institutions despite constitutional transitions, courts and social movements can co-create legal openings. The combination of PALU’s advocacy and the Court’s expansive approach in handling this Request is instrumental toward building an accessible forum for legal reform through advisory opinions. ... A big part of this success seems to be a fortunate but contingent institutional alignment within the African Human Rights System, between PALU, the Commission, and the Court. First, PALU’s wide experience in strategic litigation ... [and a Memorandum of Understanding (MOU)] with the AU provided it with legal standing. Second, ... the AU Commission’s “Principles on the Decriminalisation of Petty Offences in Africa” provided an authoritative text for reference by PALU and the Court Most significantly, the Court took the opportunity to expand its own powers by stating in obiter that its Advisory Opinions provide guidance to all member states of the AU regardless of whether they have ratified various human rights instruments. ...

But, on the other hand, the Court did not here explicitly turn away from its past restrictive interpretation [of the entities entitled to request an advisory opinion]. ... The Court has repeatedly held that ... NGOs have no standing to bring requests for advisory opinions because they are not recognized by the AU. This position has been heavily criticized and is a highly restrictive reading of the Court’s jurisdiction [I]t is not clear whether there are other African civil society organizations besides PALU that have an MOU with the AU. ...

Lastly, while the Opinion may provide leverage to individuals and local/regional organizations that litigate rights nationally, the highlighting of intersections between vagrancy laws, poverty, underdevelopment, and degradation of human rights calls for more institutional linkages between AU organs and national institutions. ...

An optimistic response to developments such as this Advisory Opinion is provided by Marius Pieterse, in 'The Relevance of the African Regional Human Rights System in the Urban Age', 36 *Leiden J. Int'l L.* (2023) 1:

[The Commission and the Court] have read the ACHPR as operating in harmony with other international human rights treaties, have embraced the interdependence and indivisibility of civil and political and social, economic and cultural rights, have frequently vindicated different groupings and intersections of individual and collective rights in particular factual contexts, have acknowledged the rights-related obligations of local government and have displayed a willingness to extend both the reach and content of the rights to contemporary urban contexts. ...

The Record of the Court

The Court itself is concerned about the current situation. In *the Annual Report of the Court 2021*, it observes:

72. One of the major challenges facing the Court at the moment is the perceived lack of cooperation from Member States of the African Union, in particular, in relation to the low level of compliance with the decisions of the Court. Of the over 200 decisions rendered by the Court, as at the time of writing this Report, only one State Party, that is, Burkina Faso, had fully complied with the judgments of the Court. As at July 2021, only 7% of judgments of the Court had been fully complied with, 18% partially complied and 75% non-compliance. Some States have stated clearly before the Executive Council that they will not comply with the Court's decisions.
73. The African Court would like to underscore that its success as a human rights court, and indeed, that of the African human rights or justice system as a whole, is a collective responsibility, and requires the active and constructive participation of all stakeholders. Compliance with the Court's judgment is one way for States to manifest their commitment to not only the protection of human rights but also a commitment to the ideals of the African Union.
74. A worrying trend which seems to be emerging is for States against which the Court has rendered a judgment to withdraw or threaten to withdraw their Article 34(6) Declaration, which allows individuals and NGOs to seize the Court directly. Within a period of four years, four State Parties to the Protocol have withdrawn their Declarations.
75. The Court views these withdrawals as a decline in the efforts already made in building democracy, defense of human rights and the promotion of the rule of law, and these withdrawals may undermine the human rights protection mechanisms on the continent.

The important role of civil society and the need for better official follow-up mechanisms are emphasized by Victor Ayeni and Andreas von Staden, in 'Monitoring Second-order Compliance in the African Human Rights System', 6 *Afr. Hum. Rts. Y.B.* (2022) 3:

[T]he driving force for most implementation monitoring activities of AHRBs [African Human Rights Bodies] have been CSOs, yet little attention has been given to them so far in regard to implementation monitoring. ... Since there are limited prospects for political monitoring due to a lack of political will by members of the AU Executive Council, implementation monitoring at least in the immediate future will depend on civil society actors and the AHRBs themselves. We remain skeptical as to the prospects of effective political monitoring in Africa and are concerned about the capacity of the African Court, a judicial institution that is constrained by institutional design, to monitor the implementation of its decisions to the same extent and using a comparable range of monitoring tools as the African Commission and the African Children's Committee. Post-judgment, the African Court may need to focus primarily on developing dialogical processes with critical compliance constituencies in respondent states rather than hoping that AU political organs will enforce its decisions through sanctions and other measures.

... [A]mong the biggest impediments to implementation monitoring in Africa is a lack of consistency and clarity in the procedures and practices of the AHRBs. Each of the three AHRBs should establish a unit within its respective secretariat dedicated exclusively to the supervision of the execution of its judgments and decisions ..., appoint a special rapporteur for follow-up, ... [and] adopt guidelines for the conduct of implementation hearings, including for joint hearings and hearings in situ. ...

Many commentators have drawn attention to the reluctance of the various bodies of the African Union to follow up on the findings of the Commission and the Court and to raise the political stakes of non-compliance. Adem Abebe, at p. 179, focuses on the concept of 'horizontal compliance' to argue that judgments invalidating legal provisions in one country should also have implications for other countries in which comparable laws exist. In order to foster broader reflection across borders, he suggests that the organ in charge of monitoring states' compliance, the AU Executive Council, should be prompted by a report from the Court to alert all states to the potential domestic implications of judgments directed against other states. The Court could also seek to engage the Assembly of Heads of States and Governments in this process.

QUESTIONS

1. 'The constraints specified in the Commission's Guidelines on shadow reports would seem likely to make it rather difficult for under-resourced NGOs to be able to submit shadow reports that comply with the guidelines, and to provide ample justifications for states and other actors to object to reports they do not appreciate.' Discuss.
2. Why might the judgment relating to Kenya's Ogiek Community be considered path-breaking?
3. If military coups are again becoming commonplace in Africa, should the Commission and/or the Court be at the forefront of efforts to deter such events?
4. The problems addressed by the Court in its Advisory Opinion on vagrancy laws exist in many countries. Why would the African Court be at the forefront of identifying the many human rights violations often associated with such laws?

PART E: STATES AND OTHER ACTORS IN THE REGIME

Chapter 12. States

Ultimately, effective protection of human rights must come from within the state. The international system has, as we have seen, a range of means that it uses to encourage states to fulfil their obligations, but ultimately it is domestic actors who will determine the extent of compliance. This chapter looks first (Section A) at the ways in which states interact with international norms, and specifically how they ‘internalize’ treaties and customary international law — that is, how states absorb international human rights norms within their domestic legal and political systems so that international human rights obligations can be implemented and enforced by state authorities. It also considers some of the principal institutional mechanisms used at the national level to promote and uphold international human rights standards.

The next four sections (B-E) of the chapter focus on what can be thought of as horizontal modes of implementing and enforcing human rights. This is in contrast to vertical modes of enforcement through the efforts explored in the preceding chapters, where intergovernmental institutions and their organs sought to secure compliance by non-compliant (violator) states. Pressures are exerted and perhaps sanctions applied by international organs ‘above’ the state. Such organs apply international law.

Section B looks at sanctions imposed in response to human rights violations. This is a practice long adopted by the United States, with increasing participation by the European Union and other Western states. Such sanctions have had an especially high profile in the wake of Russia’s invasion of Ukraine in 2022. Section C examines jurisdictional principles, with particular emphasis on the exercise of universal jurisdiction which involves enforcement by national bodies in cases where there is no direct nexus to the forum state. Section D turns to the role of national courts in providing remedies to victims of human rights violations that occurred in other countries. The principal historical example was the Alien Tort Statute in the United States, but in recent years it has declined dramatically in importance. Finally, Section E considers sovereign and official immunity. It discusses the prospect of achieving justice in light of the ability of states and some officials to invoke such defences to shield themselves from prosecution.

As a matter of international law, a threshold question is whether a national body has legal authority to exercise jurisdiction. Should courts, for example, be presumed to have such power unless international law expressly prohibits it? Or should courts be presumed not to have such power unless international law affirmatively authorizes it? Also consider different classes of defendants. That is, in addition to those thorny jurisdictional issues, should high state officials be immune from criminal and civil proceedings in foreign courts? In particular, should standard forms of diplomatic and sovereign immunity protect individuals who have allegedly engaged in crimes against humanity and other gross human rights violations? What is the proper balance between the need to protect sovereign prerogatives and the need to redress human rights abuses in these contexts? What principles should be developed to strike the correct balance and who should decide? These are some of the issues we explore in the sections that follow.

These issues variously concern the lawful authority and desirability of different forms of influence over foreign human rights practices. They demand answers to questions about the proper allocation of power between private individuals and public authorities. They also invite an exploration of the vices and virtues of criminal prosecution and civil litigation, as well as the impact on foreign policy relationships in taking such cases to court.

A. DOMESTIC INTERNALIZATION OF INTERNATIONAL LAW

Part A begins with a reflection by Ryan Goodman and Derek Jinks on how international human rights law might be able to change state behaviour. It then moves to focus on the incorporation of human rights treaties in domestic legal and political systems. It examines the interpenetration of the international and national systems, and the significance of treaties within states. Our discussion then

expands to include relationships between customary international law and national systems. The broad questions explored are: how do these international norms influence the national legal and political systems of states? Are they automatically absorbed into a state legal system, or reproduced in state legislation, and with what effects on the different branches of government such as the executive and judiciary? Or do they remain distinct from the state system, ‘above’ it as part of international law? While the readings by David Sloss relate primarily to United States law,⁵⁴⁶ the broader principles hold true elsewhere.⁵⁴⁷

**RYAN GOODMAN AND DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS
THROUGH INTERNATIONAL LAW
(2013) 21**

...
Chapter 2: Three Mechanisms of Social Influence
...

A. Material inducement

The first and most obvious social mechanism is material inducement — whereby states and institutions influence the behavior of other states by increasing the benefits of conformity or the costs of nonconformity through material rewards and punishments. ...

B. Persuasion

... Persuasion theory suggests that the practices of actors are influenced through processes of social “learning” and other forms of information conveyance that occur in exchanges within international organizations and transnational networks. Persuasion “requires argument and deliberation in an effort to change the minds of others.” Persuaded actors “internalize” new norms and rules of appropriate behavior and redefine their interests and identities accordingly. ... The touchstone of the overall process is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice. ... [They] change their minds on the basis of the norm’s congruence with their existing beliefs and values.

C. Acculturation

... Whereas persuasion emphasizes the content of a norm, acculturation emphasizes the relationship of the actor to a reference group or wider cultural environment. ... [It] encompasses processes such as mimicry and status maximization. The general mechanism induces behavioral changes through pressures to conform. Individual behavior (and community-level behavioral regularity) is in part a function of social structure — the relations between individual actors and some reference group. Actors are impelled to adopt the behavioral practices and attitudes of similar actors in their surrounding social environment.

The touchstone of acculturation is that varying degrees of identification with a reference group generate varying degrees of cognitive and social pressures to conform. ... Social influence is a rich process — one that also includes “normative social influence” whereby actors are impelled to adopt appropriate attitudes and behaviors. An actor need not be unaware of these influences — these processes can be subconscious or fully apparent. ...

⁵⁴⁶ See C. Bradley, *International Law in the US Legal System* (3rd edn., 2020).

⁵⁴⁷ See A. Byrnes and C. Renshaw, ‘Within the State’, in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (4th edn., 2022) 505; A. Edgar and R. Thwaites, ‘Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law’, 19 *Melb. J. Int’l L.* (2018) 1; and European Commission for Democracy Through Law (Venice Commission), ‘Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts’ (2014).

Despite the obvious similarities, acculturation differs from persuasion in important respects. First, persuasion requires acceptance of the validity or legitimacy of a belief, practice, or norm — acculturation requires only that an actor perceive that an important reference group harbors the belief, engages in the practice, or subscribes to the norm. Accordingly, persuasion involves complete internalization. Acculturation can involve complete or incomplete internalization. Second, persuasion requires active assessment of the merits of a belief. Acculturation processes, in contrast, frequently (though not invariably) operate tacitly; it is often the very act of conforming that garners social approval and alleviates cognitive discomfort. Persuasion involves assessment of the content of the message (even if only indirectly); acculturation involves assessment of the social relation (the degree of identification) between the target audience and some group (and of the importance of the issue to the group). Acculturation occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure. Acculturation depends less on the properties of the rule than on the properties of the relationship of the actor to the community. Because the acculturation process does not involve actually agreeing with the merits of a group's position, it may (but does not necessarily) result in outward conformity with a social convention without private acceptance or corresponding changes in private practices.

...

DAVID SLOSS, DOMESTIC APPLICATION OF TREATIES
DUNCAN HOLLIS (ED.), THE OXFORD GUIDE TO TREATIES (2ND ED., 2020) 355

I. Monism and Dualism

...

Dualist States are States in which no treaties have the status of law in the domestic legal system; all treaties require implementing legislation to have domestic legal force. Monist States are States in which some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation. In most monist States, there are some treaties that require implementing legislation and others that do not. There is substantial variation among monist States as to which treaties require implementing legislation. Moreover, monist States differ considerably in terms of the hierarchical rank of treaties within the domestic legal order. Despite these variations, all monist States have one common feature: at least some treaties have the status of law within the domestic legal order.

...

II. Horizontal, Transnational, and Vertical Treaty Provisions

... States conclude treaties to regulate three different types of relationships: horizontal relations between and among States, vertical relations between States and private actors (including natural persons and corporations), and transnational relations between private actors who interact across national boundaries. The role of domestic courts in applying treaties varies greatly depending on whether the treaty provision at issue is horizontal, vertical, or transnational.

Domestic courts rarely apply treaties that regulate horizontal relationships among States. ...

In contrast ..., domestic courts routinely apply transnational treaty provisions that regulate cross-border relationships between private actors [such as the 1980 Convention on the International Sale of Goods and the 1980 Hague Convention on Child Abduction]. Although States negotiated and ratified these treaties, they are designed primarily to regulate cross-border relationships among private actors, not horizontal relationships among States. ... [S]uch transnational treaties 'have generated thousands of reported opinions' from domestic courts, including more than 10,000 domestic judicial opinions applying the CISG, at least 1,750 applying the New York Convention, and almost 1,000 applying the Hague Convention. ...

...

The most significant differences among States relate to the judicial application of vertical treaty provisions—provisions that regulate relations between States and private parties [such as the ICCPR or the Refugee Protocol]. ...

Whereas both vertical and transnational treaty provisions implicate the rights of private parties ... vertical treaty provisions implicate the public functions of government in a way that is not true for transnational treaty provisions. ...

This distinction between vertical and transnational treaty provisions helps explain the distinction between nationalist and transnationalist approaches to the judicial application of treaties. ‘Transnationalist’ decisions manifest a belief that the judiciary has an independent responsibility to ensure that domestic government officials act in accordance with international treaty obligations. ‘Nationalist’ decisions manifest a belief that courts should not scrutinize too closely government conduct that is arguably inconsistent with international treaty obligations. In countries where courts adopt a more ‘transnationalist’ approach—such as Albania, Argentina, the Netherlands, and South Africa—domestic courts apply both vertical and transnational treaty provisions with equal vigour. However, in States where courts adopt a more ‘nationalist’ approach—such as the United States and Israel—domestic courts are hesitant to apply vertical treaty provisions, even though they routinely apply transnational provisions.

The contrast between nationalist and transnationalist approaches manifests different judicial attitudes about the relative weight assigned to two competing factors: the judicial responsibility to protect the rights of private parties and the judicial responsibility to refrain from interfering with public governmental functions. ...

A. Statutory interpretation

Courts in both monist and dualist States frequently apply an interpretive presumption that statutes should be construed in conformity with the nation’s international legal obligations, including obligations derived from both treaties and customary international law. This interpretive presumption is sometimes called a ‘presumption of conformity’ or a ‘presumption of compatibility’. In the United States, the presumption is referred to as the ‘*Charming Betsy* canon’. Labels aside, the presumption of conformity is probably the most widely used transnationalist tool. ...

B. Treaty interpretation

Domestic courts in both monist and dualist States are frequently asked to interpret treaties. In dualist States, this situation commonly arises when the legislature enacts a statute that is expressly intended to implement a treaty. In monist States, courts sometimes interpret treaties when a litigant asks the court to apply a treaty directly, and sometimes when the treaty is applied indirectly. ...

Courts applying a transnationalist approach interpret treaties in accordance with the shared understanding of the parties. In accordance with this approach, transnationalist judges cite the Vienna Convention on the Law of Treaties, decisions of foreign courts and international tribunals, as well as views adopted by non-judicial international bodies to support their interpretations of particular treaty provisions. ...

In contrast, courts applying a nationalist approach emphasize that treaty interpretation is primarily an executive function, not a judicial function. ...

C. Constitutional interpretation

Courts in both monist and dualist States apply treaties to help elucidate the meaning of constitutional provisions. Argentina, South Africa, and India are leading examples of States where courts routinely invoke treaties and other provisions of international law in the context of constitutional interpretation. ...

**DAVID SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL
CHANGE
(2016) 1548**

When the Framers of the U.S. Constitution met in Philadelphia in 1787, they drafted a Constitution designed to ensure that states would not violate the nation's treaty commitments. ...

On August 5, 2008, the State of Texas executed José Ernesto Medellín. His execution violated the nation's legal obligations under the U.N. Charter ... President George W. Bush ... tried to block Medellín's execution, precisely because it violated U.S. treaty obligations. However, the Supreme Court ruled in ... *Medellín v. Texas* [552 U.S. 491] that President Bush could not prevent Texas from putting Medellín to death, even though the execution violated international law. The Supreme Court based its decision on an understanding of the Constitution that differed sharply from the Framers' understanding. ...

...The "treaty supremacy rule" is codified in Article VI of the Constitution, known as the Supremacy Clause. The rule, as traditionally understood, provided that treaties automatically supersede conflicting state laws. ... [This rule] helped ensure that state governments would not violate U.S. treaty obligations unless the federal political branches authorized them to do so. ... Articles 55 and 56 of the Charter obligate the United States to promote "human rights ... for all without distinction as to race." In the late 1940s and early 1950s, human rights activists in the United States invoked the Charter's human rights provisions, together with the Constitution's treaty supremacy rule, to challenge the validity of state laws that discriminated on the basis of race or nationality. In 1950, in *Fujii v. California* [242 P. 2d 617] a California court ruled in favor of human rights claimants, striking down a California law that discriminated against Japanese nationals because it conflicted with the Charter's human rights provisions. The potential implications of that decision were shocking. If the court was right, the United States had effectively abrogated Jim Crow laws throughout the South by ratifying the U.N. Charter. That result was unacceptable to many Americans at the time. Responding to *Fujii*, conservatives mobilized support for a constitutional amendment, known as the Bricker Amendment, whose aim was to abolish the treaty supremacy rule. ... [P]roponents of the Bricker Amendment realized some of their goals without a formal constitutional amendment. I refer to that constitutional transformation as the "de facto Bricker Amendment."

... [This] is not a story about the triumph of democracy and popular sovereignty [but] about invisible constitutional transformation. ... [M]ost lawyers in the United States today are unaware that the Constitution's treaty supremacy rule was dramatically transformed in the 1950s. The substance of that transformation was initially expressed in American Bar Association (ABA) reports and Senate testimony by Eisenhower administration officials in the early 1950s. Later, the de facto Bricker Amendment was "codified" in the Restatement (Second) of Foreign Relations Law [1965]. None of those sources were readily accessible to the American public. Moreover, neither the ABA nor the ALI exercises formal governmental authority.

The de facto Bricker Amendment remained largely invisible because the results were expressed in technical legal jargon that obscured the magnitude of the constitutional change. Before 1950, the treaty supremacy rule was simple: all treaties prevail over conflicting state laws because the Supremacy Clause says so. By 1965, though, a new constitutional understanding had emerged - "self-executing" treaties prevail over conflicting state laws, but states are free to violate "non-self-executing" treaties. ... The de facto Bricker Amendment expanded the scope of self-execution doctrine to encompass the relationship between treaties and state law. In the process, lawyers created the "NSE exception to the treaty supremacy rule." The NSE exception allows state government officers to violate U.S. treaty obligations without authorization from the federal political branches.

...

... In *Medellín v. Texas*, the Supreme Court held that Article 94 of the U.N. Charter is not self-executing. The Court's decision was based on the NSE exception to the treaty supremacy rule that arose from

⁵⁴⁸ For a review of the book by a long-time State Department lawyer, see D. Stewart, 112 *Am. J. Int'l L.* (2018) 779.

the de facto Bricker Amendment (although the Court claimed, incorrectly, that it was applying nineteenth-century self-execution doctrine). As a practical matter, the Court's decision meant that Texas was allowed to violate U.S. treaty obligations. Moreover, Texas's actions meant that the federal political branches were forced to deal with the foreign policy consequences of a treaty violation that they did not authorize and that the president tried to prevent. This was precisely the type of situation that the Framers sought to avoid by codifying the treaty supremacy rule in Article VI of the Constitution.

The de facto Bricker Amendment gained acceptance because the NSE exception to the treaty supremacy rule was responsive to widely shared sentiments about American constitutional identity. ...

... [T]he Bricker debate generated an atmosphere in which human rights treaties are seen as political poison. Consequently, the United States refuses to ratify most human rights treaties, and the treaties we do ratify include unilateral reservations and declarations designed to ensure that ratification does not affect human rights protection in the United States. The net result is that we cling to our faith in the superiority of the U.S. constitutional system, but domestic protection for human rights falls short of international standards. ...

**COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 9:
DOMESTIC APPLICATION OF THE COVENANT
UN DOC. E/C.12/1998/24 (1998)**

...

A. The duty to give effect to the Covenant in the domestic legal order

...

2. [The Covenant requires] each State Party to use all the means at its disposal to give effect to the rights recognized in the Covenant Thus the norms themselves must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

...

B. The status of the Covenant in the domestic legal order

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals concerned to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. ...

5. The Covenant itself does not stipulate the specific means by which its terms are to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State Party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State Party. The means chosen are also subject to review as part of the Committee's examination of the State Party's compliance with its Covenant obligations.

...

C. The role of legal remedies

...

11. The Covenant itself does not negate the possibility that the rights may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant providing that it be considered 'non-self-executing' were strongly rejected. In most States the determination of whether or not a treaty provision is self-executing will be

a matter for the courts, not the executive or the legislature. In order to perform that function effectively the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation [W]hen Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations

...

D. The treatment of the Covenant in domestic courts

...

13. ... [S]ome courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. ...

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the Rule of Law which must always be taken to include respect for international human rights obligations.

...

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 31: THE NATURE OF THE GENERAL LEGAL OBLIGATION IMPOSED ON STATES PARTIES TO THE COVENANT (2004)

...

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to

investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

...

* * *

Traditionally, the main focus of national level human rights efforts has been on domestic constitutional and legislative provisions, and especially Bills of Rights.⁵⁴⁹ Examples of this phenomenon appear throughout the casebook. Suffice it for present purposes to note that, while the experience of states differs greatly from one to another, constitutional rights are clearly not sufficient on their own to ensure compliance by states with their international human rights obligations. Consider, for example, the following assessment by Adam Chilton and Mila Versteeg, 'The Politics of Constitutional Rights', in Mark Tishnet and Dimitry Kochenov (eds.), *Research Handbook on the Politics of Constitutional Law* (2023) 432:

Some rights may be adopted by some countries as a genuine attempt to prevent repression, while others are adopted to advance strategic goals, such as entrenching economic interests, attracting investors, appeasing the international community, and even paving the way for greater authoritarianism. Once adopted, some rights, like the right to form political parties, may be associated with improved rights practices; but other rights, like the right to education, might not be associated with any changes in school funding or educational attainment. And even if some rights may individually be associated with better rights practices, it is still possible that the inclusion of more rights in constitutions still may weaken respect for rights overall.⁵⁵⁰

One of the most important exercises in domestic internalization of international norms was the adoption in the United Kingdom of the Human Rights Act in 1998. The Act 'gives further effect' to the rights guaranteed under the European Convention. Public bodies are generally required to act in ways compatible with the Convention, and the courts must take account of the jurisprudence of the European Court of Human Rights, including interpreting legislation, as far as possible, in a way compatible with Convention rights. If a court finds a statute to be incompatible it must issue a ruling to that effect. Such a ruling does not set aside the offending provisions but calls their attention to the Parliament, which must indicate what remedial legislation, if any, will be proposed. The Act has brought major changes to domestic law, but has also been the subject of political controversy and a series of inquiries into its impact and legislative proposals to substitute it by a British Bill of Rights.

Roger Masterman, in 'The United Kingdom's Human Rights Act as a Catalyst of Constitutional Migration: Patterns and Limitations of Rights Importation by Design', 19 *Eur. Const. L. Rev.* (2023) 88, at 109, assesses its impact:

... the Act has also provoked opposition to the extent to which it permits 'foreign' authorities to influence domestic judicial decision-making. The consequence of the international heritage of the Convention rights and the courts' internationalist approach to their application has been a significant convergence between the substance of Convention norms and protections at the UK national level. This is, first, attributable to the design of the Human Rights Act which ... leaves 'little scope' for divergence between the Strasbourg Court and UK apex court in relation to the definition and meaning of the Convention rights. It is, secondly, a product of the cumulative judicial approach to 'taking into account' the Convention case law ... which has generated a perception of domestic courts abdicating decision-making responsibility as regards the

⁵⁴⁹ See S. Fredman, *Comparative Human Rights Law* (2018).

⁵⁵⁰ See also A. Chilton and M. Versteeg, 'Do Constitutional Rights Make a Difference?', 60 *Am. J. Pol. Sci.* (2016) 575.

substance of the domestically applicable rights and remedial extent of the Act. A narrative of legal subjection to the European Court of Human Rights – of transplantation and overweening influence – is firmly embedded in UK human rights discourse. This is even though the Human Rights Act facilitates a fluid and multi-directional migration of authorities; it has not operated to the exclusion of the common law (or other foreign) authorities in rights adjudication and has empowered domestic courts to interact with Strasbourg jurisprudence in ways which allow it to be integrated with – rather than supplant – domestic laws. ... While the Human Rights Act scheme holds the potential to allow for the critical assimilation of domestic and international norms – to facilitate a context-sensitive rather than overriding migration of constitutional standards – the tenor of recent reform proposals points towards a future parochialisation (and significant dilution) of the UK's legal rights regime and a further post-Brexit step towards insulating the domestic legal order from external influences.

Institutional Dimensions of Internalization

Many scholars have criticised the extent to which the international human rights regime has focused on the issues discussed in the preceding readings, and failed to address adequately the essential role of a more diverse and pluralistic approach that goes well beyond both legal incorporation and a preoccupation with the role of the state as legislator and enforcer of rights. Julie Fraser, in *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (2020) at 9, argues that treating state law 'as *the* law' leads to an approach that 'recognises only the modern state model and marginalises other plural legal systems beneath and beyond the state that exist in virtually all countries in the world.' In terms of alternative approaches, she suggests (at 287) that domestic implementation measures should involve 'broad consultation and seek to identify culturally sensitive approaches'. This includes engagement with non-state actors, 'including representatives or members of social institutions', and the development of National Human Rights Institutions. 'States should identify domestic constituents from within local communities and support them to develop a culture of rights from the bottom up.' States, in turn, when reporting to UN treaty bodies, should provide an account of how such processes have worked, and treaty bodies should tailor their recommendations to take full account of the role played by social institutions, broadly defined.

National systems for implementing, monitoring and enforcing international human rights norms have proliferated greatly in recent years.⁵⁵¹

a. National Human Rights Institutions (NHRIs)

In the early 1990s, the UN General Assembly encouraged Member States to establish or strengthen national human rights institutions (NHRIs), a term that has been interpreted to include human rights commissions, human rights ombuds institutions, consultative and advisory bodies, institutes and centres, and hybrid institutions. The General Assembly adopted the 'Paris Principles' in Resolution 48/134 (1993):

UN GENERAL ASSEMBLY, PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS (THE PARIS PRINCIPLES) RESOLUTION 48/134 (1993)

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

⁵⁵¹ S. Jensen, S. Lagoutte and S. Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction', 37 *Nordic J. Hum. Rts.* (2019) 165.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent Body ... opinions, recommendations, proposals and reports on any matters concerning ... human rights; [such actions] shall relate to the following areas:

(i) Any legislative or administrative provisions ... intended to [protect] human rights ...;

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national [human rights] situation ...;

(iv) Drawing the attention of the Government to [domestic] situations ... where human rights are violated and making proposals to ... end to such situations ...;

(b) To promote and ensure the harmonization of national legislation regulations and practices with the [State's human rights obligations], and their effective implementation;

(c) To encourage ratification ...;

(d) To contribute to ... reports [submitted] to United Nations bodies and ... regional institutions ... , with due respect for their independence;

(e) To cooperate with [international and other national human rights institutions];

...

Composition and guarantees of independence and pluralism

1. The composition of the ... [NHRI shall] ensure the pluralist representation of the social forces (of civilian society) ...

2. The national institution shall have [a suitable] infrastructure ..., in particular adequate funding ... to enable it to have its own staff and premises, in order to be independent of the Government

Methods of operation

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence ...;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly ...;

(d) Meet on a regular basis ...;

...

Additional principles ...

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. ...

* * *

An important innovation, building on the NHRI concept, is reflected in Article 33 of the Convention on the Rights of Persons with Disabilities (CRPD):⁵⁵²

1. States Parties ... shall designate one or more focal points within government for matters relating to the implementation of the [CRPD]
....
2. States Parties shall ... maintain, strengthen, designate or establish ... a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the [CRPD]. When designating or establishing such a mechanism, States Parties shall take into account the [Paris Principles].
3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Similarly, Article 3 of the 2002 Optional Protocol to the Convention against Torture requires each State Party to ‘set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment’. The Protocol also addresses questions of the independence, mandate and budgetary resources of these ‘national preventive mechanisms’, or NPMs. In addition to visiting places of detention, they complement the work of international bodies.⁵⁵³

In 1993, NHRIs set up an International Coordinating Committee which, in 2016, became the Global Alliance of National Human Rights Institutions (GANHRI). One of its most important functions is accreditation. NHRIs accorded ‘A status’ comply fully with the Paris Principles, and those with ‘B status’ have achieved only partial compliance. In 2023, there were 88 with A status and 32 with B status. Accreditation involves a peer-based review undertaken by a Sub-Committee on Accreditation (SCA) at the outset, every five years thereafter, or when a significant change of circumstances occurs.⁵⁵⁴

In 2023, for example, the SCA again deferred re-accrediting the National Human Rights Commission of India (NHRC) for a range of reasons, including that: it involved police officers in its investigations, thus compromising its impartiality; three of six commissioner positions were vacant, and no women were members; the appointments process lacked transparency and participation by civil society and was not conducive to a merit-based selection that ensures pluralism; the Commission’s executive head, the Secretary-General, is seconded by the government from the public service, thus affecting the Commission’s actual and perceived independence; and its relationships with civil society were neither effective nor constructive. The SCA also gave credence to a third-party submission alleging: that the Commission had failed to review important legislation, such as the Foreign Contribution (Regulation) Act 2010, Citizenship (Amendment) Act 2019, and Unlawful Activities (Prevention) Act 1967, each of which seriously restricted human rights; that it had not been active in protecting religious minorities; and that it dismissed a high number of complaints at the first stage of the process.⁵⁵⁵

There is now an extensive literature on NHRIs and their effectiveness or otherwise.⁵⁵⁶ Despite the binary A or B status adopted by the GANHRI, there is huge variation in: the design of such institutions, the scope of their activities, their actual as opposed to formal relationship with the government, and their preparedness to stand up for human rights in difficult situations. Specific

⁵⁵² C. Lichuma and D. Tatic, ‘Human Rights Experimentalism in Action: The Potential of National Human Rights Institutions in Enhancing the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities’, 14 *J. Hum. Rts. Prac.* (2022) 108.

⁵⁵³ See OHCHR, *The Role of National Preventive Mechanisms: A Practical Guide* (2018).

⁵⁵⁴ D. Langtry and K. Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (2021); and H. Takata, ‘How Are the Paris Principles on NHRIs Interpreted? Towards a Clear, Transparent, and Consistent Interpretative Framework’, 40 *Nordic J. Hum. Rts.* (2022) 285.

⁵⁵⁵ <https://ganhri.org/accreditation/sca-reports/>.

⁵⁵⁶ For a literature review, see R. Welch, J. DeMeritt and C. Conrad, ‘Conceptualizing and Measuring Institutional Variation in National Human Rights Institutions (NHRIs)’, 65 *J. Conflict Resol.* (2021) 1010.

institutions also fluctuate over time between strong and weak, influential and powerless, well-resourced and starved for funding, and respected and dismissed. An illustration of the challenges is provided by Tomer Broude and Natan Milikowsky, in ‘Establishing an NHRI in a Contested Political Space: A Deliberative Process in Israel’, 37 *Nordic J. Hum. Rts.* (2019) 281. They ask, in the context of a heavily contested space for human rights in Israel, how a NHRI can be meaningfully established and whether, in reality, the effectiveness of domestic human rights actors might be enhanced without a formal NHRI. They describe the results of a deliberative process that considered key questions such as:

... (1) should the goal be a ‘first-best’ NHRI or second-best alternatives (‘ideal’ vs ‘realist’ scenarios)? (2) what would be the role of an NHRI given reduced chances of addressing the most politically contested human rights concerns, such as the situation of Palestinians in East Jerusalem and the West Bank, and unequal family status in Israeli society; (3) might NHRI establishment in the current political climate in Israel result in adverse effects for human rights through co-optation and political capture? And (4) how best to design an NHRI that satisfies not only formal requirements but also localised effectiveness?

Their conclusion is that the Paris Principle model might be too demanding politically in a contested space such as that in Israel today. This pragmatic conclusion inevitably also raises questions as to the effectiveness of the 88 NHRIs around the world that are considered to comply with the demands of the Principles, even though many of them operate in countries with terrible human rights records.

Another assessment of the institutional arrangements that have evolved in relation to NHRIs places particular emphasis on the role played by the SCA through its accreditation process.

**KATERINA LINOS AND TOM PEGRAM, WHAT WORKS IN HUMAN RIGHTS INSTITUTIONS?
111 AM. J. INT’L L. (2017) 628**

... An important prior quantitative study ... concludes that countries that set up NHRIs perform better on critical physical integrity measures, such as freedom from torture, extrajudicial killing, political imprisonment, and disappearance, than countries that lack NHRIs. However, qualitative case studies reveal surprising variation among NHRIs, praising some for robust, even heroic, protection efforts, while condemning other bodies as sham institutions.

... We collected fine-grained quantitative data on twenty-two formal institutional design features of all NHRIs around the world, focusing on four critical dimensions: independence safeguards, investigatory powers, promotion functions, and inclusiveness. ...

Broadly, our study demonstrates that formal institutional safeguards influence human rights outcomes, in part because formal institutional design remains relatively stable over time. Whereas governments can often resist NHRI advocacy by pulling on other levers—notably by manipulating personnel appointments and cutting budgets—they find it harder to change formal safeguards. In turn, formal safeguards structure the initial hiring and priorities of NHRIs, shape modes of resistance, and contribute to the development of positive or negative feedback loops over time.

Our study suggests that one institutional safeguard above all, the power to initiate, execute, and complete investigations on receipt of complaints, stands out as particularly important in enabling NHRI effectiveness, including in developing country settings displaying weak rule of law. Other design features strongly promoted by international NHRI templates, such as independence safeguards and broad promotional powers, may not correlate generally with more effective organizational outcomes across countries, but emerge as important under certain conditions

... [T]he diffusion of NHRIs around the world marks a big success for the United Nations. Almost 120 countries now have NHRIs, and the vast majority of these closely follow the UN-sponsored Paris

Principles. Moreover, the United Nations has begun building on the success of NHRIs by giving NHRIs formal speaking rights and incorporating them into treaty structures—notably as national preventive mechanisms under the OPCAT. The establishment of ex novo structures has also set in motion important design feedback effects, serving as a focal point for mobilizing compliance levels above an expected baseline

... [T]he ultimate test of the United Nations' influence does not concern the diffusion of NHRIs, but the diffusion of effective NHRIs. ... By showing that formal design features are in fact connected to greater effectiveness, this study documents a particularly strong influence of the United Nations. Formal rules have provided NHRI practitioners and their supporters with a rare lever of influence over instituting structures at the national level, but ... adopting states retain significant prerogatives over the resulting NHRI form, as well as the individuals who populate the organization.

The United Nations has few levers other than formal design recommendations to influence NHRI behavior—for instance, it cannot directly appoint NHRI staff members, or contribute significantly to NHRI financing. This greatly increases the importance of issuing the correct formal design recommendations. ...

Our study highlights one particular limitation of the UN-promoted Paris Principles—the de-prioritization of protective functions, and especially complaint-handling powers. How can one best ensure that the UN template is updated in light of current knowledge? Amending the Paris Principles seems unlikely However, another avenue for reform seems promising: the SCA, the peer review monitoring mechanism that grades NHRIs. Lacking a direct means to implement policy, the UN system has strongly promoted the role of the SCA as a third-party monitor of NHRI design integrity and performance. Delegation of monitoring duties to a third party can enhance compliance, especially where—as is the case of the SCA—a central body collects information from diverse sources and issues highly specific assessments in the form of letter grades to individual NHRIs. In recent years, the SCA has sought to ratchet up the specificity of the Paris Principles still further through authoritative interpretations.

...

b. Parliaments

Two other initiatives warrant a mention in terms of efforts to encourage internalization of international norms. The first is the role played by national parliaments.⁵⁵⁷ The Inter-Parliamentary Union (IPU) encourages its member institutions to establish human rights committees and lists well over 100 states in which such bodies have been created. A well-known example, which at one stage was especially active and effective, is the United Kingdom Parliamentary Joint Committee on Human Rights. It scrutinizes government Bills for compatibility with human rights, monitors the government's response to relevant court judgments, scrutinizes the UK's compliance with international human rights treaty obligations, and conducts thematic inquiries. In Australia, the Human Rights (Parliamentary Scrutiny) Act 2011 established a similar Joint Committee.⁵⁵⁸ Some parliaments, as with the United States Congress, have standing and other committees that regularly consider human rights performance in other countries, but rarely do so domestically.

A 2018 Policy Brief prepared by the Commonwealth and the Universal Rights Group on *The Role of National Parliaments* underlined the importance of 'leveraging parliaments' legislative, oversight and budgetary roles to support the effective domestic implementation of the recommendations of the UN's human rights mechanisms, the transparent monitoring of progress, and objective and balanced international reporting.⁵⁵⁹ In practice, the human rights record of parliaments, even in democratic countries, is often rather poor. They may well be on the frontlines of adopting legislation that deprives certain groups of their rights and of taking measures to resist accountability.⁵⁵⁹ In addition,

⁵⁵⁷ Council of Europe, *National Parliaments as Guarantors of Human Rights in Europe: Handbook for Parliamentarians* (2018).

⁵⁵⁸ L. Grenfell and J. Debeljak (eds.), *Law Making and Human Rights* (2020).

⁵⁵⁹ See generally, M. Hunt, H. Hooper and P. Yowell (eds.), *Parliaments and Human Rights* (2015); and M. Saul, A. Follesdal and G. Ulfstein (eds.), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (2017).

parliamentarians themselves are not infrequently the victims of human rights violations, as indicated by the hundreds of cases documented by the IPU.

In 2018, the UN Office of the High Commissioner for Human Rights proposed a set of Draft Principles on Parliaments and human rights, prompted by the role of parliaments in relation to the Universal Periodic Review process (Ch. 8B, above).⁵⁶⁰ The Draft Principles call on all parliaments to set up a human rights committee and to give it the following responsibilities:

- (a) To encourage the ratification of ... human rights instruments;
- (b) To introduce and review bills and existing legislation to ensure [human rights] compatibility ...;
- (c) To lead the parliamentary oversight of the [human rights-related] work of the Government ...;
- ...
- (e) To review draft national budgets from the perspective of ... human rights;
- (f) To ensure that development assistance and cooperation funds support the implementation of recommendations from international and regional human rights mechanisms in countries recipient of such funds;
- (g) To call for the elaboration of national human rights action plan and oversee its implementation;
- (h) To engage and consult with the national human rights institution and civil society representatives ...;
- (i) To lead parliamentary action in response to national human rights developments and issues, including through legislative initiatives, parliamentary inquiries, public hearings, public debates, and the issuing of reports ...;
- (j) To hold public hearings ...;
- ...

The Principles spell out the roles that such a committee should have as well as its ideal composition and working methods. Although this approach draws its inspiration from the Paris Principles for NHRIs, commentators have been critical of the ‘one size fits all’ approach, the assumption that parliamentary committees can act independently of governments in many contexts, and have drawn attention to the risk that such committees might ‘open rights up to negative politicization’. Kirsten Roberts Lyer, in ‘Parliaments as Human Rights Actors: The Potential for International Principles on Parliamentary Human Rights Committees’, 37 *Nordic J. Hum. Rts.* (2019) 195 suggests that one response to such concerns is for the OHCHR and perhaps the IPU to set up a body comparable to the SCA under the Paris Principles, so that parliamentary committees are peer-reviewed and compliance ranked.

c. Local authorities

In ‘Transnational Human Rights and Local Activism: Mapping the Middle’, 108 *American Anthropologist* (2006) 38, Sally Engle Merry asked how transnational ideas such as human rights are ‘adopted in local social settings’. ‘How do they move across the gap between a cosmopolitan awareness of human rights and local sociocultural understandings ...’. While her focus was on the concepts of vernacularization and translation discussed in Ch. 7 above, the potentially important role of local authorities such as

⁵⁶⁰ ‘Contribution of parliaments to the work of the Human Rights Council and its universal periodic review’, UN Doc. A/HRC/38/25 (2018), Annex.

cities and municipalities in localizing human rights norms has gained increased attention in recent years.⁵⁶¹ Their importance has been enhanced by steadily increasing urbanization around the world, and growing decentralization all too often accompanied by de facto budget cuts that place the burden of making the hard decisions on local governments. Barbara Oomen and Moritz Baumgärtel, in ‘Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law,’ 29 *Eur. J. Int’l L.* (2018) 607 also link this phenomenon to the ‘right to the city’ that was spelled out by Henri Lefebvre, in *Le Droit à la ville* (1968), and emphasized the importance of all residents being able to shape the city in which they live. The concept is now reflected in the Brazilian Constitution and in local ordinances in Mexico City and elsewhere.

In Canada cities and municipalities have launched various initiatives, including ‘local recognition of human rights through an ordinance, declaration, or charter ...; ... rights-based audits of policies, plans and budgets, setting aside adequate staff and financial resources to embed a culture of rights, and providing relevant training to municipal staff; participatory governance and inclusion ...; and [adopting] accountability mechanisms, such as human rights ombudspersons, local human rights commissions, and citizen juries ...’.⁵⁶²

In the United States, since 2013, a Cities for CEDAW has encouraged US municipalities to become CEDAW Cities by adopting some sort of municipal code requiring them to ‘(1) conduct a gender analysis of city operations and laws; (2) establish a convention oversight body; and (3) financially underwrite any convention initiatives.’ By 2021, 41 US cities had adopted such initiatives.⁵⁶³

QUESTIONS

1. Compare Sloss’s analysis with the comment quoted above by Jack Goldsmith, arguing that U.S. ‘[d]omestic incorporation of the ICCPR ... would constitute a massive, largely standardless delegation of power to federal courts to rethink the content and scope of nearly every aspect of domestic human rights law.’ Is the U.S. alone in this dilemma, and what solutions might be available?
2. Welch et al., above, describe NHRIs as ‘domestic institutions that increase the (perceived) costs of repression for government leaders and their agents’ and as ‘abuse-limiting ... institutions’. What does this say about the role envisaged for such institutions? Should NHRIs play a significant role in relation to ESCR norms?
3. The Universal Periodic Review process, described in Chapter 8, is a relatively successful peer review process. So is GANHRI’s Sub-Committee on Accreditation. Would such a process also work in relation to parliamentary human rights committees?

⁵⁶¹ See J. Miaz et al. (eds.), *Engaging with Human Rights: How Subnational Actors use Human Rights Treaties in Policy Processes* (2024); and M. Saul, ‘Local Authorities at the European Court of Human Rights’, *Int’l J. Hum. Rts.* (2024) 000.

⁵⁶² N. Dragicevic and B. Porter, *Human Rights Cities: The Power and Potential of Local Government to Advance Economic and Social Rights* (2020).

⁵⁶³ See M. Och, ‘More Than Just Moral Urbanism? The Incorporation of CEDAW Principles into Local Governance Structures in the United States’, 14 *J. Hum. Rts. Prac.* (2022) 1060; and A. Sisson Runyan and R. Sanders, ‘Prospects for Realizing International Women’s Rights Law Through Local Governance: The Case of Cities for CEDAW’, 22 *Hum. Rts. Rev.* (2021) 303.

B. SANCTIONS

Economic and other forms of sanctions became commonplace in international relations after World War II. They were enshrined in the UN Charter as one of the most powerful tools available to the UN if the Security Council agreed to their imposition. In the 1970s and 1980s, states from the Global South were strong advocates of their use against South Africa and other racist regimes. Following Iraq's invasion of Kuwait in 1991, the Security Council imposed very harsh sanctions against the government of Saddam Hussein which, according to Nicholas Mulder, in *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (2022) 'cost hundreds of thousands of lives and permanently damaged the country's economic and social fabric.'

The United States has long used economic, trade and financial sanctions to promote foreign policy goals,⁵⁶⁴ as illustrated problematically by the case of Cuba. In 2023, the U.S. Treasury's Office of Foreign Assets Control (OFAC) listed 25 countries sanctioned by the United States.⁵⁶⁵ This reflects the military dominance of the U.S., its longstanding record of intervening in other countries to promote its foreign policy goals, and the powerful role of U.S. financial markets. But other countries have now followed this lead,⁵⁶⁶ as we will see below. While a range of stated objectives have been used to justify such sanctions, human rights and countering terrorism are now the most commonly invoked.

A key question is whether such sanctions work. This is Mulder's assessment:

While the success rate differs depending on the objective, the historical record is relatively clear: most economic sanctions have not worked. In the twentieth century, only one in three uses of sanctions was "at least partially successful." More modest goals have better chances of success. But from the available data it is clear that the history of sanctions is largely a history of disappointment.

What is striking is that this limited utility has not affected frequency of use. To the contrary: sanctions use doubled in the 1990s and 2000s compared to the period from 1950 to 1985; by the 2010s it had doubled again. Yet while in the 1985–1995 period, at a moment of great relative Western power, the chances of sanctions success were still around 35–40 percent, by 2016 this had fallen below 20 percent. In other words, while the use of sanctions has surged, their odds of success have plummeted.

...

Perhaps the most confounding aspect of sanctions is that regardless of their technical sophistication, their outcome is never a matter of economic factors alone. ... Given the power of [nationalism and other related] ideas to move entire societies, how would economic pressure alone dissuade them from repeating such collective struggle? While history shows the power of material calculations, it illustrates equally important countervailing motives. ...

The same aspect of economic sanctions that makes them philosophically appealing to liberal internationalism—their reliance on a homo economicus rationale—also limits their salience. Economic sanctions do not project only material force; they also project political, social, and cultural values. Sanctions would no doubt work better in a world of perfectly rational, consistently self-interested subjects, but this is not the world that we actually inhabit. Most people in most places at most times make collective choices on the basis of a

⁵⁶⁴ See generally A. Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law', 113 *AJIL. Unbound* (2019) 163.

⁵⁶⁵ Afghanistan, The Balkans, Belarus, Burma, Central African Republic, China, Cuba, Democratic Republic of Congo, Ethiopia, Hong Kong, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, North Korea, Russia, Somalia, Sudan, South Sudan, Syria, Ukraine, Venezuela, Yemen, and Zimbabwe. For a critique of OFAC's approach, see D. Leclercq, 'Rights-Based Sanctions Procedures', 75 *Admin. L. Rev.* (2023) 105.

⁵⁶⁶ See T. Ruys, C. Ryngaert, and F. Rodríguez Silvestre (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law* (2024).

wider set of considerations. The economic weapon may be a form of politics by other means. But ultimately, stitching animosity into the fabric of international affairs and human exchange is of limited use in changing the world.⁵⁶⁷

Given reasonably broad acceptance of the view that sanctions generally don't achieve their stated goal,⁵⁶⁸ the question then becomes: why the United States continues to use economic sanctions so often? Richard Hanania, in 'Ineffective, Immoral, Politically Convenient: America's Overreliance on Economic Sanctions and What to Do About It' (Cato Institute, Policy Analysis No. 884 (2020)), offers this answer:

The popularity of sanctions owes more to the domestic interests of politicians than their ability to achieve geopolitical goals. American policymakers show little interest in the empirical research on sanctions and they often do not supplement trade restrictions with diplomatic efforts that can help achieve a bargain. In contrast, sanctions make sense from the perspective of domestic politics and political psychology. They provide a middle ground between military force and doing nothing and are unlikely to cause a domestic backlash because the damage they inflict is indirect and largely unobserved.

But the sanctions weapon of choice has changed significantly over the past two decades, as noted by Gary Clyde Hufbauer and Euijin Jung, in 'Economic sanctions in the twenty-first century', in Peter A.G. van Bergeijk (ed.), *Research Handbook on Economic Sanctions* (2021) 26:

In earlier decades, the United States enacted statutes (e.g., the Helms–Burton Law in 1996) and issued regulations designed to force foreign subsidiaries of US firms, and even foreign firms, not to do business with targets such as Cuba and China. These laws and regulations sparked nationalist backlashes in Canada, France, and other US allies because US measures were perceived to intrude on sovereign powers abroad.

In recent decades, the United States has devised a more direct technique—offer banks and industrial firms in Europe, Japan, Korea, and elsewhere a choice: Do business in the target country, or do business in the United States, but not both. ... Moreover, the surveillance techniques of the National Security Agency (NSA) and the Central Intelligence Agency (CIA) provide powerful deterrence against 'cheating.' ...

...

Seldom acknowledged but hard to deny, broad economic sanctions are akin to area bombing, also known as carpet bombing ... [which] inevitably kills innocent children and other civilians; broad sanctions inevitably inflict privation, disease, and hunger on the poorer strata of society, often the young and old.

...

... [T]he overwhelming trend in the past two decades is away from comprehensive sanctions to 'smart' or 'targeted' sanctions. In the scores of cases unknown to the public, limited sanctions are the preferred tool – sanctions aimed at specific individuals, companies, or transactions, without inflicting humanitarian harm on the broader population. However, in high-profile cases – ... such as Iran, Cuba, North Korea, and Venezuela – the flavor is comprehensive sanctions. Humanitarian exceptions thus remain a key component of sanctions policy.

⁵⁶⁷ N. Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (2022), at 295.

⁵⁶⁸ A. Demarais, *Backfire: How Sanctions Reshape the World Against U.S. Interests* (2022).

...

Human rights groups have played a central role in many of these developments, but generally in demanding new and stronger sanctions rather than questioning their use. Following the push for sanctions against apartheid South Africa in the 1980s, various other campaigns were launched including those against the trade in ‘conflict diamonds’ and against countries engaged in ‘modern slavery’. More recently, civil society groups have campaigned strongly for sanctions against military leaders in Myanmar and those responsible for China’s repression of the Uighur population and the crackdown against democracy protesters in Hong Kong. But one of the most effective lobbying efforts related to sanctions against Russia for the death in detention of a whistle-blowing tax lawyer:

**CONGRESSIONAL RESEARCH SERVICE, THE GLOBAL MAGNITSKY HUMAN RIGHTS
ACCOUNTABILITY ACT:
SCOPE, IMPLEMENTATION, AND CONSIDERATIONS FOR CONGRESS
DOC. NO. R46981 (3 DECEMBER 2021)**

...

Origins

The Global Magnitsky Act is based, in part, on a 2012 law that focuses on Russia, the Sergei Magnitsky Rule of Law Accountability Act (hereafter, the Sergei Magnitsky Act). Sergei Magnitsky, a tax lawyer and auditor in Russia, documented the expropriation of the assets of Hermitage Capital—once the largest foreign investment brokerage in Russia—through rampant Russian government corruption. Russian authorities arrested Magnitsky in November 2008, reportedly for tax evasion, and denied him medical care, family visits, and legal due process. Magnitsky was reportedly beaten while in detention, and ultimately died in prison in November 2009. [In August 2019, the European Court of Human Rights concluded that the case had involved multiple violations of human rights.] ...

In 2012, Congress passed the Sergei Magnitsky Act to require the President to identify and impose sanctions on any person determined to have been involved in the detention, abuse, or death of Magnitsky; the ensuing cover-up; or the alleged criminal conspiracy that Magnitsky had uncovered. ... [In 2016, the Global Magnitsky Human Rights Accountability Act was enacted.]

Numerous Members [of Congress described these Acts] as providing the United States with tools to impose some measure of accountability against foreign perpetrators, particularly when relevant foreign governments are unable or unwilling to do so. ... [Some see them] as providing the executive branch with a tool to impose sanctions against specific persons in countries with which the United States shares important bilateral relations without necessarily provoking a broader rupture to these relations.

The Global Magnitsky Act contrasts with some other provisions in law that contemplate broader restrictions on relations with foreign governments on the basis of human rights violations. It also differs from country-specific targeted sanctions regimes, the creation of which can be time consuming and diplomatically challenging or disadvantageous

Overview of the Law and Executive Order

The Global Magnitsky Act was enacted on December 23, 2016. The executive branch has used Executive Order 13818, issued on December 20, 2017, to implement and build on the act’s provisions. When issuing E.O. 13818, the President additionally invoked emergency authorities set out in the National Emergencies Act (NEA) and International Emergency Economic Powers Act (IEEPA), as well as authority under the Immigration and Nationality Act (INA). The President determined that serious human rights abuse and corruption “constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States,” declaring that they “undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets.”

...

Type of Sanctions

... The law authorizes two types of restrictions:

- Economic sanctions (asset blocking and prohibitions on transactions): Freezing any property held within U.S. jurisdiction and prohibiting U.S. individuals or entities from entering into transactions with the designated person.
- Visa restrictions: Denying entry into the United States and revoking any already-issued visas.

...

Scope of Sanctionable Behavior and Targets

...

With regard to human rights, the Global Magnitsky Act authorizes the President to impose sanctions on any foreign person that the President identifies as “responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights” against an individual in any foreign country who seeks to

- “expose illegal activity carried out by government officials,” or
- “obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to fair trial and democratic elections.”

...

* * *

As of 10 December 2022, 450 foreign individuals and entities had been made subject to Global Magnitsky sanctions. Those sanctioned are included in the OFAC ‘Specially Designated Nationals and Blocked Persons List’, which as of 28 July 2023 ran to 2,206 pages of small print in three columns.

Other states with Magnitsky laws include Australia (Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021), the United Kingdom, Canada, and quite a few others.

In the United Kingdom, the Sanctions and Anti-Money Laundering Act 2018 is supplemented by the Global Human Rights Sanctions Regulations 2020 to create a Magnitsky-style law. By November 2022, ‘designations’ had been made in relation to the following countries: Belarus, Bosnia and Herzegovina, Central African Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Guinea-Bissau, Iran, Iraq, Libya, Mali, Myanmar, Nicaragua, Pakistan, Russia, Somalia, South Sudan, Sudan, Syria, The Gambia, Venezuela, Yemen, and Zimbabwe.⁵⁶⁹

Canada adopted the Justice for Victims of Corrupt Foreign Officials Act in 2017. Meredith Lilly, in ‘Symbolic Act, Real Consequences: Passing Canada’s Magnitsky Law to Combat Human Rights Violations and Corruption’, 75 *Int’l J.* (2020) 163, notes that all of the sanctions imposed in the first three years could have been adopted under the pre-existing legislative framework and concluded that the law had been adopted for largely symbolic reasons. But she also cautions that the Act’s existence will generate more pressure to act, and thereby ‘politicize those actions for domestic political purposes, and to pursue uneven policy decisions that could result in dramatic policy swings over time.’

⁵⁶⁹ <https://www.gov.uk/government/publications/the-uk-sanctions-list#full-publication-update-history>.

**COUNCIL OF THE EUROPEAN UNION, REGULATION 2020/1998 CONCERNING RESTRICTIVE MEASURES AGAINST SERIOUS HUMAN RIGHTS VIOLATIONS AND ABUSES
(7 DECEMBER 2020)**

...

Article 2

1. This Regulation applies to:

- (a) genocide;
- (b) crimes against humanity;
- (c) the following serious human rights violations or abuses:
 - (i) torture and other cruel, inhuman or degrading treatment or punishment;
 - (ii) slavery;
 - (iii) extrajudicial, summary or arbitrary executions and killings;
 - (iv) enforced disappearance of persons;
 - (v) arbitrary arrests or detentions;
- (d) other human rights violations or abuses, including but not limited to the following, in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU:
 - (i) (trafficking in human beings, as well as abuses of human rights by migrant smugglers as referred to in this Article;
 - (ii) sexual and gender-based violence;
 - (iii) violations or abuses of freedom of peaceful assembly and of association;
 - (iv) violations or abuses of freedom of opinion and expression;
 - (v) violations or abuses of freedom of religion or belief.

2. For the purpose of applying paragraph 1, regard should be had to customary international law and widely accepted instruments of international law, such as: [the ICCPR, the ICESCR, Genocide Convention, CAT, CERD, CEDAW, CRC, Convention on Disappearances, CRPD, the Trafficking Protocol, the ICC Statute; and the ECHR.]

3. For the purposes of applying this Regulation, natural or legal persons, entities or bodies may include:

- (a) State actors;
- (b) other actors exercising effective control or authority over a territory;
- (c) other non-State actors

Article 3

1. All funds and economic resources belonging to, owned, held or controlled by any natural or legal person, entity or body as listed in Annex I shall be frozen.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex I.

...

* * *

The EU sanctions regime reflects a Magnitsky-style approach, but it carefully avoids that name in order not to antagonize Russia. And unlike the U.S. approach, it does not cover acts of corruption. The listing of individuals pursuant to the EU Regulation requires a unanimous decision by all EU member states, thus leaving open the question of whether individual states might seek to supplement the system with their own national initiatives. The jurisdictional basis of the EU regime has been clarified by Tom Ruys, in ‘Introductory Note to The European Union Global Human Rights Sanctions Regime (EUGHR SR)’, 60 *Int’l Legal Mat.* (2021) 298, who notes that:

The Commission Guidance Note stresses, somewhat confusingly, that the financial sanctions “do not apply extra-territorially.” The more accurate formulation would be that the scope of application of Regulation 2020/1998 ... remains within the bounds of permissive principles of jurisdiction by refraining from creating obligations for non-EU operators unless the business is conducted at least partly within the EU.

...

On a more general level, debate remains regarding whether sanctions against human rights offenders have (only) a signaling and deterring objective, or are also punitive in nature. Related to this is the question of exit strategy—under what conditions will sanctions be lifted? The unilateral (non-UN) character also raises the question of legitimacy and may fuel accusations of double standards, as certain individuals are listed and other obvious candidates left out. Most in the Western world will regard the EUGHR SR and consorts as an important tool in the fight against impunity and for the promotion of human rights. Yet dissenting voices may criticize the proliferation of unilateral Magnitsky-style sanctions—with the lists of designated persons differing from one jurisdiction to another—as a *lex horrenda* and a recipe for international tension. Against this background, one question that remains largely unanswered concerns the effectiveness of sanctions (sectoral and targeted) in changing behavior. Either way, the introduction of a “Magnitsky-style” sanctions regime by a bloc of 27 EU Member States is bound to give further impetus to the spread of such regimes to other countries. Already in December 2020, nine other European countries “aligned” themselves with Council Decision (CFSP) 2020/1999. Several other countries are reportedly preparing or considering similar legislation.

**CHRISTINA ECKES, EU HUMAN RIGHTS SANCTIONS REGIME:
STRIVING FOR UTOPIA BACKED BY SOVEREIGN POWER?
26 EUR. FOR. AFF. REV. (2021) 219**

...

The EU HRSR may be inspired by the US regime but the US model of *Global Magnitsky* cannot and should not be followed too closely as it does not offer judicial protection to those sanctioned in a way that would meet due process guarantees under the Charter of Fundamental Rights. For the EU HRSR,

it will be a challenge to ensure compliance with the human rights guaranteed under EU and national law, including the rights to the defence of those sanctioned. The high numbers of annulments in the past, both of counterterrorist and country sanctions, have seriously damaged the legitimacy of these sanction regimes. The EU HRSR has to make a credible claim of contributing to the protection of human rights without itself infringing them.

...

The very objective of protecting human rights requires that such a regime must be endowed with particularly robust legal safeguards to ensure that those committed to fighting human rights violations do not become perpetrators themselves. The EU HRSR would have done well in stipulating the need for a clear and distinct link based on personal conduct between the targeted person and a grave human rights violation; an express and sufficient evidentiary threshold; and the commitment to meet this threshold on the basis of publicly available and reliable information. It did not do so. These stipulations could have contributed to ensuring a practice of self-restraint needed in view to the broad scope of a sanction regime addressing grave human rights violations across the globe. They could have ensured that all designations rest on a robust factual basis that can be made available to those sanctioned and, in the event of a legal challenge, to the CJEU. The EU HRSR leaves these points open and it is now for the Council to develop a credible practice that respects the rights of those sanctioned.

Rules on the burden of proof, the commitment to formality by establishing clear and precise listing criteria, as well as the use of presumptions are in their core about accepting that inevitably mistakes will be made. All three mechanisms could have been used to ensure strategically and in the long-term that when mistakes are made they are made because the EU is not able to list someone who committed a serious human rights violation rather than that it targets an innocent person. Only time and potentially a series of legal challenges might tell us more about the EU's use of the EU HRSR in practice.

The EU HRSR may become a successful attempt to reach beyond the existing means of holding perpetrators of serious human rights violations responsible. Yet, we cannot expect it to be applied neutrally and impartially, exclusively focused on the gravity of the violation. As [with] all sanction instruments, the EU HRSR cannot but conform to the foreign policy objectives and interests of those applying it. It is best to acknowledge the link between human rights sanctions and sovereign power than to pretend neutrality.

The Lawfulness of Sanctions: Venezuela and Russia/Ukraine

Venezuela ratified the ICC Statute in June 2000. On 26 September 2018, Argentina, Colombia, Chile, Paraguay, and Peru referred the situation in Venezuela to the Prosecutor of the court, alleging that the Maduro government had committed crimes against humanity. Invoking various reports prepared within the Inter-American system, they cited '(i) murder; (ii) imprisonment or other severe deprivation of physical liberty; (iii) torture; (iv) rape; (v) the persecution of an identifiable group or collectivity on political grounds; and (vi) the enforced disappearance of persons'. On 3 November 2021, the Prosecutor announced both a decision to proceed with investigations and an agreement with Venezuela to foster mechanisms to support genuine proceedings at the national level.

On 13 February 2020, Venezuela submitted its own referral to the court (Referral II) in relation to U.S. sanctions. In 2017 the U.S. had imposed sanctions under EI 13808 prohibiting U.S. individuals and entities from dealing with the Venezuelan government and the state-owned oil company (PDVSA). Additional targeted sanctions were imposed in 2018 against senior Venezuelan officials, and in 2019, oil shipments and Central Bank transactions were targeted.

In its claim, Venezuela cited an analysis by Mark Weisbrot and Jeffrey Sachs, entitled *Economic Sanctions as Collective Punishment: The Case of Venezuela* (2019) which found that 'most of the impact of [U.S.] sanctions [had] not been on the government but on the civilian population':

The sanctions reduced the public's caloric intake, increased disease and mortality (for both adults and infants), and displaced millions of Venezuelans They

exacerbated Venezuela's economic crisis and made it nearly impossible to stabilize the economy, contributing further to excess deaths. ...

...

We find that the sanctions have inflicted, and increasingly inflict, very serious harm to human life and health, including an estimated more than 40,000 deaths from 2017 to 2018; and that these sanctions would fit the definition of collective punishment of the civilian population

In 2021, the UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, visited Venezuela and noted sanctions imposed not just by the United States but also the European Union, the United Kingdom, Canada, Switzerland, Mexico and other countries in Latin America. She reported (UN Doc. A/HRC/48/59/Add.2) that:

... [S]ectoral sanctions on the oil, gold and mining industries, the economic blockade, the freezing of Central Bank assets, the targeted sanctions imposed on Venezuelans and third-country nationals and companies and the overcompliance by banks and third-country companies have exacerbated the pre-existing economic and social crisis and had a devastating effect on the entire population, especially those living in poverty, women, children, older persons, persons with disabilities or life-threatening or chronic diseases, and the indigenous population. No strata of society has been untouched. She recommends that these sanctions, which were imposed mostly in the name of human rights, democracy and the rule of law, be lifted, as they undermine those very principles, values and norms.

Venezuela's referral made similar claims:

... Such measures contravene international law ..., have caused enormous hardship for the people of Venezuela, ... have contributed to very significant increases in mortality of children and adults, and negatively affected a range of other human rights Such unilateral coercive measures of unprecedented scale constitute a widespread or systematic attack upon a civilian population [thus amounting to crimes against humanity under Article 7(1) of the Rome Statute].

By way of background, the UN Committee on Economic, Social and Cultural Rights adopted General Comment No. 8 in 1997, focused on 'the relationship between economic sanctions and respect for economic, social and cultural rights'. It was adopted at a time when there was a strong backlash against very severe sanctions against Iraq in response to its invasion of Kuwait in 1990 and the subsequent military intervention by an UN-authorized coalition, led by the United States.

...

3. [Sanctions] often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardise the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive elites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged elites which manage it, enhancement of the control of the governing elites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. ...
4. In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the

governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. ...

5. However, a number of recent United Nations and other studies which have analysed the impact of sanctions, have concluded that [humanitarian exemptions do not protect ESCR].

...

7. The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State.

...

10. ... The imposition of sanctions does not in any way nullify or diminish the relevant obligations of [the target state]. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. ...
11. The second set of obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. In this respect, the Committee considers that there are three conclusions which follow logically from the recognition of economic, social and cultural human rights.
12. First, these rights must be taken fully into account when designing an appropriate sanctions regime. ...
13. Second, effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are in force. When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the [ESCR] of the affected population.
14. Third, the external entity has an obligation “to take steps, individually and through international assistance and co-operation, especially economic and technical” in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.
15. In anticipating the objection that sanctions must, almost by definition, result in the grave violations of [ESCR] if they are to achieve their objectives, the Committee notes the conclusion of a major United Nations study to the effect that “decisions to reduce the suffering of children or minimize other adverse consequences can be taken without

jeopardizing the policy aim of sanctions”. This applies equally to the situation of all vulnerable groups.

...

**DEVIKA HOVELL, UNFINISHED BUSINESS OF INTERNATIONAL LAW:
THE QUESTIONABLE LEGALITY OF AUTONOMOUS SANCTIONS
113 AJIL UNBOUND (2019) 140**

...

... U.S. domestic law [on sanctions] appears to leave the President with impressive latitude. The most common domestic legal basis for U.S. sanctions programs is the International Emergency Economic Powers Act (IEEPA), which grants the President power that has been described by the U.S. Supreme Court as “sweeping and unqualified.” Sanctions are commonly implemented by executive orders under which the President declares a national emergency justifying the imposition of sanctions measures. ...

...

[The Trump] White House not only uses sanctions more widely, but also shows a greater tendency to deploy them unilaterally. ... [T]here is a legally relevant difference between UN-authorized sanctions and “autonomous” sanctions, with the latter term denoting sanctions either lacking or exceeding authorization by the UN Security Council. The distinction between UN-authorized and autonomous sanctions is not one the United States clearly draws. While the EU website clearly sets out the source of sanctions in either UN, EU, or combined acts, the Office of Foreign Assets Control (OFAC) declines to provide information explaining the degree of convergence between U.S. sanctions programs and those authorized by the United Nations. ...

Opposition to U.S. autonomous sanctions is not new. Since 1992, the General Assembly has annually passed a resolution urging all states to “refrain from promulgating laws and measures” such as the U.S. Helms-Burton Act imposing autonomous sanctions against Cuba and those trading with Cuba, “the extraterritorial effects of which affect the sovereignty of other states, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation.” The latest resolution passed by 189 votes to 2 (the United States and Israel voting against). ...

... The European Union is a key player in the autonomous sanctions game, with twenty-five of its forty-three sanctions regimes imposed on non-EU member states without UN authorization. ...

...

Unilateral Corrective Sanctions: The Maverick Enforcer

The main basis for the legality of autonomous sanctions derives from the law relating to countermeasures. The ILC's Articles on State Responsibility clarify and refine the scope of a state's right to deploy countermeasures, setting out a number of conditions. These include:

- (1) The targeted state must have committed an internationally wrongful act.
- (2) The sanctioning state must establish it is an “injured state.”
- (3) The measures must aim to induce the targeted state to comply with its obligations.
- (4) The measures must be proportionate to the injury suffered.
- (5) The measures may not affect fundamental human rights norms or jus cogens norms. These include the due process rights of individuals or entities targeted by sanctions measures.
- (6) The measures must be terminated when the wrongful act has ceased.

Uncertainty remains as to the definition of “injured state.” This is relevant as many of the violations that U.S. sanctions, and indeed EU sanctions, seek to redress could be said not to affect U.S. or EU

citizens directly, although they would fall within the category of violations of an obligation that protects the collective interest of the group (e.g., a multilateral disarmament regime, as in the case of Iran) or of an *erga omnes* obligation owed to the international community as a whole (e.g., grave human rights violations, as in the case of Syria or Myanmar). The ILC expressly reserved its position on this question, leaving “resolution of the matter to the further development of international law.”

Unilateral Coercive Sanctions: The Rogue Enforcer

At the end of the day, the key difference between lawful and unlawful autonomous sanctions is that the former serve the corrective purpose of bringing wrongdoing states back into line with their treaty or customary international law obligations. The idea is that sanctions should not cross the line from inducing a state to comply with legal obligations it has accepted to coercing a state to do something it is not bound to do under international law. Unilateral acts “become especially contentious where they are associated with one community imposing its values on another, where that other community has not consented to the imposition of such values.” Sanctions should not be a wager on a state's weakness, but on its wisdom to conform with agreed principles of international law.

There is a growing movement of states arguing for the illegality of unilateral coercive measures. ... [H]owever, until states declare themselves willing to agree on defined legal parameters, the precise line between lawful and unlawful autonomous measures remains a matter of debate rather than law.

...

DAPO AKANDE, PAYAM AKHAVAN, AND EIRIK BJORGE, ECONOMIC SANCTIONS, INTERNATIONAL LAW, AND CRIMES AGAINST HUMANITY: VENEZUELA'S ICC REFERRAL 115 AM. J. INT'L L. (2021) 493

...

There is no doubt that the ... Trump administration[‘s] ... policy has had a devastating impact. The question [is] whether it constitutes crimes against humanity.

...

G. The UN Human Rights Covenants

The [ICCPR and the ICESCR] both provide, in common Article 1(2), that: “In no case may a people be deprived of its own means of subsistence.” ... Thus, “measures taken in the framework of inter-state relations should not be such as to threaten starvation of the people of a State.” To the extent that economic sanctions breach that rule—and have the effect of threatening the starvation of a whole people—they are illegal under international law. ...

...

I. ICESCR

The provisions of the ICESCR are more directly relevant to economic sanctions and frequently invoked by Venezuela in Referral II. Article 2(1) obliges states parties “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 recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” This obligation of conduct is “programmatic and promotional,” and requires good faith efforts to realize progressively the relevant rights, rather than achieving a particular result. The ICJ has clarified that the ICESCR guarantees rights that are “essentially territorial,” though “it is not be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.” ...

[The authors quote briefly from General Comment No. 8, above.]

It is thus very difficult to conclude as a general principle that sanctions would necessarily violate obligations under the ICESCR. Customary international law does not bar the use of economic coercion. In the absence of specific legal obligations to engage in trade with another state, an embargo will in principle be a lawful measure. Where general international law does impose a limit is in the extreme circumstance where unilateral sanctions rise to the level of depriving a people of its own means of subsistence or threatens the starvation of the people of a state. There is in general international law a “duty not to use economic coercion for the purpose of destroying or dismembering a State.” This would seem to be some way removed from the U.S. sanctions against Venezuela, whether their ostensible objective is merely to confront human rights violations or to achieve “regime change.” ...

**ELENA CHACHKO AND J. BENTON HEATH, A WATERSHED MOMENT FOR SANCTIONS?
RUSSIA, UKRAINE, AND THE ECONOMIC BATTLEFIELD
116 AJIL UNBOUND (2022) 135**

...

The Russian invasion of Ukraine has opened the sanctions floodgates. A trickle of preexisting sanctions that the United States, the European Union, and others had imposed against Russia over its annexation of Crimea, malicious cyber activity, and human rights violations has turned into a tsunami of increasingly severe economic measures. The Russia sanctions regime continues to evolve daily, but the sanctions imposed to date can be divided into roughly six categories. [(i) full asset freezes against the Russian leadership and elites; (ii) blocking sanctions against major Russian banks and financial institutions, limitations on transactions with others, and the removal of certain financial institutions from the Swift financial messaging system; (iii) bans on the import of Russian oil, liquefied natural gas, and coal, as well as any new U.S. investment in Russia’s energy sector; (iv) export controls designed to curtail Russian access to necessary commodities and technologies and to hinder Russia’s military buildup; (v) bans on Russian airlines and the repossession of planes leased to Russian airlines; and (vi) an exodus of private actors which have suspended operations in Russia.]

...

The overwhelming response, in the short term, reaffirms the central role of sanctions as a tool of the post-1945 legal order, and reaffirms a “laissez faire” approach to their application. Today, sanctions are a widely recognized pressure valve in international relations—an ostensibly non-violent measure that can be applied to influence state and increasingly individual behavior and punish violations of the law. This is a break with the older law of neutrality, in which the decision to restrain trade with only one party to a conflict could be considered a hostile act. The legal distinction between economic force and war is widely accepted today, and it is reaffirmed in contemporary commentary that treats the allies’ sanctions as wisely avoiding, rather than contributing to, military escalation.

The “pressure valve” view has become coupled with a relative absence of strong legal constraints on a state’s decision on whether to deploy sanctions. The International Court of Justice’s finding that even a comprehensive embargo does not breach customary international law, though it may violate an applicable commercial treaty, remains the point of departure. In practice, rules of general international law that might have constrained a state’s decision to use sanctions—such as non-intervention or limits on national jurisdiction—often seem to be at best a minimal constraint. If sanctions do not violate a primary norm, then rules governing countermeasures, such as notice and proportionality, do not apply.

Domestic legal institutions in key sanction-imposing jurisdictions have also acquiesced in the practice and the fundamental legitimacy of sanctions as a tool of statecraft. In the United States in particular, a series of Supreme Court decisions in the 1980s “freed the president . . . to conduct widespread economic warfare merely by declaring a national emergency with respect to a particular country,” while sidelining congressional oversight.

...

Conclusion

Going forward, the question is whether this high-profile economic war heralds any significant legal change. We are skeptical that the international legal order stands at the precipice of any kind of grand

regulatory moment for economic sanctions, though legal reform is a worthy long-term goal. The present moment, instead, offers a set of overlapping and competing narratives, which are likely to be refracted through the overlapping and competing institutions that purport to govern economic warfare. If there is any call for optimism today, it is the hope that the renewed public focus on economic conflict will generate an ethic of responsibility around sanctions, along with a toolbox of ideas that might be combined and experimented with as international politics lurches from crisis to crisis.

QUESTIONS

1. Some of the governments that have been most active in imposing Magnitsky sanctions have significantly downgraded human rights in terms of their other foreign policy priorities. Is this a reasonable trade-off to be making?
2. Sanctions regimes have often made the provision of humanitarian assistance virtually impossible. In December 2022, the Security Council (Res. 2664) decided that ‘the provision, processing or payment of funds, other financial assets, or economic resources, or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs ... are permitted and are not a violation of the asset freezes imposed [by the Council].’ India abstained from voting on the grounds (UN Doc. SC/15134) that ‘terrorist groups [take] full advantage of humanitarian carve-outs and [make] a mockery of sanctions regimes’. They ‘use the umbrella of the humanitarian assistance space to raise funds and recruit fighters’. Should and could sanctions regimes be made humanitarian-friendly?
3. In rejecting part of the claims made by Venezuela, Akande et al. conclude that ESCR are merely ‘programmatic and promotional’ and that the Covenant only ‘requires good faith efforts to realize progressively the relevant rights’. Is this an appropriate understanding, based on the materials considered in Chapter 4, above, and if you agree with it, does it mean that there is no role for the analysis in General Comment No. 8 of the ESCR Committee?

C. UNIVERSAL JURISDICTION

The principle of universal jurisdiction emerged primarily in the context of criminal prosecutions and subsequently extended to areas of civil litigation. It is accordingly helpful to review basic jurisdictional principles on which states prescribe (make law), particularly laws imposing individual criminal responsibility, and the basic jurisdictional principles on which a state’s courts hear civil and criminal cases.

Criminal litigation, unlike civil litigation, ordinarily requires that the state whose courts are trying a case have custody of the defendant. Holding criminal trials *in absentia* is rare. Choice of law, so vital an element of many civil cases, generally does not figure in criminal litigation; the court applies only the law of the state from which it derives its authority, almost always the one in which it sits, even if the conduct occurred or the effects were felt in other states. The principle of universal jurisdiction examined below, constitutes a major exception to this generalization.

The bases on which states enact the criminal laws to which their courts look therefore becomes a critical issue. There are certain conventional categories, some of which are more broadly accepted internationally than others. This is reflected in the list included in the American Law Institute, Restatement (Fourth), Foreign Relations Law of the United States (2019), section 402:

- (1) ... [T]he United States exercises jurisdiction to prescribe law with respect to:
 - (a) persons, property, and conduct within its territory;
 - (b) conduct that has a substantial effect within its territory;
 - (c) the conduct, interests, status, and relations of its nationals and residents outside its territory;
 - (d) certain conduct outside its territory that harms its nationals;
 - (e) certain conduct outside its territory by persons not its nationals or residents that is directed against the security of the United States or against a limited class of other fundamental U.S. interests; and
 - (f) certain offenses of universal concern ...
- (2) In exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity.

The *Restatement* elaborates on the offenses in 1(b) above in section 413:

International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated.

A 'comment' attached to that section notes that:

e. *Common limits*. Some states impose additional limits on exercises of universal jurisdiction, such as: (1) the territorial presence of the suspect before initiation of a criminal investigation or commencement of trial proceedings; (2) commission of the crime during a specified conflict or time period; (3) authorization or approval of the prosecution by an executive or judicial body; and (4) deference to the territorial state or the suspect's state of nationality if either state is willing and able to prosecute (i.e., complementarity). Considerations of international comity, rather than the obligations of international law, appear to motivate these limitations.

1. THE EICHMANN TRIAL

The *Eichmann* trial and conviction in 1961 illustrate issues concerning the application of universal jurisdiction at an early stage of the post-Nuremberg evolution of human rights law.

Adolf Eichmann, operationally in charge of the mass murder of Jews in Germany and German-occupied countries, fled Germany after the war. He was abducted from Argentina by Israelis, and brought to trial in Israel under the Nazi and Nazi Collaborators (Punishment) Law, enacted after Israel became a state. Section 1(a) of the Law provided:

A person who has committed one of the following offences — (1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people; (2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity; (3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime; is liable to the death penalty.

The Law defined ‘crimes against the Jewish people’ to consist principally of acts intended to bring about physical destruction. The other two crimes were defined similarly to the like charges at Nuremberg. The 15 counts against Eichmann involved all three crimes. The charges stressed Eichmann’s active and significant participation in the ‘final solution to the Jewish problem’ developed and administered by Nazi officials. Eichmann was convicted in 1961 and later executed. There appear below summaries of portions of the opinions of the trial and appellate courts.

***THE ATTORNEY-GENERAL OF THE GOVERNMENT OF ISRAEL V. EICHMANN*⁵⁷⁰**

Eichmann argued that the prosecution violated international law by inflicting punishment (1) upon persons who were not Israeli citizens (2) for acts done by them outside Israel and before its establishment, (3) in the course of duty and (4) on behalf of a foreign country. In reply, the Court noted that, in the event of a conflict between an Israeli statute and principles of international law, it would be bound to apply the statute. However, it then concluded that ‘the law in question conforms to the best traditions of the law of nations. The power of the State of Israel to enact the law in question or Israel’s “right to punish” is based ... from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their specific character as being designed to exterminate the Jewish people.’

Thus the Court relied primarily on the universality and protective principles to justify its assertion of jurisdiction to try the crimes defined in the Law. It held such crimes to be offences against the law of nations, much as was the traditional crime of piracy. It compared the conduct made criminal under the Israeli statute (particularly the ‘crime against the Jewish people’) and the crime of genocide, as defined in Article 1 of the Convention for the Prevention and Punishment of Genocide.

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.⁵⁷¹

The Court also stressed the relationship between the Law’s definition of ‘war crime’ and the pattern of crimes defined in the Nuremberg Charter. It rejected arguments of Eichmann based upon the retroactive application of the legislation, and stated that ‘all the reasons justifying the Nuremberg judgments justify *eo ipse* the retroactive legislation of the Israeli legislator’.

The Court then discussed another ‘foundation’ for the prosecution — the offence specifically aimed at the Jewish people.

[This foundation] of penal jurisdiction conforms, according to [the] acknowledged terminology, to the protective principle. ... The ‘crime against the Jewish people,’ as defined in the Law, constitutes in effect an attempt to exterminate the Jewish people. ... If there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel. ... The connection between the State of Israel and the Jewish people needs no explanation.

***EICHMANN V. THE ATTORNEY-GENERAL OF THE GOVERNMENT OF ISRAEL*⁵⁷²**

After stating that it fully concurred in the holding and reasoning of the district court, the Supreme Court proceeded to develop arguments in different directions. It stressed that Eichmann could not claim to have been unaware at the time of his conduct that he was violating deeply rooted and universal

⁵⁷⁰ District Court of Jerusalem, Judgment of 11 December 1961. This summary and the selective quotations are drawn from 56 *Am. J. Int’l. L.* (1962) 805 (unofficial translation).

⁵⁷¹ Article 6 of the Convention, the meaning and implications of which were viewed differently by the parties, states: ‘Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’

⁵⁷² Supreme Court sitting as Court of Criminal Appeals, 29 May 1962. See 36 *Int’l. L. Rep.* (1968) 277.

moral principles. Particularly in its relatively underdeveloped criminal side, international law could be analogized to the early common law, which would be similarly open to charges of retroactive law-making. Because the international legal system lacked adjudicatory or executive institutions, it authorized, for the time being, national officials to punish individuals for violations of its principles, either directly under international law or by virtue of municipal legislation adopting those principles.

Moreover, in this case Israel was the most appropriate jurisdiction for trial, a *forum conveniens* where witnesses were readily available. It was relevant that there had been no requests for extradition of Eichmann to other states for trial, or indeed protests by other states against a trial in Israel.

The Court affirmed the holding of the district court that each charge could be sustained. It noted, however, much overlap among the charges, and that all could be grouped within the inclusive category of ‘crimes against humanity’.

PNINA LAHAV, JUDGMENT IN JERUSALEM (1997) 150

[In this portion of her biography of Simon Agranat, Justice and later Chief Justice of the Israeli Supreme Court, Lahav analyses his role in the Supreme Court’s affirmance of Eichmann’s conviction and death sentence. The Court delivered its judgment in a *per curiam* opinion. Justice Agranat had prepared the section of that opinion dealing with jurisdictional challenges to the trial.]

Agranat also understood that more than appearance was at stake: the soul of the Zionist project was reshaped by the brutal confrontation with the Holocaust. The old tension within Zionism between universalism and particularism now tilted in favor of particularism. Israelis were perceiving themselves as special: a special target for genocide and special in their right to ignore international norms in pursuit of justice. Popular hubris was growing, nurturing a victim mentality, a sense of self-righteousness and excessive nationalism, threatening to weaken the already shaky foundations of universalism in Israeli political culture.

...

Agranat understood that the legal reasoning he chose would affect the resolution of the tension between particularism and universalism. The Supreme Court could either let the conviction stand on the basis of crimes against the Jewish people, thereby lending force to the contention that Israel operated by its own rules, impervious to the laws developed by the community of nations, or it could try to show that Eichmann’s trial was compatible with international norms of justice and fairness.

Most of the legal arguments advanced by Eichmann were designed to prove that Israel lacked jurisdiction to try him. Two of these arguments received extensive attention from the international community. The first was that the 1950 Israeli Law against the Nazis and Nazi Collaborators, which vested jurisdiction in the Israeli courts, was an *ex post facto* criminal law and as such could not apply to foreign nationals; the second was that, because the crimes were ‘extra-territorial offenses’ committed by a foreign national, Israel could not prosecute Eichmann according to the territoriality principle of international law.

In rejecting these arguments, the district court stressed the superiority of Israeli law in the sovereign state of Israel. The Law against the Nazis and Nazi Collaborators, the district court held, was a part of Israeli positive law and, as such, was binding on the courts of the land. It did hold that the law agreed with international norms, but emphasized the impact of the Holocaust on the evolution of the law of nations. This holding contained a symbolic message: Jewish national pride and self-assertion ruled the day. There was poetic justice in this interpretation. If the Final Solution was about the lawless murder of Jews, the *Eichmann* case was about the subjection of the perpetrators to Jewish justice, conceived and applied by the very heirs of those murdered.

There was ambivalence in Agranat’s handling of this theme. On one hand, he endorsed the district court’s analysis; on the other, his own reasoning went in a different direction. He sought to prove that

the validity of the Law against the Nazis and Nazi Collaborators stemmed not from its superiority to the law of nations but from its compatibility with international law. Jewish justice was thereby not different from or superior to the law of nations; rather, it was a part of it.

...

... Citing scholarly works and judicial opinions, he asserted that international law did not prohibit ex post facto laws and was not dogmatic about the territoriality principle. Thus Israel's decision to prosecute, far from being a violation of international law, was simply a perfectly legitimate reluctance to recognize principles not fully endorsed by the community of nations. ... He wanted to show that Israel's law was not an aberration but an affirmation of the law of nations.

The Law against the Nazis and Nazi Collaborators created a new category of crimes: crimes against the Jewish people. As such, it was a unique ex post facto law. The crime was specific to Jews and created a category hitherto unknown in any legal system. It was precisely for this reason that the crime formed a coherent part of Zionism. ... Zionism portrayed the Holocaust less as the vile fruit of totalitarianism and more as the culmination of two millennia of anti-Semitism. The Jews had been defenseless because they did not possess political power. Even in Nuremberg the Allies refused to recognize that the Jews as a nation were especially targeted by the Nazis. The offense, 'crimes against the Jewish people', was designed to correct that myopia and to assert, ex post facto and forever, the Jewish point of view. ...

Speaking for the Supreme Court, Agranat raised a different voice. He reviewed the four categories of the indictment, and he concluded that they had a common denominator, a 'special universal characteristic'. About 'crimes against the Jewish people' he had this to say: 'Thus, the category of "crimes against the Jewish people" is nothing but ... "the gravest crime against humanity". It is true that there are certain differences between them ... but these are not differences material to our case'. Therefore, he concluded, in order to determine whether international law recognized Israeli jurisdiction stemming from this ex post facto statute, the Court could simply collapse the entire indictment into 'the inclusive category of "crimes against humanity"'. This 'simple' technique enabled Agranat to devote the bulk of his opinion to the universal aspects of the *Eichmann* case.

QUESTIONS

1. Consider the alternatives to trial of Eichmann by the Israeli court. Would any international tribunal have been competent? What would have been involved in an effort to establish another ad hoc international criminal tribunal like Nuremberg, and would that effort have been likely to succeed? Would trial before the courts of another state have been preferable? Which state?
2. What problems, if any, do you see in reliance on 'crimes against the Jewish people'? How would you distinguish it from, for example, legislation by an African state defining 'crimes against the black people' that could reach persons in Western or other states who are accused of violence against black people? Are both types of statutes good ideas?

2. Ex Parte Pinochet and Universal Jurisdiction

General Augusto Pinochet resigned as head of state of Chile in 1990 and became a 'Senator for life'. In 1998, he travelled to the United Kingdom for medical treatment. Judicial authorities in Spain sought to extradite him to stand criminal trial in Spain on several charges, including torture, related to the right-wing military overthrow of President Allende on 11 September 1973 and the subsequent political repression during Pinochet's term as head of state. An international warrant for his arrest was issued in Spain, and a British magistrate issued a provisional warrant under the UK Extradition Act 1989. None of the conduct alleged by the Spanish authorities was committed against UK citizens or in the

United Kingdom. Seeking to return to Chile, Pinochet initiated proceedings for habeas corpus and for judicial review of the warrant.

On appeal, the House of Lords decided the case, but this judgment was set aside due to a conflict of interest involving one of the Law Lords. A differently constituted seven-member panel reheard the appeal in 1999. Six of the seven Law Lords upheld the extradition process, but (in the majority of their opinions) only with respect to a small number of the charges. Extradition was appropriate only for charges satisfying the ‘double criminality’ principle, which requires the conduct in question to have been criminal in both Spain and the United Kingdom at the time it was committed. A majority of the Law Lords concluded that because a section of the Criminal Justice Act 1988, incorporating the United Kingdom’s obligations under the Convention Against Torture, had created a new domestic crime for torture committed outside the country, only the charges of torture committed after the Act’s entry into force could proceed.

Lord Browne-Wilkinson discussed the foundation for universal jurisdiction over torture:

I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense.

But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see ... *Attorney-General of Israel v. Eichmann*. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. ... The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal — the torturer — could find no safe haven. ...

...

Under Article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory.

...

[I]n my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.

Other Law Lords expressed a range of opinions concerning universal jurisdiction. Consider, for example, Lord Millett’s opinion:

... [C]rimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria. ...

...

... Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.

In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the

courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it. ...

...

Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the Convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction. ... Whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so.

In contrast, Lord Phillips remarked:

I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crimes — that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel, notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or to attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.

After the decision, the extradition case continued while Pinochet remained under house arrest. France, Belgium and Switzerland also made extradition requests. In 2000, the British Home Secretary stated that medical examinations of Pinochet led him to conclude that the 84-year-old general was incapable of standing trial and should be released to return to Chile. Later that year, Pinochet was permitted to fly home, to a radically different political context in which he was an isolated, far less influential and potent figure. Judicial steps were underway towards intense investigation into Pinochet's connection with the killings and torture. The Chilean Supreme Court stripped Pinochet of immunity, and several charges were brought against him. However, on 10 December 2006, Pinochet died before any prosecution was brought.

3. The Belgian Arrest Warrant Case

A leading treatment of the scope and viability of universal jurisdiction arose in proceedings before the International Court of Justice (ICJ). The case involved Belgium's 'universal jurisdiction' law, which has since been modified. At the time, the law permitted Belgian judicial authorities to prosecute violations of international humanitarian law regardless of where the acts were committed and regardless of the nationality of the perpetrators and victims. In late 1998, 12 individuals lodged a complaint with a Belgian investigating judge at the Brussels Court of First Instance. Of the 12 complainants, five were of Belgian nationality, seven were of Congolese nationality and all were resident in Belgium. The complaint concerned events that had taken place in the Democratic Republic of the Congo (DRC).

In mid-2000, the Belgian judge issued an arrest warrant *in absentia* against Mr Abdulaye Yerodia Ndombasi, who was the DRC's Minister for Foreign Affairs at the time. The warrant accused Mr Yerodia of committing war crimes and crimes against humanity before serving in his ministerial post. The complaint alleged that he made public speeches that incited the massacre of several hundred people, mainly of Tutsi origin, in the DRC. The Government of the DRC initiated proceedings against the Government of Belgium before the ICJ claiming that the issuance and international distribution

of the arrest warrant unlawfully infringed the foreign minister's immunity and violated international rules on jurisdiction. A majority of the ICJ did not reach the issue of universal jurisdiction, holding instead that the promulgation and circulation of the arrest warrant violated Mr Yerodia's official immunity as Foreign Minister. A separate opinion joined by Judges Rosalyn Higgins, Peter Kooijmans and Thomas Buergenthal squarely addressed the issue of universal jurisdiction in one of the most extensive treatments of the subject to date. We return to the majority's assessment of the official immunity claim later in this chapter. Excerpts of the joint separate opinion follow.

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO V. BELGIUM)
INTERNATIONAL COURT OF JUSTICE, GENERAL LIST NO. 121 (14 FEBRUARY 2002)

JOINT SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS AND BUERGENTHAL:

19. We ... turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory. ...

20. Our analysis may begin with national legislation, to see if it evidences a State practice. ... [N]ational legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify the more qualified practice. [The Opinion then reviews the Australian War Crimes Act of 1945, the United Kingdom War Crimes Act of 1991 and the Criminal Code of Canada 1985.]

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so far as reliance on universal jurisdiction is concerned. In the Pinochet case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. ...

...

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. This is doubtful.

27. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, provides:

“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

This is an obligation to assert territorial jurisdiction, though the *travaux préparatoires* do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C 6/SR, 134; p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal — even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in

the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case.

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the *aut dedere aut prosequi* to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true universality principle. But a different interpretation is given in the authoritative Pictet *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?

...

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

“(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.”

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted *a contrario*.

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of “primary universal repression” came now to be widely referred to by delegates as “universal jurisdiction” — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an “offence against the law of nations.” (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that “universal jurisdiction” over torture would create problems under their domestic legal systems. (See E/CN. 4/1984/72.)

40. This short historical survey may be summarized as follows.

41. The parties to these treaties agreed both to grounds of jurisdiction and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. ... These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found, shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as “universal jurisdiction,” though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, *inter partes* or, whether it is now, at least as regards the offences articulated in the treaties, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

...

44. However, we note that the inaccurately termed “universal jurisdiction principle” in these treaties is a principle of obligation, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose. ...

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. ... Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law, — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosecute* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law.

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. “Effects” or “impact” jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries, and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

...

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? ... The only prohibitive rule ... is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of

Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

...

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. ... [C]ommencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d'instruction*. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

...

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. "Racial hatred" would need to be assimilated to "persecution on racial grounds," or, on the particular facts, to mass murder and extermination. [The opinion analyses whether incitement is an acceptable form of liability under international criminal law, and concludes that it is.]

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of "crimes against humanity" and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

4. The Fall and Rise of Universal Jurisdiction

The 1993 Belgian law on universal jurisdiction led to a handful of cases being brought against prominent international leaders, including Fidel Castro and Saddam Hussein. Following charges brought in June 2001 against Israeli Prime Minister Ariel Sharon, which led to strong protests by Israel, and the ICJ judgment upholding Yerodia's immunity as Foreign Minister, Belgium decided to amend its law. Before it could do so, in 2003, seven Iraqi families living in Belgium requested an investigation of former U.S. President George H. W. Bush, Vice-President Dick Cheney, Secretary of State Colin Powell, and General Norman Schwarzkopf for war crimes during the first Gulf War in 1991. Then

U.S. Secretary of Defense, Donald Rumsfeld, called the charges ‘absurd’, denied the authority of Belgian courts to try American officials, and threatened to withhold funding for the new NATO headquarters in Brussels. Belgium repealed the 1993 law and introduced a much more restrictive law.

A similar dynamic played out in Spain. After the Pinochet case, as well as charges brought against officials from the United States and Israel, the Spanish court in June 2014 issued warrants for China’s former President Jiang Zemin and former Prime Minister Li Peng in relation to human rights abuses in Tibet. In the face of a powerful diplomatic backlash, the Spanish law was amended to greatly reduce its scope.

On 30 November 2018, and again on 12 April 2023, Israel drew lessons from its experience. It told the UN Sixth Committee, during a debate on the ILC Draft Articles on Crimes against Humanity, that the following safeguards should apply to the exercise of universal jurisdiction:

... a requirement that any initiation of legal proceedings would be conducted only with the prior approval of high-level legal officials in the executive branch at the earliest stage; assertion of universal jurisdiction should be regarded as a measure of last resort in appropriate circumstances only; adherence to the principle of subsidiarity; and a requirement that prior to issuing requests for mutual legal assistance, provisional arrest, or extradition, States take appropriate measures to determine whether the party that filed the complaint has filed complaints about the alleged incident or suspect in other fora, and if so, whether an investigation has taken place or is ongoing there.

But in the past few years, universal jurisdiction has made a comeback. In November 2023, French investigative judges issued an arrest warrant for Syrian President Bashar al-Assad relating to the use of chemical weapons. The following materials explore the impact of the situation in Syria, especially in Europe.

**BETH VAN SCHAACK, IMAGINING JUSTICE FOR SYRIA
(2020) 447**

... [T]he failures of the Security Council when it comes to Syria have eroded our faith in the U.N. system of collective security. With Russia readily wielding its veto in defense of Assad, the Council has been unable to invoke Chapter VII and deploy its strongest accountability tools: the creation of an ad hoc tribunal or even an investigative mechanism with teeth, the referral of the situation to the International Criminal Court, or the imposition of targeted sanctions on responsible individuals. ... [S]tates have turned to other multilateral fora, such as the Organisation for the Prohibition of Chemical Weapons, and [the General Assembly created] the International, Impartial and Independent Mechanism for Syria—which is collecting, collating, and analyzing evidence of international crimes for any national, regional, or international proceedings that materialize. ...

... [I]t is not clear ... that the ICC offers the best solution to the imperative of justice in Syria given the sheer magnitude of the criminality on display and limitations in the Court’s subject matter jurisdiction over war crimes committed in non-international armed conflicts. In addition, the shortcomings of prior Security Council referrals are legion. Besides the obvious problems associated with the Council exercising political control over the Court in violation of the trias politica, detractors point to controversial textual elements in the resolutions that were deemed essential to achieve consensus (such as the provision effectively granting immunity to personnel from non-member states); the failure of the Council to provide any meaningful follow-up to effectuate its referrals (particularly when it comes to the arrest of suspects); and the fact that such referrals amount to an unfunded mandate. Indeed, Security Council referrals have been described by Court insiders as a “poisoned chalice.” Furthermore, the limitations of the ICC are becoming increasingly apparent as cases fail and resources become even more thinly spread.

...

... [T]he war in Syria has re-enlivened the principle of universal jurisdiction alongside other extraterritorial jurisdictional principles, rendering domestic courts the situs of the most aggressive and creative accountability exercises. ... A number of juridical innovations have facilitated this trend toward the empowerment of domestic courts, including the incorporation of international criminal law and expansive jurisdictional principles into national penal codes, the establishment of specialized—and globally networked—war crimes units, and the creation of increasingly frictionless systems of mutual legal assistance. On the ground, the fact that a fourth of the Syrian prewar population has fled the country means that perpetrators, victims, and witnesses are on the move and often find themselves in close proximity to each other in their states of refuge. With no international forum capable of exercising plenary jurisdiction, domestic courts have stepped up to fill the jurisdictional void. The enforcement of international criminal law is now more decentralized, but also more coordinated, than ever. And so, like flowing water, justice finds its outlets wherever it can.

EYAD A. CASE

**KOBLENZ HIGHER REGIONAL COURT, CASE NO. 1 STE 3/21 (24 FEBRUARY 2021)
[MACHINE TRANSLATION FROM THE ORIGINAL GERMAN CASE REPORT.]**

...

As part of this widespread and systematic attack on the civilian population, the accused Eyad A., as an employee of the Syrian General Intelligence Service, helped to seriously deprive a total of 30 people of their physical liberty in branch 251 prison and to torture them while they were held there as a member of Branch 40 of the Syrian General Intelligence Service in September/October 2011, after the violent breakup of a demonstration in Douma, he and colleagues searched the streets for fleeing demonstrators and finally arrested 30 people and took them to Branch 251 prison. The accused accompanied the transport of the demonstrators in one of the buses and saw that they were being beaten on the way to the prison as well as on arrival at the prison. In prison, the detainees were then brutally mistreated and systematically tortured. The accused, Eyad A., was already aware of the regular and systematic torture in Ward 251 prison when the demonstrators were arrested and accepted the torture of those arrested with approval. He also expected the torture to be part of a planned, organized government crackdown on opposition forces.

These findings of the Senate are based on the statements of the numerous witnesses questioned, on the information provided by the experts, the documentary and visual evidence collected and, to a large extent, on the information provided by the accused Eyad A. himself. He did not comment on the allegation throughout the criminal proceedings. In May 2018, however, he revealed his work for the secret service in a hearing in the asylum procedure, but initially only revealed himself as an "eyewitness" to violent attacks. Finally, during a police interrogation in August 2018, he disclosed his involvement in the persecution ...

...

**ROGER LU PHILLIPS, A DROP IN THE OCEAN: A PRELIMINARY ASSESSMENT OF THE
KOBLENZ TRIAL ON SYRIAN TORTURE
JUST SECURITY, (22 APRIL 2021)⁵⁷³**

...

... The case had special resonance because some of the victims from Branch 251 were depicted in the Caesar Files which show the bodies of several thousand victims of torture in photographs smuggled out of Syria by a military photographer. ...

...

So far, universal jurisdiction has proven to be the most viable option for Syrians to obtain a measure of justice in the near term, particularly in Germany, Sweden, the Netherlands, and France where there are sizeable populations of Syrians and special war crimes units mandated to conduct such investigations. ...

⁵⁷³ Analysis based on The Syria Justice and Accountability Centre, *Between Hope and Despair: A Way Forward after the Koblenz Trial* (2022)

Limits of Universal Jurisdiction

...

Hundreds of thousands of Syrians have sought refuge in Germany, yet very few have attended the proceedings in Koblenz or even know what is happening there. The German Federal Prosecutor chose to file charges in the provincial court likely to avoid a backlog of cases in other locales such as Berlin, where there is a large Syrian population. But the result was to deprive many Syrians of an opportunity to see justice at work. When they did attend, they were not permitted access to the Arabic language interpretation, which is produced for the benefit of the defendants and plaintiffs. ...

The court's approach to witness protection could also be described as clumsy. On several occasions, witnesses were hesitant to speak and expressed concerns for the safety of family members living in Syria, Turkey, and even Europe. It was not apparent that the court had advance notice of these concerns and the issues were addressed as they arose in court. ...

Syrian audiences were likewise perplexed by the decision to charge Eyad Al-Gharib despite his low rank and the fact that he defected from the regime, not to mention his apparent cooperation with authorities in the investigation of [another accused] Anwar Raslan. Other witnesses with the same or more significant responsibility testified in the trial and were not charged by the prosecutor. This created confusion as to the German Federal Prosecutor's policy, leading Al-Gharib's counsel to question what criteria were used to open criminal proceedings in Germany. It also contributed to the reticence of insider witnesses to cooperate with investigators and prosecutors. This will likely create obstacles to building cases against senior leaders and begs the question as to who of the millions of Syrians with some connection to the Syrian government should be prosecuted. This will be a significant challenge as Syrians grapple with the conflict of the last 10 years and chart a path forward that includes comprehensive justice and the possibility of reconciliation.

Sweden⁵⁷⁴

Sweden ratified the Rome Statute of the International Criminal Court in 2002. The Swedish Criminal Code (SCC) and the Swedish Act on Criminal Responsibility for Genocide already covered some of the relevant crimes, but in 2014 a new law codifying the Rome Statute was incorporated into Swedish law through the Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes incorporated the Rome Statute into Swedish law. Its coverage includes genocide, crimes against humanity, and war crimes, and a range of other crimes provided for in the Statute. It also allows for universal jurisdiction for those crimes as well as any other crime which carries a minimum sentence of four years under Swedish law.

LENA BJURSTRÖM, SWEDEN ON THE FRONTLINE WITH SYRIA CASES JUSTICEINFO.NET (11 FEBRUARY 2021)

...

On 10 February 2015, Syrian rebel Mouhannad Droubi appeared before the District Court of Södertörn, south of Stockholm. Droubi, a veteran of the Free Syrian Army (ASL) and refugee in Sweden since September 2013, was charged with particularly aggravated assault and accused of war crimes. In a video broadcast on Facebook in the summer of 2012, he is seen beating up a supposed soldier of the Syrian loyalist army and threatening to cut out his tongue. The video, which he himself posted online, got lost in the limbo of social networks before being anonymously transmitted to the Swedish police in July 2014, leading to an investigation and his arrest three months later.

... After several twists and turns in the trial and appeal, Droubi was finally sentenced to eight years in prison for this crime in August 2016.

...

This created controversy in the Syrian community in exile [because it] concerned a member of the opposition. At a time when evidence of the multiple crimes committed by the regime were

⁵⁷⁴ See Open Society Justice Initiative and Trial International, *Universal Jurisdiction Law and Practice in Sweden*, (April 2020).

accumulating, the conviction of the former ASL soldier rubbed some people up the wrong way, especially when this case was followed a few months later in Sweden by a life sentence on another rebel fighter, Haisam Omar Sakhanh, for the execution of seven regular army soldiers.

... [In order to educate the public, the] Swedish police then developed brochures in several languages, including Arabic, explaining the work carried out and calling on Syrians to testify.

Founded in 2008, the International Crimes Unit of the Swedish Public Prosecutor's Office now has 16 prosecutors, assisted by 15 officers from the war crimes unit of the national police. ...

In September 2017, ... a former soldier in Bashar Al-Assad's army [was convicted]. Mohammed Abdullah had been spotted on his arrival in Sweden in 2015 by the Syrian human rights organization Al Kawakibi and reported to the asylum office and then the police. First arrested in 2016, the former soldier was first released for lack of evidence, despite strong suspicions. It was a photo in which he posed smiling, with his foot on a pile of corpses, that allowed him to be charged the following year and sentenced to eight months in prison for "outrages upon human dignity" as a war crime. [The murder charge had to be dropped, for lack of sufficient evidence.]

At the same time, the Swedish Public Prosecutor's Office opened a wide-ranging investigation as early as 2015. ...[According to Hanna Lemoine, a prosecutor:] "We learned lessons from investigations in Rwanda, where we heard victims and witnesses of events that happened more than 20 years ago. We understood that if we could have catalogued evidence and documented these events earlier, it would have been better. ... Since we have an important Syrian community in Sweden, we understood there was potentially a lot of evidence in our country regarding the crimes committed in Syria"

[A]bout 50 individual investigations are now underway in Sweden While the majority concern former members of Daesh, particularly foreign fighters, a few cases concern individuals affiliated with other rebel groups, and about ten concern individuals linked to the Syrian regime. ...

[But the future of such prosecutions in Sweden remains uncertain. In] any case involving universal jurisdiction, Swedish prosecutors must seek express authorization from the government before any indictment. "No criteria [for justification] are mentioned in the law, which gives the government wide discretionary power," notes a report by the NGOs Trial International and Open Society Justice Initiative on Swedish universal jurisdiction. "This could potentially be a major obstacle to prosecution of foreigners, especially high ranking ones, and there is no recourse available to challenge the government's exercise of decision." To date, this authorization has never been refused. But the Syrian suspects pursued in Sweden were only subordinates, present on the territory. And so far, Sweden has never issued international arrest warrants in such cases.

...

**WOLFGANG KALECK AND PATRICK KROKER, SYRIAN TORTURE INVESTIGATIONS IN
GERMANY AND BEYOND:
BREATHING NEW LIFE INTO UNIVERSAL JURISDICTION IN EUROPE?
16 J. INT'L CRIM. JUST. (2018) 165**

The structural investigations regarding Syria ... demonstrate that a more nuanced approach to UJ offers an avenue to fill the gaps in (the incomplete and imperfect) system of international criminal law. Additionally, they allow for strategic investigations into atrocity crimes for which there are no other judicial forum. This prosecutorial technique further enables the authorities to investigate powerful actors at least in the beginning, without directly being exposed to political pressure since they are not focused on specific incidents or suspects, thus avoiding strong political reactions and interference by states whose elite might be under investigation. Yet, structural investigations can ultimately yield tangible results in the form of arrest warrants issued against persons most responsible for heinous crimes if individual investigations against them are opened. They thus allow the German Federal Prosecutor to balance the rationale of 'no-safe haven' approach and to avoid what Langer calls the

‘high political cost’, namely an approach that takes into consideration the important role of national jurisdictions in the patchwork of international justice.

The combination of trials against suspects arrested on European territory and the initiation of broader investigations against those who bear the most responsibility... show that the ‘no-safe haven’ and the ‘global-enforcer approach’ can complement each other and that this combination can serve as an interesting model for a modern and pragmatic approach to revitalizing UJ in Europe.

**MÁXIMO LANGER AND MACKENZIE EASON, THE QUIET EXPANSION OF UNIVERSAL
JURISDICTION
30 EUR. J. INT’L L. (2019) 779**

...

2 The Numerical Expansion of Universal Jurisdiction

...

A. Complaints and Cases Considered by Authorities by Their Own Motion (Propio Motu Investigations)

...Before 1988, there were 286 universal jurisdiction cases initiated. In the decade between 1988 and 1997, 342 universal jurisdiction cases were initiated. In the following decade – 1998–2007 – there were 503 such cases. And, [between 2008 and 2017] there were 815 new universal jurisdiction cases, which represents a total nearly as high as the two previous decades combined.

...

B. Completed Trials

[T]here were 32 universal jurisdiction cases that resulted in a completed trial between 1961 and June 2010. In our 2016–2018 updating of the Langer-Eason Database, we found 29 universal jurisdiction trials that were completed between July 2010 and 2017. ...

...

C. Explanatory Factors

...

1 ICC Implementing Legislation

One such factor could be the adoption of new universal jurisdiction provisions, generally as part of the domestic implementation of the Rome Statute. Such statutory changes set the stage for the expansion in both universal jurisdiction complaints and trials by increasing the range of venues in which it is possible for universal jurisdiction claims to be heard.

2 Creation of Specialized Investigative Units

In addition to these statutory changes leading to a greater number of venues in which universal jurisdiction litigation is permitted, the increasing frequency and regularity of universal jurisdiction cases and trials is also likely due in part to a series of institutional changes and processes that have increased the number of venues in which universal jurisdiction is logistically possible. One of these institutional changes has been the creation of special international crimes units in the police and/or in the office of the prosecutor or among investigating judges. ...

3 Institutional Learning

... The term ‘institutional learning’ refers to the ‘capability’ of complex institutions to ‘learn about, adapt and change’ both their institutional frameworks and operational strategies over time. ...

We can see evidence of ... state officials involved with universal jurisdiction investigations and trials ... 'learning by doing' and 'learning by using', becoming more effective/efficient the more cases they conduct. ... [E]xperience conducting universal jurisdiction cases generates institutional knowledge that facilitates holding more universal jurisdiction trials in the future.

...

4 Technological Change

... [T]echnological shifts ... have reduced the logistical difficulty and economic cost of universal jurisdiction investigations and litigation. The first of these is the increase in the availability of Internet-connected devices capable of audio/video/photo recording and the use of this technology to document the kinds of abuses criminalized under international law. As smartphones are becoming ubiquitous even in the poorest and most conflict prone areas of the world, more and more individuals have the means to reliably and clearly 'record and document acts of atrocity'. As these devices are also connected to the Internet, this same technological shift has made it easier for victims to send this documentary evidence directly to advocates or to share it with others via social media.

...

1 The Trial of Hissène Habré in Senegal

... Hissène Habré was the president of Chad from 1982 to 1990. During his rule, arbitrary arrests, torture, enforced disappearances, extrajudicial executions and other abuses were committed against political opponents and members of different ethnic groups. When Habré was deposed in 1990, he fled to Senegal. ... On 25 January 2000, seven Chadian nationals, together with an association of victims, filed a complaint before an investigating judge in Senegal, with a civil party application. On 4 July 2000, the Appeals Chamber in Senegal held that Senegalese courts did not have jurisdiction over the case given that the Senegalese Criminal Procedure Code did not provide for universal jurisdiction. In 30 November 2000, a group of victims filed another complaint against Habré in Belgium based on the principle of universal jurisdiction. In 2001, victims filed a case against Senegal with the United Nations Committee against Torture that called Senegal to keep Habré there.

On 19 September 2005, the Belgian investigating judge issued an arrest warrant against Habré for torture, genocide, crimes against humanity and war crimes and requested his extradition from Senegal. On 25 November 2005, the Appeals Chamber of Senegal held that it could not extend its jurisdiction to matters relating to the investigation or prosecution of a former head of state for acts allegedly committed during the exercise of his functions. The day after the delivery of this judgment, Senegal referred to the African Union the issue of the institution of proceedings against this former head of state. In early 2006, the United Nations Committee against Torture ruled that Senegal had violated the Convention against Torture by failing to extradite or prosecute Habré. In July 2006, the African Union's Assembly of Heads of State and Government 'decid[ed] to consider the Hissène Habré case as falling within the competence of the African Union, ... mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees of a fair trial' and 'mandate[d] the Chairperson of the [African] Union ... to provide Senegal with the necessary assistance for the effective conduct of the trial'.

In 2007, Senegal amended its laws to give universal jurisdiction to its courts over core international crimes and to establish the rest of the legal framework to be able to try Habré in Senegal. In 2010, Senegal negotiated with donors to pay a budget of €8.6 million for the costs of the trial. In the meantime, Belgium instituted proceedings against Senegal in 2009 before the International Court of Justice (ICJ), and, on 20 July 2012, the ICJ ruled that Senegal had the duty to prosecute or extradite the case under the Convention against Torture. Only four days later, Senegal and the African Union agreed to establish the 'Extraordinary African Chambers in the Senegalese Courts'. The Statute of the Extraordinary African Chambers, annexed to the agreement, established that the official capacity of the accused did not relieve him of criminal responsibility. On 30 May 2016, the Trial Chamber composed by two Senegalese judges and a judge from Burkina Faso convicted Habré for [crimes against humanity, torture, and war crimes]. It sentenced him to life imprisonment. On 27 April 2017,

the Appeals Chamber – a body composed of three judges, one from the Republic of Mali and two from Senegal – confirmed most of the convictions against Habré issued by the Trial Chamber and further ordered Habré to pay 82.290 million West African francs (€123 million) in compensation to victims.

...

B Quiet Expansion

The quiet character of this expansion of universal jurisdiction can also be considered a positive development. First, against predictions that universal jurisdiction would deeply disrupt international relations among states or interfere with transitions to democracy or to peace, the quiet expansion of it suggests that it has not. Similarly, against concerns that universal jurisdiction trials would engage in global vigilante justice that would infringe on the sovereignty of other states, the quiet expansion of universal jurisdiction also suggests that this has not happened either. ...

...

* * *

Trial International's *Universal Jurisdiction Annual Review 2023*, at 10, notes that 'countries, with little or no experience with the specificities of investigating international crimes, also took legal action to respond to the atrocities committed in Ukraine,' partly in response to an influx of Ukrainian asylum-seekers. The review noted the resulting 'real risk of duplication, overdocumentation and re-traumatization of victims, in particular taking into account [the] varying levels of expertise [of the investigators].' This is consistent with the cases in Germany and Sweden in which migrants from countries in which they were persecuted act as a stimulus to universal jurisdiction cases. Leslie Johns, Máximo Langer, and Margaret E. Peters, in 'Migration and the Demand for Transnational Justice', 116 *Am. Pol. Sci. Rev.* (2022) 1184 reflect on the dynamics involved:

... [W]hen individuals migrate from repressive societies, they often have grievances that were not adequately remedied in their sending state. These grievances can motivate migrants to seek transnational justice when they arrive in a receiving state.¹ Migrants have numerous tactics for achieving transnational justice including reporting crimes to authorities, providing evidence and witness testimony, increasing public awareness of atrocities, and lobbying government elites to take action. In some states, they can even launch private prosecutions. However, these demands will only yield transnational justice if enough migrants demand that the receiving state take action. Our main theoretical claim is that higher migrant stocks from a sending state increase the likelihood of criminal cases by the receiving state for acts that occurred in the sending state. We additionally argue that universal jurisdiction cases are more likely when there are more severe atrocities in the sending state; the government of the receiving state is more responsive to political demands; and the economic, legal, and political costs of prosecutions are lower. In sum, transnational justice is a justice remittance, in which migrants provide accountability and remedies for crimes in their sending states. ...

...

... [O]ur evidence counters the claim that universal jurisdiction is a form of "judicial tyranny" by domestic courts seeking to intervene in foreign states. [D]omestic courts ... usually have links to the alleged crimes because victims are living in the prosecuting state. Additionally, most states do not allow actual trials to occur unless the defendant is physically present, meaning that prosecuting states often deny "safe harbor" to an international criminal within their borders, rather than to merely project neo-imperial power abroad. Indeed, the UK's refusal to extradite Pinochet ultimately stymied the Spanish prosecution.

Extradition proceedings therefore serve as a check on overzealous domestic prosecutions.

While most of the commentaries above reflect an assumption that the growth in universal jurisdiction cases is clearly a positive development, Brianne McGonigle Leyh, in ‘Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes’, 16 *Int’l J. Transitional Just.* (2022) 363, draws attention to three risks involved:

Over-Documentation and Contestation Amongst Civil Society Actors

... [O]ver-documentation ... is a risk both for the safety and well-being of the victims as well as for the reliability and usability of the information gathered. The risk of over-documentation involves situations where victims are repeatedly asked, by numerous and varied actors, to retell their stories again and again. In many of these situations, victims are unaware of who is recording their story or what it will be used for.

Having to recount traumatic experiences multiple times to multiple actors, who are often strangers, can lead to what experts call ‘interview fatigue,’ and re-traumatization. ...

Concerns around the well-being and re-traumatization of victims are also connected to questions about the quality and accuracy of the information collected. Research indicates that when victims or witnesses recount something multiple times, the reliability of their statement declines. Inaccurate and unreliable statements harm justice processes, and present obstacles to building successful cases. ...

Poor Conduct and Lack of Oversight

Another risk has to do with limited codes of conduct and a lack of oversight. The same ethical and professional standards that apply to domestic investigators and prosecutors do not apply to private investigators. ... Furthermore, the lack of democratic legitimacy, oversight and accountability (coupled in some cases with geographic distance between the victim communities and the international NGOs) is problematic in relation to the rights of others as well as the reliability of the process as a whole.

...

Dominance of the Domestic Criminal Law of European States

With a few exceptions, such as the Hissène Habré case in Senegal and recent developments in Argentina, European states are dominating the accountability landscape when it comes to universal jurisdiction cases for serious international crimes. Since 2009, there has been a ‘significant’ shift in terms of which European states are pursuing investigations and prosecutions. ... [W]hat does this dominance mean for the international criminal law landscape and how does it pose a risk?

... A shift to European domestic systems, away from global institutions, carries three risks: (i) a reproduction of colonial dynamics whereby actors in the Global North exercise jurisdiction over ‘others’ in the South, marginalizing local groups and contributing to a two-tiered system of justice; (ii) substantive fragmentation whereby domestic crime interpretation may prevail over that of global institutions; and (iii) procedural obstacles for participating and non-participating victims and affected communities in the foreign domestic jurisdiction.

... European interest will in all likelihood prevail when it comes to case selection or any other politically sensitive topic. If cases become too sensitive (for instance they begin to target Western allies) ... there will likely be a curtailing of universal jurisdiction. There is an obvious hypocrisy here. This is also the case when funding comes directly from Western states known to oppose foreign accountability processes directed at their own citizens or allies. Additionally, there is a 'danger of a colonial power dynamic (white saviour complex)' between the Western-based NGOs and the grassroots organizations and populations they are working with and 'assisting.' Care must be taken not to marginalize the voices and interests of affected groups. ...

QUESTION

Do you see any downsides, from a human rights perspective, in the rapid increase in cases invoking universal jurisdiction? Is the North-South dynamic problematic? What might the alternative be?

D. CIVIL LITIGATION IN THE UNITED STATES AND GLOBAL COMPARISONS

As with universal jurisdiction, which has waxed, waned and now appears to be on the rise once more, efforts by victims of human rights violations by governments or corporations to obtain redress through civil action in domestic courts have seen mixed results over the last two decades. From the 1980s to the early 2000s, an important line of cases in the United States successfully utilized the 1789 Alien Tort Statute (ATS) (28 U.S.C. 1350) to secure accountability for perpetrators of human rights abuses located in the U.S. It provides that: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

Largely overlooked for almost two centuries, it was given new life by in *Filártiga v. Peña-Irala* (630 F.2d 876 (2d Cir. 1980)) in which the court permitted two Paraguayan citizens, Dr Joel Filártiga and his daughter, to file an ATS suit against a Paraguayan official for allegedly torturing to death Dr Filártiga's teenage son. That decision has since been cited, for various propositions, in well over two hundred U.S. federal court cases. Other federal courts subsequently permitted suits to be brought under the ATS for international law violations including genocide, slavery, disappearances and war crimes. Congressional passage of the U.S. Torture Victim Protection Act of 1991 added another dimension to the opportunities afforded by the ATS for human rights litigation in U.S. courts.

However, in 2004 the Supreme Court significantly limited the causes of action under the ATS (*Sosa v. Alvarez Machain* (542 U.S. 692)). Since then, the Court has continued to narrow the scope of the ATS further in a series of cases, to the point where it has now effectively eliminated its utility as a route to compensation for victims of human rights violations. In contrast, other Global North jurisdictions are becoming more hospitable to such litigation. Thus, the European Union has mandated human rights due diligence for larger companies, while courts in Canada, the United Kingdom and the Netherlands have recently ruled in favour of victims of human rights abuses.

1. The Alien Tort Statute

The early successes of the ATS had political as well as legal consequences. As noted by Oona A. Hathaway et al. in 'Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment', 107 *Cornell L. Rev.* (2022) 1205, at 1207:

Even as it was celebrated by human rights advocates, the ATS became the bane of some scholars, lawyers, judges, and U.S. administrations who came to regard its use by human rights advocates as an inappropriate effort to challenge U.S. foreign policy through the courts. When advocates began using the ATS against U.S. and foreign officials, the U.S. government treated the ATS as a growing threat. In the 2000s, the Bush Administration regularly weighed into ATS suits in favor of defendants. Around the same period, ATS lawyers trained their sites on corporations they alleged were complicit in human rights abuses. These corporations had deep pockets that offered the potential of meaningful compensation for plaintiff victims.

Further, while earlier cases like *Filártiga* had targeted foreign government officials, litigants also began to bring ATS claims against the U.S. government in relation to the interventions in Afghanistan and Iraq in the early 2000s. It was against the background of these broader political considerations that the Supreme Court was called upon to decide the future of the ATS in *Sosa v Alvarez-Machain*.

a. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)

The Court summarised the background to this case as follows:

In 1985, an agent of the Drug Enforcement Administration (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture.

In 1990, a federal grand jury indicted Alvarez for the torture and murder of Camarena-Salazar, and the United States District Court for the Central District of California issued a warrant for his arrest. The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.

Alvarez was acquitted of the charges brought against him in 1992 and subsequently sought damages from Sosa under the ATS. He was successful before the Ninth Circuit, and certiorari was granted to the Supreme Court to clarify the scope of the ATS. That is, in the absence of statutory clarification of what constituted 'a tort ... committed in violation of the law of nations or a treaty of the United States', what kinds of claims could be brought under the statute? Did the ATS create a substantive right to bring claims for violation of customary international law, or was it merely 'a jurisdictional statute creating no new causes of action'?

The majority leaned toward the latter conclusion. It held that the scope of the international norms and violations thereof covered by the ATS was restricted to those which had been in the conception of the drafters at the time of its passage in 1789:

... There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section... . Still, the history does tend to support ... [the proposition] that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative

mind appears to have been offenses against ambassadors; violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims.

However, the majority did not entirely foreclose the possibility that the ATS could be extended by analogy to *some* causes of action under modern customary international law:

We assume, too, that no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law... .Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. ...

The majority warned that significant judicial caution should be exercised in expanding the scope of the ATS beyond ‘offenses against ambassadors; violations of safe conduct ... and individual actions arising out of prize captures and piracy’. Reasons for this caution included the 1938 decision of *Erie R. Co. v. Tompkins*, 304 U.S. 64, which ‘denied the existence of any federal “general” common law’; the Court’s preference for leaving to Congress any decision to create a private right of action; concerns about the foreign policy implications of ATS claims; and a wariness towards ‘judicial creativity’ in seeking out violations of the law of nations.

In contrast, Justice Scalia’s concurring judgment (Chief Justice Rehnquist and Justice Thomas joining) powerfully disagreed that any new causes of action could be created under the ATS:

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today’s opinion approves that process in principle, though urging the lower courts to be more restrained.

This Court seems incapable of admitting that some matters — any matters — are none of its business. ...In today’s latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then — repeating the same formula the ambitious lower courts themselves have used — invites them to try again.

b. The ATS after *Sosa*

The lower courts did, as Scalia warned, try again. In *Kiobel v. Royal Dutch Petroleum Co.* 569 U.S. 108 (2013), applicants argued that oil companies headquartered in the Netherlands, Britain and Nigeria had aided and abetted violations of the law of nations committed by the Nigerian government against the Ogoni people in the Niger Delta. In the 1990s, Ogoni communities had protested the environmental damage caused by oil drilling in the region, and – per the complaint – oil companies had ‘enlisted the Nigerian Government to violently suppress the burgeoning demonstrations.’ The claimants alleged that the respondents had assisted in the commission of the atrocities by ‘providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents’ property as a staging ground for attacks.’

The lack of a clear nexus with the United States, however, proved fatal to the claim. As Oona A. Hathaway et al. (above) describe, at 1237:

In its decision in 2013, the Supreme Court held that the ATS cause of action did not apply to wholly extraterritorial conduct. Only claims that “touch and concern the territory of the United States . . . with sufficient force” will “displace the presumption against extraterritoriality,” and that “mere corporate presence” in the United States is insufficient. In the end, the Court did not rule on the question of corporate liability, though each side found language in the opinion to favor their view.

The Supreme Court went further in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). In this case, the petitioners were victims of terror attacks in Israel and Palestine to which, they alleged, the Jordanian bank had made financial contributions. The Court held that foreign corporations could not be subject to ATS liability under any circumstances, on the basis that (a) it was not clear that a universal norm of corporate responsibility for human rights violations had coalesced as a ‘violation of the law of nations’; and (b) the foreign policy implications of imposing liability on foreign corporations make it appropriate for the Court to defer to Congress to determine whether it is ‘prudent and necessary’ to do so. But if *Jesner* established that foreign companies were immune from ATS prosecution, what of domestic corporations?

In 2021, the Supreme Court handed down its decision in *Nestlé USA, Inc. v. Doe et al.*, 141 S. Ct. 1931, concerning allegations that U.S.-based chocolate companies Nestlé and Cargill had aided and abetted the use of child labour and forced labour on cacao plantations in West Africa. Oona A. Hathaway, in ‘*Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe*: The Twists and Turns of the Alien Tort Statute’, 5 *Am. Const. Soc. Sup. Ct. Rev.* (2021) 163, summarizes the majority’s reasoning at 173:

Justice Thomas, writing for eight justices (only Justice Alito declined to join), did not apply the “touch and concern” test from *Kiobel*, but instead relied on an intervening decision, *RJR Nabisco, Inc. v. European Community*, in which the Court articulated a two-step framework. First, “we presume that a statute only applies domestically” and ask “whether the statute gives a clear, affirmative indication’ that rebuts this presumption.” Second, where the statute does not overcome the presumption against extraterritoriality, “plaintiffs must establish that ‘the conduct relevant to the statute’s focus occurred in the United States.’” Here, Justice Thomas writes, the statute does not apply extraterritorially, so the question is whether the conduct meets the second step of *RJR*. Justice Thomas, joined by seven other justices, says no: “Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast.” The Ninth Circuit had allowed the case to proceed because plaintiffs—respondents here—pleaded that “every major operational decision by both companies is made in or approved in the U.S.” But “general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.” In *Kiobel*, the Court had held that it was not enough to simply allege “mere corporate presence.” Here, Justice Thomas writes, “Pleading general corporate activity is no better.” He elaborates, “generic allegations of this sort do not draw a sufficient connection between the cause of actions respondents seek—aiding and abetting forced labor overseas—and domestic conduct.” He concludes, “To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity.”

For many commentators, the Court’s reasoning on jurisdiction effectively foreclosed the ATS as a route to corporate accountability for human rights abuses. If ‘general corporate activity’ – such as operational decision-making, payments and other assistance to alleged violators, and lobbying against transparency regulations – was insufficiently connected with the statute’s focus to rebut the

presumption against extraterritoriality, it is unclear which, if any, activities would suffice to establish jurisdiction.

In some respects, however, the Court's decision did not neuter the ATS to the extent some had feared. The majority did not favour an interpretation of the ATS which would involve total immunity for corporate defendants: five judges made it clear in their opinions that they would reject such an interpretation, while the remainder were silent on the issue. Further, only Justices Thomas, Gorsuch and Kavanaugh would have followed Justice Scalia in limiting causes of action under the ATS to the three historical offences identified in *Sosa*. Oona A. Hathaway (above, 5 *Am. Const. Soc. Sup. Ct. Rev.* (2021) at 174 provides a tentatively optimistic interpretation of the Court's reasoning:

But what about corporate cases? It's possible that the Court means exactly what it says—it's not enough to assert "general corporate activity." Instead, the pleadings should have done more to connect the dots between the human rights violations that took place in Ivory Coast and the corporate decisions made in the United States. ...

...

Some or all of the justices (though, interestingly, not Justice Alito himself) may have come away from [the plaintiffs' oral argument] convinced that the pleadings were not sufficiently specific to establish that corporate conduct that supported aiding and abetting liability took place in the United States. If that is correct, then the impact of *Nestlé* might be less significant, at least for corporate cases. It would simply mean that plaintiffs must more specifically allege that the corporate conduct in the United States specifically aided and abetted the human rights violations abroad.

c. The future of the ATS

Many commentators do not, however, share Hathaway's optimism for the future of corporate accountability claims under the ATS. The post-*Nestlé* ATS has been described as 'functionally ... dead letter as a tool to address transnational human-rights violations by companies'.⁵⁷⁵ Clara Petch, in 'What Remains of the Alien Tort Statute after *Nestlé USA, Inc. v. Doe?*', 42 *Nw. J. Int'l L. & Bus.* (2022) 397 at 420 is circumspect in her analysis:

...despite the Supreme Court's continual chipping away of the ATS's jurisdictional reach, the ATS still formally provides avenues for bringing suit. As far as named defendants are concerned, ATS precedent permits suit against domestic parties. While there is debate over whether the ATS authorizes liability for any foreign party, the Supreme Court has not yet foreclosed the option to sue a foreign individual. With respect to causes of action, plaintiffs can bring suit for specifically defined and universally accepted international offenses under *Sosa*, including genocide, war crimes, crimes against humanity, slavery, and terrorism.

However, neither an egregious violation of international law nor a domestic defendant engaging in activities within the United States alone will establish grounds for jurisdiction. The pattern of litigation over the past decade indicates that the presumption against extraterritoriality and foreign policy concerns enshrined in the modern ATS framework present significant obstacles. As a practical matter, it is striking that the Supreme Court has never permitted jurisdiction for an ATS suit and has progressively carved away at the scope of

⁵⁷⁵ C. Ryerson, D. Pinkert, and A. Kelly, 'Seeking Justice: The State of Transnational Corporate Accountability', *The Yale L. J. F.* (22 December 2022), 806.

the statute. While, from a doctrinal standpoint, there may still be available avenues for bringing ATS claims, the current trend suggests that the Supreme Court would foreclose them when given the opportunity. Therefore, it would be inadvisable for potential litigants to deplete their resources in the pursuit of ATS litigation at this time.

Legislative reform of the ATS has been proposed as one solution. The Alien Tort Statute Clarification Act (ATSCA) was introduced in 2022 by Senators Dick Durbin (D-IL) and Sherrod Brown (D-OH). It aims to clarify that the statute's extraterritorial application extends to 'any tort...if ... an alleged defendant is a national of the United States or an alien lawfully admitted for permanent residence ... or an alleged defendant is present in the United States, irrespective of the nationality of the alleged defendant'. This language mirrors the 2008 amendment to the Trafficking Victims Protection Reauthorization Act (TVPRA), which has been accepted by U.S. courts as extending the statute's extraterritorial application to corporations as well as natural persons, as well as European Union regulations limiting *forum non conveniens* and extraterritoriality doctrines. However, Hassan M. Ahmad, in 'Judicial Activism in Transnational Business and Human Rights Litigation', 42 *Berkeley J. Int'l L.* (2024) cautions that:

... the ATSCA is unlikely to pass into law. Distinct from the Torture Victim Protection Act (TVPA) and the Trafficking Victims Protections Reauthorization Act that cannot compel corporations to compensate foreign plaintiffs, the ATSCA ... would allow for foreign plaintiffs to access corporate revenues. Given that some of the largest U.S.-headquartered MNCs that undertake extractive and manufacturing operations in the Global South have considerable lobbying power over Congress and have previously avowed to oppose attempts at finding them liable for human rights violations abroad "until hell freezes over", it is improbable they will likely let up now. ...

Unless a reformed ATS becomes a reality, or the Supreme Court signals a change of course, it is likely that suits under the statute will continue to decline. In their retrospective on the ATS, Oona A. Hathaway et al. (above) suggest (at 1299) that this may be a helpful juncture to critically evaluate both the statute's impact and the role of strategic litigation generally:

Has the ATS made a difference? Yes, but not necessarily in the ways one might expect. ATS suits have not been very successful in bringing about monetary awards that are actually paid. Nonetheless, the process of litigation has led to a number of significant monetary settlements, including for the plaintiffs in Nestle. ... Moreover, the incidence of private settlement of ATS complaints has brought to the fore the tension between the material and normative aims of human rights cases, because private dispute resolution generally precludes public scrutiny of the human rights violations, and it often represents a missed opportunity to affirm and develop legal norms and standards of accountability.

ATS litigation has also brought normative benefits not always reflected in financial payments: Through the process of litigation, survivors of human rights abuse have been able to exercise their voices and reclaim a measure of dignity by defending their rights. ATS suits have also exposed inadequacies in the current legal regime, providing ammunition to human rights organizations that advocate for legal and policy reform. Perhaps the greatest contribution of ATS suits to the collective interest in greater accountability for human rights abuse has been the exposure of the mismatch between social expectations about the protection of human rights and the actual legal protection of these rights. ...

The story of the ATS offers [broader] lessons By design, litigation alone cannot bring about broad social change. Instead, litigation is most effective when used in tandem with other strategies—including activism, harnessing media attention, and highlighting the individual stories of those who have long

been ignored to bring about legislative reform and change in practice on the ground. ... It may be that the ATS will make its greatest difference by exposing the limits of litigation alone to secure even the most basic human rights.

QUESTIONS

1. Other than the three historical paradigms identified in *Sosa* and subsequent cases, which violations of the law of nations might plausibly constitute causes of action under the ATS? Do you agree with the Supreme Court's decision to restrict possible causes of action in this manner?
2. What challenges might a claimant face in pleading specific corporate activity tying a company's actions in the United States to human rights abuses in other countries?
3. How do you explain the evolution of the Court's approach to jurisdiction, from the 'touch and concern' test in *Kiobel* to its application of the *Nabisco* test in *Nestle*?

2. Other Avenues for Civil Litigation in the United States

Some alternative statutory avenues exist through which victims of foreign human rights abuses may seek compensation.⁵⁷⁶ However, the extent to which these can provide broad-based relief, particularly in cases against corporations, remains unclear.

a. The Torture Victim Protection Act (TVPA)⁵⁷⁷

The TVPA, passed in 1991, was intended to complement the ATS and carry out the intent of the Convention Against Torture, which the United States had ratified the year prior. It provides rights for both citizens and non-citizens to bring civil suits against natural persons for acts of torture and extrajudicial killing committed outside the United States. The TVPA is in some respects more favourable to claimants than the ATS: extraterritorial jurisdiction under the TVPA is explicitly authorized and unambiguous, and plaintiffs may be either aliens or U.S. nationals. While the statute commenced in 1992, plaintiffs have in some circumstances been able to recover for conduct well before that date, provided that the conduct complained of constituted a violation of relevant customary international law at the time. In *Cabello v. Fernández-Larios*, 402 F.3d 1148, (11th Circuit 2005), for example, the court granted compensation to the estate of a Chilean economist executed by officials of the Pinochet regime during the 1973 'Caravan of Death'.

However, the TVPA has important limitations as a route to civil compensation for victims of overseas human rights abuses. Victims can only recover against natural persons – that is, there is no right of action, including for aiding and abetting, against states, organizations or corporate defendants⁵⁷⁸ – and must have exhausted domestic remedies in the jurisdiction where the torture occurred. Further, a defendant must have acted 'under actual or apparent authority, or color of law, of any foreign nation'.⁵⁷⁹ It is therefore only available where a victim has been subjected to torture by agents of a foreign power, and only against those agents – not, for example, a corporation which aided and abetted the torture.

⁵⁷⁶ See generally E. Aristova and U. Grusic (eds.), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (2023).

⁵⁷⁷ Pub. L. No. 102–256, 106 Stat. 73 (1992).

⁵⁷⁸ See, e.g., *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012).

⁵⁷⁹ TVPA, section 2(a).

b. The Trafficking Victims Protection Reauthorization Act (TVPRA)⁵⁸⁰

The TVPRA has been proposed as a promising alternative route to corporate liability. In addition to providing extraterritorial jurisdiction over crimes associated with forced labour and human trafficking, the TVPRA allows trafficking victims to file civil suits against any defendant who ‘knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in [human trafficking or forced labour]’.

TVPRA lawsuits against corporations using forced labour have seen some success. In 2021, the United States District Court for the Northern Mariana Islands awarded almost \$6,000,000 to Chinese construction workers who had been lured to the island with promises of good wages and U.S. green cards.⁵⁸¹ The defendant corporations (based in mainland China and Hong Kong) charged the plaintiffs large recruitment fees, smuggled them into the island on tourist visas and confiscated their passports, subjected them to up to 24-hour workdays, provided cramped and unsanitary quarters, denied them medical treatment for workplace injuries, and threatened harm or deportation if they reported these conditions.

Attempts to use the TVPRA against corporations for violations that occur further down their supply chains, however, have so far been unsuccessful. In 2021 decision, the District Court of Columbia dismissed a petition brought against a number of large electronic companies by a group of Congolese children forced to work in cobalt mines which supplied the raw materials for the companies’ products.⁵⁸² Notably, the court held that the global supply chains of Apple, Microsoft and others did not constitute a ‘venture’ within the meaning of the TVPRA.

c. Consumer Protection Litigation

As environmental and social governance (ESG) becomes a branding strategy for corporations, State laws governing misleading or deceptive advertising are emerging as a route through which consumers can make companies accountable for these claims. Two cases before State courts as of 2023 illustrate this trend:

- In *Walker v. Nestlé USA*, the plaintiff consumer sued under California consumer and competition statutes in respect of statements displayed on Nestlé products, including that the cocoa was ‘sustainably sourced’, certified by a social auditing agency, and that the company is ‘[s]upporting farmers for better chocolate’. The plaintiff argues that she relied on these claims in purchasing the products, and that these statements are deceptive because the company ‘sources its cocoa from West African plantations which rely on child labor and child slave labor, ...[and that] the child labor conditions have worsened rather than improved since the inception of the “NESTLÉ® Cocoa Plan”’.⁵⁸³ In March 2022, a judge of the California District Court denied Nestlé’s motion to dismiss the case.
- In October 2021, NGO Corporate Accountability Lab commenced proceedings against Hershey and social auditing scheme Rainforest Alliance for false and deceptive marketing representations under Washington, D.C. consumer laws. Its complaint notes that the worst forms of child labour are endemic and well-known in farms in West Africa, from which Hershey sources most of its cocoa.⁵⁸⁴

⁵⁸⁰ 18 U.S.C. § 1589, 18 U.S.C. § 1590, 18 U.S.C. § 1595 and 18 U.S.C. § 1596.

⁵⁸¹ *Wang et al. v. Gold Mantis Construction Decoration LLC.*, United States District Court for the Northern Mariana Islands, Civil Action No. 1:18-cv-00030 (24 May 2021).

⁵⁸² *John Doe v. Apple Inc., et al.*, United States District Court, District of Columbia, Civil Action No. 1:19-cv-03737 (2 November 2021).

⁵⁸³ *Walker v. Nestlé USA, Inc.*, United States District Court, S.D. California, Case No.: 3:19-cv-723-L-DEB (28 March 2022).

⁵⁸⁴ <https://corpaccountabilitylab.org/calblog/2021/11/2/cal-files-suit-against-hershey-and-rainforest-alliance>.

If these cases are successful, strategic consumer protection litigation may be the next frontier for corporate accountability in the United States. These types of cases can incentivize meaningful transparency and better supply chain practices by multinational corporations. However, they offer limited scope for remediating third-party victims of corporate human rights abuses.

d. International Arbitration

Some scholars have proposed that international investment arbitration may be the next frontier for human rights claims against corporations. In 2016, in *Urbaser v. Argentina*, an arbitral tribunal accepted that ‘the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights’.⁵⁸⁵ However, it did not find that this founded an obligation on the part of an investor to provide water and sanitation services in a manner consistent with the local community’s right to water.⁵⁸⁶

The treatment of corporate human rights obligations in *Urbaser* remained somewhat ambivalent. More ambitious proposals exist for incorporating human rights into the investment treaty system: for example, some treaties drafted recently make express reference to human rights. A group of international lawyers published model Rules on Business and Human Rights Arbitration in 2019,⁵⁸⁷ and others have even proposed an international tribunal to resolve human rights complaints related to corporate activity.⁵⁸⁸ However, whether investment arbitration can serve as a suitable vehicle for human rights claims will also depend on whether it can overcome the structural hurdles of confidential proceedings, limited opportunities for third-party intervention, and narrow grounds for appeal.

QUESTIONS

1. Which, if any, of the paradigms above do you think are a convincing alternative to the ATS for victims of overseas human rights violations seeking a civil remedy?
2. How far should a corporation’s liability for human rights abuses in its supply chain extend?

3. Civil Litigation of Human Rights Claims in Other Jurisdictions

As ATS suits recede, plaintiffs are increasingly seeing success in other jurisdictions. Recent decisions in Canada and the United Kingdom, as well as the introduction of mandatory due diligence laws in the European Union, signal a more progressive approach to corporate accountability.

a. Canada

In 2020, the British Columbia Supreme Court handed down a decision in *Nevsun Resources Ltd. v. Araya*.⁵⁸⁹ The defendant, a Vancouver-based mining company, had developed and held a majority stake in an Eritrean mine, pursuant to an agreement with the government. The case was brought by a group of Eritrean refugees living in Canada, who had been indefinitely conscripted to work at the mine pursuant to a national service program. They claimed that their treatment violated prohibitions against slavery, forced labour, cruel, inhuman and degrading treatment and crimes against humanity under

⁵⁸⁵ *Urbaser S.A. et al. v. The Argentine Republic* (Award of 8 December 2016), ICSID Case No. ARB/07/26, at 1199.

⁵⁸⁶ *ibid.*, 1207.

⁵⁸⁷ B. Simma et al., *The Hague Rules on Business and Human Rights Arbitration* (June 2019), <https://www.cilc.nl/cms/wp-content/uploads/2019/06/Draft-BHR-Rules-Final-version-for-Public-consultation.pdf>.

⁵⁸⁸ C. Cronstedt and R. C. Thompson, ‘A Proposal for an International Arbitration Tribunal on Business and Human Rights’, 57 *Harvard Int’l L. J.* (2016) 66.

⁵⁸⁹ [2020] S.C.C. 5 (Can.).

customary international law. *Nevsun* sought to strike out the claim on the basis that (a) the Canadian courts could not assess the sovereign acts of Eritrea's government (the 'act of state' doctrine); and (b) that claims based on customary international law were bound to fail.

The Court dismissed *Nevsun*'s motion. It held by a 7:2 majority that the 'act of state' doctrine did not apply in Canada, and by a 5:4 majority, that customary international law formed part of Canadian common law. It could thus to some degree bind corporations, and be considered by a trial court. The case would not, however, go to trial: the parties reached a confidential settlement later that year.

Although the question whether *Nevsun* was bound by the customary human rights norms was never judicially resolved, *Nevsun v. Araya* is a landmark case. Beatrice A. Walton, in a case note on the decision, suggests that:

... *Nevsun* may well prove a watershed moment for human rights plaintiffs in Canada seeking to invoke customary international law. The opinion also provides a model for other national courts looking to make use of customary international law more generally. *Nevsun* is equally important as a case about corporate social responsibility, particularly in finding that it is possible for a court to apply customary international law to corporations in a suit at common law. After the U.S. Supreme Court's decision in *Arab Bank v. Jesner* that foreign corporations cannot be held liable under the ATS, *Nevsun* provides a resounding reply in substance and in form to the U.S. Supreme Court's increasing hostility to transnational human rights litigation. ...

...

At the most basic level, the fact that customary international law is "part of" the common law means that Canadian courts can fashion new torts inspired by custom, as common law courts do in other areas of law. But the fact that custom is "part of" Canadian law also has significant ramifications for the claims said to be brought under international law "directly." Even with respect to these claims, the majority's approach acknowledges, even embraces, a reasonable degree of discretion in translating international law into the common law. An important example of this comes in relation to the debate over which body of law supplies the various aspects of these claims. ...

...

... The *Nevsun* majority suggests that even if a norm has a strictly interstate character, it may be possible for the common law to "evolve so as to extend the scope of th[e] norm to bind corporations" to corporations (para. 113). Whether these more flexible approaches to custom take hold, and the ultimate success of customary international law claims in Canada, remains to be seen in further appeals.⁵⁹⁰

b. The United Kingdom

In two recent cases, the Supreme Court of the United Kingdom has held that a parent company based in the Global North can in some circumstances owe a duty of care to people affected by the impact of its subsidiaries' activities in other countries.

Vedanta Resources PLC & Anor v Lungowe & Ors [2019] 1 CLC 619 involved negligence and breach of statutory duty claims brought by a group of Zambian citizens against Vedanta and its subsidiary, KCM, claiming that a copper mine run by KCM had polluted local watercourses. In support of their claim

⁵⁹⁰ Beatrice A. Walton, 'Case Note: *Nevsun Resources Ltd. v. Araya*, Case No. 37919' 115 *Am. J. Int'l L.* (2021) 107.

against the parent company, the plaintiffs argued that Vedanta had ‘...exercised a sufficiently high level of supervision and control of the activities at the mine, with sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses, as to incur a duty of care to the claimants.’⁵⁹¹ This supervision, they alleged, was supported by ‘material published by Vedanta in which it asserted its responsibility for the establishment of appropriate group-wide environmental control and sustainability standards, for their implementation throughout the group by training, and for their monitoring and enforcement.’⁵⁹²

The Supreme Court, considering Vedanta’s jurisdictional challenge, found that the claimants’ case was arguable and not an abuse of EU law. In relation to the question whether a parent company could have a duty of care to third parties in respect of its subsidiary’s actions, the court stated:

Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, ... the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.⁵⁹³

The court found the question of whether England (and not Zambia) was the proper forum for the litigation a more difficult question, stating:

This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants’ choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. ...⁵⁹⁴

However, after carefully considering the poverty of the applicants and the lack of funding available to class action participants in Zambia (including the failure of similar cases where claimants had been unable to afford to obtain expert evidence), the court found that it would be unjust to remove the case to Zambian courts.

The reasoning in *Vedanta* was subsequently applied in *Okpabi & Ors v. Royal Dutch Shell Plc & Anor* [2021] WLR 1294, a jurisdictional appeal involving claims by Nigerian plaintiffs that Royal Dutch Shell (RDS) had failed to fulfil its duty of care to properly clean and remediate oil spills from its subsidiary’s infrastructure. As in *Vedanta*, the claimants adduced evidence that RDS ‘exercised significant control over material aspects of SPDC’s operations and/or assumed responsibility for SPDC’s operations, including by the promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals which allegedly failed to protect the appellants against the risk of foreseeable harm arising from SPDC’s operations.’⁵⁹⁵ Applying *Vedanta*, the Court held that the plaintiffs had an arguable case.

⁵⁹¹ *Vedanta Resources PLC & Anor v. Lungowe & Ors* [2019] 1 CLC 619, para. 55.

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*, para 53.

⁵⁹⁴ *Ibid.*, para 87.

⁵⁹⁵ *Okpabi & Ors v. Royal Dutch Shell Plc & Anor* [2021] WLR 1294, para 7.

c. The European Union

Commentators have noted that a ‘growth of legal activism among campaigning NGOs in Europe’ in recent years has strengthened the culture of public interest and impact litigation in the EU.⁵⁹⁶ In the Netherlands, for example, Friends of the Earth supported a group of Nigerian farmers to file claims against Royal Dutch Shell concerning – as in the UK case of *Okpabi* – oil pipeline leaks. This litigation, commenced in 2008, eventually produced a settlement of 15 million euros for the plaintiffs in December 2022.⁵⁹⁷

Another important development in this context is the 2024 European Commission due diligence directive, considered in Ch. 13A, below.

* * *

The developments above indicate that some parts of the Global North are broadening the scope for civil claims against multinational corporations for overseas human rights violations. On one view, this indicates that wealthy countries are increasingly prepared to accept responsibility for damage caused by businesses headquartered in their jurisdictions and from whose profits their economies benefit. On another, confining this kind of litigation to courts outside the countries in which the relevant harms occurred reflects legal imperialism and stunts the development of the law in Global South countries.⁵⁹⁸

E. SOVEREIGN AND OFFICIAL IMMUNITY

Civil suits, especially those pursued under the ATS and TVPA, often end in default judgments and generally do not result in actual payment of damages. Several obstacles thwart the attainment of financial compensation. Individual defendants often do not have deep pockets. In contrast with criminal cases, defendants may also freely leave the country. Also, foreign enforcement of judgments is usually difficult if not practically impossible. Suits against two types of defendants — corporations and governments — do not pose such obstacles. This part considers obstacles that uniquely affect suits against states and state officials, the type of cases in which plaintiffs might have a real prospect of achieving compensation but where principles of immunity can close off such avenues. Indeed, questions of immunity have frequently arisen in cases under the ATS. The first group of cases set out below concerns the ability of plaintiffs to sue a foreign state directly. The second involves attempts to sue particular individuals in their official or personal capacity when those individuals claim to be protected by immunity.

1. Foreign State Immunity from Human Rights Prosecutions

Depending on the jurisdiction in which a claim is brought, foreign state immunity will be governed by complementary and often overlapping regimes derived from customary international law, treaties, and domestic legislation. The principle that a foreign state is (subject to certain enumerated exceptions) immune from the jurisdiction of the courts of another state is well-established in customary international law.⁵⁹⁹ It is also set out the 1972 European Convention on State Immunity (Basle Convention) and the 2004 United Nations Convention on Jurisdictional Immunities of State and Their Property. In the United States, the Foreign Sovereign Immunities Act of 1976 (FSIA), codified principally at 22 U.S.C.A. 1602–11, provides a comprehensive legislative framework for claims of immunity by foreign states, including ‘an agency or instrumentality’ thereof.

⁵⁹⁶ See, e.g., R. Chambers and G. Berger Walliser, ‘The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison’, 58 *Am. Bus. L. J.* (2021) 579, 634.

⁵⁹⁷ Reuters, ‘Shell to pay 15 mln euros in settlement over Nigerian oil spills’ (23 December 2022).

⁵⁹⁸ D. Palombo, ‘Rejecting Jurisdiction to Avoid Imperialism – That Simple?’, *Opinio Juris* (25 June 2021).

⁵⁹⁹ See, e.g. International Law Commission, ‘Jurisdictional Immunities of States and their Property’, 2 Y.B. *Int’l L. Comm’n* (1980) 137 (A/CN.4/SER.A/1980/Add.1 (Part 2)); *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, I.C.J. Rep. 99, paras. 55–57.

Both international and domestic law provide for limited exceptions to the principle of foreign state immunity. The customary law distinction between a state's *acta jure gestionis* (act of management) and *acta jure imperii* (act of government) is reflected in the exclusion of immunity where a state is engaged in a commercial transaction. Other generally accepted exceptions include circumstances where a state has waived its immunity or submitted itself to the jurisdiction; for employment contracts performed in the territory of a foreign state; in proceedings for pecuniary compensation for death, injury or property damage occurring in a foreign state; and in relation to intellectual and industrial property.

The following cases illustrate how domestic, regional and international courts have examined and applied the law of state immunity.

Argentine Republic v. Amerasia Hess Shipping Corp., 488 U.S. 428 (1989), involved an ATS action with origins in the Falklands (Malvinas) war between the United Kingdom and Argentina. It was based on damage to the plaintiff's ship by an attack of Argentinian aircraft. The Supreme Court refused to find an exception to the rule of immunity for suits under the ATS because of Argentina's alleged violation of international law. The Court held that the FSIA is 'the sole basis for obtaining jurisdiction over a foreign state in our courts'. It drew from the FSIA 'the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.' Plaintiffs were accordingly required as a threshold matter to satisfy one of the conditions under the FSIA for suspending sovereign immunity. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), the Court of Appeals agreed with the plaintiff's argument that official acts of torture attributed to Argentina constituted a violation of a *jus cogens* norm of the 'highest status within international law'. Nonetheless, taking its lesson from the *Amerasia Hess* decision in which the Supreme Court was so specific, the court concluded that it was Congress that would have to make any further exceptions to sovereign immunity. 'The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.'

In *Al-Adsani v. United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 35763/97, (21 November 2001), a dual British-Kuwaiti national initiated civil proceedings in the United Kingdom against the Government of Kuwait and individual Kuwaitis for his alleged torture in Kuwait. The UK appellate court permitted Mr Al-Adsani to proceed against the individual Kuwaitis but held that the State Immunity Act 1978 barred suit against the Government of Kuwait. Mr Al-Adsani appealed to the European Court of Human Rights, claiming in significant part that the application of state immunity denied him access to a court in violation of Article 6 of the European Convention. The Grand Chamber, by a slim majority (9 votes to 8), rejected his claim, holding that:

66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

In 2014, the ECtHR affirmed this position in *Jones v. United Kingdom*. This case involved a similar claim by British citizens subjected to torture in Saudi Arabian prisons. Before the European Court, they argued that that the approach in *Al-Adsani* should be reconsidered. The Court declined to do so, holding that it 'was acting in accordance with its obligation to take account of the relevant rules and principles of international law and to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part'.⁶⁰⁰

⁶⁰⁰ *Jones and Others v. The United Kingdom*, European Court of Human Rights, Applications Nos. 34356/06 and 40528/06 (2 June 2014), para. 195.

Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment of 3 February 2012, *I.C.J. Rep.* 99 was a case brought by Germany in response to a series of decisions by Italian courts holding that sovereign immunity did not apply in respect of compensation claims filed by victims of crimes committed by Nazi Germany. The ICJ held that Germany was entitled to immunity, even if the actions of its armed forces and other organs of the state during World War II amounted to violations of *jus cogens* norms:

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

The Court also rejected Italy's argument that sovereign immunity created an inconsistency with states' obligations to have regard to *jus cogens* violations of international law, holding that, 'the two sets of rules address different matters. The rules of State immunity are procedural in character They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful'.

In *Kazemi Estate v. Islamic Republic of Iran* (2014) S.C.C. 62, Canada's Supreme Court came to a similar conclusion. The applicant brought a civil case against Iran for the wrongful detention and torture of himself and his mother, who died as a result of her treatment by the Iranian authorities. The Supreme Court took note of the recent decisions in *Jones* and *Germany v. Italy*. It concluded that the applicant could not take advantage of the 'personal or physical injury' exception to state immunity, as this does not apply if the act causing the injury did not occur in Canada. Further, it held that:

[104] ... The fact of the matter is that Canada has expressly created an exception to immunity for criminal proceedings, and has stopped short of doing so for civil suits involving *jus cogens* violations Much like the I.C.J., I am convinced that the fact that universal criminal jurisdiction exists has no bearing in the present case (*Germany v. Italy*, at para. 87). The two types of proceeding are seen as fundamentally different by a majority of actors in the international community.

In coming to this decision, the court noted the potential impact on Canada's foreign relations of recognizing universal civil jurisdictions for violations of customary human rights law.

The cases of *Germany v. Philipp*, 592 U.S. ____ (2021) and *Republic of Hungary v. Simon*, 592 U.S. ____ (2021) involved attempts by Holocaust survivors to obtain compensation for property expropriated by state authorities during World War II. The plaintiffs claimed that this taking was an act of genocide and thus fell within the FSIA's expropriation exception, which excluded sovereign immunity in respect of 'rights in property taken in violation of international law'. In *Philipp*, the Supreme Court of the United States held unanimously that international law at the time of the FSIA's enactment only prohibited expropriating the property of aliens: expropriation of a state's own citizens' property ('domestic takings') was a matter for domestic law. The expropriation exception in the FSIA was therefore only applicable where a government confiscated the property of foreigners.

The Court in *Philipp* chose not to address the second argument raised by Germany: that it was obligated to abstain from deciding the case on international comity grounds. In *Hungary v. Simon*, which raised only the comity question, the Court vacated the judgment of the D.C. Circuit and remanded it for reconsideration in light of *Philipp*.

2. Immunity of State Officials from Human Rights Prosecutions

Domestic and international courts have also considered whether the acts of state officials can be made the subject of civil claims. State officials may be immune from prosecution on one of two bases: (1) immunity *ratione materiae*, which is applicable to any state official to the extent that they are performing acts of an official nature; and (2) immunity *ratione personae*, which is applicable only to incumbent holders of high office (i.e. heads of state, heads of government, foreign affairs ministers, and diplomatic agents) but covers both official and private acts committed prior to or during their term of office. The cases below involve judicial consideration of the circumstances where immunity *ratione materiae* and *ratione personae* exist in the context of human rights claims.

As discussed above in the context of universal jurisdiction, the case of *Rex v. Bow Street Magistrate, ex parte Pinochet*⁶⁰¹ stems from the 1998 arrest of the former dictator of Chile in London at the request of Spain. The Spanish prosecutor charged Pinochet with authorizing the torture, disappearances and murder of citizens of Chile, as well as Spanish nationals. The question before the House of Lords was whether Pinochet should be extradited to Spain. In order to determine this, they needed to determine whether Pinochet was immune from the jurisdiction of UK courts in respect of his violations of international law. Six of the seven Law Lords concluded that Pinochet did not enjoy immunity from prosecution for these acts and should therefore be extradited. However, their reasoning for so doing varied, with some indicating that they would not have decided in this manner if the case concerned a violation of a *jus cogens* norm, rather than a violation of the Torture Convention.

Lord Saville reasoned that the Torture Convention necessarily eliminated Pinochet's official immunity for the crime of torture. Lord Browne-Wilkinson agreed, indicating his view that there was a 'strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function.' However, he expressed doubt that a crime against customary international law or *jus cogens* would be sufficient to overcome an immunity:

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime.

Lord Hope of Craighead added:

... [T]here remains the question whether the immunity can survive Chile's agreement to the Torture Convention if the torture which is alleged was of such a kind or on such a scale as to amount to an international crime. ...

...

Despite the difficulties which I have mentioned, I think that there are sufficient signs that the necessary developments in international law were in place by [29 September 1998, the date of entry into force of the Criminal Justice Act].

...

I would not regard this as a case of waiver. Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity *ratione materiae* with respect to all acts of official

⁶⁰¹ *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 2 WLR 827 (1999).

torture as defined in article 1. It is just that the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity *ratione materiae* to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available.

Three years later, in *Arrest Warrant Of 11 April 2000 (Democratic Republic of The Congo v. Belgium)*,⁶⁰² the International Court of Justice was called upon to determine the validity of Belgium's issue and circulation of an arrest warrant against the incumbent foreign minister of the DRC. The ICJ held by 13 votes to three that no exception to the principle of immunity *ratione personae* exists in customary international law, even where an incumbent holder of high office is suspected of having committed war crimes or crimes against humanity. However, it emphasized '...that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity.'⁶⁰³ It set out four circumstances in which immunity would not bar the prosecution of a high-ranking state official: (1) in cases brought against them by their courts of their own countries; (2) if the state they represent waives their immunity; (3) when they cease to hold office, in which case they may be tried in respect of 'acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'; and (4) where they are subject to proceedings before specific international criminal courts with jurisdiction, such as the ICTY, ICTR or ICC.⁶⁰⁴ In particular, the court noted that the ICC Statute expressly states that immunities do not bar the Court from exercising its jurisdiction over defendants.

In *Samantar v. Yousuf* 560 U.S. 305 (2010), the Supreme Court of the U.S. was called upon to decide a case brought against a former member of the Somali government. The plaintiffs had sued under the ATS and TVPA, alleging that they had suffered torture and other human rights violations at his hands. The defendant claimed that he was entitled to immunity under the FSIA; as, he argued, this statute immunized a foreign official for acts taken on behalf of the foreign state. The Supreme Court disagreed, holding that Congress did not intend the FSIA to codify the immunity of officials – only of states – and remanded the matter to the District Court to determine whether he was entitled to immunity under the common law. However, the Court observed that sovereign immunity might still preclude the exercise of jurisdiction in some circumstances:

[N]ot every suit can successfully be pleaded against an individual official alone. Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law. ... Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest. ...

In January 2021, the German Federal Court of Justice (BGH), delivered a landmark judgment concerning the immunity of foreign state officials who committed grave violations of international law.⁶⁰⁵ The case concerned an officer in the Afghan army who had mistreated captured Taliban officers and desecrated the body of a deceased Taliban member; there was some debate as to whether these actions amounted to torture or a war crime. Ultimately, the BGH held that war crimes prosecutions

⁶⁰² Judgment of 14 February 2002, I.C.J. *Rep.* 3.

⁶⁰³ Para. 60.

⁶⁰⁴ Para. 61.

⁶⁰⁵ Bundesgerichtshof [BGH], 3 StR 654/19, Case No. ECLI:DE:BGH:2021:280121U3STR564.19.0 (28 January 2021).

would not be precluded on the basis of immunity where the acts were ‘committed by a foreign, lower-ranking defendant in the exercise of foreign sovereign activity against non-domestic persons.’⁶⁰⁶ It therefore abstained from referring this question to the German Federal Constitutional Court.⁶⁰⁷

Tom Syring, in ‘Judgment on Foreign Soldiers’ Immunity for War Crimes Committed Abroad (BGH)’ 61 *Int’l Legal Materials* (2022) 483, at 485, notes that:

While the Court’s reasoning and concomitant decision not to refer the question of functional immunity to the Federal Constitutional Court may be contestable from the vantage point of legal theory, it is all the more understandable from a practical perspective: a referral would likely have taken several years and put on hold—if not jeopardized altogether—several current and future cases. ... [F]rom a legal policy perspective, this is an important judgment

QUESTIONS

1. Is there a consistent thread that runs between the treatment of immunity in the Pinochet case and the 2021 BGH decision? Should other courts follow the BGH decision?
2. What role should international comity play in relation to claims of immunity?

⁶⁰⁶ Translation provided in T. Syring, ‘Judgment on Foreign Soldiers’ Immunity for War Crimes Committed Abroad (BGH)’ 61 *Int’l Legal Materials* (2022) 483, 487.

⁶⁰⁷ For more detail, see L. Sadat, ‘New Developments in State Practice on Immunity of State Officials for International Crimes’ 25 *ASIL Insights* (23 September 2021).

Chapter 13. Non-State Actors: Businesses and Others

One of the most dramatic developments within international human rights law over the past three decades has been the growing importance of a range of non-state actors. The centrality of the state is one of the defining features of international law and the human rights system builds upon this by seeking to bind states through a network of treaty obligations to which, in the vast majority of cases, only states can become parties. Non-state actors are thus, by definition, placed at the margins of the resulting legal regime. The problem is that actors such as corporations and other businesses, civil society groups, international organizations and armed opposition groups, to name just the most prominent among a wide range of potentially important non-state actors, have all assumed major roles in relation to the enjoyment of human rights, especially in recent years.

Various factors have contributed to this development. They include: (1) the privatization of functions previously performed by governments, including in relation to social welfare services, prisons, asylum processing, schools, adoptions, health-care provision for the poor, and the supply of water, gas and electricity; (2) the ever-increasing mobility of capital and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalization; (3) the expanding responsibilities of multilateral organizations, some of which have been called upon to exercise a wide range of governmental functions in areas ranging from Kosovo and East Timor to Afghanistan and Iraq; (4) the enormous growth in the role played by transnational civil society organizations, many of which now have multimillion dollar budgets, employ very large staffs, and perform public-type functions in many countries; (5) the changing nature of conflicts, which has seen a growth in the number and proportion of internal conflicts and a subsequent rise in the importance of organized armed groups controlling territory and population and aspiring to gain international legitimacy; and (6) the growth of international terrorist and criminal networks, which are not confined to any one state and some of whose activities have become global in scope.

These developments have increased the risk that a human rights regime that addresses itself effectively only to states will become increasingly marginalized in the years ahead. The phenomenon of privatizing security through the ‘outsourcing’ of military and military-support functions, even in wartime, provides a good illustration. As recently as the 1980s, there was widespread opposition to the role played by such ‘mercenaries’. But the twenty-first century has witnessed a broad and potentially almost unlimited role being accorded to private contractors in conflict situations, from Afghanistan to Ukraine. A similar phenomenon is also occurring in many other sectors of society, including prisons, policing, healthcare, education, and public transport.

This chapter looks at the role of non-state actors in three specific situations. The first concerns the endeavours, primarily within the UN setting, to articulate and implement human rights obligations for corporations. The second examines the extent to which the existing framework of human rights law is capable of addressing the role of armed opposition groups. And the third looks at the human rights obligations of international organizations, including the UN itself, the World Bank and other major institutional actors.

Before engaging with these specific contexts, note should be taken of the approach to non-state actors adopted by human rights bodies, such as the UN Human Rights Committee and the Committee on Economic and Social Rights.

The Human Rights Committee stated in its General Comment No. 31 (2004) on ‘the nature of the general legal obligation imposed on States Parties to the Covenant’ that:

The article 2, paragraph 1, obligations [‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized ...’] are binding on States Parties and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are

protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. ...

In General Comment No. 36, on the right to life, the same Committee said in 2018:

22. 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.

In 2011, a group of international experts, convened by Maastricht University and the International Commission of Jurists, adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, which provide, *inter alia*.⁶⁰⁸

...

8. Definition of extraterritorial obligations

For the purposes of these Principles, extraterritorial obligations encompass:

a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; ...

...

24. Obligation to regulate

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. ...

25. Bases for protection

States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

a) the harm or threat of harm originates or occurs on its territory;

⁶⁰⁸ See O. De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', 34 *Hum. Rts. Q.* (2012) 1084; but cf. R. Wilde, 'Socioeconomic Rights, Extraterritorially', in E. Benvenisti and G. Nolte (eds.), *Community Interests Across International Law* (2018) 381.

- b) where the non-State actor has the nationality of the State concerned;
- c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
- d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory; ...

Apparently drawing inspiration from the Maastricht Principles, the UN Committee on Economic, Social and Cultural Rights adopted General Comment No. 24 (2017) on State obligations under the [ICESCR] in the context of business activities:⁶⁰⁹

11. The present general comment addresses the States parties to the Covenant, and in that context it only deals with the conduct of private actors — including business entities — indirectly. In accordance with international law, however, States parties may be held directly responsible for the action or inaction of business entities: (a) if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts; (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities; or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.

...

28. Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory

2. Extraterritorial obligation to protect

30. The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, ...

...

33. In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever

⁶⁰⁹ For a critique, see D. Birchall, 'Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in an Era of Marketisation', 71 *I.C.L.Q.* (2022) 227.

they may be located. The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned. ...

A. BUSINESS AND HUMAN RIGHTS (BHR)

The relationships between states and corporations, especially regarding issues of human rights, must be considered in their historical context. This involves recognizing elements of continuity running from colonial times through to today. The excerpt below from Doreen Lustig provides both a historical overview and an outline of the formal framework of international law that applies. It is also important to understand that, notwithstanding efforts to develop forms of accountability as described later in this chapter, international law and multilateral institutions have played a central role in shaping and facilitating the continuities between colonialism and the current legal regime. This is described by Karen Alter, whose approach also highlights the fact that the North-South logic that has dominated much of the BHR discourse is increasingly inadequate to capture the dynamics at play in the debates over human rights-based accountability.

DOREEN LUSTIG, THE ENDURING CHARTER: CORPORATIONS, STATES, AND INTERNATIONAL LAW

M. J. DURKEE (ED.), STATES, FIRMS, AND THEIR LEGAL FICTIONS: ATTRIBUTING IDENTITY AND RESPONSIBILITY TO ARTIFICIAL ENTITIES (2024) 87

(1) *Introduction*

The corporation as a legal entity and a form of governance has no innate conceptual identity; rather, its legal identity is the product of historical developments. During the nineteenth century, a corporation came to be considered a private entity formed for the purpose of pursuing commercial ends. Prior to that time, the identity of corporations was less clearly defined, and they owed their existence to the governments that chartered them. They were frequently granted monopolistic privileges and tasked with building infrastructure projects, such as roads and canals. As noted by Philip Stern, during the early modern period “[i]ncorporation ... had nothing to do with the nature of the business at hand. It was a legal and political institution that allowed groups of students, merchants, townsmen, or monarchical subjects to make claims on property, rights, and privileges, and to pass these on to later generations in perpetuity.” Over the course of the nineteenth century, the corporation gradually came to be governed by private and contract law principles.

In the context of international law, this transition would gain prominence in the latter part of nineteenth century in debates among scholars in the field about the involvement of chartered companies in the scramble for Africa. During this period, scholars of international law scrutinized the involvement of business corporations in Africa and ultimately criticized the use of the chartered company for colonial purposes. As the nineteenth century drew to an end, most chartered companies were dissolved. ...

Yet, the formal dissolution of the charter hardly put an end to the close relationship between governments and corporations. ...

(2) *The Separate Spheres Presumption in the Articles on Responsibility of States for Internationally Wrongful Acts*

The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) are the primary source for defining the doctrine of attribution in international law. Of particular interest here is their definition of the circumstances under which “conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.”

As noted in the ILC commentaries, “the conduct of private persons or entities is not attributable to the State under international law.” While the ILC has presented rules for entities, or organizations, and international criminal law has developed rules for holding natural persons responsible, the responsibility of non-state actors in international law remains underdeveloped.

In the context of state responsibility, the circumstances for imputing the acts of corporate actors to a state are limited to situations in which the private corporation is operating *as a state organ* (Article 4), *like a state organ* (Article 5), or in cases when it is *directed or controlled by the state* (Article 8). This approach to attribution presumes a clear distinction between the private sphere of the corporation and the public sphere of the state as the underlying logic for defining the extent of state responsibility. As the ILC commentary explains:

In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to *limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account* and not at the instigation of a public authority.

...

V. The Positivist Turn in Corporate Responsibility and the Separate Spheres Presumption

The international law of the post-charter era not only leveraged the commercial interests of business corporations; it also further contributed to the insulation of corporations from legal scrutiny when they operated in colonial settings. Once the charters of these companies were revoked, they were legally considered as private corporations. As the last vestiges of the chartered corporation disappeared, corporations, as such, would no longer be subjects of international legal scrutiny. The classic public–private distinction situated corporations on the private side of that divide. The fact that at this point (the 1880s onward), corporations could be freely incorporated made this transition from chartered to private companies relatively easy, with little or no negative impact on the businesses or the businessmen involved.

In an interstate legal order, concerns over corporate involvement in dubious practices translated to positivist concerns over the obligation of the state to regulate such practices. But the demand that powerful imperial governments assume control over their territories did not result in an attempt to regulate the conduct of corporations. Almost to the contrary, historical accounts of this period in the African context document how the close collaboration between colonial officials and African authorities “formed a patriarchal alliance to bolster their respective power and control over younger men, women and children.” Amid the end of imperial governments’ control over foreign territories, the involvement of corporations in the exploitation of labor and resources, as well as their destabilizing effect on political communities in postcolonial settings remained invisible to international legal scrutiny for decades to come. Until recently, even though the home state of transnational corporations usually had the regulatory capacity to hold such corporate actors accountable, it could only be held internationally responsible in the exceptional circumstances of effective control over the territory in which the corporation operates. States had no international responsibility to regulate corporate actors operating outside their national territory, even in situations where the corporate actor had the nationality of the state concerned. As noted by Cristina Lafont:

[T]he “veil of sovereignty” gives rise to the “veil of ignorance” that allows other states to single-mindedly protect and promote the interests and rights of those

under their jurisdiction while disclaiming that they have any obligation to be aware of, let alone to take into account, the impact that their actions might have upon the human rights of those outside their jurisdiction. Such impacts are simply conceptualized as someone else's responsibility.⁶¹⁰

While home states were conceived as having limited to no responsibility to regulate the conduct of corporations beyond their borders, governments of host states are often unwilling or unable to provide their citizens with access to remedies for international legal violations caused by corporations (either as direct perpetrators or as possible accomplices to such violations). The regulatory weakness of host states and limited to no regulatory responsibility of home states is often viewed as a governance gap. Indeed, applying the nineteenth-century shift to territoriality as a defining feature of sovereignty in a world of uneven regulatory capacities proved particularly consequential in the context of private corporations. Global value chains (GVCs) enable the coordination of production across national borders while maintaining their high-value activities in affluent countries. ...

While international lawyers' opposition to the legitimacy of corporate actors exercising sovereign authority continued to shape the law on state responsibility in the post-charter era, freely incorporated corporations were conceived as nationals and could use the doctrine of diplomatic protection to call upon their incorporating (powerful) governments to protect their interests if such were undermined by, frequently, less powerful governments. Yet, as noted in the landmark 1970 *Barcelona Traction* decision, "the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance." The incorporation of the corporate actor by the same (powerful) government" was not sufficient as a basis for the attribution to the state of the subsequent conduct of that entity." Thus, while a corporation could be protected as a national of a particular state under the doctrine of diplomatic protection, and later, under the regulatory umbrella of bilateral investment treaties and international human rights, that nexus of nationality was not a sufficient basis for state responsibility.

While corporations are conceived by international law as "nationals" in the context of diplomatic protection or "investors" and "individuals" in international investment law and international human rights, the practice of corporations in the post-charter era often blurs the distinction between the corporation as a private (individual) and the state as the archetype for public governance authority. The influence of corporations on governmental lawmaking and their prominent role as regulators and lawmakers in global governance are prominent challenges to such public/private distinctions. As noted earlier, international lawyers of the late nineteenth century ignored Adam Smith's critique of the influence of chartered companies as interest groups who shaped governmental positions to advance their limited interests. Even in later periods, long after the revocation of the charter, scholars continue to criticize the failure to regulate the significant role of corporations as inhibitors or influential interest groups in international lawmaking processes. Corporations not only exercise their influence on global regulation as lobbyists and interest groups. They also exercise regulatory functions themselves. The literature on global private authority, transnational private regulation, voluntary sustainability standards, and corporate social responsibility offers different conceptual framings for their regulatory influence. Beyond the new governance context, corporations could be conceived as lawmakers in the context of concessionary agreements and international investment law. Such non-statist regulatory perspective on the role and influence of corporations undermines the presumption of separateness between the public and the private and marks a transition to a theory of international legal ordering in which the state is but one regulator among others.

...

⁶¹⁰ C. Lafont, *Sovereignty and the International Protection of Human Rights* (2015) 427.

**KAREN J. ALTER, FROM COLONIAL TO MULTILATERAL INTERNATIONAL LAW:
A GLOBAL CAPITALISM AND LAW INVESTIGATION
19 INT’L J. CONSTIT. L. (2021) 798**

The shift from a colonial to multilateral international order was full of great promise. Colonialism was built on coercive domination. European colonial systems were famous for locating the most profitable economic elements in the metropole, while treating peripheral countries as producers of raw materials, as sites of grueling cheap and slave labor, and as captive markets for European finished products. The 1941 Atlantic Charter signaled the hopes of multilateralism, promising an end to territorial domination, a recognition of the right to self-determination, an effort to work collectively towards lowering trade barriers, improved labor standards and economic advancement, promoting freedom of the seas, and creating a world free of want and fear. The United Nations (UN) enshrined these goals, recognizing that nations would interact as sovereign equals drafting international law through multilateral processes. Multilateral institutions created new international legal rules to promote free trade, to keep oceans open for all, to create a stable currency exchange system, and to help secure peace and security. Colonial prerogatives including the right to use force to open markets or to compel the repayment of debts were eliminated.

The shift to multilateralism created profound changes in international law, usually in the direction of creating international agreements and institutions that could garner greater international political support from states. Yet global capitalism operated alongside this international legal and institutional transformation. The forces of global capitalism served as a break on what was politically possible. Newly independent states hoped that their growing numbers would translate into a multilateral power to renegotiate the set of global economic rules that had been created by and for colonial powers. Their hopeful ideals—for permanent sovereignty over their own natural resources, for a New International Economic Order (NIEO), and for a set of more equal and fair international economic agreements—failed in large part because of the refusal of wealthy states to accede to developing country demands. Multilateralism therefore also served as a break on what was possible.

[The author defines global economic law as encompassing ‘international law, transnational law and transnational legal orderings, and binding private contracts between firms, banks, and states that are then upheld by domestic courts.’ This enlarged categorization reflects the options that state and economic actors have in being able to rely upon ‘multilateral international law’ or on ‘transnational law, private contracts, bilateral agreements’, which might better reflect the goals of powerful economic actors.]

... [A] lack of an agreed-upon legal hierarchy across the elemental institutions and agreements allows actors within to play the different layers of authority against each other. For example, by moving from one institutional venue to another, actors can either escape or draw on legal obligations that are present in one system but lacking in another. ...

[W]hile both the laws and lacunae of the colonial and multilateral global economic systems reflect state decisions, economic actors can act independently in ways that constrain state action. In both the colonial and multilateral eras, global firms asked for and Sovereigns provided domestic and international law and international relations support to secure these firms’ global operations. Yet it is also true that firms have used jurisdiction jumping to escape state efforts to curb business excesses. The Marxist notion that states are mere handmaidens of capitalist interests misses how firms also work through and across the international regime complex to escape individual and collective efforts by states to regulate the global market.

... [Looking ahead] we should not expect these trends to change even if Western power declines and Asian power ascends. The nature of global capitalism is that it is adaptive and driven by an extractive and profit-seeking logic. Global capitalism can shed entire regimes—like slavery and colonialism—and then reform and reproduce inequality and exploitative relationships in new forms. Meanwhile global economic law, in its multilateral, bilateral, coalition of the willing and private law forms, remains the legal infrastructure that facilitates and structures global capitalism, enabling firms to jump

jurisdictions to escape state regulation and to exploit gaps in the international regime complex of global economic law. ... [N]ew emerging powers ... are likely to replicate or reproduce pieces of the American-led multilateral order, even as they aspire to get beyond it. And these powers are likely to do so using the existing tools of global economic law.

1. Types of Challenge

The range of human rights abuses of which corporations have been accused is vast. The online Business and Human Rights Resource Centre collects detailed information about situations globally, and the following excerpts provide a flavour of the challenges.

A report on Africa (*Africa Quarterly*, May 2022), which focuses on litigation brought by local communities in foreign and domestic courts, illustrates some of the key issues:

In Zambia, local communities have sued Anglo-American for alleged lead poisoning caused by one of its mines, while in Liberia, Salala Rubber Corporation is in court facing allegations of land grabbing, water pollution, and desecration of cemeteries and sacred sites. In South Africa, Indigenous peoples won a court ruling which halted the construction of an Amazon headquarters on their ancestral lands subject to free and inclusive consultation. Poor working conditions and lack of respect for workers' rights have also led to legal proceedings against British American Tobacco in Malawi, Panda International in the Democratic Republic of Congo and Sama, Meta's (formerly Facebook) content moderation subsidiary in Kenya. Even MTN [Africa's largest mobile network operator] has been sued over internet blackouts in eSwatini, while other companies have been accused of complicity in war crimes and crimes against humanity in connection with their activities in Sudan.

Another report, Business and Human Rights Defenders in Southeast Asia (November 2022), focuses on Asia:

Between 2015 and 2021, we recorded more than 4,200 attacks on human rights defenders (HRDs) raising concerns about business-related human rights abuses. During this seven-year period, Asia-Pacific and Latin America have consistently been the two most dangerous regions for HRDs focused on business and nearly a quarter of all attacks globally (22% or 916 attacks) have occurred in Southeast Asia. In 2021, three out of the four most dangerous countries for HRDs in Asia-Pacific were ... the Philippines, Cambodia and Indonesia.

The report notes that the most dangerous sectors for HRDs in Asia were mining (230 cases), agribusiness (207), and logging and lumber (89). Seventy percent of attacks in Southeast Asia in 2021 were against climate, land and environmental rights defenders, while 27 percent were against labour rights activists and trade unionists. A very prominent feature is the extent of 'judicial harassment', defined as including arbitrary detention, criminalisation of protests and other activities, and strategic lawsuits against public participation (SLAPPs).

Mining activities, especially on the lands of indigenous peoples, also give rise to many disputes. This story illustrates one such case:⁶¹¹

... [L]ocals from Asunción Mita, Guatemala, voiced their opposition in a referendum on the mining projects that have affected their community for decades. Eighty nine per cent of them voted "no" ... in a municipal consultation held last month

⁶¹¹ G. Ferrucci, 'Canadian mining project in Guatemala opposed in local vote over environmental concerns', *The Conversation* (27 October 2022).

... Bluestone Resources [a Canadian company], Guatemala's Ministry of Energy and Mines and a local pro-mining group tried to contest the legality of the voting process

... [T]he Guatemalan Constitutional Court nullified the consultation results after an injunction filed by a Bluestone Resources subsidiary, Elevar Resources. The community, along with social and environmental organizations in the neighbouring countries of El Salvador and Honduras, plan to take the consultation case to the Inter-American Court of Human Rights. ...

The ministry approved an Environmental Impact Assessment that overlooked the concerns, such as the pollution of the Lempa river, presented by the Guatemalan Madre Selva environmental collective and locals from Asunción Mita Until now, the Guatemalan government has never conducted a consultation before awarding an extraction license. ...

... The Cerro Blanco mining activity in Guatemala poses a great threat to El Salvador and Honduras as well because they rely on the Lempa river to meet the water requirements of their 3.8 million residents.

Bluestone Resources said an independent international consulting firm collected data from locals and found "a positive attitude toward the project." The company obtained the support of some locals by investing in infrastructure, education and promises of employment, creating divisions within the community as those who oppose the mine are stigmatized and further marginalized...

2. Towards Regulation

For human rights proponents, the growth of corporate power raises the question of how to ensure that the activities of corporations in general, and transnational corporations (TNCs) in particular, are consistent with human rights standards, and of how to promote accountability when violations of those standards occur. In principle, the answer is straightforward. The human rights obligations assumed by each government require it to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights.

In practice, however, various problems arise: (1) governments are often loathe to take the measures necessary to ensure compliance by TNCs, especially, but not only, in relation to labour matters; (2) such measures are costly and perceived to be beyond the resource capabilities of governments in developing countries; (3) in the context of increasing global mobility of capital, competition among potential host countries discourages initiatives that may push up labour costs and make one country less attractive than others with lower regulatory standards (the so-called 'race to the bottom'); (4) the transnational complexity of manufacturing and related arrangements in an era of globalization makes it increasingly difficult to identify who is responsible for what activities and where; and (5) especially in the labour area, difficult issues arise about the different levels of minimum acceptable standards from one country to another.

In the 1970s, in the context of demands by developing countries for the establishment of a New International Economic Order, efforts began to draft a Code of Conduct for Transnational Corporations. Although a draft was completed in 1983, developed countries sought to circumvent the process by pursuing a separate initiative through the rich countries' club — the Organisation for Economic Co-operation and Development (OECD). The OECD adopted its Guidelines for Multinational Enterprises in 1976, and they continue to be regularly updated. In the meantime, the Code, which reflected a much more stringent approach to regulating the conduct of TNCs, was finally abandoned in 1992. The end of the Cold War brought much greater competition to attract foreign

direct investment to developing countries, and with it came increased pressure to accept the terms on offer from the TNCs rather than making human rights or related demands. Gradually, however, the pendulum has swung back again over the past decade or more.

Codes of conduct have been adopted by thousands of TNCs and they vary hugely in their content, participation, arrangements for monitoring, follow-up, etc. In 1999, then-UN Secretary-General Kofi Annan launched the Ten Principles of the UN Global Compact, designed to encourage corporations to commit to following a list of principles in their activities. In addition to principles governing the environment and anti-corruption efforts, the Compact includes the following:

Human Rights

Principle 1: support and respect the protection of international human rights within their sphere of influence;

Principle 2: make sure their own corporations are not complicit in human rights abuses.

Labour Standards

Principle 3: freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour;

Principle 6: the elimination of discrimination in respect of employment and occupation.

The Global Compact (www.unglobalcompact.org) has attracted significant corporate support but has generally elicited scepticism from human rights proponents because of the vagueness of the Ten Principles, and their apparent failure to generate significant pressure upon corporations to improve their performance. As of 2025, the Compact listed over 10,000 participating companies in 160 countries, representing more than 70 million employees.

According to the *Annual Report for 2020*, prepared for the Global Compact by DNV, A Norway-based consultancy firm working in the area of renewable energy and the oil and gas industry:

More than 90 per cent of survey respondents have corporate policies in place that reflect the four issue areas of the Ten Principles: human rights (90%), labour (94%), environment (94%) and anti-corruption (90%). ...

...

... [W]hile 62 per cent of companies conduct an environmental impact assessment, impact assessments are only conducted by 18 per cent for human rights, 25 per cent for anti-corruption and 29 per cent for labour.

...

...[O]nly 17 per cent of respondents require supply chain partners to adhere to the Ten Principles of the UN Global Compact.⁶¹²

Some commentators have described the Compact as little more than a platform for sharing best practices, while others have criticized it on the grounds that there are few incentives to keep

⁶¹² Uniting Business in the Decade of Action (Global Compact & DNV GL, 2020), at 16.

subscribers in line and that its governance structure ‘inhibits both accountability for actions and transparency in external communications, further highlighting the absence of meaningful programme evaluation and credible reporting.’⁶¹³

In essence, the strategy reflected in the Global Compact is gradually to ratchet up the levels of commitment and accountability. Many in the human rights field, however, have expressed frustration with such incrementalism, and have pressed instead for progress towards binding legal rules. A first step in this direction was thought to have been the adoption of a set of Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the so-called ‘UN Norms’). The Norms were drafted in 2003 by a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights, chaired by David Weissbrodt.⁶¹⁴ The Sub-Commission was abolished in 2006 and effectively replaced by the Human Rights Council Advisory Committee.

Responses to the UN Norms varied dramatically. The NGOs who were most engaged — notably Amnesty International, Human Rights Watch and the International Commission of Jurists — all endorsed them as an appropriate starting point from which to develop corporate accountability. While the views of scholars were deeply divided, governmental reaction was largely negative. Most developing countries were not keen on intrusive regulation, and most developed countries felt that the Norms were either unnecessary or overreaching. The United States, for example, spoke of an ‘anti-business agenda’. The response of industry representatives was mixed, but most were hostile. In 2004, the UN Commission on Human Rights (the predecessor to the Human Rights Council) noted that the Norms contained ‘useful elements and ideas’, but stated that the draft had no legal standing. The following year, it opted (CHR Res. 2005/69) instead to appoint an independent expert as Special Representative of the Secretary-General (SRSG) with a mandate:

- (a) To identify and clarify standards of corporate responsibility and accountability ...; (b) To elaborate on the role of States in effectively regulating [corporations] ..., including through international cooperation; (c) To research and clarify the implications ... of concepts such as ‘complicity’ and ‘sphere of influence’; (d) To develop materials and methodologies for undertaking human rights impact assessments of [corporate activities]; and (e) To compile a compendium of best practices of States and [corporations].

John Ruggie was appointed as SRSG on the issue of human rights and transnational corporations and other business enterprises. Ruggie assembled a staff of ten researchers/advisors, obtained free legal assistance from over 24 law firms worldwide, mobilized academic institutions and other researchers, engaged in 47 consultations with stakeholders around the world, conducted 20 site visits, drafted detailed studies and analyses of key issues, and placed his mandate at the centre of most discussions about corporate human rights responsibilities. He raised millions of dollars from governments and corporations to facilitate his work, and he avoided explicit criticism of particular corporations.⁶¹⁵ The intellectual framework that he developed was organized around the three principles of ‘protect, respect and remedy’ and he submitted his final report in 2011. It consisted almost entirely of a set of Guiding Principles (the UNGPs), on which comments from governments and other stakeholders had been solicited and reflected in advance.

GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK UN DOC. A/HRC/17/31, ANNEX (21 MARCH 2011)

General principles

⁶¹³ N. Andrews, ‘Normative Spaces and the UN Global Compact for Transnational Corporations: The Norm Diffusion Paradox,’ 47 *J. Int. Relat. Dev.* (2017) 1.

⁶¹⁴ D. Weissbrodt and M. Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,’ 97 *Am.J. Int’l L.* (2003) 901.

⁶¹⁵ See generally, J. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013).

These Guiding Principles are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

...

Nothing in these Guiding Principles should be read as creating new international law obligations. . . .

...

I. The State duty to protect human rights

A. Foundational principles

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

...

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

...

B. Operational principles

General State regulatory and policy functions

3. In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

The State-business nexus

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State

agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

...

5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

...

6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

...

Supporting business respect for human rights in conflict-affected areas

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

...

Ensuring policy coherence

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

...

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

10. States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

II. The corporate responsibility to respect human rights

A. Foundational principles

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights — understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

...

13. The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

...

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

...

B. Operational principles

Policy commitment

16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise;
- (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

...

Human rights due diligence

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- (a) Draw on internal and/or independent external human rights expertise;
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

...

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

- (a) Effective integration requires that:
 - (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
 - (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
- (b) Appropriate action will vary according to:
 - (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
 - (ii) The extent of its leverage in addressing the adverse impact.

...

20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

- (a) Be based on appropriate qualitative and quantitative indicators;
- (b) Draw on feedback from both internal and external sources, including affected stakeholders.

...

21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of

affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

- (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

...

Remediation

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

...

Issues of context

23. In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

...

III. Access to remedy

A. Foundational principle

25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

...

B. Operational principles

State-based judicial mechanisms

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. ...

State-based non-judicial grievance mechanisms

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

...

Non-State-based grievance mechanisms

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. ...

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. ...

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available. ...

Effectiveness criteria for non-judicial grievance mechanisms

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

...

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

NOTE

In response to the SRSG's final report, the Human Rights Council 'endorsed' the Guiding Principles and noted that Ruggie's work did not foreclose 'any other long-term development, including further enhancement of standards'. But rather than appointing a new SRSG, it appointed a five-member Working Group to promote the Guiding Principles, to gather good practices and lessons learned, to support capacity-building and, potentially most significantly, to 'explore options and make recommendations for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas' (HRC Res. 17/4 (2011)). While Ruggie explicitly disparaged suggestions that the next phase should include the drafting of a binding international legal instrument, he diplomatically suggested that 'a multilateral approach to providing greater legal clarification may be warranted in response to the diverging national interpretations of the applicability to business enterprises of international standards prohibiting 'gross' human rights abuses, possibly amounting to the level of international crimes.'⁶¹⁶ The Council chose to ignore this proposal.

The Working Group issues an annual report. The focus of recent reports has been on: artificial intelligence (A/HRC/59/53 (2025)); LGBTI and business (A/79/178 (2024)); investors and ESG approaches (A/HRC/56/55 (2024)); and the extractive sector (A/78/155 (2023)). It undertakes country visits, most recently to Colombia (in 2024), Japan and Argentina (2023), and Luxembourg and Liberia (2022). The Group also sends communications to states and other entities (in 2025 it wrote to the United States seeking information on the impact of a series of Executive Orders (OL USA 16/2025 on 13 May 2025). And it 'guides' the work of the annual Forum on Business and Human Rights.

TAKING STOCK

Although most international institutional actors and many states have warmly embraced the UNGPs,⁶¹⁷ Tara Melish, in 'Putting "Human Rights" Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights', in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (2017) 62, notes that some human rights NGOs have seen them 'as "regressive," a "step backward" in the protection of human rights, one based on a corporate good will model that not only has proven itself ineffective over decades of trial and creative experimentation, but that ... ignores the critical elements of a human rights approach to social change.' In her view, the price for high-level corporate and state buy-in was the systematic removal from the UNGPs framework and regulatory logic of 'the very essence of a "human rights approach" to community problem-solving' revolving around empowerment, participation, and accountability.⁶¹⁸

In 2021, the Working Group issued a major report entitled *UNGPs 10+: A Roadmap for the Next Decade of Business and Human Rights*. In its annual report that year it acknowledged that '[t]he persistence of business-related abuses is a major concern and a source of deep frustration, and should be a matter of urgent priority attention by States and business. ... [V]oluntary approaches alone are not enough. The rise of mandatory measures will undoubtedly accelerate both uptake and progress. At the same time, the experience of many decades has demonstrated that legal measures are essential but not sufficient ...' (UN Doc. A/HRC/47/39 (2021), para. 114).

Steven R. Ratner, in his 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights', 114 *AJIL Unbound* (2020) 163, concluded that the strong multi-stakeholder support for the UNGPs was a consequence of 'their lack of legal bindingness, their imprecise provisions on key issues, and their absence of any true control mechanism.'

Nicola Jägers, in 'UN Guiding Principles at 10: Permeating Narratives or Yet Another Silo?', 6 *Bus. & Hum. Rts. J.* (2021) 198, argues that:

⁶¹⁶ www.business-humanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf.

⁶¹⁷ See generally B. Choudhury (ed.), *The UN Guiding Principles on Business and Human Rights* (2023).

⁶¹⁸ For another critical perspective see I. Kampourakis and L. Lane, 'The Law and Political Economy of Business and Human Rights: From Governance Gaps to Root Causes', 38 *Leiden J. Int'l L.* (2025) 000.

The success of the UNGPs lies in a process of ‘norm-cascading’, influencing other powerful narratives that ultimately help shape policy responses. Arguably, the design and language of the UNGPs hold promise to penetrate the notoriously fragmented regulatory and policy responses to global problems and the incoherence that arises from such a siloed approach. Corporate (ir)responsible behaviour plays a significant role in many of the challenges faced today. In the critical area of climate change, this is certainly the case. Yet, ... the Paris Climate Agreement and the SDGs, two global instruments central to the narrative on (environmental) sustainability, reflect remarkably little uptake of the BHR narrative by states. ...

... [T]he lack of reference to corporate responsibility and accountability in competing narratives indicates that BHR to date does not seem to function as the guidepost for states on how to involve the private sector in reaching (environmental) sustainability goals in a manner that recognizes their human rights responsibilities. In fact, [we see] the prevalence of perpetuating the [corporate social responsibility] narrative of linking responsible business conduct to philanthropy. As Deva has pointed out, ... most businesses are continuing with their leisurely ‘human rights journey’ and states often remain mute on the responsibilities of corporations. Moreover, ‘states continue to pursue a “development first, human rights later” strategy and “cashstrapped UN Agencies increasingly flirt with business to forge unprincipled partnerships”’. In light of the immense challenges and the need to mobilize vast resources, seeking the partnership of the private sector is a necessity, but this should not come at the expense of the vulnerable whose human rights are negatively affected by corporate activity.

The role of codes of conduct and related initiatives continues to be robustly contested. One strong proponent is Erika George, in *Incorporating Rights: Strategies to Advance Corporate Accountability* (2021), at 325:

In the ecology of global governance, new business and human rights indicators, rankings, and benchmarks now provide rights advocates with greater power and the ability to inform and influence investors. Taken together, this mix of strategies has the potential to play an important role in solidifying emerging soft law standards and strengthening future regulation. The commitments contained in voluntary codes of conduct to respect human rights are becoming obligatory through being incorporated into supplier contracts that link global supply chains. ...

...

... Responsible business practices and corporate codes of conduct consistent with the responsibility to respect international human rights will serve to create a body of soft law to supplement the human rights regime and strengthen protections. ...

This mix of standards and strategies to actually operationalize respect for human rights in business enterprises is likely to be a more promising avenue for progress than promulgating still more international human rights treaties. This is not to say that there is no place for law. Rather, I argue that more than law will be required to bridge the human rights regulatory gap.

...

... [A] new approach to corporate social responsibility in the international arena may be the best option for improving standards and practices Indeed, a broader business ethic, one that embraces human rights, is imperative.

Significantly, corporate culture and committed leadership are important in driving change.

A similar emphasis on the centrality of change from within is reflected in Michael Posner's book *Conscience Incorporated: Pursue Profits While Protecting Human Rights* (2025) at 222:

The path forward will require carrots: government subsidies, rewards by investors and consumers, purposeful engagement with civil organizations, and detailed coverage of best practices by the mainstream media and academic experts. But it will also require sticks, mainly, new government regulations that hold companies' feet to the fire, whatever the industry. ...

But, ... regulations alone will never be sufficient. Governments can exert leverage on companies, but change must be generated from within. Regulation can be a catalyst At the end of the day, though, improved corporate performance in this realm will require adopting better models and new ways of doing business. ...

A more skeptical assessment of codes of conduct is presented by Cristina Aibar-Guzmán, Isabel-María García-Sánchez and Celia Salvador-González, in 'Do Codes of Conduct Really Mean a Change in Corporate Practices with Regard to Human Rights? Evidence from the Largest Garment Companies Worldwide', 26 *Int'l J. Hum. Rts.* (2022) 282:

One of the consequences of globalisation is the rise of outsourcing and the relocation of certain links of companies' value chains to developing countries, characterised by low wages, weak enforcement of labour law, and precarious working conditions. This has resulted in abuse and human rights violations, such as forced and child labour, physical and sexual abuse, exploitation, and discrimination as well as health problems, injuries, and workers' death caused by poor working conditions.

As a result, global corporations have been subjected to significant pressure from stakeholders (e.g. international NGOs, customers, the media, creditors, shareholders, and investors) concerned about working conditions at their supply factories in other countries and the status of their workers' human rights, which has led global corporations to assume their responsibility in this regard and insert the human rights agenda into their social responsibility policies.

An instrument for integrating human rights obligations into corporate social responsibility is the development of voluntary codes of conduct. They define the 'baseline expectations or responsibilities to which companies are expected to adhere by a wide range of stakeholders'. Corporate codes of conduct state the management's formal commitment to behave ethically and set the actions to be adopted in this regard. In this sense, the reasons why global corporations adopt a voluntary code of conduct are varied, including enhanced reputation, a response to stakeholder pressures, and the actual desire of modifying procedures and preventing misconduct. Given their voluntary nature, codes of conduct lack any 'legally binding effect'; instead, they are 'self-regulatory governance systems' which define the firm's social aspirations and moral obligations.

...

Our analysis shows that the adoption of a code of conduct by the analysed companies expressing their formal commitment to respect labour and human rights can be considered a legitimization strategy with no reflection in the actual corporate behaviour.

QUESTIONS

1. What do you see as the principal strengths and weaknesses of the UNGPs?
2. What significance, if any, do you attach to the Working Group's decision not to 'investigate' any alleged corporate violations?
3. A press release dated 19 August 2019, announced 'Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"'. The group brought together the CEOs of America's leading companies. In what was lauded as a breakthrough statement, they committed to: delivering value to our customers; investing in our employees; dealing fairly and ethically with our suppliers; supporting the communities in which we work; and generating long-term value for shareholders. No mention was made of rights. In light of the analyses by Lustig and Alter, how might deep change be brought about in this area?
4. Thousands of participants now attend the annual UN Annual Forum on BHR. Michael Hobbes, in 'Saving the World, One Meaningless Buzzword at a Time', *Foreign Policy* (21 February 2017), argued that it involved 'corporations, activists, and politicians [turning] the language of human rights into meaningless babble'. He also suggested that the businesses participating in BHR discussions are an unrepresentative sample:

Most of the world, after all, is not companies you've heard of. There are no state-owned enterprises here, no business-to-business firms, no steel smelters or brandless megasuppliers. The companies here, the ones that are scared of you, are just a tiny sliver of the global economy, a few billion in revenue, a few hundred thousand workers. The rest of it is firms no one knows, that no one is watching, that do not produce marketing messages that can be turned against them.

How would a BHR proponent respond to such a challenge?

BEYOND THE UNGPS

In September 2013, Ecuador led a group of 84 governments in the Human Rights Council calling for a legally binding 'instrument' to regulate business and human rights. The group welcomed the UNGPs and the creation of the Working Group, but called this only 'a first step'. The Council responded in Res 26/9 (2014) by establishing 'an open-ended intergovernmental working group [OEIGWG] on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights...'. Between 2015 and 2022, the OEIGWG held eight sessions. The original resolution envisaged a central role for the Chair-Rapporteur of the group, who has so far always been an Ecuadorian. A succinct overview of the process is provided by Claire O'Brien, and Daniel Schönfelder, in 'A Defining Moment for the UN Business and Human Rights Treaty Process', *Verfassungsblog* (26 October 2022):

... [The] ... process has seen geographically uneven participation, with many globally and regionally significant economies notably absent. Earlier texts, moreover, adopted a prescriptive approach, seeking to legislate in close detail over matters such as civil and criminal procedure in cross-border cases. They would also have pre-committed states parties to a raft of premature design choices around due diligence laws. At the same time, they regressed from the ambition of the UNGPs to address all business activity by dropping state-businesses and small and medium-sized enterprises from their focus.

Out of kilter with the form of most human rights treaties, this approach, perhaps unsurprisingly, drew many detractors. Participating states, often with good reason, raised incompatibilities with national constitutional commitments and court procedure, particularly in the domain of civil litigation. Many (including initially the United States) stayed away, while registering discontent or, like the European Union, either reserved positions on the whole text and remained largely silent, while nevertheless embarking on unilateral national regulatory initiatives.

Until now, it was often attempted to solve such problems by simply adding more text, in an attempt to cover all national eventualities. Yet this resulted in long and complex clauses that still failed to reflect the subsidiarity or discretion commonly afforded states in other areas.

At its October 2023 session, the OEIGWG focused on the following text, along with amendments submitted by States in advance of the session.

**DRAFT LEGALLY BINDING INSTRUMENT [LBI] TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES
JULY 2023**

[Preamble omitted]

Article 1. Definitions

1.1. “**Victim**” shall mean any person or group of persons who suffered a human rights abuse in the context of business activities, irrespective of the nationality or domicile of the victim. ...

1.2. “**Adverse human rights impact**” shall mean a harm which corresponds to a reduction in or removal of a person’s ability to enjoy an internationally recognized human right.

1.3. “**Human rights abuse**” shall mean any acts or omissions that take place in connection with business activities and results in an adverse human rights impact.

1.4. “**Business activities**” means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by a natural or legal person, including State-owned enterprises, financial institutions and investment funds, transnational corporations, other business enterprises, joint ventures, and any other business relationship undertaken by a natural or legal person. This includes activities undertaken by electronic means.

1.5. “**Business activities of a transnational character**” means any business activity described in Article 1.4. above, when:

- a. It is undertaken in more than one jurisdiction or State; or
- b. It is undertaken in one State but a significant part ... takes place through any business relationship in another State or jurisdiction; or
- c. It is undertaken in one State but has significant effect in another State or jurisdiction.

1.6. “**Business relationship**” refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship,

or any other structure or relationship, including throughout their value chains, as provided under the domestic law of the State, including activities undertaken by electronic means.

...

1.8. “**Human rights due diligence**” shall mean the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts. While these processes will vary in complexity with the size of a business enterprise, the risk of severe adverse human rights impacts, and the nature and context of the operations of that business enterprise, these processes will in every case comprise the following elements:

- (a) identifying and assessing any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships;
- (b) taking appropriate measures to prevent and mitigate such adverse human rights impacts;
- (c) monitoring the effectiveness of its measures to address such adverse human rights impacts; and
- (d) communicating how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons.

1.9. “**Remedy**” shall mean the restoration of a victim of a human rights abuse to the position they would have been had the abuse not occurred, or as nearly as is possible in the circumstances. An “effective remedy” involves reparations that are adequate, effective, and prompt; are gender and age responsive; and may draw from a range of forms of remedy such as restitution, compensation, rehabilitation, satisfaction, such as cessation of abuse, apologies, and sanctions, as well as and guarantees of non-repetition.

Article 2. Statement of Purpose

2.1. The purpose of this [LBI] is:

- a) To clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfill and promote human rights in the context of business activities, particularly those of transnational character;
- b) To clarify and ensure respect and fulfillment of the human rights obligations of business enterprises;
- c) To prevent and mitigate the occurrence of human rights abuses in the context of business activities by effective mechanisms of monitoring and enforceability;
- d) To ensure access to gender responsive, child sensitive and victim centred justice and effective, adequate and timely remedy for victims of human rights abuses in the context of business activities;
- e) To facilitate and strengthen mutual legal assistance and international cooperation

Article 3. Scope

3.1. This [LBI] shall apply to all business activities, including business activities of a transnational character.

3.2. ... States Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context or the severity of impacts on human rights.

3.3. This [LBI] shall cover all internationally recognized human rights and fundamental freedoms binding on the State Parties of this [LBI].

Article 4. Rights of Victims

4.1. Victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms.

...

Article 5. Protection of Victims

...

5.3 States Parties shall investigate all human rights abuses covered under this [LBI], effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural and/or legal persons found responsible, in accordance with domestic and international law.

...

Article 6. Prevention

6.1. States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character.

6.2. State Parties shall adopt appropriate legislative, regulatory, and other measures to:

- a) prevent the involvement of business enterprises in human rights abuse;
- b) ensure respect by business enterprises for internationally recognized human rights and fundamental freedoms;
- c) ensure the practice of human rights due diligence by business enterprises; and,
- d) promote the active and meaningful participation of individuals and groups, ... in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.

...

6.4. Measures to achieve the ends referred to in Article 6.2 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that business enterprises while carrying out human rights due diligence:

- a) undertake and publish on a regular basis human rights impact assessments prior and throughout their operations;
- b) integrate a gender and age perspective, and takes full and proper account of the differentiated human rights-related risks and adverse human rights impacts experienced by women and girls;
- c) take particular account of the needs of those who may be at heightened risks of vulnerability or marginalization;
- d) meaningful consult with potentially affected groups and other relevant stakeholders;
- e) protect the safety of human rights defenders, journalists, workers, members of indigenous peoples, among others, as well as those who may be subject to retaliation; and

- f) insofar as engagement with indigenous peoples takes place, undertake such process in accordance with the internationally recognized standards of free, prior, and informed consent.

6.5. Each Party shall take necessary measures to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases.

...

Article 7. Access to Remedy

7.1. States Parties shall provide their relevant State agencies, with the necessary competence in accordance with this [LBI] to enable victims' access to adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women and groups in vulnerable or marginalized situations face in accessing such mechanisms and remedies.

...

Article 8. Legal Liability

8.1. Each State Party shall adopt such measures as may be necessary to establish a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their business activities or relationships, including those of transnational character.

...

Article 9. Jurisdiction

9.1. State Parties shall take such measures as may be necessary to establish its jurisdiction in respect of human rights abuse in cases where:

- a) the human rights abuse took place, in whole or in part, within the territory or jurisdiction of that State Party;
- b) the relevant harm was sustained, in whole or in part, within the territory or jurisdiction of that State Party;
- c) the human rights abuse was carried out by either:
 - i. a legal person domiciled in the territory or jurisdiction of that State Party; or
 - j. a natural person who is a national of, or who has his or her habitual residence in the territory or jurisdiction of, that State Party; and
- d) a victim seeking remedy through civil law proceedings is a national of, or has his or her habitual residence in the territory or jurisdiction of, that State Party.

...

A strong critique of the process is provided by Dena Freeman, in 'Sovereignty, Human Rights and the Regulation of Transnational Corporations: A Critical Spatial Analysis of Civil Society Proposals for a Binding Treaty', 21 *Globalizations* (2024) 000

My argument in brief is as follows. Starting from critical spatial histories of international law that argue that Northern states use international law to facilitate global capital accumulation by diminishing sovereignty beyond their borders and intentionally *not* extending their sovereignty over capital operating in these non- or low-sovereign spaces, I argue that considering ways to reconfigure spatial patternings of sovereignty is fundamental to devising ways to

regulate contemporary TNCs. I show that the two main civil society groupings active in the current UN negotiations make proposals that elaborate spatial orderings of sovereignty in significantly different ways and that would lead to vastly different global spatial orders if implemented. The Human Rights NGOs [a loose network of many, largely Northern-based, human rights and social justice NGOs, including FIDH, ESCR-Net, the ICJ, CIDSE and others] would elaborate what I call ‘imperial sovereignty’, in which Northern states would extend their sovereignty into the spaces where they had previously sought to keep sovereignty diminished. This imperial sovereignty might limit capital accumulation and enable TNC regulation but it would also further an imperial spatial order. The Global Campaign, [made up predominantly of Southern-based NGOs and grassroots social movements] in contrast, seek to elaborate what I call ‘global sovereignty’, in which sovereignty is vertically dispersed upwards to a global level and downwards to the people. This formulation, I argue, would both enable TNC regulation and also promote an emancipatory global spatial order. ...

QUESTION

Why would it be in the interests of various key countries to consider agreeing to the approach reflected in the draft? How compelling is the case put by Olivier De Schutter, in ‘Reclaiming states’ economic sovereignty: the crux of the new treaty on business and human rights’, Business and Human Rights Resource Center, 24 Oct 2023:

Rich countries have an interest in seeking to counter the blackmailing of corporations which routinely threaten to outsource production to locations where human rights are regularly flouted with impunity. Developing nations have an interest in ensuring transnational corporations will not coerce them into granting investors exorbitant privileges, which largely annul any benefit host countries might have expected from the arrival of investors.

All governments, in fact, have a common interest in reclaiming control of globalisation: the urgency is to tame the new leviathans, the corporate groups integrated at transnational level, that 40 years of globalisation have allowed to emerge – undermining the sovereignty of all states.

3. Facebook Case Study

A decade or so ago, the sectors that preoccupied BHR debates and initiatives were the extractive industries, footwear and garment manufacturers, electronics producers, private security companies, and discount retailers. In today’s world, Big Tech is in the spotlight,⁶¹⁹ and for good reason:

Information technology is embedded in global society and used daily by billions of people. The internet, personal electronic devices and social media are intrinsic to our economic and social future and offer important opportunities to tackle social and sustainability challenges. Yet concern at tech giants’ negative human rights impacts is growing and society’s trust in them is being corroded. ...

Tech giants’ human rights impacts range widely. Besides workforce and other supply chain issues, they include impacts linked to the gathering, use and

⁶¹⁹ See OHCHR, ‘The practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies’, UN Doc. A/HRC/50/56 (2022).

commercialisation of personal data; facilitating the spread of hate speech, misinformation, political extremism, terrorism, electoral manipulation and the suppression of democratic dissent; the impacts of content moderation and encryption; discrimination and other human rights abuses resulting from algorithmic bias; and impacts on at-risk groups including children and human rights defenders. At system level, further impacts relate to concentration of wealth and reinforcement of inequalities, large-scale tax avoidance and its consequences for public revenues, economic instability and criminality linked to cryptocurrencies, for example. Many such issues have assumed new dimensions in the context of the COVID-19 pandemic.

Regulators face difficulties in addressing such risks and securing compliance by powerful tech giants whose activities are dynamic, diversified, transnational and technically complex. In many cases, root causes of risks to human rights go beyond individual products or services to implicate tech giants' business models, corporate governance and incentives structures, as well as the effects of dominant market positions that assume, but also transcend, the decisions and conduct of individual corporations.⁶²⁰

In addition to all of these factors, the major tech companies are leviathans in terms of their revenues, profits and stock market valuations. In the United States, for example, in 2021 the stock market value of the five largest American firms (Apple, Microsoft, Google, Amazon and Facebook) was \$9.3 trillion, which was 'more than the value of the next 27 most valuable U.S. companies put together, including corporate giants like Tesla, Walmart and JPMorgan Chase'. Apple's profits in a three-month period in 2021 reached \$21.7 billion, which 'was nearly double the combined annual profits of the five largest U.S. airlines in pre-pandemic 2019'. And, in the same time period, Google earned \$50 billion in advertising revenue.⁶²¹

Facebook was founded in 2004 and, by 2023, had 3.03 billion monthly active users, with 2.064 billion users visiting at least one of Facebook's core products (Facebook, WhatsApp, Instagram, and Messenger) every day. It is available in 112 languages worldwide. In the United States, 70 percent of the total population use Facebook, and in the United Kingdom it is used by 66 percent of the population. It is the leading social platform, used by 61.8 percent of social media users.⁶²² On 30 September 2023, Meta (Facebook's parent) had 66,185 full-time employees, down from 86,482 nine months earlier. In 2006, it had 150 employees. On 1 October 2021 the *Wall Street Journal* published 'The Facebook Files', aimed at showing that Facebook 'knows, in acute detail, that its platforms are riddled with flaws that cause harm, often in ways only the company fully understands.'

For all of these reasons, the following case study focuses on Facebook (and its parent company, Meta).⁶²³ We look first at its official human rights policy and its policy guidance on 'dangerous organizations'.⁶²⁴ Then we consider the work of its Oversight Board, set up in 2020, and originally described by Mark Zuckerberg as a kind of 'Facebook Supreme Court'.⁶²⁵

META/FACEBOOK, CORPORATE HUMAN RIGHTS POLICY (2021)

Meta's mission is to give people the power to build community and bring the world closer together. We build social technologies to enable the best of what people can do together. Our principles are: give people a voice; serve everyone; promote economic opportunity; build connection and community;

⁶²⁰ C. O'Brien, R. Jørgensen and B. Hogan, *Tech Giants and Human Rights: Investor Expectations* (2021). This is a report prepared for the Council on Ethics of the Swedish National Pension Funds by the Danish Institute for Human Rights.

⁶²¹ S. Ovide, 'Big Tech Has Outgrown This Planet', *The New York Times* (29 July 2021).

⁶²² www.demandsage/facebook-statistics/

⁶²³ See Meta, Human Rights Report: Insights and Actions 2022 (2023).

⁶²⁴ For a description of the evolution of these policies, see K. Stylianou, N. Zingales and S. Di Stefano, *Is Facebook Keeping Up with International Standards on Freedom of Expression? A Time-Series Analysis, 2005-2020* (2022).

⁶²⁵ For a 2025 update on developments, see J. Tuovinen, 'The Meta Oversight Board in the Trump Era: A Subtle Shift with Far-Reaching Consequences?', *Verfassungsblog*, 26 May 2025.

keep people safe and protect privacy. We recognize all people are equal in dignity and rights. We are all equally entitled to our human rights, without discrimination. Human rights are interrelated, interdependent and indivisible.

OUR COMMITMENTS

We are committed to respecting human rights as set out in the [UNGPs]. This commitment encompasses internationally recognized human rights as defined by the International Bill of Human Rights [the UDHR and the two Covenants], as well as the [ILO] Declaration on Fundamental Principles and Rights at Work.

Depending on circumstances, we also utilize other widely accepted international human rights instruments, including [CERD, CEDAW, CRC, CRPD, the EU Charter of Fundamental Rights, and the American Convention].

We specifically recognize that the universal obligation of non-discrimination is a necessary — but not sufficient — condition for real, lived, equality.

We are committed to implementing the Global Network Initiative (GNI) Principles on Freedom of Expression and Privacy, and their associated Implementation Guidelines. Human rights also guide our work developing responsible innovation practices, including when building, testing, and deploying products and services enabled by Artificial Intelligence (AI).

We recognize the importance of the OECD Principles on Artificial Intelligence, which are widely adopted and endorsed by the G20. In particular, we note the framework’s recommendation that:

“AI actors should respect the rule of law, human rights and democratic values, throughout the AI system lifecycle. These include freedom, dignity and autonomy, privacy and data protection, non-discrimination and equality, diversity, fairness, social justice, and internationally recognised labour rights.”

We recognize the diversity of laws in the locations where we operate, and where people use our products. We strive to respect domestic laws. When faced with conflicts between such laws and our human rights commitments, we seek to honor the principles of internationally recognized human rights to the greatest extent possible. In these circumstances we seek to promote international human rights standards by engaging with governments, and by collaborating with other stakeholders and companies.

HOW WE IMPLEMENT

We implement our commitment to human rights using approaches set out in the [UNGPs]. ...

...

02 Conducting Human Rights Due Diligence and Disclosure

The potential human rights impacts of Meta’s products and operations varies significantly across time, location, content, and affected communities. We thus identify and prioritize the most salient human rights issues in each context using the UNGP framework of likelihood and severity (the latter defined by scope, scale, and remediability).

We conduct human rights due diligence to identify such risks, and to help us create strategies to avoid, prevent and mitigate them. We also seek to identify and support opportunities for our products, policies, and operations to promote human rights.

We use a variety of due diligence methodologies, including, but not limited to, human rights impact assessments.

We pay particular attention to the rights and needs of users from groups or populations that may be at heightened risk of becoming vulnerable or marginalized. We are committed to identifying relevant such groups for each context, undertaking meaningful engagement to hear their hopes and concerns, and to protecting and promoting their rights when using our products.

...

**FACEBOOK COMMUNITY STANDARDS: DANGEROUS INDIVIDUALS AND ORGANIZATIONS
POLICY
(ACCESSED 9 NOVEMBER 2022)**

Policy Rationale

In an effort to prevent and disrupt real-world harm, we do not allow organizations or individuals that proclaim a violent mission or are engaged in violence to have a presence on Facebook. We assess these entities based on their behavior both online and offline, most significantly, their ties to violence. Under this policy, we designate individuals, organizations, and networks of people. These designations are divided into three tiers that indicate the level of content enforcement, with Tier 1 resulting in the most extensive enforcement because we believe these entities have the most direct ties to offline harm.

Tier 1 focuses on entities that engage in serious offline harms - including organizing or advocating for violence against civilians, repeatedly dehumanizing or advocating for harm against people based on protected characteristics, or engaging in systematic criminal operations. Tier 1 entities include terrorist, hate, and criminal organizations. We remove praise, substantive support, and representation of Tier 1 entities as well as their leaders, founders, or prominent members. Tier 1 includes hate organizations; criminal organizations, including those designated by the United States government as Specially Designated Narcotics Trafficking Kingpins (SDNTKs); and terrorist organizations, including entities and individuals designated by the United States government as Foreign Terrorist Organizations (FTOs) or Specially Designated Global Terrorists (SDGTs).

In addition, we do not allow content that praises, substantively supports, or represents events that Facebook designates as violating violent events - including terrorist attacks, hate events, multiple-victim violence or attempted multiple-victim violence, multiple murders, or hate crimes. Nor do we allow praise, substantive support, or representation of the perpetrator(s) of such attacks. We also remove content that praises, substantively supports or represents ideologies that promote hate, such as nazism and white supremacy.

Tier 2 focuses on entities that engage in violence against state or military actors but do not generally target civilians -- what we call "Violent Non-State Actors." We remove all substantive support and representation of these entities, their leaders, and their prominent members. We remove any praise of these groups' violent activities.

Tier 3 focuses on entities that may repeatedly engage in violations of our Hate Speech or Dangerous Organizations policies on-or-off the platform or demonstrate strong intent to engage in offline violence in the near future, but have not necessarily engaged in violence to date or advocated for violence against others based on their protected characteristics. This includes Militarized Social Movements, Violence-Inducing Conspiracy Networks, and individuals and groups banned for promoting hatred. Tier 3 entities may not have a presence or coordinate on our platforms.

We recognize that users may share content that includes references to designated dangerous organizations and individuals to report on, condemn, or neutrally discuss them or their activities. Our policies are designed to allow room for these types of discussions while simultaneously limiting risks of potential offline harm. We thus require people to clearly indicate their intent when creating or sharing such content. If a user's intention is ambiguous or unclear, we default to removing content.

In line with international human rights law, our policies allow discussions about the human rights of designated individuals or members of designated dangerous entities, unless the content includes other praise, substantive support, or representation of designated entities or other policy violations, such as incitement to violence.

...

OVERSIGHT BOARD CHARTER (SEPTEMBER 2019)

Introduction

Freedom of expression is a fundamental human right. Facebook seeks to give people a voice so we can connect, share ideas and experiences, and understand each other.

...

... The purpose of the [Oversight Board] is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies.

The board will operate transparently and its reasoning will be explained clearly to the public, while respecting the privacy and confidentiality of the people who use Facebook, Inc.'s services, including Instagram (collectively referred to as "Facebook"). It will provide an accessible opportunity for people to request its review and be heard.

...

Article 1. Members

The board will be composed of a diverse set of members whose names will be public. They will exercise neutral, independent judgment and render decisions impartially.

SECTION 1. SIZE

The board will consist of [between 11 and 40 members. As of January 2023, there were 23].

SECTION 2. BOARD COMPOSITION AND MEMBER QUALIFICATIONS

... [M]embers must possess and exhibit a broad range of knowledge, competencies, diversity, and expertise.

Members must not have actual or perceived conflicts of interest that could compromise their independent judgment and decision-making. Members must have demonstrated experience at deliberating thoughtfully and as an open-minded contributor on a team; be skilled at making and explaining decisions based on a set of policies or standards; and have familiarity with matters relating to digital content and governance, including free expression, civic discourse, safety, privacy and technology.

SECTION 3. TERM

Each member will serve for a three-year term, for a maximum of three terms. Trustees will oversee the approval of term renewals.

...

SECTION 4. COLLECTIVE POWERS

The board will have the following expressly defined authorities for content properly brought to the board for review:

1. Request that Facebook provide information reasonably required for board deliberations in a timely and transparent manner;
2. Interpret Facebook's Community Standards and other relevant policies (collectively referred to as "content policies") in light of Facebook's articulated values;
3. Instruct Facebook to allow or remove content;
4. Instruct Facebook to uphold or reverse a designation that led to an enforcement outcome;
5. Issue prompt, written explanations of the board's decisions.

In addition, the board can provide policy guidance, specific to a case decision or upon Facebook's request, on Facebook's content policies. The board will have no authority or powers beyond those expressly defined by this charter.

...

Article 2. Authority to Review

People using Facebook's services and Facebook itself may bring forward content for board review. The board will review and decide on content in accordance with Facebook's content policies and values.

SECTION 1. SCOPE

In instances where people disagree with the outcome of Facebook's decision and have exhausted appeals, a request for review can be submitted to the board by either the original poster of the content or a person who previously submitted the content to Facebook for review. Separately, Facebook can submit requests for review, including additional questions related to the treatment of content beyond whether the content should be allowed or removed completely. Detailed procedures on submission and requirements for review by the board will be publicly available.

The board has the discretion to choose which requests it will review and decide upon. In its selection, the board will seek to consider cases that have the greatest potential to guide future decisions and policies. In limited circumstances where the board's decision on a case could result in criminal liability or regulatory sanctions, the board will not take the case for review.

The board will establish its own set of procedures that its staff will use to select a pool of cases from which the board can choose. Once a case is selected, the board will notify the submitting person, the person who originally posted the content, and Facebook.

SECTION 2. BASIS OF DECISION- MAKING

Facebook has a set of values that guide its content policies and decisions. The board will review content enforcement decisions and determine whether they were consistent with Facebook's content policies and values.

For each decision, any prior board decisions will have precedential value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are substantially similar.

...

* * *

The Oversight Board has used the following formulation to summarize its own status and role:

The Oversight Board is a separate entity from Meta and will provide its independent judgment on both individual cases and questions of policy.⁶²⁶ Both the Board and its administration are funded by an independent trust. The Board has the authority to decide whether Facebook and Instagram should allow or remove content. These decisions are binding, unless implementing them could violate the law. The Board can also choose to issue recommendations on the company's content policies.

The Board's 'decisions' are prepared by five-member panels, and approved by a majority of the Board. Membership of the panels is not public, and majority and minority views are not attributed to named individuals.

OVERSIGHT BOARD, THE TRUMP CASE CASE DECISION 2021-001-FB-FBR (2021)

Full case decision

In this case, Facebook asked the Board to answer two questions:

Considering Facebook's values, specifically its commitment to voice and safety, did it correctly decide on January 7, 2021, to prohibit Donald J. Trump's access to posting content on Facebook and Instagram for an indefinite amount of time?

In addition to the board's determination on whether to uphold or overturn the indefinite suspension, Facebook welcomes observations or recommendations from the board about suspensions when the user is a political leader.

...

2. Case description

Elections are a crucial part of democracy. They allow people throughout the world to govern and to resolve social conflicts peacefully. In the United States of America, the Constitution says the president is selected by counting electoral college votes. On January 6, 2021, during the counting of the 2020 electoral votes, a mob forcibly entered the Capitol where the electoral votes were being counted and threatened the constitutional process. Five people died and many more were injured during the violence.

Prior to January 6, then-President Donald Trump had asserted without evidence that the November 2020 presidential election had been stolen. Legal claims brought by Mr. Trump and others of election fraud were rejected in over 70 cases, and the then-Attorney General, after investigation, stated that there had been no fraud "on a scale that could have effected a different outcome in the election." Nevertheless, Mr. Trump continued to make these unfounded claims, including through using Facebook, and referred to a rally planned for January 6:

a. On December 19, 2020, the Trump Facebook page posted: "Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump - A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!"

b. On January 1, 2021, the Trump Facebook page posted: "The BIG Protest Rally in Washington, D.C., will take place at 11.00 A.M. on January 6th. Locational details to follow. StopTheSteal!"

...

⁶²⁶ <https://www.oversightboard.com/>.

During [the mob attack on the Capitol], Mr. Trump posted a video and a statement to his Facebook page (which had at least 35 million followers), and the video was also shared to his Instagram account (which had at least 24 million followers). The posts stated the 2020 election was “stolen” and “stripped away.” The posts also praised and supported those who were at the time rioting inside the Capitol, while also calling on them to remain peaceful. ...

...

Mr. Trump posted the following written statement at 6:07 pm EST, as police were securing the Capitol:

These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!

At 6:15 pm EST, Facebook removed this post for violating its Community Standard on Dangerous Individuals and Organizations and imposed a 24-hour block on Mr. Trump’s ability to post on Facebook or Instagram.

On January 7, 2021, after further reviewing Mr. Trump's posts, his recent communications off Facebook, and additional information about the severity of the violence at the Capitol, Facebook extended the block “indefinitely and for at least the next two weeks until the peaceful transition of power is complete.” Facebook cited Mr. Trump's “use of our platform to incite violent insurrection against a democratically elected government.”

...

4. Relevant standards

Under the Oversight Board’s Charter, it must consider all cases in light of the following standards:

I. Facebook’s content policies:

...

Facebook’s Community Standard on Dangerous Individuals and Organizations prohibits [certain content.]

...

II. Facebook’s values:

Facebook has five values outlined in the introduction to the Community Standards which it claims guide what is allowed on its platforms. Three of these values are “Voice,” “Safety,” and “Dignity.”

...

III. Human rights standards:

...

The Board analyzed Facebook’s human rights responsibilities in this case by considering human rights standards including:

- The right to freedom of expression: ... (ICCPR), Articles 19 and 20; as interpreted in General Comment No. 34, Human Rights Committee (2011); the Rabat Plan of Action [on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, published by OHCHR], (2012); UN Special Rapporteur on freedom of opinion and expression report A/HRC/38/35 (2018); Joint Statement of international freedom of expression monitors on COVID-19 (March, 2020).
- The right to life: ICCPR Article 6.
- The right to security of person: ICCPR Article 9, para. 1.
- The right to non-discrimination: ICCPR Articles 2 and 26; [ICERD], Articles 1 and 4.
- Participation in public affairs and the right to vote: ICCPR Article 25.

- The right to remedy: ICCPR Article 2; General Comment No. 31, Human Rights Committee (2004); UNGPs, Principle 22.

5. Content creator's statement

When Facebook refers a case to the Board, the Board gives the person responsible for the content the opportunity to submit a statement. In this case, a statement to the Board was submitted on Mr. Trump's behalf ...

...

6. Facebook's explanation of its decision

...

Facebook states that its decision was “informed by Article 19 of the ICCPR, and U.N. General Comment No. 34 on freedom of expression, which permits necessary and proportionate restrictions of freedom of expression in situations of public emergency that threatens the life of the nation. In this case, the District of Columbia was operating under a state of emergency that had been declared to protect the U.S. Capitol complex.” Facebook notes that it also took into account the six contextual factors from the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred. The Rabat Plan of Action was developed by experts with the support of the United Nations to guide states in addressing when advocacy of racial, religious or national hatred that incites discrimination, hostility or violence is so serious that resort to state-imposed criminal sanctions is appropriate, while protecting freedom of expression, in line with states' obligations under Article 19 and Article 20, para. 2 of the ICCPR.

Facebook argues that the events of January 6 represented an unprecedented threat to the democratic processes and constitutional system of the United States. While Facebook asserts that it strives to act proportionately and accountably in curtailing public speech, given the unprecedented and volatile circumstances, Facebook believes it should retain operational flexibility to take further action including a permanent ban.

In this case, the Board asked Facebook 46 questions, and Facebook declined to answer seven entirely, and two partially. The questions that Facebook did not answer included questions about how Facebook's news feed and other features impacted the visibility of Mr. Trump's content; whether Facebook has researched, or plans to research, those design decisions in relation to the events of January 6, 2021; and information about violating content from followers of Mr. Trump's accounts. The Board also asked questions related to the suspension of other political figures and removal of other content; whether Facebook had been contacted by political officeholders or their staff about the suspension of Mr. Trump's accounts; and whether account suspension or deletion impacts the ability of advertisers to target the accounts of followers. Facebook stated that this information was not reasonably required for decision-making in accordance with the intent of the Charter; was not technically feasible to provide; was covered by attorney/client privilege; and/or could not or should not be provided because of legal, privacy, safety, or data protection concerns.

7. Third-party submissions

The Oversight Board received 9,666 public comments related to this case. ...

...

8. Oversight Board analysis

8.1 Compliance with content policies

The Board agrees with Facebook's decision that the two posts by Mr. Trump on January 6 violated Facebook's Community Standards and Instagram's Community Guidelines. Facebook's Community Standard on Dangerous Individuals and Organizations says that users should not post content “expressing support or praise for groups, leaders, or individuals involved in” violating events. ...

...

The Board notes that other Community Standards may have been violated in this case, including the Standard on Violence and Incitement. Because Facebook's decision was not based on this Standard and an additional finding of violation would not affect the outcome of this proceeding, a majority of the Board refrains from reaching any judgment on this alternative ground. ...

A minority of the Board would consider the additional ground and find that the Violence and Incitement Standard was violated. The minority would hold that, read in context, the posts stating the election was being "stolen from us" and "so unceremoniously & viciously stripped," coupled with praise of the rioters, qualifies as "calls for actions," "advocating for violence" and "misinformation and unverifiable rumors that contribute[d] to the risk of imminent violence or physical harm" prohibited by the Violence and Incitement Community Standard.

The Board finds that the two posts severely violated Facebook policies and concludes that Facebook was justified in restricting the account and page on January 6 and 7.

...

8.2 Compliance with Facebook's values

The analysis above is consistent with Facebook's stated values of "Voice" and "Safety." For the reasons stated in this opinion, in this case the protection of public order justified limiting freedom of expression.

A minority believes it is particularly important to emphasize that "Dignity" was also relevant. Facebook relates "Dignity" to equality and that people should not "harass or degrade" others. The minority considers below that previous posts on the platform by Mr. Trump contributed to racial tension and exclusion and that this context was key to understanding the impact of Mr. Trump's content. Having dealt with this case on other grounds, the majority does not comment on these posts.

8.3 Compliance with Facebook's human rights responsibilities

... [The UNGPs] which Facebook has endorsed, establish what businesses should do on a voluntary basis to meet these responsibilities. ...

Facebook has become a virtually indispensable medium for political discourse, and especially so in election periods. It has a responsibility both to allow political expression and to avoid serious risks to other human rights. Facebook, like other digital platforms and media companies, has been heavily criticized for distributing misinformation and amplifying controversial and inflammatory material. Facebook's human rights responsibilities must be understood in the light of those sometimes competing considerations.

The Board analyzes Facebook's human rights responsibilities through international standards on freedom of expression and the rights to life, security, and political participation. Article 19 of the ICCPR sets out the right to freedom of expression.

... The Board does not apply the First Amendment of the U.S. Constitution, which does not govern the conduct of private companies. However, the Board notes that in many relevant respects the principles of freedom of expression reflected in the First Amendment are similar or analogous to the principles of freedom of expression in ICCPR Article 19.

Political speech receives high protection under human rights law because of its importance to democratic debate. The UN Human Rights Committee provided authoritative guidance on Article 19 ICCPR in General Comment No. 34 ...

...

International law allows for expression to be limited when certain conditions are met. Any restrictions must meet three requirements – rules must be clear and accessible, they must be designed for a legitimate aim, and they must be necessary and proportionate to the risk of harm. The Board uses this three-part test to analyze Facebook's actions when it restricts content or accounts. First Amendment

principles under U.S. law also insist that restrictions on freedom of speech imposed through state action may not be vague, must be for important governmental reasons and must be narrowly tailored to the risk of harm.

I. Legality (clarity and accessibility of the rules)

...

The clarity of the Standard against praise and support of Dangerous Individuals and Organizations leaves much to be desired ... The UN Special Rapporteur on Freedom of Expression has also raised concerns about the vagueness of the [Standard]. ... Any vagueness under the terms of the Standard does not render its application to the circumstances of this case doubtful. The January 6 riot at the Capitol fell squarely within the types of harmful events set out in Facebook's policy, and Mr. Trump's posts praised and supported those involved at the very time the violence was going on, and while Members of Congress were calling on him for help. In relation to these facts, Facebook's policies gave adequate notice to the user and guidance to those enforcing the rule.

With regard to penalties for violations, ... the Board reiterates that the patchwork of applicable rules makes it difficult for users to understand why and when Facebook restricts accounts, and raises legality concerns.

... Facebook's imposition of an "indefinite" restriction is vague and uncertain. "Indefinite" restrictions are not described in the Community Standards and it is unclear what standards would trigger this penalty or what standards will be employed to maintain or remove it. Facebook provided no information of any prior imposition of indefinite suspensions in any other cases. The Board recognizes the necessity of some discretion on Facebook's part to suspend accounts in urgent situations like that of January, but users cannot be left in a state of uncertainty for an indefinite time.

The Board rejects Facebook's request for it to endorse indefinite restrictions, imposed and lifted without clear criteria. Appropriate limits on discretionary powers are crucial to distinguish the legitimate use of discretion from possible scenarios around the world in which Facebook may unduly silence speech not linked to harm or delay action critical to protecting people.

II. Legitimate aim

...

III. Necessity and proportionality

The requirement of necessity and proportionality means that any restriction on expression must, among other things, be the least intrusive way to achieve a legitimate aim (General Comment No. 34, para. 34).

...

The crucial question is whether Facebook's decision to restrict access to Mr. Trump's accounts on January 6 and 7 was necessary and proportionate to protect the rights of others. ...

As part of its analysis, the Board drew upon the six factors from the Rabat Plan of Action to assess the capacity of speech to create a serious risk of inciting discrimination, violence, or other lawless action: [Context; status of the speaker; intent; content and form; extent and reach; and imminence of harm.]

...

Analyzing these factors, the Board concludes that the violation in this case was severe in terms of its human rights harms. Facebook's imposition of account-level restrictions on January 6 and the extension of those restrictions on January 7 was necessary and proportionate.

...

9. Oversight Board decision

On January 6, Facebook's decision to impose restrictions on Mr. Trump's accounts was justified. ...

However, it was not appropriate for Facebook to impose an indefinite suspension.

Facebook did not follow a clear published procedure in this case. Facebook's normal account-level penalties for violations of its rules are to impose either a time-limited suspension or to permanently disable the user's account. The Board finds that it is not permissible for Facebook to keep a user off the platform for an undefined period, with no criteria for when or whether the account will be restored.

...

Facebook must, within six months of this decision, reexamine the arbitrary penalty it imposed on January 7 and decide the appropriate penalty. This penalty must be based on the gravity of the violation and the prospect of future harm. It must also be consistent with Facebook's rules for severe violations which must in turn be clear, necessary, and proportionate.

...

... A minority of the Board emphasizes that Facebook's rules should ensure that users who seek reinstatement after suspension recognize their wrongdoing and commit to observing the rules in the future. In this case, the minority suggests that, before Mr. Trump's account can be restored, Facebook must also aim to ensure the withdrawal of praise or support for those involved in the riots.

10. Policy advisory statement

...

Finally, the Board urges Facebook to develop and publish a policy that governs its response to crises or novel situations where its regular processes would not prevent or avoid imminent harm. While these situations cannot always be anticipated, Facebook's guidance should set appropriate parameters for such actions, including a requirement to review its decision within a fixed time.

OVERSIGHT BOARD, THE 'BLACK PETE' CASE CASE 2021-002-FB-UA (2021)

On December 5, 2020, a Facebook user in the Netherlands shared a post including text in Dutch and a 17-second-long video on their timeline. The video showed a young child meeting three adults, one dressed to portray "Sinterklaas" and two portraying "Zwarte Piet," also referred to as "Black Pete."

The two adults portraying Zwarte Piets had their faces painted black and wore Afro wigs under hats and colorful renaissance-style clothes. All the people in the video appear to be white, including those with their faces painted black. In the video, festive music plays and one Zwarte Piet says to the child, "[l]ook here, and I found your hat. Do you want to put it on? You'll be looking like an actual Pete!"

Facebook removed the post for violating its Hate Speech Community Standard.

Key findings

While Zwarte Piet represents a cultural tradition shared by many Dutch people without apparent racist intent, it includes the use of blackface which is widely recognized as a harmful racial stereotype.

Since August 2020, Facebook has explicitly prohibited caricatures of Black people in the form of blackface as part of its Hate Speech Community Standard. As such, the Board found that Facebook made it sufficiently clear to users that content featuring blackface would be removed unless shared to condemn the practice or raise awareness.

A majority of the Board saw sufficient evidence of harm to justify removing the content. They argued the content included caricatures that are inextricably linked to negative and racist stereotypes, and are considered by parts of Dutch society to sustain systemic racism in the Netherlands. They took note of documented cases of Black people experiencing racial discrimination and violence in the Netherlands linked to Zwarte Piet. These included reports that during the Sinterklaas festival Black children felt scared and unsafe in their homes and were afraid to go to school.

A majority found that allowing such posts to accumulate on Facebook would help create a discriminatory environment for Black people that would be degrading and harassing. They believed that the impacts of blackface justified Facebook's policy and that removing the content was consistent with the company's human rights responsibilities.

A minority of the Board, however, saw insufficient evidence to directly link this piece of content to the harm supposedly being reduced by removing it. They noted that Facebook's value of "Voice" specifically protects disagreeable content and that, while blackface is offensive, depictions on Facebook will not always cause harm to others. They also argued that restricting expression based on cumulative harm can be hard to distinguish from attempts to protect people from subjective feelings of offense.

...

The Oversight Board's decision

The Oversight Board upholds Facebook's decision to remove the content.

...

OVERSIGHT BOARD, TIGRAY COMMUNICATION AFFAIRS BUREAU CASE 2022-006-FB-MR (2022)627

Case Summary and Outcome

On October 4, 2022, the Oversight Board upheld Meta's decision to remove a Facebook post that threatened violence during the conflict in Ethiopia. The content was posted on the official page of the Tigray Regional State's Communication Affairs Bureau and was viewed more than 300,000 times. The post discussed the losses suffered by federal forces, encouraged the national army to "turn its gun" toward Prime Minister Abiy Ahmed's group, and warned government forces that they would die if they refused to surrender. ...

[T]he Board held that by removing this post, Meta complied with Facebook's Violence and Incitement Community Standard, Meta's values, and the company's human rights responsibilities. Moreover, the Board considered that the "context in Ethiopia, the status and intent of the speaker; the content of the speech as well as its reach; and the likelihood of offline harm all contributed to a heightened risk of offline violence".

While the Board recognized Meta had taken positive steps to improve content moderation in some conflict zones, it highlighted that Meta should do more to meet its human rights responsibility to establish a principled, transparent system for moderating content in such contexts to reduce the risk of its platforms being used to incite violence or violations of international law. ...

OVERSIGHT BOARD, CALL FOR WOMEN'S PROTEST IN CUBA CASE 2023-014-IG-UA (2023)

...

2. Case description and background

In July 2022, a news platform's verified Instagram account, describing itself as critical of the government in Cuba, posted a video in which a woman calls on other women to join her in the streets to protest. A caption in Spanish includes quotes from the video, hashtags that refer to the "dictatorship" and "regime" in Cuba, and calls for international attention to the humanitarian situation in the country, including by using #SOSCuba. At one point in the video, the woman says that Cuban

⁶²⁷ For a critique, see D. Wong, and L. Floridi, 'Meta's Oversight Board: A Review and Critical Assessment', 33 *Minds & Machines* (2023) 261.

men are “rats” because they cannot be counted on to defend those who are being repressed by the government. At another point, she says that Cuban men are “mares” who carry urinal pots. The text overlaying the video connects political change to women’s protests. The video was played more than 90,000 times and shared fewer than 1,000 times.

...

The post was shared around the first anniversary of the historic nationwide protests that occurred in July 2021 when Cubans took to the streets in what the Inter-American Commission on Human Rights (IACHR) described as “a peaceful protest to claim their civil liberties and demand changes to the country’s political structure.” ...

...

The [government’s] legislative response to the July 2021 protests also included further criminalization of online speech, including new penal code regulation establishing heightened penalties for alleged offenses such as spreading “fake information” or offending someone’s “honor” on social media, or in online or offline media. This is supplementary to existing provisions of the penal code, which cover “public disorder,” “resistance,” and “contempt,” and have historically been used to stifle dissent and criminalize protests. ...

Near-complete government control of the internet’s technical infrastructure in Cuba, in addition to censorship, obstruction of communications, and the very high cost of accessing the internet, “prevents all but a small fraction of Cubans from reading independent news website and blogs” (IACHR, 2022 Annual Report, para. 69). The Board also makes note of the attempts by government-linked networks described by Meta in its February 2023 report on Adversarial Threat to “create the perception of widespread support for the Cuban government across many internet platforms, including Facebook, Instagram, Telegram, Twitter, YouTube and Picta, a Cuban social network.” ... [Meta’s] investigation found links between the Cuban government and the people behind a network of 363 Facebook accounts, 270 pages, 229 groups and 72 accounts on Instagram, which violated Meta’s policy against coordinated inauthentic behavior.

...

6. Meta's submissions

...

The Board asked 17 questions in writing. The questions addressed issues relating to Meta’s content-moderation approach in Cuba; the bearing that asymmetrical power dynamics have on the Hate Speech Community Standard, as well as its enforcement following automated and human review; and opportunities for context assessment, specifically within the part of Meta’s cross-check system called Early Response Secondary Review (ERSR). ERSR is a type of cross-check that provides additional levels of human review for certain posts initially identified as violating Meta’s policies while keeping the content online. All 17 questions were answered by Meta.

...

8. Oversight Board analysis

...

8.1 Compliance with Meta's content policies

I. Content rules

The Board finds that the content in this case is not hate speech as per Meta’s Community Standards, but a *qualified behavioral statement* and, as such, is allowed under the Hate Speech policy. Consequently, the removal of the content is inconsistent with this policy. ...

According to public comments and experts consulted by the Board, epithets such as “rats” or “mares” are used in the vernacular Spanish spoken in Cuba in heated discussions to imply cowardice. As such, the terms should not be read literally and do not indicate that men have inherently negative characteristics by virtue of being men. Rather, they mean that Cuban men have not acted with the necessary forcefulness to defend those who are being repressed by the government in the context of the protests.

...

In conclusion, the Board finds that, when read as a whole, the post does not intend to dehumanize men, generate violence against them or exclude them from conversations about the Cuban protests. On the contrary, the woman in the video is questioning what, in her opinion, the behavior of Cuban men has been in the precise context of the protests, and she aims to galvanize them to participate in such historic events. The content in this case is, therefore, a statement of qualified behavior on an issue of significant public interest related to the historic protests and the wave of repression that followed.

...

Finally, the Board agrees that the post falls directly within Meta's paramount value of "Voice." Therefore, its removal was not consistent with Meta's values. ...

...

NOTE

Following the Board's decision in the Trump case, Meta's Vice-President of Global Affairs issued a statement on 4 June 2021. Trump's accounts were suspended for two years, a term that could be extended if Facebook determines that there remains a serious risk to public safety.

When the suspension is eventually lifted, there will be a strict set of rapidly escalating sanctions that will be triggered if Mr. Trump commits further violations in future, up to and including permanent removal of his pages and accounts.

...

... [Now that we have enforcement protocols] ... we hope and expect they will only be applicable in the rarest circumstances.

We know that any penalty we apply — or choose not to apply — will be controversial. There are many people who believe it was not appropriate for a private company like Facebook to suspend an outgoing President from its platform, and many others who believe Mr. Trump should have immediately been banned for life. ...

Of course, this penalty only applies to our services — Mr. Trump is and will remain free to express himself publicly via other means....

...

The Oversight Board's decision is accountability in action. It is a significant check on Facebook's power, and an authoritative way of publicly holding the company to account for its decisions. ...

... Facebook shouldn't be making so many decisions about content by ourselves. In the absence of frameworks agreed upon by democratically accountable lawmakers, the board's model of independent and thoughtful deliberation is a strong one that ensures important decisions are made in as transparent and judicious a manner as possible. The Oversight Board is not a replacement for regulation, and we continue to call for thoughtful regulation in this space.

We are also committing to being more transparent about the decisions we make and how they impact our users. ... ⁶²⁸

⁶²⁸ N. Clegg, 'In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit', *Meta Newsroom*, 4 June 2021.

The transparency commitment was challenged several months later by Faiza Patel and Mary Pat Dwyer, in ‘So, What Does Facebook Take Down? The Secret List of ‘Dangerous’ Individuals and Organizations’, *Just Security* (1 November 2021):

... [N]ew information has emerged about the content that the company routinely removes from the platform on the theory that it is legally required to do so. Because Facebook maintains that these takedowns are legally mandated, it has erected a wall around debates about those decisions. Its own Oversight Board is barred from hearing cases where a decision to reinstate a post “could” lead to “criminal liability” or “adverse governmental action.” This rule insulates from review decisions about how Facebook interprets its legal obligations and how it evaluates the risks of a country’s reaction.

Recently, the Intercept published the lists of people and groups that Facebook deems “dangerous,” a jumble of well-known terrorist groups, street gangs, drug cartels, media organizations, and far-right militias that are covered under the company’s Dangerous Individuals and Organizations (DIO) Community Standard. Facebook itself had only disclosed the existence of these lists and their overall policy rationale, but not the specific content of the lists. Upon publication of the lists, Facebook defended them with a familiar refrain; its departing Director of Counterterrorism and Dangerous Organizations stated that the company “has a legal obligation to follow U.S. law related to entities designated as foreign terrorist organizations, global terrorists and other sanctioned parties.”

In fact, Facebook’s lists include hundreds of groups and individuals that have not been designated or sanctioned by the U.S. government. Many of them are unsavory and under U.S. law Facebook is legally permitted to keep them off its platform, but no U.S. law requires it to do so.

Even for those groups that are drawn from U.S. government designations, the question remains: does U.S. law require social media platforms to take down praise and positive comments about groups and individuals if the government designates them as terrorists? Despite the repeated assertions of Facebook and Instagram, the answer is no.

The issue has significance far beyond the United States too. Does Facebook, for example, consider itself bound by Israel’s recent, controversial designation of six human rights groups as terrorist organizations? Only when Facebook acknowledges that its decisions on who to include on its banned lists are its own can the company (and its peers, many of which also rely on similar lists) address the harms from this approach – a form of content moderation that is designed to capture a swath of speech that has little relationship to real world harms.

American commentators have also pushed back against Facebook’s call for more effective government regulation of the Internet. Will Duffield, in ‘About Those Facebook Ads Calling for More Internet Regulation’, *National Review* (Online, 7 February 2022) argues that:

A “standardized approach” would eliminate competition among platforms to provide the best content moderation. At present, if Facebook users deem the platform’s rules too restrictive, they can use more liberally governed services such as Reddit or Gab. Switching between rules is as easy as switching tabs. But standardizing the speech rules “all across the board” would erase many of these platforms’ distinguishing features. Because of Facebook’s size and ubiquity, any standardized rules would probably look more like Facebook’s than those of other platforms.

...

Facebook seems to forget that America already provides a set of standardized speech rules. First Amendment jurisprudence allows the prohibition of obscenity, imminent threats, copyright violations, and other longstanding categories of unprotected speech. ...

...

Standardizing the moderation practices of platforms would require government either to promulgate rules for the removal of protected speech or to prohibit platforms from removing protected speech entirely. In the former case, government would violate constitutional prohibitions on government censorship; in the latter, it would usurp the editorial rights of private platforms. Without the ability to moderate, platforms would struggle to attract the advertisers that fund their free publishing tools.

Although Facebook might wish to give its editorial rights to the government, our Constitution prevents the government from accepting them. If Facebook's power over speech is concerning, it would be more concerning in the hands of the state. One size of speech rules cannot possibly fit all. Facebook's desired homogenization of content policies would harm its competitors and leave Internet users worse off.

**ANDREAS KULICK, META'S OVERSIGHT BOARD AND BEYOND—
CORPORATIONS AS INTERPRETERS AND ADJUDICATORS OF INTERNATIONAL HUMAN
RIGHTS NORMS 22 L. & PRAC. INT'L CTS. & TRIBUNALS (2023) 167**

2.2. Flawed, But Without Alternative

Global Tech companies interpret human rights. ...

... But they are flawed interpreters. Decision-making based on such interpretation lacks legitimacy in at least three respects. First of all, corporations in general lack democratic legitimacy to decide matters of individuals' human rights protection. ...

Second, corporations ... lack judicial legitimacy, i.e. the ability to settle a dispute authoritatively between two sides as an independent, neutral and impartial third party. [Tech companies are none of these.] ... [S]ignificant differences exist between state courts as opposed to (quasi-) adjudicatory bodies set up by corporations. ... First, corporations' internal structure may provide for some power-sharing and checks and balances and thus some 'corporate governance', but still is not tailored towards a separation of power into three branches of government that include a judiciary. Second, corporations are accountable only to their shareholders and not to an entire polis. Above all, corporations are not obliged to serve the public interest but instead have a duty to serve the shareholders' interests, which primarily means profit-making.

Third, there is the danger of what may be called corporate human rights imperialism: Global Tech companies usually lack socio-cultural legitimacy to interpret international human rights norms and to issue binding decisions based on such interpretations. ... [T]here is the palpable possibility that companies hailing from the Western hemisphere apply predominantly Western views on how certain human rights standards should be interpreted. ...

... [I]n the foreseeable future there seems to be hardly an alternative to corporations as flawed interpreters in the area of online speech regulation. ... Furthermore, public regulation of online discourse does not seem an attractive alternative, considering the vast opportunities this would open for authoritarian governmental control. Also, the sheer number of instances in which decisions between two or several human rights issues on a platform with hundreds of millions or even several

billion users need to be taken means that only a very small fraction of them will ever come before a domestic or international court. This is why domestic or regional regulation of online speech usually defers to corporations to realize and enforce human rights matters in the first – and often in the last – instance. It therefore seems that we are ... stuck with corporations as flawed interpreters of human rights. Therefore, we need to think how to improve on such flaws. ...

3. Case Study: The Jurisprudence of the OB [Oversight Board]

...
 ... [T]he OB's 'independence' as enshrined in its Charter and Bylaws should not distract from the fact that the OB remains very much Meta's creature: set up, (initially) selected and financed by the corporation. Meta has created an entity that it has bestowed with the competence to make, in a few select 'hard cases', individual content decisions in its stead. The OB's interpretations of human rights norms thereby remain attributable to Meta, Inc. and thus remain very much corporate interpretation – even more so given that the OB's 'independence' has limits

3.2. Analysis of the Case Law Thus Far

Turning to the analysis of its case law, as of mid-August 2022, the OB had deliberated on 26 disputes and had issued 25 decisions. ...

...
 ... [A]ll 25 decisions are unanimous in concentrating on the interpretation of international human rights norms. In all decisions thus far, the OB starts with the Facebook Community Standards and Values but then dedicates usually about two thirds of the analysis to international human rights law.

...
 ... [E]stablished customary rules on treaty interpretation, as arguably enshrined in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), find neither mention nor recognizable application in the OB's decisions thus far. In fact, the board does not seem to burden itself with any form of textual interpretation of the human right norms it refers to. ... [T]he OB relies for the most part on interpreting interpretations of human rights norms. What instructs its analysis are mostly secondary documents by U.N. and treaty bodies Most frequently referred to are the [Human Rights Committee's General Comment No. 34], which is mentioned in each of the 25 decisions and 90 times overall, and various reports of the U.N. Special Rapporteur on Freedom of Expression, which all decisions but four refer to and which are cited 64 times in total. Other general comments or observations of the [Committee] or other treaty bodies as well as a few documents of U.N. (sub)bodies, such as the Rabat Plan of Action, feature regularly, but less frequently.

... The lack of consideration of [Human Rights Committee] case law on Article 19 ICCPR and similar jurisprudence on other provisions and by other treaty bodies is particularly striking. ...

...

3.3. Conclusions on the OB 'Case Law'

... [T]he board's rather idiosyncratic method of interpretation, disguised as a mere application of authoritative interpretations of international human rights treaty provisions, bears the high potential of changing the content of these norms in the interest and image of the social media corporation

...

* * *

Some observers are more optimistic about the OB's role. Laurence Helfer and Molly Land, in 'The Meta Oversight Board's Human Rights Future', 44 *Cardozo L. Rev.* (2023) 2233, at 2299, conclude that:

the Board is already making noteworthy contributions to advancing human rights. As it continues to provide Meta with interpretive guidance and recommendations, the OB will gradually shape the company's content moderation decisions and policies as well as international human rights law writ

large. The Board may also assist national and regional lawmakers and courts in regulating social media companies and particularizing their due diligence obligations. And Meta's engagement with the OB may affect the company's culture, helping to inculcate the values of transparency, information sharing, and fair process.

...

But a key question is whether the OB is achieving legitimacy by ticking the relevant procedural boxes – accessibility, selection criteria, legal reasoning, and the invocation of IHRL standards – while failing to explore the tailored substantive norms that are required in the context of content moderation by a private actor. Evelyn Douek, in 'The Meta Oversight Board and the Empty Promise of Legitimacy', 37 *Harn. J. L. & Tech.* (2024) 000, notes that:

The Board has barely discussed the differences between state and private speech regulators—it has not even discussed the ways in which the UNGPs explicitly distinguish a State's and a company's obligations under IHRL. Indeed, it more often emphasizes the way companies and states might face similar questions, rather than their differences. In no case has the use of IHRL meaningfully constrained the Board, nor could it. This is not a weakness of IHRL alone—because there is so little precedent about how to think about free speech interests in the context of private platforms, no body of pre-existing norms answers the difficult questions for making rights-respecting content moderation decisions. ...

...

The Board instead regularly cites rules that apply to states and then proceeds to apply them to Meta, without comment, often using general and passive language like "restrictions on freedom of expression must [meet IHRL criteria]," eliding that the authorities they cite to are exclusively state-based jurisprudence. ...⁶²⁹

She argues that this failure is even more important since other key actors moving to regulate platform operators, from the European Union to national efforts in India and Germany, are increasingly adopting an OB-style approach.

QUESTIONS

1. In assessing the potential of self-regulatory schemes such as that put in place by Facebook, consider the implications of this analysis by Ronald J. Deibert, in 'The Road to Digital Unfreedom: Three Painful Truths About Social Media', 30 *J. of Democracy* (2019) 25:

The first painful truth is that the social-media business is built around personal-data surveillance, with products ultimately designed to spy on us in order to push advertising in our direction. The second painful truth is that we have consented to this, but not entirely wittingly: social media are designed as addiction machines, expressly programmed to draw upon our emotions. The third painful truth is that the attention-grabbing algorithms underlying social media also propel authoritarian practices that aim to sow confusion, ignorance, prejudice, and chaos, thereby facilitating manipulation and undermining accountability. Moreover, the fine-grained surveillance that companies perform for economic reasons is a valuable proxy for authoritarian control.

2. Richard Wilson, in 'Digital Authoritarianism and The Global Assault on Human Rights', 44 *Hum. Rts. Q.* (2022) 704, at 738 argues that '[p]latforms must move away from a one-size-fits-all content moderation policy towards a context-specific approach that is informed by, and responsive to, the circumstances on the ground. Content moderation policies must facilitate a

⁶²⁹ See also E. Douek, 'The Limits of International Law in Content Moderation', 6 *UC Irvine J. Int'l, Trans International, Transnational, and Comp. L.* (2021) 37.

pluralization of speech norms and a decentralization of their operations while conforming to international human rights principles ...'. Is this what the Board did in the Cuban case?

3. In thinking about the desirability of internal or external 'oversight', consider the example of Twitter. One week after Elon Musk became owner and CEO of Twitter in October 2022, the company's Human Rights Counsel tweeted that 'the entire Human Rights team has been cut from the company', adding that he was proud of the work the team had done to implement the UNGPs 'to protect those at-risk in global conflicts & crises'.

4. Other Approaches to Regulation

Codes of conduct, various forms of Corporate Social Responsibility, voluntary self-regulation, and other techniques have often been found wanting in this context. In the materials that follow, we consider the approaches adopted by different judicial actors, note emerging regulatory approaches around human rights due diligence and, finally, consider some alternative ways forward, as suggested by Katarina Pistor and Surya Deva.

Judicial Remedies

Courts are increasingly involved in different aspects of the BHR debate, at both the national and international levels.

Historically, there are many examples of corporations being involved in crimes against humanity and war crimes, including unlawful killings, torture, and deprivation of liberty. Such crimes are committed in 'host states suffering from armed conflict and/or authoritarian regimes, in which the corporations operate or have business interests.'⁶³⁰ During the drafting of the Rome Statute, France proposed the inclusion of an article stating that '[w]ithout prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute.' This amendment was not adopted and the Statute applies only to natural persons.⁶³¹ Nevertheless, efforts continue in this direction. Article 46C of the Statute of the African Court of Justice and Human Rights,⁶³² as amended by the Malabo Protocol of 2014, which has not yet entered into force, provides for corporate criminal liability:

1. ... [T]he Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation. ...

⁶³⁰ W. Huisman, S. Karstedt and A. van Baar, 'The Involvement of Corporations in Atrocity Crimes', in B. Holá et al. (eds.), *The Oxford Handbook of Atrocity Crimes* (2022) 393, at 417.

⁶³¹ A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (2000) 139.

⁶³² T. Michalakea, 'Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and Its Contours', 7 *Int'l Hum. Rts L. Rev.* (2018) 225.

And the Draft Articles on Crimes Against Humanity adopted by the International Law Commission in 2019 also address legal persons:

Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative (UN Doc. A/74/10 (2019), 14).

In terms of judicial remedies in domestic courts, Gwynne Skinner, in *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* (2020) 158 sees them as a crucial element in attaining a just outcome:

... [V]ictims of business-related human rights abuses face numerous obstacles when they attempt to seek judicial remedy from a TNC from within the host state. TNCs often operate in high-risk countries whose legal systems lack causes of action, encompass an ineffective and non-independent judiciary, and fail to properly induce lawyers to take on cases about human rights violations. Additionally, these countries often fail to physically protect advocates and victims from retaliation or other forms of intimidation. Their legal codes often impose burdensome rules on victims (such as loser pays rules) that mean the case is both physically and logistically difficult to sustain. Such hurdles at the outset of a case mean that the legal system is already stacked against the victim, who usually lacks the financial resources of a TNC.

When faced with such hurdles within the host country, victims should be able to turn to another jurisdiction for remedy. But in home states, too, ... victims usually face similar hurdles: they lack a cause of action, such that the foreign court cannot establish subject matter jurisdiction (in the US, this is framed as a restriction on the extraterritorial jurisdiction of American courts). Moreover, rules limiting shareholder liability have pushed parent companies to the fringes of responsibility. Legal doctrines such as forum non conveniens, and restrictive rules for example on choice of law and limitation periods, are additional hurdles that victims encounter. ...

Non-judicial types of remedy, while theoretically an alternate source of redress, are often not as successful. Schemes at the company- or project-level, or initiatives such as the OECD's [National Contact Points], rarely achieve success for individual victims. Moreover, because their scope is so limited, their wider impact on human rights issues is too narrow to be effective.

Together, these obstacles prevent victims from obtaining a remedy for their harm in two ways. First, they make the legal system financially and practically inaccessible to victims of business-related human rights violations. Second, for those victims who decide to pursue judicial remedy, it raises the emotional, financial, and physical costs to an overwhelming height.

...

... [H]ome states [should] legislate that parent corporations are strictly liable for any harm resulting from the extraterritorial acts of majority-owned subsidiaries and other affiliates they control which breach international human rights law, at least in those instances where the plaintiffs cannot realistically obtain a remedy from the subsidiary or affiliate in the host country. ...

In *Vedanta Resources PLC v Lungowe*, [2019] UKSC 20, 1,800 Zambian citizens claimed that their health and livelihoods had been damaged by toxic discharges from the Nchanga Copper Mine, operated by Konkola Copper Mines (KCM), a Zambian company. The latter's parent company was the UK-

domiciled Vedanta Resources. The suit alleged common law negligence and breach of statutory duty by both KCM as the operator of the Mine, and Vedanta on the basis that exercised control and direction at all material times over the mining operations.

The UK Supreme Court concluded that the public claims Vedanta had made about its responsibility for maintaining environmental control over its subsidiaries and its ongoing monitoring, training, and enforcement role gave rise to a possible duty of care. The Court explained that its main rationale for providing the claimants access to justice in the UK by asserting its jurisdiction was that the claimants had insufficient resources to fund litigation, had no access to legal aid, and could not rely on conditional fee agreements, which were illegal in Zambia. The Court also questioned the capacity of Zambian legal professionals ‘in terms of numbers in the legal team, or experience’ in order to conduct such complex litigation. The case has been widely welcomed as opening a potential door for litigants against parent companies for the operations of their subsidiaries. But critics have argued that the ‘company’s duty of care is construed as a product of its will (as conveyed in its “published materials”) rather than on its potential impact and influence on the conduct of its subsidiaries. Such reasoning reifies the power relations between the British (Court) and the Zambian (victims and legal system). The voice, presence, and agency of the litigants are all missing from the decision.’⁶³³

The regional human rights courts have also addressed many issues of corporate responsibility. The European Court of Human Rights, for example, has an extensive body of case law dealing with state-owned corporate entities.⁶³⁴ It also has a complex jurisprudence dealing with the *human* rights of corporations.⁶³⁵ We turn now to an important case from the Inter-American system which relies heavily on the UNGPs in its reasoning.

**INTER-AMERICAN COURT OF HUMAN RIGHTS, *MISKITO DIVERS (LEMOTH MORRIS ET AL.)*
V. HONDURAS
JUDGMENT OF 31 AUGUST 2021
[UNOFFICIAL TRANSLATION FROM SPANISH]**

[The case began with a 2004 petition to the Inter-American Commission on Human Rights alleging that Honduras had violated the human rights of a group of 42 lobster and shrimp divers from the indigenous Miskito community in the east of the country by failing to regulate safe working conditions, prevent labour exploitation, and provide effective administrative and judicial mechanisms for redress. In 2018, the Commission and the government reached a Friendly Settlement Agreement and the Court was called upon to approve the settlement.]

31. According to PAHO [the Pan American Health Organization, male members of the Miskito community traditionally] practiced ‘free diving’ (without equipment) to obtain lobster for family consumption, not going deeper than 40 to 60 feet in their dives. However, due to their greater commercialization, which represents an important source of income for the Honduran economy, they began to fish on the Atlantic Coast of Honduras and Nicaragua, by diving, and not by artisanal fishing. PAHO noted that the Miskitos begin this activity at the age of 14, and that it ... causes occupational accidents, intoxications and disabilities for people of productive age. ... [O]f the 9,000 lobster divers, 98% of whom are Miskitos, 97% have suffered some type of syndrome and 4,200 have some type of disability.

32. [The Court noted the grave dangers of such deep-sea fishing and PAHO’s evidence that most diving accidents are preventable if a range of precautionary measures are taken.]

⁶³³ D. Lustig, ‘The Vedanta Challenge to Multilateralism: Piercing the Boundaries of the Global Legal Order’, 20 *Int’l J. Const L.* (2022) 35, at 44.

⁶³⁴ M. Barnes, ‘The European Court of Human Rights and State-Owned Entities: Engagement and Development of a *Jurisprudence Constante*’, 21 *The Law & Practice of International Courts and Tribunals* (2022) 369.

⁶³⁵ A. Kulick, ‘Corporate Human Rights?’, 32 *Eur. J. Int’l L.* (2021) 537.

33. [T]he Inter-American Development Bank [IDB] reported that ... the fishing companies do not have the minimum standards necessary ..., there are no contracts to support the labor relationship, the appropriate equipment for this activity is not provided, so divers lack adequate safety conditions. In addition, the IDB noted that some divers have been offered drugs to be able to resist as long as possible underwater fishing for lobster, even in some cases receiving part of their salary in cash and part with drugs.

34. ... [T]he National Commissioner for Human Rights ... indicated that, since 2001, Miskitos who are recruited to be divers do not receive training on diving techniques or on the safety measures that should be adopted. They also reported that the people affected by accidents have not received compensation for the damages suffered or the illnesses or disabilities resulting from such accidents. For this reason, due to injuries and lack of treatment and compensation, most Miskito divers with disabilities engage in begging.

...

38. ... According to the information received, there are no mechanisms to supervise the working conditions of Miskito divers. On the other hand, there is little State presence to offer protection and judicial guarantees to the divers in the area. The State stated that it would look further into the issue to find a solution.

...

Considerations of the court with respect to human rights violations to the detriment of the victims

41. ... [T]his Court deems it appropriate to analyze the content of the rights that were affected ... with special emphasis on the rights to life, personal integrity, health and social security, work and fair and satisfactory conditions that guarantee the health and safety of the worker

A. Preliminary consideration: the responsibility of business with respect to human rights

42. ... [T]he first obligation assumed by the States Parties [to] the Convention, is to “respect the rights and freedoms” recognized [T]he protection of human rights necessarily includes the notion of restricting the exercise of state power.

43. The second obligation of States is to “guarantee” the free and full exercise of the rights This obligation implies the duty of the States Parties to organize the entire governmental apparatus and, in general, all structures through which the exercise of public power is manifested, in such a way that they are capable of legally ensuring the free and full exercise of human rights. As a consequence of this obligation, States must prevent, investigate and punish any violation of the rights recognized

44. ... [T]he obligation to guarantee extends beyond the relationship between State agents and persons subject to their jurisdiction, and encompasses the duty to prevent, in the private sphere, third parties from violating protected legal rights. [But any liability on the part of the State for private acts will depend on the particular circumstances and the concreteness of the relevant obligations.]

45. ... Article 2 of the Convention contemplates the general duty of the States Parties to adapt their domestic law to ... to guarantee [Convention rights]. This duty implies the adoption of measures in two areas. On the one hand, the elimination of norms and practices of any nature that violate the guarantees set forth in the Convention. On the other hand, the issuance of norms and the development of practices conducive to the effective observance of these guarantees. Precisely with respect to the adoption of such measures, this Court has recognized that all the authorities of a State Party to the Convention have the obligation to exercise a control of conventionality, so that the interpretation and application of the Convention may be based on the principle of the right to a fair trial.

46. [The Court's responsibility is not] to determine the individual responsibility of private parties, but to establish whether States are responsible for the violation of the human rights recognized in the Convention. [The Court recalls General Comment No. 24 of the ESCR Committee].

47. [The Court then 'highlights', and quotes at length from, the three pillars of the UNGPs,] as well as the foundational principles derived from these pillars, which are fundamental in determining the scope of the human rights obligations of States and companies

48. Therefore, and in the framework of the obligations to guarantee and the duty to adopt domestic law provisions derived from Articles 1(1) and 2 of the American Convention, this Court emphasizes that the States have the duty to prevent violations of the Convention. The States must adopt legislative and other measures to prevent such violations and to investigate, punish and redress such violations when they occur. States are thus obliged to regulate that companies adopt actions aimed at respecting the human rights recognized in the various [Inter-American human rights instruments] ... especially in relation to risky activities. By virtue of this regulation, companies must prevent their activities from causing or contributing to human rights violations, and adopt measures aimed at remedying such violations. The Court considers that the responsibility of companies is applicable regardless of size or sector; however, their responsibilities may be differentiated in the legislation by virtue of the activity and the risk they pose to human rights.

49. In addition, this Court considers that, in order to achieve the aforementioned goals, States should adopt measures to ensure that companies have: a) appropriate policies for the protection of human rights; b) due diligence processes for the identification, prevention and correction of human rights violations, as well as to guarantee decent and dignified work; and c) processes that allow the company to repair human rights violations that occur as a result of its activities, especially when these affect people living in poverty or belonging to groups in vulnerable situations. The Court considers that, within this framework of action, States should encourage companies to incorporate good corporate governance practices with a stakeholder approach, which entail actions aimed at orienting business activity towards human rights violations. ...

50. ... States must guarantee the existence of judicial or extrajudicial mechanisms that are effective in remedying human rights violations. ...

51. ... [I]t is the companies that are primarily responsible for behaving responsibly in the activities they carry out, since their active participation is fundamental for the respect and enforcement of human rights. Companies must adopt, on their own, preventive measures for the protection of the human rights of their workers, as well as those aimed at preventing their activities from having a negative impact on the communities in which they operate or on the environment. In this sense, the Court considers that the regulation of business activity does not require companies to guarantee results, but should be aimed at ensuring that they carry out continuous assessments of the risks to human rights, and respond through effective and proportional measures to mitigate the risks caused by their activities, in consideration of their resources and possibilities, as well as with accountability mechanisms for the damages that have been produced. This is an obligation that must be adopted by companies and regulated by the State.

52. ... States must adopt measures aimed at ensuring that transnational corporations are held accountable for human rights violations committed in their territory, or when they benefit from the activity of national companies that participate in their chain of productivity.

...

[In a unanimous Judgment, the Court endorsed the Friendly Settlement Agreement, accepted the State's acknowledgement of international responsibility, found violations of the rights to life, to life with dignity, to personal integrity, to judicial guarantees, to the rights of the child, to equal protection of the law, to judicial protection, to health, to work in just, equitable and satisfactory conditions, to social security, and to equality and non-discrimination, and it ordered a wide range of specific actions to be undertaken by the State (para. 162).]

Due Diligence-Based Regulatory Options

The UNGPs have succeeded in turning much of the regulatory focus on to the principle of due diligence. But it has done so in a way that poses risks to the original meaning(s) of the term. The emphasis of international regulatory efforts is now on the notion of ‘human rights due diligence’ or HRDD, which is assuming an increasingly narrow and specialized meaning. When the concept first entered the mainstream of human rights jurisprudence through the *Velásquez Rodríguez* case (see Ch. 3, above) it had a broad and open-ended connotation, which was then transposed into issue areas such as violence against women. Recall the Human Rights Committee’s use of the concept in 2004 (Ch 9, above) as an obligation on states ‘to prevent, punish, investigate or redress the harm caused’ by private actors. In 2018, it expanded upon this approach in General Comment No. 36, observing that States parties have ‘a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State. ... States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals and private security firms (para. 21).

John Ruggie defined HRDD as ‘a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks’ (UN Doc. A/HRC/11/13 (2009), para. 71). The emphasis was thus on risk and the notion that was imported owed much more to the field of corporate law and risk management than to human rights.⁶³⁶

European Due Diligence Laws

In 2017, France adopted a law mandating large companies to adopt due diligence policies. The Law Relating to the Duty of Vigilance of Parent and Contracting Companies requires companies to identify and prevent adverse human rights and environmental impacts. The results have been mixed.⁶³⁷ Germany, the Netherlands, Norway, and Switzerland also adopted such laws, but with widely varying coverage and standards. Partly in order to avoid such fragmentation, the European Union (EU) adopted, on 15 March 2024, a Directive on Corporate Sustainability Due Diligence (the CSDDD). It was the outcome of over two years of heavily contested negotiations and extensive last minute attempts to scuttle it or at least water it down. Some of the latter succeeded. EU member states must incorporate the Directive into national legislation within two years.

It applies to very large EU companies employing over 1,000 employees and generating a net worldwide annual turnover of €450 million, and to non-EU companies generating €450 million turnover in the EU. In total, some 5,300 companies in the EU are affected. The Directive’s due diligence obligations draw on the UNGPs, the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct.

Companies are required to conduct risk-based HRDD to prevent, mitigate and bring to an end adverse environmental and human rights impacts. These are defined as impacts on persons arising from human rights abuses, including, rights of liberty, freedom of thought and religion; interference with privacy; just working conditions; adequate workforce housing; the rights of children and prohibition of child labour; the prohibition of forced labour; and unequal treatment in employment.

⁶³⁶ J. Bonnitich and R. McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’, 28 *Eur. J. Int’l L.* (2017) 899.

⁶³⁷ See E. Savourey and S. Brabant, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption’, 6 *J. Bus. & Hum. Rts.* (2021) 141; and A. Schilling-Vacaflor and M.-T. Gustafsson, ‘Towards More Sustainable Global Supply Chains? Company Compliance with New Human Rights and Environmental Due Diligence Laws’, 32 *Environmental Politics* (2023) 000.

Companies are also required to pay special attention to individuals in marginalised or vulnerable groups, such as indigenous peoples, and use their influence to contribute to an adequate standard of living (particularly, a living wage) in supply chains, as well as to take into account corruption and bribery factors.

Stakeholder engagement is a feature of the Directive. Affected parties who must be consulted include employees, communities, and civil society organizations. Companies must regularly monitor the effectiveness of their due diligence processes and provide annual public reports detailing their findings and actions taken.

In addition, companies must establish or participate in effective remediation processes to address adverse impacts. This may require setting up grievance mechanisms to provide affected individuals and communities with access to remedies.

Enforcement and Sanctions

Each EU member state will appoint authorities responsible for overseeing compliance with the directive. Fines for non-compliance are potentially as high as five percent of a company's global turnover, and there is civil liability for damages caused by failure to meet due diligence obligations.

An early assessment is provided by Nicolas Bueno, Nadia Bernaz, Gabrielle Holly, and Olga Martin-Ortega, in 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise', 9 *Bus. & Hum. Rts. J.* (2024) 000:

[The Directive's conditions for fault-based civil liability] ... are quite restrictive: damage arising from an adverse impact 'to a person'..., a negligent or intentional failure to comply with the obligation to prevent or end an adverse impact, and causation between this specific failure and the damage. Causation is further excluded if the damage is caused 'only' by the business partners. All these elements must be proven by the claimant.

To attenuate the onerous burden of proof for claimants, domestic courts must be able to order the disclosure of evidence that lies in the control of the company 'in accordance with national procedural law'. This should be read as requiring the member states to introduce or adapt a mechanism of disclosure in accordance with their existing laws, otherwise, it would be meaningless. ...

III. Implications of the Directive Beyond Europe

A. Impact on Companies along the Value Chain

The CSDDD will have extraterritorial implications, including prompting changes in the policies and practises of companies along value chains. ...

B. New Legislation in Third Countries

[Anu] Bradford has ... theorised and documented the 'de jure Brussels effect', whereby third countries adopt their legislation in response to EU laws with extraterritorial implications. Third countries do so to level the playing field in their jurisdiction between companies who have to follow EU law, and companies who only operate domestically. The adoption of the CSDDD may lead third countries to pass their own sustainability due diligence laws

C. Implications for the Business and Human Rights Treaty Negotiation

... [T]he adoption of the CSDDD shows that it is possible to turn aspects of existing soft law instruments into actual binding legislation, albeit with important compromises in terms of scope and content. ...

IV. The Way Forward

...

... [T]he Directive is, at its core, a ‘do no harm’ instrument inspired by the UNGPs. Its impact on human rights, the environment and climate will greatly depend on how member states implement it, how the Commission reviews it, how civil society engages with it, and whether there are sufficient drivers for companies to engage meaningfully with the process, rather than adopting a compliance-driven approach. The UNGPs will continue to be a reference point to ensure that the CSDDD is adhered to not just in accordance with the letter of the law, but also in the spirit of the UNGPs.

Alternative Approaches

If a binding treaty is far from finished, and HRDD approaches are only just beginning to be implemented in binding legislative form, the question arises as to what other approaches might be pursued. Mark Goodale, in *Reinventing Human Rights* (2022) 153 calls for a deeply transformative approach:

Perhaps nothing quite captures the unique combination of self-interestedness and folly in the international human rights system as the idea that multinational corporations should be trusted to restructure their operations so as to protect human rights around the world, all because of an earnest commitment to the value of corporate social responsibility (CSR) and a willingness to perform human rights ‘due diligence.’

Arguing that ‘it would be the height of naivety to imagine that corporations could be reliable allies in the struggle against the economic, environmental, and social problems that are an inevitable consequence of capitalism as a mode of production’, he calls for the ‘reinvention’ of human rights in order to ‘break the shackles of inevitability ... and to ground a vision of the future in which profit maximization is relegated as the dominant value so that a more radically ‘ambitious and successful moral program’ can be given shape and form.

Views on HRDD differ greatly. Daniel Litwin, in ‘Business Impacts on Economic Inequality: An Agenda for Defining Related Human Rights Impacts and Economic Inequality Due Diligence’, 8 *Bus. & Hum. Rts. J.* (2023) 90, argues that if HRDD is seen ‘as a management process rather than a source of tortious liability’, businesses could be required ‘to identify, assess and address their actual and potential economic inequality-related adverse human rights impacts’ as part of their HRDD responsibilities. But a major study by Ingrid Landau, *Human Rights Due Diligence and Labour Governance* (2024) concludes that by deferring to managerial understandings of the concept, decision-makers have ‘shorn HRDD of much of its transformative potential’. She adds that (p. 184):

... HRDD so far appears to be lending a technical and apolitical veneer to questions around the corporate management of labour rights in supply chains and thus potentially impeding, rather than facilitating, the capacity of workers and their organisations to challenge corporate practices. ...

...

... [There is] a real possibility that HRDD’s legalisation will ultimately reinforce existing private governance approaches and further entrench those very business models and power dynamics that lead to labour exploitation in the first place.

There is also a risk that ongoing momentum surrounding HRDD in transnational governance may overshadow, or detract from, efforts to expand other more promising approaches and mechanisms in transnational labour governance.

Taking the example of Big Tech, Katarina Pistor calls for more imaginative forms of accountability to be explored. Finally, Surya Deva, a former member of the UN Working Group, surveys a broad range of ‘alternative approaches’ to the BHR puzzle.

KATARINA PISTOR, STATEHOOD IN THE DIGITAL AGE 27 CONSTELLATIONS (2020) 3

...
7 Accountability of Digital Power Wielders

[Grant and Keohane]⁶³⁸ discuss the landscape of power wielders in an increasingly globalized world and the various means by which they can be held accountable. They surveyed the bewildering number and range of power wielders in global relations that included states and multinational corporations, along with non-governmental and multilateral organizations. The authors argue that while many of these power wielders are not subject to the classic accountability mechanisms associated with democratic forms of governance, such as elections and the division of powers, neither do they operate beyond anyone's control. Rather, they respond to different accountability mechanisms and different constituencies or “accountability holders.” Some are part of a hierarchical organization or are fiscally constrained, others can be held liable in a court of law or have to endure regular supervision, and yet others are subject to a competitive market or peer pressure, or risk their reputation if they misbehave. As long as some effective accountability mechanisms exist, power wielders can be kept in check. Grant and Keohane offer a minimalist vision of accountability, but this makes their framework especially useful for inquiring into the accountability of the digital power wielders. If they are not even subject to the mechanisms Grant and Keohane identify, they may in fact be largely unconstrained.

When applied to the new digital power wielders, foremost the Big Tech companies among them, one is indeed struck by the absence of truly effective accountability mechanisms that might keep these companies in check. As corporations with shareholders, one might assume that Big Tech companies should be subject to capital market pressure. Yet ... many Big Tech companies have chosen capital structures that mute the shareholder voice. A single or just a handful of founding shareholders exerts full control over the company. Neither are these companies likely to have to return to capital markets to raise additional funds, because they can more easily monetize their control over consumer data and use these earnings for future investments or their own shares for acquiring other companies.

There are two other “market” forces to consider: the market for the users or consumers of digital platforms on one hand, and the market for the clients that buy access to the user data the digital platforms harvest, organize, and analyze. ...

...
The relation between Big Tech and their clients also is a far cry from the ideal of a market transaction. The clients are buying access to the predictive power of the data the Big Tech companies have amassed in order to place targeted ads or select information that is meant to influence the behavior of the platform customers. Importantly, each client's needs and interests in the data differ so that there cannot be a truly competitive auction for data, but only tailored access to them. And just as consumers do, the clients of Big Tech companies suffer from information asymmetry because they do not have sufficient information about the data or the algorithms that are used to organize and analyze them.

If digital power wielders are not subject to market forces, what other accountability mechanisms might keep them in check? As it turns out, none of the mechanisms that Grant and Keohane identified work for Big Tech companies. First, Big Tech companies do not face a binding budget constraint. The data

⁶³⁸ R. Grant and R. Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *Am. Pol. Sci. Rev.* (2005) 29.

they constantly harvest from billions of users is their revenue stream—a resource that is potentially infinite. As consumers grow increasingly dependent on the services of platform providers and clients on the insights the data these customers generate, Big Tech's future revenue streams are all but assured. They hardly fear peer pressure, because the handful of Big Tech companies have carved out spheres of interests for themselves that free them both from competition and from peer pressure. Neither do they have to fear reputational harm, as they can control the dissemination of information about themselves, both negative and positive. They can create their own image and ensure that deviations from it will be suppressed.

This leaves supervisory and regulatory control by state institutions. Such control has not been absent entirely. Regulators in the USA and the EU have launched investigations into anti-competitive conduct, tax evasion, and illegal state aid schemes. As discussed, on occasion they have imposed fines of these companies. However, these sanctions have not had any lasting effects, in part because they were too small to ensure compliance in the future. In response, some US politicians (including Senator Warren) have called for the break-up of Big Tech companies. This is perhaps the greatest threat these companies face, but one should not be too optimistic about the lasting effects of such measures. Digital platforms exhibit powerful network effects, making true competition all but elusive. Moreover, unless these companies are restrained from future acquisition sprees that would allow them to rebuild their empires and thwart competition yet again, not much will be gained.

Where accountability mechanisms do not exist yet, they could nonetheless be created. One mechanism that has been widely discussed in the literature is to give consumers full property rights over their data. Another would be to give human data the status of *ius communis* of things that may not be appropriated by anyone. The first solution is unlikely to have much effect on Big Tech's business model. Consumers already contract away most uses of their data; it is difficult to see why allocating property rights to them would make them more cautious in trading them away. Holding property rights to their data will also not give them much in terms of monetary gain, as the raw information an individual produces is not worth much. Only the aggregation of similar information from millions, if not billions, of users produces the kind of predictive power that can be monetized.

This leaves the idea of data as a common good, for the management of which a public trust might be created. Ideally, such a measure should have been implemented long ago. Turning back the clock on the vast amounts of data that have already been collected and stored and the extensive surveillance apparatus private companies and state agencies have established over the last two decades seems almost an impossible task. Still, this is worth trying as it would diminish access to data in the future and thus cut the income stream of Big Tech companies. For this to work, the state with its power of coercion would have to act and restrain Big Tech. This, unfortunately, is the Achilles heel of this scheme. States are among the greatest harvesters and aggregators of data, and not only in China. They too have benefited from the legal grey zone that has surrounded data, arguing that collecting vast amounts of data, even from their own citizens, is not subject to legal or even constitutional constraints that protect individuals against them, including the need for court warrants for wire or phone tapping, because they allegedly do not target specific individuals (although they can be attributed to them with ease). Moreover, states have on occasion taken advantage of the data that Big Tech companies have amassed; they collaborate with these companies in creating new surveilling techniques, separate platforms for state agencies (such as the Central Intelligence Agency), and storage facilities for their data. In short, the only force that might establish accountability over Big Tech is not only conflicted, if not complicit in the very practices it should regulate. States may be competing with Big Tech over monetary sovereignty; but when it comes to the unconstrained access to the data of their citizens, their interests are aligned.

**SURYA DEVA, BUSINESS AND HUMAN RIGHTS: ALTERNATIVE APPROACHES TO
TRANSNATIONAL REGULATION**

17 ANNU. REV. LAW SOC. SCI. (2021) 139, 151

...

7. Conclusion

From a critical review of selected alternative approaches to transnational regulation of business, several conclusions and insights for the future can be drawn. First, the influence of the UNGPs, embodying polycentric governance, on diverse regulatory pathways is clear. What is less clear is whether UNGP-induced approaches will bring systemic changes needed to humanize business. For example, mandatory HRDD laws might end up becoming a tick-box compliance exercise with no effective remedy for victims of corporate human rights abuses. ...

...

Third, it seems that states remain a critical, if not central, player in guiding business behavior, even in polycentric governance or non-state-centric regulatory approaches. For example, transparency and disclosure rules by state agencies enable market actors like consumers, investors, and CSOs to assume a regulatory role. At the same time, states continue to show lack of political will, at both individual and collective levels, in regulating business behavior effectively. They often act incohesively and put profit (i.e., creating a business- and investment-friendly environment) over people and the planet (i.e., building an inclusive and sustainable society). ...

Fourth, ... rights in BHR do not really mean legally enforceable rights on paper or in practice. Going forward, regulatory approaches should respond to the needs of rightsholders rather than deliver what is acceptable to businesses. ...

Fifth, assuming that most businesses are rational actors, different regulatory approaches should be employed in tandem to make corporate human rights abuses a costly business. A range of incentives and disincentives should also be employed to change the corporate culture that gives priority to profit over people and the planet. Corporate laws will be vital in internalizing human rights in all business decision-making processes.

Sixth, greater attention should be paid to the role of businesses to protect and fulfil human rights, rather than merely respect human rights. Equally critical will be to focus on corporate responsibility for abuses of socioeconomic rights, contributing to poverty or tax evasion. The COVID-19 pandemic has exposed many inequalities and vulnerabilities that would not be overcome by merely adopting a do-no-harm approach.

Seventh, developing an effective transnational framework combining various regulatory strands in the BHR field requires more clarity on several issues. How will soft social expectations under Pillar II of the UNGPs interact with hard HRDD regulations and legalization of business responsibility to respect human rights on the regional or international level? Should businesses have an obligation of result in certain situations, and should conducting HRDD operate as a defense to legal liability? In what circumstances, and how, could states be held accountable for breach of their duty to protect against human rights abuses by businesses? How to deal with hard cases of corporate impunity in the BHR field, situations in which there is no obvious business case to respect human rights and the concerned states are unable or unwilling to hold the relevant business actors accountable?

QUESTION

The prospects for the successful negotiation of a binding treaty, followed by its ratification by the key states, do not seem especially bright. Meanwhile, most of the governmental momentum seems to be focused on HRDD laws. How do you evaluate this trend in light of this comment by Claire O'Brien, and Daniel Schönfelder:

... [Such] responses are still a patchwork, full of loopholes and discrepancies, that remains wide open to gaming by corporate malefactors. Such initiatives are also, so far, largely restricted to jurisdictions of the Global North, while their impacts redound 'elsewhere', on the rights and livelihoods of people who have had almost no part in their design. Yet both inclusion and coordination are as imperative in devising human rights rules for the global economy, as they will be in their future oversight, evaluation and review: principles of

universality and democracy demand no less, making it hard to see how legitimacy or effectiveness can be achieved without them. The science of due diligence regulation is, further, in its infancy, with little evidence to hand regarding the merits or challenges associated with models espoused by different national jurisdictions. Without an international binding instrument, then, a global level playing field remains out of sight. The interests of responsible businesses, therefore, are equally served by a widely-endorsed global business and human rights framework.

B. NON-STATE ARMED GROUPS

At one level, non-state armed groups (NSAGs), opposed to the relevant government, are simply outlaws. They have rejected or resisted the authority of the state and opted to act outside the applicable legal framework. But at another level, such groups are often involved in a quest for legitimacy, designed to convince the relevant population and the world at large of the illegitimacy of the existing form of state power, and perhaps invoking by way of justification the state's violations of the rights of the group concerned. Two questions arise. First, should we seek to encourage such groups to accept human rights commitments? Second, what would the legal basis for any such obligations be?⁶³⁹

International humanitarian law (IHL) has long accepted that armed opposition groups engaged in an internal armed conflict are bound by IHL, even though they are not parties to the relevant treaties. Even though the structure and assumptions of human rights law are different, there have been examples of governments and opposition groups consenting to abide by both human rights and IHL commitments in a single agreement. In 2021, the International Committee of the Red Cross estimated that there are over 100 armed conflicts around the world and that, worldwide, 'around 600 armed groups have the capacity to cause violence of humanitarian concern'. In IHL terms, more than 100 of those qualify as parties to a non-international armed conflict (NIAC), and are thus bound by IHL. Some of these groups perform functions typically reserved for states, administering territory, providing a wide range of services to populations that number in the millions, and demanding tax contributions from those within their area of control.

In the readings that follow, Sivakumaran outlines the theoretical bases upon which the application of IHL to armed opposition groups might be grounded,⁶⁴⁰ and Clapham considers how the UN has dealt with such groups. The section concludes with some reflections on the current state of the law.

SANDESH SIVAKUMARAN, BINDING ARMED OPPOSITION GROUPS 55 INT'L. & COMP. L. Q. (2006) 369

The vast majority of conflicts being fought today are internal in character. Internal armed conflicts are fought between a state and an armed opposition group, or between two armed opposition groups, within the boundaries of a single state. Armed opposition groups are becoming increasingly sophisticated and are responsible for some of the most egregious atrocities committed in conflicts. Given the proliferation of internal armed conflicts, the number of armed opposition groups that take part in them, and the atrocities that are committed by such groups, it is essential that international humanitarian law regulates such conflicts and governs the behaviour of such groups.

⁶³⁹ See generally, Special Issue on Non-state armed groups, 915 *Int'l Rev. Red Cross* (2022); E. Heffes, 'International Human Rights Law and Non-State Armed Groups: The (De)construction of an International Legal Discourse', in R. Kolb et al. (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2022) 265; and A. Callamard, 'Towards International Human Rights Law Applied to Armed Groups', 37 *Neth. Q. Hum. Rts.* (2019) 85.

⁶⁴⁰ See also S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012).

There exist, however, only a minimum of international humanitarian law rules that pertain to armed conflict of an internal character. [They include, in particular, Common Article 3 of the four Geneva Conventions, and Additional Protocol II.] ...

A treaty binds parties to it, thus these instruments bind states parties fighting in an internal armed conflict. The language of these instruments also purports to bind armed opposition groups fighting in such a conflict. This raises the question of how armed opposition groups are bound by the law governing internal armed conflict when they are not party to the relevant treaties. ...

Four reasons that are commonly put forward to explain the binding nature of the rules governing internal armed conflict on armed opposition groups — customary international law; general principles; the rules governing the effect of treaties on third parties; and the principle of succession — are not in fact capable of binding all types of armed opposition groups by all the rules of internal armed conflict. This is so even when all four reasons are used in conjunction with one another. The legislative jurisdiction explanation — the principle whereby the state binds all individuals within its territory upon ratification of a treaty — is the only one that is capable of binding all types of armed opposition groups by all the rules that govern internal armed conflict.

There is a more fundamental theoretical difference between the four limited explanations on the one hand and the legislative jurisdiction explanation on the other hand. The four limited explanations apply the rules that are applied to states to armed opposition groups. In this way, they are treated like states. The legislative jurisdiction approach treats armed opposition groups as entities subordinate to states. The default positions of the two also differ. The four limited explanations start off from the position that armed opposition groups are not bound by the rules governing internal armed conflict while the legislative jurisdiction explanation begins from the view that armed opposition groups are so bound. Consequently, the four limited explanations are more attractive to armed opposition groups while the legislative jurisdiction approach is more appealing to states. As a result, a question that has to be asked is whether using the legislative jurisdiction approach will lead to a decrease in compliance with the rules on the part of the armed opposition group.

Compliance in this regard is likely affected more by the degree of legitimacy the armed opposition group sees in the rules than the precise manner in which they are bound. One of the threads underlying this article has been the degree of legitimacy of the rules from the perspective of the armed opposition group. In order to increase the degree of legitimacy of and foster a sense of respect for the laws governing internal armed conflict, participation of armed opposition groups in the formation of the rules is vital. Participation may range from the formal — for example involvement of armed opposition groups in the conclusion of new international humanitarian law treaties using their practice for the purposes of customary international law, concluding Common Article 3 agreements and encouraging unilateral declarations of acceptance — to the less formal — such as creating linkages with armed opposition groups that do respect international humanitarian law and pointing to the positive practice of other armed opposition groups.

That armed opposition groups are bound by the rules governing internal armed conflict is beyond doubt; quite how to increase their compliance with these rules is the next big question.

**ANDREW CLAPHAM, DILEMMAS FACING COMMISSIONS OF INQUIRY
NEHAL BHUTA ET AL. (EDS.), THE STRUGGLE FOR HUMAN RIGHTS (2021) 251**

... [I]nternational bodies such as the Security Council, the General Assembly, and the HRC use the expressions ‘human rights violations’ and ‘human rights abuses’ rather arbitrarily even if COIs generally favour the word violations, although some human rights lawyers still prefer to draw a strict distinction, reserving the word abuses to describe the transgressive acts of non-state actors. ...

In the practice of special rapporteurs, the Security Council, and COIs, any dichotomy between legal obligations and non-legal moral responsibility is dissolved when reporting on armed groups that are

considered to be carrying out governmental type functions and controlling territory. ... The Security Council monitors six 'grave violations' of children's rights in armed conflict, listing governments and armed groups without distinction. COIs often report on the acts of non- state actors as violating human rights obligations under international law and determine responsibility for both governmental and opposition forces without nuance.

...

... [A 2006 report on Sri Lanka, by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (UN Doc. E/CN.4/2006/53/Add.5)] grappled with the dilemma of how to report on and engage non- state actors, without seemingly lending them legitimacy by treating them 'like a state'. ...:

As a non- State actor, the LTTE [the Liberation Tigers of Tamil Eelam] does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the [UDHR], that every organ of society respect and promote human rights.

I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it 'exercises significant control over territory and population and has an identifiable political structure. This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community's hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to 'treat it like a State.

It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights. The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration's 'common standard of achievement.

... [One] complexity of the current situation ... is that some of the armed groups are more like criminal enterprises than governments-in-waiting. Some may have minimal control over territory, and yet move around with their child abductees and targeting those they come across. Some victims may find that control over their town changes from week-to-week or even day-to-day. ... [T]hese days many of the groups may be oscillating between opposition and government. ... [T]he idea that there is at all times a clear distinction between state and non-state groups is fallacious. In some contexts armed groups can be better described as 'spin offs' from the state rather than non- state actors, and those same groups may at various stages take on functions that the state chooses not to entrust to its own forces. Add to this the ambiguity over whether some groups have joined or left the government, along with the factor that we may often have different governments within the same state recognized as *de lege* authorities by different parts of the international community, and one can see the impossibility of ... drawing watertight distinctions when labelling specific incidents as violations or abuses. ...

Looking Ahead

Cordula Droege and Eirini Giorgou, in ‘How International Humanitarian Law Develops’, 920-921 *Int’l Rev. Red Cross* (2022) 1, note that while it is widely accepted that NSAGs are bound by the IHL rules applicable to NIACs, they:

are not involved in the development of IHL by means of treaty or custom: they do not participate in treaty negotiations or become party to such instruments, and their practice does not constitute “State practice” constituent of customary law.

Nevertheless, some submit that, with their activities, such actors “have consistently and conspicuously affected the evolution of IHL for a long time”, in particular through the conclusion of special agreements among parties to the conflict on the application of IHL or through the adoption of action plans with the UN. Similarly, there are signs that the practice of NSAGs is, if not accepted on a formal normative level by States, at least accepted for practical reasons in many respects. In that way, the contribution of NSAGs to the interpretation of the rules through practice might be more substantial than meets the eye.

Katharine Fortin, in *The Accountability of Armed Groups under Human Rights Law* (2017) 391, notes the value of parallel accountability processes, including those of Geneva Call, an independent humanitarian NGO, and the UN’s Monitoring and Reporting Mechanism on Children and Armed Conflict. The rationale is that NSAGs ‘are more likely to adhere to norms which they have signed themselves, than to norms which have been imposed upon them by the State against whom they are fighting.’ Under these mechanisms, ‘the voices of the armed groups are valid and can be heard’, and their declaration can be monitored on the ground.

Marco Sassòli, in ‘How Will International Humanitarian Law Develop in the Future?’, 920-921 *Int’l Rev. Red Cross* (2022) 2052, calls for the involvement of NSAGs in developing IHL, although he acknowledges that ‘States are nearly unanimously opposed’ for fear of conferring legitimacy on ‘terrorist’ groups. There are, however, other ways of ensuring their input, such as through Geneva Call. In relation to the relevance of NSAG practice in determining custom, he argues that ‘it is useless to consider a rule to be “customary” law if half of the addressees ... do not respect it out of a sense of conviction.’ But he notes that conceptual difficulties arise in considering NSAG practice in determining custom applicable in NIACs: (i) such groups are not meant to be permanent which makes the notion of assessing their practice more complicated; (ii) their practice generally relates only to one state or one other armed group; (iii) the problem of whether the diversity of NSAGs should be reflected in the relevant rules; and (iv) the problem of whether the rules resulting from the practice of NSAGs should bind only them or states as well. But, whatever the difficulties, he concludes that NSAGs ‘must gain more voice in the development of IHL of NIACs.’

But despite the strong trend reflected above, the resistance of states remains a major obstacle. The extent of legitimacy and legal standing granted to NSAGs has varied enormously with the winds of international politics. National Liberation Movements in the twentieth century achieved considerable rights of participation and substantial legitimization of their armed struggle as a result of the geopolitical climate in which they emerged: the rise of the Third World majority in the General Assembly, and a Cold War dynamic in which each superpower sought to court, or avoid alienating, the newly emerging states, and so cooperated in different degrees with their normative agenda at the United Nations. In the contemporary world, the pendulum appears to have swung far in the other direction. The utility of declaring armed groups as ‘terrorist’ — and thus confining them categorically to the status of criminals — appears widely understood among states facing internal armed conflicts, with few states willing to contest such labels even if the facts are more complex. Thus, while there is no doubt that the Islamic Resistance Movement in Palestine (Hamas) engages in terrorist tactics, it is equally beyond doubt that they now effectively control the Gaza Strip and its population and

conduct a full range of governance functions. Continuing to label the group terrorist as a means of inducing compliance with humanitarian and human rights law has had limited success, and greatly limits the avenues through which ‘carrots’ can be used to induce moderation, compromise, and conflict resolution.⁶⁴¹

Laws prohibiting the provision of ‘material support’ to terrorist groups can come into conflict with the humanitarian goal of engaging with NSAGs in order to protect civilian populations and seek an end to conflict. In *Holder v. Humanitarian Law Project*,⁶⁴² the HLP sought to train members of the Kurdistan Worker’s Party (PKK) in international law for dispute resolution and for bringing petitions to UN bodies and to engage in political advocacy. The U.S. Supreme Court held that while some U.S. government-designated Foreign Terrorist Organizations engage in political and humanitarian activities, they are nonetheless ‘so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct’. Three dissenting justices argued that the government should have to show that the ‘defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims’. The contradictions between such criminal law approaches to counter-terrorism and initiatives to bring armed groups within the humanitarian umbrella have created serious unresolved dilemmas on the ground.⁶⁴³

QUESTION

‘Arguments based upon the approach of IHL to armed opposition groups have no relevance to human rights law. The latter’s assumptions are fundamentally different and the label of human rights respecter is one that, by definition, can and should only be conferred on a legitimate state actor.’ Discuss.

C. INTERNATIONAL ORGANIZATIONS

Like other non-state actors, international organizations (IOs) are not states, and in most cases they are not able to become parties to human rights treaties. But the conclusion that they are not therefore bound to respect human rights is generally considered to be untenable. The challenge, however, is to identify legal grounds for asserting that relevant obligations apply. Three main routes have been identified.

Derivation from Member States’ Obligations

In principle, it can be argued that IOs are agents of the States that are their members and that they are therefore bound to act in accordance with their principals’ treaty obligations. But this does not take adequate account of the fact that most IOs have independent legal personalities, and thus must consent to be bound by treaties. In addition, as argued by Gerald Neuman, in ‘International Organizations and Human Rights – the Need for Substance’, Human Rights Program at Harvard Law School (HRP 19-001 (2019)) the states will have overlapping and inconsistent treaty obligations, making it difficult to determine which ones apply.

It has also been suggested, especially by the UN Committee on ESCR, that IOs must take the human rights obligations of the relevant states into account when interacting with them, so that they do not become complicit in some way in relation to violations. See, for example, General comment No. 12: The right to adequate food (1999), para. 19). An extension of this argument is that IOs derive from

⁶⁴¹ N. Bhuta, ‘The Role International Actors Other Than States Can Play in the New World Order’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 61, at 70.

⁶⁴² 130 S. Ct 2705 (2010).

⁶⁴³ See N. K. Modirzadeh et al., ‘Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape’, 883 *Int’l. Rev. Red Cross* (2011) 1.

the obligations of Member States an obligation to interpret their statutes consistently with human rights law.⁶⁴⁴

The International Law Commission's 2011 Draft articles on the responsibility of international organizations (DARIO) suggest four routes through which an IO may be responsible for violations of human rights law: aid or assistance in the commission of an internationally wrongful act; direction and control exercised over the commission of an internationally wrongful act; coercion of a state or another international organization; or circumvention of its own international obligations through directing or authorising a member state to commit an act that would be wrongful if committed by the IO.⁶⁴⁵ However each of these options – with the exception of coercion – requires that the act must have been wrongful for the IO, and thus that the IO must have had human rights obligations independent of the state through which it acted.

Separate Legal Capacity

It has been long accepted that IOs have a separate legal personality provided they meet certain requirements: that is, they are a permanent association of states with a decision-making structure and the capacity to enter into relations and conclude agreements with other IOs and nations.⁶⁴⁶ This definition would include the UN specialized agencies listed in the 1947 Immunities Convention (the ILO, WHO, IMF, World Bank, etc.) as well as organizations with similar functions like the WTO. IOs may therefore be subject to human rights obligations in the same manner as states: consent, customary international law, or general principles of law.⁶⁴⁷ These obligations also extend to the employees or agents of IOs, as well as organs of states placed at their disposal (for example, in joint peacekeeping operations).⁶⁴⁸ But IOs' powers and obligations are generally limited to what is necessary for, or related to, the exercise of their functions in the fulfilment of their purposes.

a. Explicit Consent or Internal Requirements

An IO is subject to human rights obligations where its governing documents specify that it must act in accordance with human rights (or a specific Convention), or where it is a party to a treaty. The latter is extremely rare: the only example to date is the European Union's (EU) accession to the Convention on the Rights of Persons with Disabilities in 2009. And few IOs have explicit human rights requirements in their constitutive documents. Again, the exception is the EU (see Chapter 11, above).

The UN Charter makes various references to human rights and requires the organization's purposes to be carried out 'in conformity with the principles of justice and international law'. But it does not, *per se*, require UN bodies to respect human rights. An increasingly common approach is for IOs to require compliance with or consideration of human rights and/or international humanitarian law through internal resolutions, policies and mandates.⁶⁴⁹ Examples include: (1) the 1999 UN Secretary-General's Bulletin on 'Observance by United Nations forces of international humanitarian law' (UN Doc. ST/SGB/1999/13); (2) the 2013 'due diligence' Policy and Guidance Note (UN Doc. A/67/775), which applies to peacekeeping and police missions as well as collaboration with migration and border security authorities (the UN has 'obligations under international law to respect, promote and encourage respect for international humanitarian, human rights and refugee law'); and (3) Security Council acknowledgements that human rights and humanitarian considerations are relevant to counter-terrorism and sanctions decisions (see, e.g., S/RES/2615 (2021)). By contrast, the World Bank and IMF have insisted that human rights are not part of their mandate.⁶⁵⁰

⁶⁴⁴ G. M. Zagel, 'International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap', 36 *Nordic J. Hum. Rts.* (2018) 74, 80.

⁶⁴⁵ ILC, Draft articles on the responsibility of international organizations [DARIO], UN Doc. A/66/10 (2011), para. 87, Arts. 14-17.

⁶⁴⁶ See, e.g., *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

⁶⁴⁷ See C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (2017), 16.

⁶⁴⁸ DARIO, Arts. 6-9.

⁶⁴⁹ See further M. Heupel and M. Zürn (eds.) *Protecting the Individual from International Authority: Human Rights in International Organizations* (2017).

⁶⁵⁰ See UN Doc. A/70/274 (2015); cf. D. van den Meerssche, *The World Bank's Lawyers* (2023).

b. Custom and General Principles of Law

There is general agreement that IOs are obligated to respect *jus cogens* norms, such as prohibitions on the crime of aggression, genocide, discrimination, crimes against humanity, and torture.⁶⁵¹ The extent to which a particular IO is required to protect or advance a wider range of rights, including social and economic rights, remains a matter of debate. Scholars have contended that human rights are binding on IOs if (a) the right has attained the status of customary international law or is a general principle of law; and (b) if the exercise of the right is relevant to or impacted by the IO's purposes and functions.

Most rights in the UDHR are arguably part of customary international law. In addition, IOs' internal measures requiring human rights compliance also strengthen claims relating to practice and *opinio juris*. Stian Øby Johansen argues in *The Human Rights Accountability Mechanisms of International Organizations* (2020), at 54, that a rule-by-rule approach is required: 'Only those rules that concern the sphere of competences of a specific organization may be applied to that organization.' In his view, positive obligations require more careful suitability assessments than negative rights, and will bind an IO only to the extent that it has the power to act.

The bottom line is that, despite gradual concessions by different IOs in the direction of accepting some human rights obligations, a significant accountability gap continues to exist.

⁶⁵¹ Ferstman, above, 19.

Chapter 14. Social Movements and Civil Society

This book is replete with illustrations of the many ways in which social movements, civil society, non-governmental organizations and an array of activists and advocates have helped shape the international human rights regime. They have invariably been the prime movers in pushing governments, corporations, international organizations and others to take greater account of human rights, and they have succeeded in imposing forms of accountability that go well beyond the formal institutional arrangements that have been the focus of several of the preceding chapters.

But perceptions differ as to the contributions made by different parts of the overall movement. Writing in 2003, Balakrishnan Rajagopal, in *International Law from Below: Development, Social Movements and Third World Resistance* (2003), at 174, criticized human rights historiographies ‘in which the agency of rights-transformation is the state or statist forms such as international organizations and the direction of rights transformation is ineluctably from the “traditional” to a (Eurocentric) “modern”’. Excluded from this historiography is the role that ordinary individuals and social movements may have played.⁶⁵² He added that this ‘discourse retains many elements which are directly descended from colonial ideology and practices.’ In his view, recent accounts had acknowledged ‘the contributions made by NGOs but these are usually restricted to “Third World watchers” located in the First World such as Human Rights Watch [HRW] or Amnesty International.’

Almost a decade later, Aryeh Neier, one of HRW’s founders, wrote *The International Human Rights Movement: A History*. He argued that ‘the driving force behind the protection of human rights worldwide, today and for roughly the past thirty-five years, has been the nongovernmental human rights movement’ (at 7). This chronology reflects the emergence of HRW and Amnesty, and much of his book is devoted to their roles. In a chapter on ‘the worldwide movement’ (at 233), he acknowledges that ‘literally thousands of other organizations are also active in the field’, but the pages that follow recount the work of a host of groups based in the United States or western Europe. They include the Lawyers Committee for Human Rights (now Human Rights First), Physicians for Human Rights, the Committee to Protect Journalists, the International Human Rights Law Group (now Global Rights), the Washington Office on Latin America, Freedom House, the International Center for Transitional Justice, and the Center for Justice and International Law (CEJIL). The account then refers to a handful of groups not based or originating in the United States, including some in the United Kingdom and eastern Europe.

In mainstream histories focusing on the United Nations human rights system, it is not difficult to trace the decisive influence of civil society actors, working individually or in coalitions, on the great majority of progressive steps taken towards recognizing the human rights of particular groups or the rights most in need of protection in particular contexts. Examples include the indispensable role of Amnesty International and, subsequently, the International Commission of Jurists in pushing for the Convention against Torture; the role played by indigenous groups in propelling efforts that led to the adoption, in 2007, of the UN Declaration on the Rights of Indigenous Peoples; and the role of diverse coalitions from both North and South in driving the processes that culminated in the adoption of the Convention on the Rights of the Child in 1989 and the Convention on the Rights of Persons with Disabilities in 2007, and in putting LGBTIQ+ rights definitively on the international community’s agenda in subsequent years.

Whatever the history books tell us, it is clear that the role played by what we might generically term ‘social movements’ in relation to the evolution of the human rights regime in all parts of the world has changed immensely in recent decades. In 2004, Charles Tilly defined social movements as consisting of sustained, organized public efforts making collective claims on target authorities and employing certain forms of political action, including associations and coalitions, public meetings, processions,

⁶⁵² For a powerful critique of the relationship between scholarship and social movements, see Aziz Choudry, ‘Reflections on Academia, Activism, and the Politics of Knowledge and Learning’, 24 *Int’l J. Hum. Rts.* (2020) 28.

vigils, rallies, demonstrations, petition drives, statements to and in public media and pamphleteering, and concerted public representations regarding the strength of the movement.⁶⁵³

Building on this definition, a 2022 report by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule (UN Doc. A/77/171), added that social movements ‘are predominantly informal in nature, ... often emerge from the grassroots, and many are leaderless and horizontal in nature.’ They provide sites of agency and solidarity, thus ‘fostering social engagement, democratic participation and responsive governance.’ He described their effective presence as ‘a key indicator of a healthy society’, enabling ‘particular communities, including those marginalized, ... to raise their voices and make their concerns visible.’

In recent years, there has been a steady rise in protests around the world, which has led governments of all persuasions to impose limitations on the right to protest.⁶⁵⁴ A study by Isabel Ortiz et al. in *World Protests: A Study of Key Protest Issues in the 21st Century* (2022) tracks 2,809 protests between 2006 and 2020 in 101 countries that together account for 93 percent of the world population. Although protests have increased everywhere, they found more in middle- and high-income countries, and an increasing number of global protests (239 events) organized across regions.

Their study notes that the ‘protests were not random, unorganized riots; the majority of world protests were planned, and their demands were articulated. The main grievances and causes of outrage were:’ failure of political representation and political systems; economic justice and anti-austerity; civil rights; and global justice. The participants were ‘not only traditional protesters (e.g. activists, NGOs/CSOs, trade unions); [but also the] middle classes, women, students and youth, pensioners, indigenous, ethnic and racial groups, as well as other grassroot citizens’. They record 52 events with one million or more protesters: ‘the largest recorded was the 2020 strike in India against the government’s plan to liberalize farming and labor, estimated to have involved 250 million protestors.’ The most common methods of protest were marches and rallies, blockades, strikes, and occupations. They also describe ‘the advent of a new era of civil disobedience/direct action carried out by computer hackers and whistleblowers’. ‘Riots and protests involving violence and vandalism/looting represent only 20% of the total. Though only used by a few, 5% of protests record desperate methods such as hunger strikes and self-inflicted violence (e.g. self-immolation, protesters sewing their own lips).’

But another important part of the picture is the claim that these mass movements are becoming less successful in the third decade of the 21st century. Erica Chenoweth, in ‘Can Nonviolent Resistance Survive COVID-19?’, 21 *J. Hum. Rts.* (2022) 304, suggests that there has been a steady decline in the success rates of people-power campaigns over the preceding twenty years, and that 2020 and 2021 were the worst years on record for people power since the 1930s:

For the first time since the 1940s—a decade dominated by state-backed partisan rebellions against Nazi occupations—nonviolent resistance does not have a statistically significant advantage over armed insurrection in terms of discrete success rates.

...

... [O]ne of the most important factors relates to the adaptive measures states have taken to prevent, deter, and suppress mass movements. These “smart repression” techniques involve a combination of divide and rule strategies, digital repression, propaganda and misinformation, and the declaration of emergency powers in the context of crises. ...

Chenoweth draws attention to the proliferation of rights restrictions that accompanied governmental responses to COVID-19, citing statistics from the International Center for Not-for-Profit Law showing that 153 countries restricted assembly rights, 59 restricted rights to expression, and 110 made

⁶⁵³ C. Tilly, E. Castañeda and L. Wood, *Social Movements*, 1768 – 2018 (4th ed., 2020).

⁶⁵⁴ E. Page and N. Robinson, ‘Legal Threats to the Right to Protest’, in *Oxford Handbook of Peaceful Assembly* (2024) 000.

emergency declarations. Governments also cracked down against human rights defenders, activists, organizers, and dissidents by relying on expanded ‘surveillance, adept use of social media to spread disinformation and mobilize their own supporters, jailing or terrorizing dissidents or their families, and purging or shoring up their inner entourage and security forces to ensure their loyalty in crucial moments.’ She also notes the frequency with which authoritarians denounce protesters and dissidents as terrorists, criminals, and traitors, and incite attacks upon them.

Another question raised in this context is whether groups promoting anti-human rights goals should be considered ‘social movements’. Ortiz et al. note that, although ‘the overwhelming majority of large protests were related to progressive issues’, some were also ‘led by radical right groups such as the QAnon protests in 2020 in the United States and globally; opposition to Muslims, migrants, and refugees in Germany; or the protests against the Workers Party in Brazil in 2013 and 2015.’ Chenoweth also observes that ‘the techniques of people power—long associated with progressive aims and causes—have been cynically appropriated by those who would use these techniques to dispossess, disenfranchise, or subjugate others.’ But the report by the UN Special Rapporteur specifically includes only social movements that ‘act in conformity with the aims and principles’ of the UN Charter and the UDHR. One question to consider is, what criteria would best serve to differentiate the various groups in this regard?

For all of their contributions, most human rights INGOs based in the West have traditionally pursued relatively narrow agendas, marginalized issues of economic and social rights, focused primarily on advocacy and trying to influence government policies, and generally operated at a considerable distance from the grassroots, or the ‘field’ as they would have called it.

Today, the landscape is changing. The human rights regime and the ‘movement’ supporting it are under pressure to expand their focus to respond to a global pandemic, with the likelihood of more to come, to dramatic global warming, rapidly growing inequality, upheavals caused by technologies, and the consequences of the near global embrace of neoliberal policies involving austerity, privatization, deregulation, shrinking government budgets and capacities, and the outsourcing to the private sector of a great many functions that were formerly performed by governments. With this expansion of the overall agenda has come the growing realization that the old-style human rights movement will need to engage much more systematically with a wider array of partners and issues, and to adopt new strategies and tactics. While path dependence makes it difficult for the largest groups to respond, adapt, and adjust, other social movements are already very active.

A. CRITIQUES OF MAINSTREAM GROUPS

Despite the importance of viewing human rights social movements in their global context, many of the harshest recent critiques of the human rights regime, some of which are reflected in Chapter 17 below, are largely based, either implicitly or explicitly, on the work of HRW and Amnesty. While these groups clearly should not be seen as proxies for the much broader and more diverse movement, their role has nonetheless been very important.

In terms of magnitude, Amnesty and HRW are still the behemoths in the field. In 2021, HRW’s budget was \$97 million, and it had 510 staff based in 105 cities, researched 100 countries, and generated 6,000 publications. In the same year, Amnesty raised €357 million and called itself ‘the largest human rights movement globally, with a global presence including offices in more than 70 countries, 2,600 staff and seven million members, volunteers and supporters worldwide.’ Although Amnesty’s budget was over three times larger than HRW’s, 30 percent was devoted to building the ‘supporter base’ (membership), and 2 percent to maintaining democratic internal governance. While 74 percent of Amnesty’s budget came from donations from over 2 million individuals, HRW does not disclose how many individual members it has, and wealthy donors play a key role in its governance structures.⁶⁵⁵

⁶⁵⁵ See generally, P. Alston, *Human Rights Watch Inc.* (forthcoming, 2026).

In terms of impact, the two organizations have played an outsized role in shaping certain parts of the international regime, and they continue to be among the most prolific and oft-cited sources of information about many of the most pressing human rights situations around the world. But there is also no shortage of criticism directed at them. A prominent critic is Stephen Hopgood whose book, *The Endtimes of Human Rights* (2013), focuses heavily on what he terms an elite concept of Human Rights (written in upper case) which is ‘a New York-Geneva-London-centered ideology’ based on ‘top-down authoritative rules’ and focused on international law, criminal justice, and global governance institutions. The relevant organizations ‘raise money, write reports, run international campaigns, open local offices, lobby governments, and claim to speak with singular authority in the name of humanity as a whole.’ This is said to be the very opposite of the ‘bottom-up democratic norms’ that make up the lower-case notion of human rights, favored by the other 99 percent of the world, and which are ‘malleable, adaptable, pragmatic and diverse’. As a result, ‘we are on the verge of the imminent decay of the Global Human Rights Regime.’ And ‘when international NGOs speak, their narrow funding base makes them little more than the private foreign policies of middle-class professionals’ (at 172). In describing global/local dynamics, he says (at x-xi) that:

... the global inevitably structures, disciplines, channels, institutionalizes, and eventually colonizes the local reproducing hierarchies of power and influence ...’. This is partly because the transnational space is structured by a political economy that is almost wholly controlled by global Human Rights centers (in western Europe and the United States). But it is also because the singularity of the Human Rights message resists local adaptation on any basis other than a transient and tactical one. What is at issue is who gets to decide global rules and to define legitimate exceptions to them. This is the essence of sovereign power— setting, and breaking, the rules. To become the supreme authority—a court of law above all politics, national and international—is the inner logic of Human Rights.

...

What changed, what turned human rights into Human Rights, was American power. From the 1970s onward, a new kind of advocacy emerged that sought to pressure the American state into using its vast resources to coerce, cajole, and induce improved human rights abroad. New organizations, of which by far the most successful has been Human Rights Watch, were the product not of a popular movement but of elite mobilization. The language of human rights soon took root, creating a large constituency of supporters, but these new activists were only in some cases like the solidarity-inspired members of the postwar years. Seismic shifts had taken place in transforming the narrow middle class of old Europe into a wide, transnational class of consumers. The majority adopted human rights as a kind of lifestyle choice, joining and campaigning for human rights as a global language of freedom and justice rather than for any specific cause with which they were personally linked. They were a paying audience as much as an activist base. The global membership model Amnesty International had pioneered proved a singular one, and while it persisted it was not replicated.

In Hopgood’s view, ‘it is only as a by-product of American power and money that human rights have been globalized’. As for Amnesty, it sought to rely on a model of ‘secular religiosity’ which ‘anchored moral authority on detachment from power politics’. But this approach ‘had very limited capacity to affect world politics in any deep way. Its achievement was to keep open the idea of impartial, neutral space over and above politics and conflict. Yet this virtue was also its weakness in terms of impact’ because it was ‘a symbolically powerful but politically ineffectual form of activism against determined opposition.’

More recently, Makau Mutua, in ‘Human Rights: A TWAILBlazer Critique’, 52 *Denn. J. Int’l L. & Pol’y* (2024) 185, 205 has reprised his earlier critiques of the same groups:

... [T]he human rights movement has a grand narrative on race in which the peoples of the Global South—who are Black and Brown—are subordinate and inferior to the white, European races of the Global North. The movement hews closely to global hierarchies of power. It is part of the geopolitical hegemonic calculus that drives the international legal order. It promises too much and delivers too little to societies in the Global South. This relationship of the inferior to the superior in racial terms has been cultivated by dominant human rights NGOs and INGOs in the Global North and powerful states in North America, especially the United States, and in the European Union. Powerful NGOs such as the London-based Amnesty International and the New York-based Human Rights Watch have styled themselves the guardians of human rights. These organizations focus mostly on human worked closely with Western governments, prominent funders, and large media houses in the West to marshal influence and power over states in the Global South. These asymmetries of power have correspondingly diminished the voices of human rights NGOs in the Global South in favor of their counterparts in the West. Further, this is why the Western-dominated human rights movement have done little to document and expose violations of economic and social rights, especially by multinational corporations.

Hopgood's provocations predictably drew many critical responses from scholars such as Kathryn Sikkink and Gráinne de Búrca (see Chapter 17, below), as well as from Kenneth Roth ("The End of Human Rights?", *New York Review of Books* (23 October 2014)), then head of HRW. He conceded that while there was 'an element of truth in Hopgood's critique', it also involves 'much caricature':

... [T]he movement is powerful because of its ability, often at great risk, to conduct detailed, on-the-ground investigations of human rights abuses and then to use the information gathered to shame and pressure governments that fall short of public expectations for their conduct. One of the most important assets of the human rights movement is its ability to focus public attention on the abuses that it investigates and documents. The work of [HRW] is cited in the global media dozens of times a day.

...

... Hopgood decries the human rights movement for not doing more to solicit direct action by members of the public, but the movement's primary methods of investigation and exposure are intimately linked to public opinion. If publicizing a rights violation does not lead to condemnation in the media and by concerned members of the public, the written law will make little difference.

The same dynamic lies behind the human rights movement's enlisting of powerful governments. Appeals to the dictates of international law are far less important in moving such governments to use their influence to defend rights than are reports in the media informing people of serious abuses. The public, in turn, often demands that its government avoid complicity in abuses by repressive regimes and use its clout to curb them. The US and other governments, for their part, can make abusive leaders pay a price for that abuse, whether in lost military aid, targeted sanctions, or diplomatic snubbing. That price can make a leader decide to stop committing human rights violations.

...

These are powerful tools. Yet Hopgood belittles them as "elite mobilization," in contrast with the popular mobilization that he prefers. But behind the verbiage seems to be a dislike for the means used to influence public opinion. It is true that groups like [HRW] tend to focus on better-informed media, because they

are more likely to have the sophistication needed to address these often complex issues. To dismiss this use of media as “elite” is to neglect its enormous impact in shaping public opinion throughout society. ...

Even scholars who emphasize the achievements of groups like HRW and Amnesty frequently concede the need for change, especially in terms of relationships between human rights groups and the broader array of social movements.⁶⁵⁶ Antoine Buyse and Verónica Gómez, ‘Human Rights Organizations and Civil Society’, in Kees Biekart and Alan Fowler (eds.), *A Research Agenda for Civil Society* (2022) 99, point to more recent initiatives ranging from:

[S]ocial justice movements in Latin America, to the #MilkTea Alliance of democracy movements in South East Asia, the #BlackLivesMatter protests against racial discrimination and the #FridaysforFuture protests of children and teenagers against climate change in many places. ... [T]hese forms of activism have been much more vocal, often more radical and certainly much more visible and locally rooted than the work of human rights NGOs. At the same time, their success has varied greatly, often because street tactics do not always easily translate into policy or legal changes and may be difficult to sustain. On the other hand, the traditional advocacy, lobbying and research work of human rights NGOs has been perceived by such movements as too slow, too moderate and too much intertwined with existing power structures. The professionalization of human rights organizations in the last few decades, including the preferred methods of action and a partial shift to paid staff as opposed to volunteers, may have increased their effectiveness within international institutions, but at the same time have widened the gap with grassroots movements. The need for rootedness for human rights NGOs and the need for long-term effect for social movements makes for a plausible argument for more cooperation, also because many of the demands of social movements could be translated into and framed as human rights issues. However, the very different ways of organizing, the specific goals and the tactics used make for two uneasy bedfellows. ...

Other critiques have addressed the field as a whole. César Rodríguez-Garavito, in ‘Human Rights 2030: Existential Challenges and A New Paradigm for the Field’, in Nehal Bhuta et al. (eds.), *The Struggle for Human Rights: Law, Politics, Practice* (2021) 328, has identified five field-wide challenges that the movement must address. They are (i) fragmentation and a lack of collaboration and learning across the field; (ii) strategic stagnation and limited innovation; (iii) slowness and a tendency to focus on the short term; (iv) a relatively narrow membership and audience; and (v) shortcomings in managing the complexity of new challenges such as inequality or climate change. Similarly, Martín Abregú, a senior Ford Foundation official and former NGO leader has criticized the movement both for its failure to address the structural causes underlying human rights violations, and for not ‘[m]aking human rights real for the vast majority of the world's people’ by engaging ‘in more comprehensive and collaborative work with non-human rights sectors.’⁶⁵⁷

A collaborative venture calling itself Reimagining International NGOs (RINGO) argues that the ‘current model of the INGO seems no longer fit for purpose.’⁶⁵⁸ Participants in one of its one of its workshops identified barriers to change, including concerns that: the large groups are not engaging in the internal reflections that are needed to bring change; these groups are unprepared to relinquish their power; they are reluctant to take a systems perspective; they do not encourage risk-taking or work on transformative change; and they are overly bureaucratized. And global North-based funders were criticized for perpetuating existing asymmetries. The group concluded by identifying eight ‘areas in which the INGO system needs to be reimagined: structural racism; patriarchy and feminist leadership;

⁶⁵⁶ For a different perspective, see R. O’Dell and L. Veazey, ‘Is Amnesty International Still a Grassroots, Member-Led Organization? An Assessment of Its Democratic Viability’, 15 *J. Hum. Rts. Prac.* (2023) 186.

⁶⁵⁷ M. Abregú, ‘What strengthening human rights has to do with challenging inequality’, Ford Foundation (22 May 2017).

⁶⁵⁸ The RINGO Project: Re-Imagining the INGO and the Role of Global Civil Society, at <https://rightscolab.org/ringo/>.

resource flows; incentives; solidarity and collaboration; governance and accountability; INGO impact; [and] government role.⁶⁵⁹

Another detailed study focused on the negative consequences that may be generated at the local level by outside advocacy groups.⁶⁶⁰ The authors generally refrain from criticizing specific INGOs, but it seems that HRW and Amnesty are clearly among their target group:

... [T]op-down advocacy models risk increasing rightsholders' experience of marginalization, and lead to interventions that are unresponsive to rightsholders' needs and priorities. They can risk adopting strategies that produce backlash and negative consequences for rightsholders, including serious security risks, and reinforce structural barriers to the exercise of rightsholder power. Such practices may also have the effect of undermining rightsholder or grassroots-led efforts to achieve social justice. For example, an advocate's intervention may provide a temporary, palliative reprieve from a violation at the expense of the broader structural change around which rightsholders had been mobilizing, or, funders may direct their limited resources to interventions designed and implemented by outside advocates rather than the rightsholders themselves. The critique of top-down advocacy is of critical importance because of its focus on power. Much human rights work is fundamentally about challenging the structural power imbalances—whether rooted in economic, political, social, or cultural systems or relationships—that operate to deprive rightsholders of the agency to affect change in their own lives. The critique calls into question to what extent outside advocates' own actions vis-à-vis rightsholders might undermine that very goal by recreating and reinforcing the imbalances of power that the advocates seek to disrupt. Advocacy practices may stunt the exercise of rightsholders' agency in decision-making processes that affect them, processes that are fundamentally important to their being able to counter a sense of invisibility and reclaim their dignity, and also to building local capacity and self-reliance to sustainably address future issues or abuses. Human rights practice that fails to empower rightsholders may therefore unwittingly further entrench human rights abuses.

B. ALTERNATIVE APPROACHES

The most powerful response to the criticisms of Hopgood, Posner, Moyn and others writing in a similar vein is that their focus is both too narrow and somewhat dated. The materials that follow aim to give a sense of the greater variety of perspectives, approaches, tactics, and techniques used by other social movement actors within the human rights community. The first reading, by Mette Eilstrup-Sangiovanni and J. C. Sharman, raises the question of whether human rights groups tend to rely on an unduly limited range of tactics. The example of 'peoples' tribunals' suggests that acting completely outside official structures might be rewarding. Then, Jochen von Bernstorff suggests that a significantly new approach that gives the 'most affected' centre stage is increasingly dominant. And several readings provide a case study of the approaches used by 'disability activists'.

1. 'Vigilante Enforcement'

**METTE EILSTRUP-SANGIOVANNI AND J. C. SHARMAN, VIGILANTES BEYOND BORDERS:
NGOS AS ENFORCERS OF INTERNATIONAL LAW
(2022) 159**

⁶⁵⁹ Rights CoLAB and Reos Partners, 'Inception Workshop: A Discovery Journey of the Ringo system' (May 2021).

⁶⁶⁰ S. Knuckey et al., 'Power in Human Rights Advocate and Rightsholder Relationships: Critiques, Reforms, and Challenges', 33 *Hum. Rts J.* (2020) 1.

Nonstate actors increasingly play the role of vigilante enforcers of international law. ... [We need] to shift our view to a more pluralistic understanding which recognizes the multiple enforcement roles of other actors in world politics, especially NGOs. So far we have illustrated the rise of autonomous NGO enforcement in three broad domains of international law: human rights, the environment, and anti-corruption. We have explained this trend by several facilitating factors: a growing mismatch between increasing legalization and limited state enforcement; legal and technological innovations empowering nonstate enforcers; and the changing ecologies of NGO populations. In some cases, states have deliberately or inadvertently created conditions for NGOs to step into an autonomous enforcement role, particularly when governments have committed to wide-ranging legal obligations and then failed to supply adequate enforcement, or when unintended consequences of law have opened new doors to nonstate enforcement. In other cases, NGOs have wrested power from states by turning domestic or international enforcement mechanisms against governments in response to sins of omission or commission.

...

... Although there are ... plenty of exceptions, human rights and anti-corruption NGOs have so far been primarily concerned with holding individuals accountable for breaches of international law. In contrast, environmental groups are more likely to target companies and governments. ...

...

The Legitimacy of Vigilante Enforcement

...

... Given that vigilante justice is sometimes seen as a contradiction in terms, what defence can be offered in terms of legitimacy for transnational enforcement by NGOs?

Scholars often distinguish between procedural and substantive legitimacy. Procedural legitimacy is taken to flow from proper procedure. Thus, if a treaty prescribes that only governments have authority to enforce, then only state-sanctioned enforcement shall be deemed legitimate. Substantive legitimacy is more concerned with the contents of rules and institutions. Hence, insofar as NGOs duly enforce laws which are passed and ratified by states in cases where states lack the means or will to do so, this may be deemed legitimate. It is a commonplace that contracts are enforced by private parties via the courts. Why not accept that legitimacy in regard to international enforcement arises from the legitimacy of international laws—not from who enforces them? This is especially so when ... the international laws in question enjoy near-universal acceptance. On these grounds transnational enforcement could be interpreted and welcomed as a trend towards greater inclusiveness and empowerment of a wider range of global actors.

In terms of the rule of law and due process, it is important to emphasize that NGOs are not above the law. Ultimately, like companies, NGOs are creatures of law and are only distinguished from collections of individuals by formal registration and recognition that ultimately comes from the state. Whether or not they are engaged in enforcement, NGOs enjoy none of the immunities granted to the police. NGOs can be and are occasionally prosecuted and sued for their transgressions. The shortcomings of NGO enforcement, which are real, need to be compared not against some ideal standard but against the practical alternative of state enforcement, warts and all. 'NGO brutality' is not a common problem, whereas police brutality is. The same goes for corruption. ...

... NGOs have often become more rather than less legalistic as they have taken on an enforcement role. Strategic litigation and the 'Pinochet effect' have meant that NGOs are increasingly operating through courts, using the laws as they exist to promote their objectives. Even when NGOs are not in court themselves, the more indirect side of enforcement commonly centres on prompting and supporting police action via preliminary investigations and evidence gathering. Vigilante NGOs are more likely to be in tacit alliance with law enforcement agencies than protest and advocacy groups are.

...

...

... World politics in the twenty-first century is increasingly a hybrid system in which the enforcement of international rules is both delegated but also independently practiced by nonstate actors. From the perspective of states, inter-governmental organizations, and NGOs alike, this hybrid approach raises

the possibility of achieving more effective and efficient enforcement of international laws. In the absence of a unitary world state with a police force to match, a combination of public and private enforcement may be the only way to maintain the operability of an ever more ambitious body of international law. In supplying law enforcement, NGOs make a plausible claim to be supplying a public good, since a lack of enforcement ultimately risks making international law irrelevant.

2. Peoples' Tribunals

International peoples' tribunals have been a prominent feature of the civil society landscape since the initiative led by Bertrand Russell and Jean-Paul Sartre to hold the United States and its allies to account for their violations, during the Vietnam War, of human rights and humanitarian law and the law on the use of force. The 25 panel members, acting in their personal capacities, consisted of writers, philosophers, activists, Nobel laureates and others, including James Baldwin, Stokely Carmichael, Simone de Beauvoir, and Alice Walker. The United States, and various allies, were found guilty in 1967 of 'the deliberate, systematic and large-scale bombardment of civilian targets ... [and] repeated violations of the sovereignty, neutrality and territorial integrity of Cambodia ...'. In the mid-1970s, another tribunal deliberated on the crimes committed by Latin American dictatorships.

The same technique of detailed hearings and collection of evidence, followed by a reasoned verdict, was subsequently adopted by the Permanent Peoples' Tribunals led by Italian leftist politician, Lelio Basso. By 2023, the Tribunal had held 49 Sessions on a wide range of issues, including COVID-19 related crimes by President Bolsonaro in Brazil, the murders of journalists worldwide, and crimes committed in Sri Lanka, Syria, Turkey, Myanmar and elsewhere (see <https://permanentpeopletribunal.org/>).

Consider the following assessment by Andrew Byrnes and Gabrielle Simm (eds.), in *Peoples' Tribunals and International Law* (2017), at 273:

[Such tribunals generally share certain features.] The first is that they all represent a 'formal' response to the (perceived) failures or inability of state-sponsored national and international institutions to prevent or redress systematic violations of human rights. Secondly, they manifest a belief in the emancipatory and protective power of international law, and those involved claim the right as the beneficiaries of that law to own it, interpret it and call states to account for violating it. Thirdly, they challenge the state monopoly on the creation of law, maintaining that it is for peoples and people to formulate a law that promotes the realisation of their rights. ... [Many of the tribunals also] critique those international legal concepts and structures that bolster and are invoked in support of injustice and seek to challenge the oppressive dimensions of international law. As a result, they regularly seek to push existing international law to develop in a direction that will provide enhanced protection to oppressed peoples and marginalised groups. The criticisms levelled at peoples' tribunals and the practice of individual tribunals frequently reflect states' desires to reassert their monopoly on authoritative lawmaking and the interpretation and application of international law. Critics also castigate peoples' tribunals for their failure to comply with a formalist and limited model of adversarial litigation and fail to understand the nature of the social activity in which peoples' tribunals are engaged. Peoples' tribunals perform multiple roles that official institutions and procedures still fail to adequately perform. This is why peoples' tribunals have been growing in popularity and have become a common form of resistance for social movements.

3. Involving the ‘Most Affected’

**JOCHEN VON BERNSTORFF, NEW RESPONSES TO THE LEGITIMACY CRISIS OF
INTERNATIONAL INSTITUTIONS:
THE ROLE OF ‘CIVIL SOCIETY’ AND THE RISE OF THE PRINCIPLE OF PARTICIPATION OF
‘THE MOST AFFECTED’ IN INTERNATIONAL INSTITUTIONAL LAW
32 EUR. J. INT’L L. (2021) 125**

1 Introduction

... Classic NGOs in various fields of law and policy-making are increasingly being replaced by local and transnational social movements, so-called ‘affected persons’ organizations’ (APOs), in reaction to a perceived crisis of legitimacy and a backlash against both international institutions and international NGOs. This trend has, over the last 10 years, already transformed rules of civil-society participation in at least 20 prominent international organizations.

For example, members of indigenous groups and peasant organizations have successfully lobbied for new rights instruments and institutional reform to ensure protection, participation and influence. Persons affected by HIV/AIDS, tuberculosis and malaria have been accorded designated seats on decision-making bodies in the Global Fund, UNITAID and other institutions of global health governance. Organizations that represent disabled people took on a strong role in the negotiations of the UN’s Convention on the Rights of Persons with Disabilities. Working children movements from the Global South challenged the Western understandings of child labour at various intergovernmental organizations (IOs). Among the first institutions which modified their rules of procedure accordingly were the Committee on World Food Security (CFS) in Rome, the Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities (CRPD) and the World Health Organization (WHO). ...

Activists involved in these movements do not want to exercise formalized decision-making powers. Rather, the general idea is to participate in institutionalized deliberation in order to influence the content of adopted decisions. For social movements, participation in international institutions is one strategy among others aimed at fostering the transnational mobilization of social resistance against perceived hegemonic networks of powerful national administrations, scientific expertise and influential corporate actors. The status of speaking, if credible and well-coordinated, for those who are being negatively affected on the ground by certain norms and policies can give these voices a high moral and empirical persuasiveness in these institutional settings. Usually, however, positions taken by APOs are more radical and uncompromising than those of classic NGO representatives. Even without formal voting rights, APOs can have a considerable impact on the content of new international norms, standards and decisions; one striking example being the negotiations on the UN Convention on the Rights of Persons with Disabilities, during which many persons with disabilities representing disability APOs participated under the motto ‘nothing about us without us!’ and exerted considerable influence on the content of the new document.

The general concept of affectedness is ... a basic and longstanding democratic ideal that those affected should have a say on issues that concern them. In traditional Western democratic theory, from Kant to Rawls, being affected by rules enforced in a certain delimited territory has been conceptualized as requiring elections of representative bodies on a ‘one citizen, one vote’ basis Nancy Fraser proposed to replace the ‘all-affected principle’ with a more specific principle of involving all those groups ‘subjected’ to a given transnational governance structure (‘all-subjected principle’). Legal scholars in this context have framed new forms of participatory and multi-level policy-making as ‘global experimentalist governance’, or ... [developed] a global administrative law (GAL) perspective

5 Conclusion

...

The quest for involving affected persons' organizations can be understood as an attempt to redraw the constructed boundaries between private and public spheres, aiming at expanding the public sphere at the cost of 'market solutions' and expert and elite-driven regulation. ... [W]e are thus witnessing a struggle for the extension of global, national and local publics, a struggle for attention and visibility in public institutions so-far dominated by hegemonic expert networks. The move to participation of the most affected does not really aim to democratize international institutions in the sense of equal representation; the aim is, instead, to give a voice to those groups that are existentially affected by policy and rule-making of a particular institution.

In international legal debates, two options for the future of international institutions have been put forward in this context. GAL scholars propose to reform international institutions through greater civil-society participation and various other measures enhancing 'accountability' taken from the toolbox of national administrative law. The second option is to dismantle international institutions and to redirect energy and mobilization of affected groups to the domestic level as suggested by Chimni. Both positions on civil-society participation and the legitimacy problem of international institutions have their inherent limitations and drawbacks. For one, the reformist agenda comes with the structural limitations posed by one of root causes of prior exclusions and blind spots of expert-driven global governance: fragmentation. It is no coincidence that the involvement of APOs, including marginalized and impoverished segments of the global society, is already well underway in all those international institutions that deal with the so-called 'negative externalities' of globalized markets and property protection regimes, such as the human rights and the environmental law field. But to assume that institutions like the WTO, the World Bank, the IMF or the UN Security Council would give affected persons' organizations an influential voice regarding their global policies and rule-making seems unrealistic. ... [A] regime that has been erected to promote free trade will refrain from integrating movements which campaign for reintroducing highly protected and subsidized national and local markets guaranteeing the survival of smallholders and non-industrial forms of traditional agriculture. ... [T]he public law framework of economic globalization, protecting the operations of powerful private economic actors and a status-quo-oriented distribution of wealth, poverty and adverse environmental effects, will not be fundamentally changed by such measures. Even if these regimes should introduce the whole GAL accountability agenda, including effective judicial review, their foundational actor and value-configuration would not allow for major concessions vis-à-vis the global poor and the climate. More accountability in the form of judicial review could eventually even destroy political concessions vis-à-vis these 'external' or second-order values (exceptions) because of the internal regime biases that have usually been internalized by specialized judges and arbitrators.

At the same time, relegating mobilization of the most affected to the national level, as proposed by Chimni, is by no means a panacea, either. Many of the problems faced by the most affected require global solutions to be developed and enforced by global institutions. The main reason is that without significant redistribution of wealth and resources from the Global North to the Global South, and without restructuring the global economy, climate change-induced catastrophes and deprivations will, in the near future, fundamentally challenge existing living conditions in all parts of the globe. The world is in need of a profound economic and social transformation Some international legal and institutional structures will certainly have to be dismantled during this phase. States will remain crucial actors, but ... global political and economic transformations require a new value configuration promoted by a hegemonic discourse including private actors. This time, however, it needs to be in the form of a solid transnational solidarity movement, involving governments, cross-sectorial international institutions, NGOs and – hopefully setting the tone – the most affected.

4. Disability Activism

Gerard Quinn, as UN Special Rapporteur on the rights of persons with disabilities, noted (UN Doc. A/HRC/46/27 (2021) para. 25) the extent to which the Convention on the Rights of Persons with Disabilities (CRPD) provided an impetus to what some have called 'disability activism':

Article 4 (3) of the Convention famously requires that the voices of persons with disabilities and their representative organizations be heard, that persons with disabilities should be closely consulted and actively involved in the development and implementation of legislation and policies to implement the Convention and in other decision-making processes concerning issues that affect them. Furthermore, article 33 (3) requires that civil society, in particular persons with disabilities and their representative organizations, be actively engaged in the process of monitoring the implementation of the Convention at the domestic level. Clearly, the Convention envisages a domestic institutional architecture of change involving power (Government), voice (civil society) and ideas (the checking value of national human rights institutions and the value added of innovative blueprints for change generated by dedicated research bodies working with civil society). At the heart of this new architecture for change is the voice of persons with disabilities.

The background to this disability activism is described by Maria Berghs, Tsitsi Chataika, Kudakwashe Dube, and Yahya El-Lahib, 'Introducing Disability Activism', in *ibid.* (eds.), *The Routledge Handbook of Disability Activism* (2020) 3:

We are living through 'activist' times with differing formal and informal expressions of what activism looks like from individual actions, artistic movements, mass protest marches, hashtag activism (e.g. #ArabSpring, #BlackLivesMatter, #JeSuisCharlie, #MeToo movement, #ThisFlag), consumer activism, climate activism, peace activism; to ensure collective institutional, legislative or political change. These campaigns are viewed as more inclusive, democratic, 'liquid' and horizontal in nature, in that anyone can join. With the impact of social media, boundaries between public and private life collapse. The personal now can become political and part of public discourses, as well as imagery, and experienced as individually empowering. Public spaces become 'occupied' and appropriated for direct action, political slogans of resistance and mass protests. Most activists now use technology, such as mobile phones and the Internet, as well as email, photographs, videos, podcasts, crowdfunding and blogs, making it accessible to a wider global audience.

Much of the physical and emotional labour of activism and advocacy, in terms of writing letters or calling, recruiting new members, ensuring funding, thinking of campaign slogans and planning innovative actions and tactics for attention, has thus profoundly altered with this new media landscape. At the same time, there have been criticisms of this 'new activism', with some despairingly calling it mainly 'online', 'cyber' or 'digital' activism, 'clicktivism', or 'slacktivism'.

...

What is missing from many of the above criticisms and analysis of new forms and impetus of activism is 'disability'. ... While everyone is involved in new forms of activism – from local to global (this is inclusive of age, ethnicity, gender, socio-economic class and so on), disability theory, people with impairments, illness and chronic conditions, as well as different forms of new activism, have been neglected. ...

Disability activism is also incorrectly viewed as only about disability 'rights' or with inadequate cross-cultural or interdisciplinary reach. It is often erroneously seen as something 'special' or 'different', with limited political or human rights impact that only those with a 'disability' identity can do. However, there is often no nuanced understanding of what 'disability issues' involve. We have nonetheless seen a surge of disability advocacy, activism, campaigning and research on activism, from confrontational protests and symbolic direct action

... , to the start of a disability movement and advocacy on disability issues in China and its intersectionality to other movements like #MeToo. ...

But despite the neglect of disability issues in mainstream analyses of human rights activism, there is actually a rich history behind the evolution of radically different approaches to activism in this field, culminating in the emergence of a human rights model of disability.

One of the most elaborate descriptions of the evolution of the various models and approaches to disability is provided by Hisayo Katsui and Lieketseng Ned, 'Discussing Models of Disability of Health in a Global Context', in Lieketseng Ned et al. (eds.), *The Routledge International Handbook of Disability and Global Health* (2024) 19, at 21-22. They suggest the possible negative and positive impacts of various approaches including a: traditional model, charity-based approach, medical model, religious model, social model, political model, human rights-based approach, 'crip theory', decolonial approach, and a neoliberalism-based approach.

Gerard Quinn (UN Doc. A/HRC/52/32 (2023)) has described the difference between the medical and human rights models and their impact in terms of transforming services for persons with disabilities:

19. Our inherited disability service system owes much to the medical model of disability. It is commonly said to focus on deviations from a norm (how "normal" humans function) and then on the design of interventions to "fix" the deviation in the person. This contributed to a narrow social support philosophy mainly seeking to "compensate" the person with a disability for their "loss". The focus was on the impairment, not the person. Moral agency, and legal capacity – the control of persons over their own lives – was not the goal. Still less was the goal to forge inclusive pathways into communal life. Left out altogether was the connection between the advancement of disability rights and community development.
20. ... The Convention departs radically from the medical model of disability. The various social models that helped pave the way for a human rights-based approach to disability challenged the underlying basis and effects of the medical model. Rejected was the fixation on impairment that devalued people. Instead, the starting point is the humanity and the just claims of persons with disabilities as human beings with equal rights, hopes and dreams.
21. Taking common humanity rather than impairment as the core departure point means taking the person seriously as an end in themselves and as a free moral agent. Thus, the objective of services must no longer be about maintenance, care or protection. ... It should be about autonomy – voice, choice and control – and social inclusion. Services of the future should primarily be about enabling one to self-actualize in the world.
22. Second, in addition to the general rejection of the medical model, a web of core rights in the Convention points strongly to the need for the reconceptualization of services. Personhood and moral agency form the bedrock of the Convention. Article 12, on equal recognition before the law, seeks to give persons with disabilities the ability to shape their own lives and thus change the way in which the world interacts with them. The provision is an antidote to the tendency of traditional service systems to bypass the wishes of the person and to entrap them in a world not of their own making. It points strongly towards the personalization of services. This does not mean fixating on the myth of

the completely atomistic individual, but taking human interdependence seriously, especially in support models for decision-making.

23. Article 19, on living independently and being included in the community, is intimately connected with this mission. It is directed at enabling the free development of one's personality, in a home of one's own, and with free interaction in the community: a mix of moral agency with social inclusion. Home is an intensely private place for repose and the evolution of identity, and it is spatially connected with the community, allowing one to engage on one's own terms.
24. The implications for the future of services are clear. For persons with disabilities to lead in all matters concerning their own lives, a reorientation will be required away from fixation on impairments and towards consciousness of the importance of the life choices of the person. Since social inclusion is vital to the evolution of our sense of self, it follows that services should stitch together social capital to ensure an equal right to belong, to grow and to be connected with others. Article 19 (b) speaks more directly to the need for personalized services and support.

...

The CRPD illustrates well the role played by civil society mobilization around the Convention, which can take many different forms. The examples of Argentina and Nigeria are instructive. Gráinne de Búrca, in *Reframing Human Rights in a Turbulent Era* (2021) describes the process followed in Argentina:

... [In Argentina] the paradigm introduced by the CRPD has been particularly successful in galvanizing and strengthening the role of relevant civil society organizations and has had a notable impact on mobilization, advocacy, and policy reform in the disability field. ...

While a variety of organizations of persons with disabilities and their advocates was already active in relation to disability issues well before the adoption of the CRPD in Argentina, the state's ratification and constitutional incorporation of that treaty galvanized many of these groups around an explicit disability rights agenda. Activists worked to build a more collective and coordinated movement, to highlight and publicize issues ..., to identify and advance particular cases, and to use legal and other strategies to challenge a range of injustices both in domestic and international fora. At the national level they sought and generated information from the state as well as from affected individuals and families, and attempted to educate the public and state officials on the issues facing people with disabilities, as well as mobilizing affected constituencies and their supporters. At the international level they used the treaty-body reporting process to organize collaboration amongst themselves, draft shadow reports, highlight particular issues, and generate international attention. They worked to inform and influence the jurisprudence and output of the treaty body and other human rights actors These normative sources—General Comments, Reports, and Concluding Observations—were then later invoked and relied on in domestic litigation to advance disability rights and to influence prosecutors, judges, and advocates general, ... leading ultimately to reforms aimed at advancing the rights of persons with disabilities [R]eform is rarely achieved through a single or discrete event, but is usually the product of an ongoing struggle and an often slow process that includes setbacks and losses rather than only successes.

...

... [I]nternational human rights institutions and actors ... [provided] a focal point for information-generation and normative elaboration as well as a forum for accountability enhancement, rather than one of conventionally understood 'enforcement'. Similarly, while local and national actors within Argentina undoubtedly drew upon and mobilized international resources and networks just as the 'boomerang' model originally described,⁶⁶¹ bringing issues to the attention of international monitoring bodies and preparing petitions and shadow reports to highlight problems and abuses, they have also had an important ongoing domestic role in following up on the interventions of international actors, using the outputs of international bodies at the national and local level to challenge, contest, advocate, explain, and promote change. ...

Nigeria also provides an instructive case study in relation to the CRPD and social mobilization. The Government signed the treaty in 2007 and ratified it in 2010. But after the National Assembly adopted a Bill to implement its provisions, successive Presidents refused to sign. The Bill finally gained Presidential assent in January 2019, after what HRW described as '9 years of relentless advocacy by disability rights groups and activists.'⁶⁶²

Audrey Comstock, in *Committed to Rights: UN Human Rights Treaties and Legal Paths for Commitment and Compliance* (2021) 88, describes the positive impact of this process:

Signing the CRPD brought the treaty and Nigerian disability rights issues to the forefront of domestic and international recognition. With signature, the Nigerian government opened itself to support from the United Nations and other programs promoting disability rights. The president could not contest the programs as imposing outside or Western rights on Nigeria because he had already committed through signing the treaty. [S]igning ... allowed for international development measures to send aid and programs into Nigeria and enact parts of the treaty. Signing the CRPD also legitimated the disability rights movement in Nigeria, fueling further domestic support and mobilization. [The federal government funded small-scale programs, and at the state] and community level, leaders were able to ... proceed with their own implementation independent of national-level implementation.

The need for such an entry point for advocacy was highlighted by HRW in a report, *Nigeria: People with Mental Health Conditions Chained, Abused* (2019), which claimed that '[t]housands of people with mental health conditions across Nigeria are chained and locked up in various facilities where they face terrible abuse':

Deep-rooted problems in Nigeria's healthcare and welfare systems leave most Nigerians unable to get adequate mental health care or support in their communities. Stigma and misunderstanding about mental health conditions, including the misperception that they are caused by evil spirits or supernatural forces, often prompt relatives to take their loved ones to religious or traditional healing places.

Human Rights Watch found that people with actual or perceived mental health conditions, including children, are placed in facilities without their consent, usually by relatives. In some cases, police arrest people with actual or perceived mental health conditions and send them to government-run rehabilitation centers. Once there, many are shackled with iron chains, around one or both ankles, to heavy objects or to other detainees, in some cases for months or

⁶⁶¹ The 'boomerang model' is a term coined by M. Keck and K. Sikkink, in *Activists beyond Borders: Advocacy Networks in International Politics* (1998). It describes how, especially in a repressive state, international and transnational networks provide alternative sources of human rights information, which they draw to the attention of states, international organizations, and others to pressure the government into honouring its international commitments. For an 'updated' version, see C. Pallas and E. Bloodgood (eds.), *Beyond the Boomerang: From Transnational Advocacy Networks to Transcalar Advocacy in International Politics* (2022).

⁶⁶² A. Ewang, 'Nigeria Passes Disability Rights Law', Human Rights Watch (25 January 2019).

years. They cannot leave, are often confined in overcrowded, unhygienic conditions, and are sometimes forced to sleep, eat, and defecate within the same confined place. Many are physically and emotionally abused as well as forced to take treatments.

5. Other Perspectives

ANN MARIE CLARK, *DEMANDS OF JUSTICE: THE CREATION OF A GLOBAL HUMAN RIGHTS PRACTICE* (2022)

Conclusion

...

As leading human rights NGOs have become more authoritative, their positioning in the human rights universe may constrain their modes of action, making them less willing to be bold, and more comfortable with status quo politics. Their established reputations, their power as gatekeepers, and their capacity in comparison to smaller NGOs bolster their authority. In addition, critical scholars point out that a human rights frame privileges classical liberal, individualist views originating in the wealthy Global North while expressing wariness of the potential to reproduce social relations that contributed to the structural injustices of colonialism, racism, and gender bias. ...

... The human rights framework as a path to justice may at some point reach its limits, but human rights possess two unique features that, to some extent, keep human rights practices from losing their edge as tools of justice. The first feature is that the users of human rights tools become subject to critique from the very standpoint of human rights that they propound, and their legitimacy depends on how well they respond to those critiques. ...

The second feature is the malleability of human rights practice, despite the level of institutionalization in law and international organization. Even where tailored protections in international human rights law are incomplete, local, regional, and global activists use human rights in new and uncharted ways.

...

Many expressions of justice concerns draw on the language of human rights: environmental justice, racial justice, indigenous rights, LGBTQI rights, gender equity, and economic and social justice concerns. The variation illustrates the broad applicability of human rights as tools of justice. ...

...

To paraphrase Beitz, human rights may be the closest thing we have to a common language of justice in global politics. Human rights practice has changed the terms of engagement in global politics by providing a common standard for the normative evaluation of political realities. The human rights culture of argument now operates against a background of institutionalized monitoring procedures in intergovernmental organizations. In addition, human rights language has become a medium for justice-related claims people make of their governments. Even with these developments, however, it is a mistake to see human rights as a finished project. Economic, social, and cultural rights have yet to be fully supplied with dedicated human rights tools at the global level. ...

...

MOHAMED EL HACHIMI AND RACHID TOUHTOU, CIVIL SOCIETY, NGOS, AND HUMAN RIGHTS IN AFRICA
R. SOORYAMOORTHY AND NENE ERNEST KHALEMA (EDS.), THE OXFORD HANDBOOK OF SOCIOLOGY OF AFRICA (2022) C27.S1

...
Conceptualizing Civil Society and Human Rights in Africa
 ...

The concept of civil society that originated with the writings of Friedrich Hegel, Karl Marx, and, later, Antonio Gramsci is endemic in Western political thought. To the extent that this concept grew out of the evolution of state-society interactions in Western societies, it can travel outside the West only with some methodological precautions. This is not to say that civil society cannot appear in other sociocultural contexts or that it is the only valid form that can emerge out of state-society interaction and perform the functions of Western civil society. It only means that, as with any other concept, the use of civil society as an analytical tool requires considering how well it is adapted to the reality of the state-society relations it seeks to grasp.

The liberal concept of civil society comprises at least three essential elements: civility, a public sphere, and a relationship with democracy. ...

...
 In Africa, however, a large majority of civil society organizations operate in sociopolitical contexts that lack one or more of the aforementioned three essentials. Civil society organizations in most African societies share three peculiarities that make it difficult to assert that they meet the core criteria. First, they mainly operate in authoritarian or semi-authoritarian political systems, where even when a political reform is introduced, it rarely meets the requirements of a liberal democracy. Second, under these authoritarian political systems, the public sphere is yet to emerge, and in many African countries there is no social arena where citizens can exchange views and opinions free from state control. Last, because the existing civil society organizations take either the form of service providers or are self-organized based on ethnic origin, they do not embody the civic spirit that is so important to the concept of civil society.

Is There an African Indigenous Concept of Civil Society?

Given these missing elements, is it possible to talk about an indigenous conception of civil society in Africa? ...

Unlike the NGOs, considered to have been imposed by colonial powers, local forms of African societal self-organization are thought to be anchored in history. These local forms cover a broad spectrum and range from local political organizations and institutions, such as chiefdoms, councils of elders, and local defense communities, to vigilante or militia groups, militant social movements, youth organizations, and violence entrepreneurs. Regardless of whether they meet the requirements for a Western civil society, the functions these groups perform are similar to those a civil society organization today is supposed to play, especially that of mediating between the society and the state, and some have filled the vacuum created by a typically weak central power.

Some scholars in fact argue that “elements of civil society may be found among political systems in Africa”. This attempt to forge an alternative concept of civil society takes the traditional Akan political environment and philosophy as an illustrative example. ...

This understanding of the notion of civil society has two serious limitations. First, restructuring the concept of civil society along the lines of the traditional African political systems is likely to be perceived as legitimizing the enduring authoritarian systems prevailing in most African countries. Second, rejecting the universal understanding of human rights because it is based on Western liberal ideology has proven to be merely a subtle maneuver instrumentalized by authoritarian regimes to justify human rights violations in the name of cultural specificities.

... We recognize the validity of some of the arguments in favor of an alternative African concept of civil society; however, these efforts are yet to come up with an operational concept able to serve as an adequate analytical tool to shed light on the peculiarities of state-society interactions in the African context. The only way we can enrich the debate on the indigenous African civil society is to analyze the dynamism of organizations that defend their civil society identities. Instead of dwelling on the theoretical, liberal, and normative discussion, we should observe how these organizations operate in their various contexts and how they define their work. ... [T]he functions performed by organizations claiming a civil society identity are shaped, *inter alia*, by a twofold constraint: on the one hand, by their struggle against various forms of repressive power, as shown by their roles in transitional justice and peacebuilding processes, and on the other hand, by coping with the traditions and cultural specificities of local societies, as reflected in their involvement in women's rights and minority rights issues.

Conclusion

... The African civil sphere, mainly as it relates to the discourses and practices of human rights, does not follow the Western, liberal perspective of states and societies that influence the civil sphere. The colonial and postcolonial trajectories of African societies have ruptures from the old, traditional lost systems of social capital and solidarity safety nets. The postcolonial trajectories of these societies when they try to imitate Western development models seem to have failed in major African societies, giving rise to forms of civic engagement from the perspective of the people trying to help themselves. ...

Associations and NGOs in Africa thrive in traditional societies where notions of tribe, family relations, and primordial forms of solidarity appear to be obstacles to the emergence of modern civil society. Although modern NGOs bloomed in Africa from the 1990s because of international aid, pressures from global civil society, and transnational corporations, the hybrid civil society specific to Africa could not break from the chains of traditionalism flourishing in African societies. Even this hybrid modern civil society could not craft the democratic civic space, the condition *sine qua non* for the emergence of a civil society in the Western model. Transitional justice mechanisms and women's rights are proof that the boundaries between traditionalism and modern civil society are not easily crossed. Indeed, it seems that cultural specificities still have a strong weight when dealing with these two issues in this hybrid civil society that tends to mobilize identity, cultural specificity, and anti-modernity arguments when dealing with transitional justice mechanisms and women's rights. To large segments of African societies, civil society was not a natural evolving process but one which was created with the availability of aid and donor organizations.

Civil society in Africa ... is increasingly challenged by the emergence of new forms of activism, mainly mobilizing in the arts, the street, and online. These new forms of activism have become widespread in Africa. The future of human rights and democracy in Africa is likely to depend more on these new forms of activism rather than on traditional civil society. ... [Although] many forms of societal organizations in Africa do not meet the universal requirements of the conception of civil society ... this did not prevent them from struggling against authoritarian regimes. ...

C. THE ACCOUNTABILITY OF HUMAN RIGHTS NGOS

Since human rights NGOs systematically demand accountability from states, international organizations, businesses, and other actors, it is unsurprising that they themselves are subject to such demands. Two decades ago there was a vibrant debate around the question of 'who elected the NGOs?'. Today, however, states that seek to repress NGOs have, for the most part moved from debating accountability to suppressing civil society space. The materials below consider both of these responses.

'Who elected the NGOs?' has been a rallying cry for those who felt that NGOs wielded too much power. At the same time, human rights proponents have agreed that greater accountability and transparency should ideally make NGOs more effective and more strongly supported. Attacks on

human rights NGOs are often led by officials and supporters of particular states whose policies have been criticized. Such attacks are, of course, evidence of the impact of the reports themselves, and the contested facts and interpretations can be fought out in the public domain in light of constantly emerging new evidence. More problematic, from the perspective of NGOs in general, have been the generic critiques of the very legitimacy of such organizations. After the Seattle riots against the WTO in 1999, *The Economist* asked whether NGOs were ‘the first steps towards an “international civil society” (whatever that might be)’, or whether they instead represented ‘a dangerous shift of power to unelected and unaccountable special-interest groups’.⁶⁶³ A year later, the same magazine asked:

... who elected Oxfam ... ? Bodies such as these are, to varying degrees, extorting admissions of fault from law-abiding companies and changes in policy from democratically elected governments. They may claim to be acting in the interests of the people — but then so do the objects of their criticism, governments and the despised international institutions. In the West, governments and their agencies are, in the end, accountable to voters. Who holds the activists accountable?⁶⁶⁴

Kenneth Anderson, in ‘The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society’, 11 *Eur. J. Int’l. L.* (2000) 92 applies this critique to international NGOs as well as the international organizations that provide them with a forum:

... [I]nternational lawyers ... fundamentally believe that international organizations, and their underlying concept of ‘world government’ — what is today taken as the vision of Grotius — are legitimate, and deserve to be understood as the world’s constitutionally supreme sources of authority and the exercise of power. ...

... [They] tend to form a church of those converted to belief in supranationalism. ...

...

... [But] the brutal fact remains that international organizations as they exist today do not have the perception of legitimacy to carry out the functions that international elites would assign to them. ...

...

... Yet now it is urgently needed, and where to get it?

... International organizations claim to have overcome the democratic deficit as an impediment to their legitimacy by having as their partners, and having the moral and political approval of, international NGOs, the voice of ‘world opinion’, and the loud and incessant invocation of ‘international civil society’. ...

...

... International NGOs, for their part, are happy to accept the accolade of ‘international civil society’, the voice of the people, and so on, for the obvious reason that it increases their power and authority within international organizations, international elites, and beyond. ...

...

⁶⁶³ ‘The Non-Governmental Order’, *The Economist* (18 December 1999).

⁶⁶⁴ ‘Angry and Effective’, *The Economist* (23 September 2000).

[The author suggests that some legitimacy might inhere in INGOs if they could claim to be] authentic intermediaries of the ‘people’. ... But this is implausible, for at least two reasons.

First, [INGOs] are not very often connected, in any direct way, to masses of ‘people’. International NGOs, in virtue of their role to operate globally rather than locally, are fundamentally elite organizations. There are exceptions, to be sure, but they are prototypically large religious affiliations. ... There are certain large secular exceptions, as well; Amnesty International is perhaps one, in that at least it has a large base membership. But that membership comes mostly from wealthy countries, and its membership even in those countries tends to be educated and at least middle class ... [T]he far more typical ‘international’ NGO of the kind whose approval and favour international organizations seek is much closer to the model of Human Rights Watch — a relatively small, highly professional, entirely elite organization funded by foundations and wealthy individuals in the Western democracies, and having no discernible base outside international elites. This is not to denigrate Human Rights Watch or the vital work it does, but it would be the first to declare that its legitimacy is not based on democratic roots among the masses but on its fidelity to its own conception of the meaning of international human rights. ...

The dilemma is straightforward. On the one hand, as Benedict Kingsbury has observed, ‘[i]nternational civil society in its widest sense is bound to be a largely unregulated free-for-all, with markets in prestige, influence, membership, fundraising capability, and other markers of organizational success.’⁶⁶⁵ Efforts to regulate or control NGOs are, in some respects, contrary to their nature and ethos. They are inevitably suspect when coming from those who have been obliged to change their policies and practices as a result of NGO campaigning. On the other hand, the NGOs’ unyielding demands for accountability on the part of others necessarily serve to focus attention on shortcomings in terms of their own accountability. Some have argued that they could not be held to the same standards of accountability as those who hold ‘real’ power. As one study put it, ‘[i]n the grand scheme of societal relations, NGOs ultimately have very little power. They do not have coercive power, financial power, or even the authority and power that derives from representation.’⁶⁶⁶ Others note that they are in any event answerable to their supporters and funders, and that their impact and effectiveness is largely dependent upon their perceived legitimacy and credibility.

One starting point is to ask what ‘accountability’ might actually mean in this context. Ruth Grant and Robert Keohane, in ‘Accountability and Abuses of Power in World Politics’, 99 *Am. Pol. Sci. Rev.* (2005) 29, identify seven accountability mechanisms of relevance in this regard:

Hierarchical accountability is a characteristic of bureaucracies and of virtually any large organization. Superiors can remove subordinates from office, constrain their tasks and room for discretion, and adjust their financial compensation. ...

Supervisory accountability refers to relations between organizations where one organization acts as principal with respect to specified agents. For instance, the World Bank and IMF are subject to supervision by states and by institutions within states, such as courts. ...

Fiscal accountability describes mechanisms through which funding agencies can demand reports from, and ultimately sanction, agencies that are recipients of funding. ...

⁶⁶⁵ B. Kingsbury, ‘First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society’, 3 *Chicago J. Int’l. L.* (2002) 183, at 193.

⁶⁶⁶ L. Jordan, ‘Mechanisms for NGO Accountability’, Global Public Policy Institute, Research Paper Series No. 3 (2005) 13.

Legal accountability refers to the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas. ... Courts do not have the broad general authority of governments or of electorates in democracies. Instead, the courts apply a narrow version of the trusteeship model, asking whether the power-wielders performed the duties of their offices faithfully in a limited sense: whether they obeyed the law. ...

Market accountability is [important. It] is not to an abstract force called “the market,” but to investors and consumers, whose influence is exercised in whole or in part through markets. ...

Peer accountability arises as the result of mutual evaluation of organizations by their counterparts. NGOs, for example, evaluate the quality of information they receive from other NGOs and the ease of cooperating with them. Organizations that are poorly rated by their peers are likely to have difficulty in persuading them to cooperate and, therefore, to have trouble achieving their own purposes.

Public reputational accountability is pervasive because reputation is involved in all the other forms of accountability. Superiors, supervisory boards, courts, fiscal watchdogs, markets, and peers all take the reputations of agents into account. Indeed, reputation is a form of “soft power,” defined as “the ability to shape the preferences of others”. The category of public reputational accountability is meant to apply to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them.

Isobelle Jaques, in ‘Strengthening Democratic Governance: The Role of Civil Society’, Report on Wilton Park Conference S06/10 (2006), suggests what the goals of legitimacy, openness and transparency might mean for NGOs:

Legitimacy stems from several sources: firstly, from a strong moral conviction, through acting on the basis of universally-recognised rights and freedoms of speech, assembly and association to articulate public concerns inadequately addressed by government; secondly, a political legitimacy or credibility, through approval of the community or constituency represented by the voluntary association, asserting people’s sovereignty and community control; thirdly, competence or performance legitimacy, by delivering results through being closer to local reality than governmental institutions, helping to bridge a government-community gap and promote social cohesion; fourthly, legal recognition ...; and, most importantly, legitimacy comes from accountability and transparency.

NGOs should be accountable to a wide range of stakeholders: peoples whose rights they seek to protect and advance; their own members, supporters and staff; to those who contribute finance, goods or services; to partner institutions, both governmental and non-governmental; to regulatory bodies; to those whose policies, programmes or behaviour they wish to influence; and, more broadly, to the media and general public. They should be able to demonstrate a democratic structure, participative decision-making and non-partisan approach if they claim legitimacy on political grounds. They should focus on whatever is their primary agenda and not be diverted from this by demands of donors or obstacles in their operational environment. Some express concern that ... some civil society organisations ... have veered away from contentious issues like political reform and redistributive justice

Fiscal accountability is ... vital, with effective reporting and monitoring systems, and sources of funding fully divulged. Some argue against accepting government support and foreign funding if civil society organisations are involved in promoting political and democratic reform; others, acknowledging the potential sensitivity of this, believe assuring a diversity of funding from public and private sources will overcome accusations of undue influence of donors.

The evolution towards national and international codes of conduct for voluntary self-regulation is regarded as a healthy development, although given the tremendous difference in size and scope of civil society organisations all cannot be brought under one approach. It will, however, introduce common principles which all can use in their work. ...

In practice, while some groups such as Amnesty International and Transparency International have signed on to codes of conduct such as that overseen by Accountable Now (which is now also responsible for the International Non-Governmental Organizations' Accountability Charter of 2005), they generally rely on internal mechanisms should major challenges arise. One notable exception occurred following the tragic suicide of two Amnesty staff members in 2018. This raised broader questions of staff well-being and led Amnesty to commission independent legal reviews of the two cases. It also asked KonTerra, a group specializing in 'staff care and organizational resilience' to undertake a thorough review. This resulted in far-reaching recommendations that Amnesty promised to review and implement. Five senior staff members subsequently resigned.⁶⁶⁷

In another situation, in 2022, Amnesty accused Ukrainian forces of putting 'civilians in harm's way by establishing bases and operating weapons systems in populated residential areas, including in schools and hospitals'.⁶⁶⁸ The organization found that '[s]uch tactics violate international humanitarian law and endanger civilians, as they turn civilian objects into military targets.' The same day, the Russian Ministry of Foreign Affairs retweeted the report and noted that this was 'exactly what #Russia has been saying all along.' Several senior Amnesty officials resigned, arguing that the organization should not be focusing on a country defending itself from brutal attacks.

Responding to the ensuing controversy, Amnesty appointed an external review panel of five IHL experts. They concluded that the evidence supported the reporting but that the legal assessment 'was made in overly emphatic and categorical terms'. More generally they found that the 'legal and factual analysis' was insufficiently 'detailed and reasoned', and that '[p]arts of the overarching narrative ... were written in language that was ambiguous, imprecise, and in some respects legally questionable.' Amnesty did not release the review publicly, but in April 2023 it was leaked to, and published by, the *New York Times*.⁶⁶⁹

In 2020, a reporter revealed that HRW had accepted a donation in 2012, reported to be \$470,000, for its work in the Middle East and North Africa but allegedly on condition that it would not support work on LGBT rights.⁶⁷⁰ The Saudi donor was also the owner of a company that HRW had previously criticized for being complicit in labour rights abuses. Both the conditionality and the donation itself raised questions under HRW's internal guidelines. HRW's Board subsequently issued a press release describing the acceptance of the donation as 'a serious error' and 'a deeply regrettable decision', and announcing the return of the money.⁶⁷¹

The broader area of humanitarian and development NGO scandals, especially involving alleged sexual exploitation and abuse (SEA) by aid workers, have led to calls for more institutionalized external forms

⁶⁶⁷ The KonTerra Group, *Amnesty International, Staff Wellbeing Review* (January 2019).

⁶⁶⁸ Amnesty International, 'Ukrainian fighting tactics endanger civilians' (4 August 2022).

⁶⁶⁹ C. Savage, 'Unreleased Report Finds Faults in Amnesty International's Criticism of Ukraine', *New York Times* (27 April 2023).

⁶⁷⁰ A. Emmons, 'Human Rights Watch Took Money from Saudi Businessman after Documenting His Coercive Labor Practices', *The Intercept* (2 March 2020).

⁶⁷¹ Human Rights Watch, 'Statement on Return of Donation' (27 February 2020).

of accountability.⁶⁷² One resulting report (Dorothea Hilhorst, Asmita Naik and Andrew Cunningham, *International Ombuds for Humanitarian and Development Aid: Scoping Study* (2018)) proposed the creation of a ‘Joint Sectoral Aid Ombuds’ which would be ‘nested in an international body and governed by different parts of the sector, with the work carried out by a small secretariat supported by a flexible roster of technical experts and on-the-ground specialists.’ If existing mechanisms had not resolved an issue, an appeal could be made to the Ombuds, which would accept complaints from ‘all affected populations’, would make recommendations, possibly publicly, but would have ‘no direct authority to sanction’. The proposal garnered little support from key stakeholders and has been criticized by scholars.⁶⁷³

Consider the following very different approach proposed by Domenico Carolei and Nadia Bernaz, in ‘Accountability for Human Rights: Applying Business and Human Rights Instruments to Non-Governmental Organizations’, 14 *J. Hum. Rts. Prac.* (2022) 507, at 523, which relies upon the UN Guiding Principles on Business and Human Rights (see Ch. 13, above):

... [A]lthough not primarily designed for them, business and human rights instruments may be applicable to NGOs. At a minimum business and human rights instruments are relevant to NGOs when they undertake business-like activities, but arguably other activities as well. Second, ... business and human rights instruments [are suitable] for the NGO sector, [but] they should go hand in hand with self-regulation and other accountability mechanisms. ... Applying existing instruments, which requires no further drafting, ... provides an attractive, moderate avenue for NGO accountability. ... The due diligence process described in the UNGPs mandates organizations to identify, prevent, mitigate and remedy their human rights impact in order to meet the (corporate) responsibility to respect human rights. Undertaking this process is challenging for all organizations, whether non-profit or for-profit. If NGOs, like corporations, undertook a transparent human rights due diligence process, communicated about it, and shared best practices, they would make a concrete contribution to the diffusion of the business and human rights standards, particularly the UNGPs. ...

‘Foreign Agent’ Designations

In Chapter 8, we read a report by the UN Special Rapporteur on the situation of human rights defenders which described the extent to which these groups have come under sustained assault in many countries around the world. In *People Power Under Attack 2022* (2023), Civicus reported that ‘the number of countries where harassment against activists was documented increased from 65 in 2018 to 106 in 2022.’ It added that ‘[a]lthough harassment is perceived as a relatively subtle form of repression and, in some instances, is used intentionally to leave little trace and ensure impunity, it is highly effective in deterring HRDs from their work and can strategically restrict the space for CSOs.

One particular form of harassment that has grown in popularity is to declare persons or groups who advocate for human rights to be ‘foreign agents’ if they meet certain conditions. Russia provides a prominent example in this regard.⁶⁷⁴

⁶⁷² See M. Polizzi and A. Murdie, ‘NGOs and human rights’, and A. Crack, ‘NGO accountability’, in T. Davies (ed.), *Routledge Handbook of NGOs and International Relations* (2019).

⁶⁷³ D. Carolei, ‘An International Ombudsman to Make Non-Governmental Organizations More Accountable? Too Good to be True ...’, 35 *Leiden J. Int’l L.* (2022) 867.

⁶⁷⁴ G. Goncharenko and I. Khadaroo, ‘Disciplining Human Rights Organisations Through an Accounting Regulation: A Case of the “Foreign Agents” Law in Russia’, 72 *Critical Perspectives on Accounting* (2020) 102129.

ECODEFENCE AND OTHERS V. RUSSIA
**EUROPEAN COURT OF HUMAN RIGHTS, THIRD SECTION, APPLICATION NOS. 9988/13 AND
60 OTHERS (14 JUNE 2022)**

[The case was brought by 73 Russian NGOs, active in civil society issues, human rights, environmental protection, cultural heritage, education, social security and migration.]

5. [The] 2012 ... Foreign Agents Act ... required Russian NGOs which were deemed to engage in “political activity” and to have been in receipt of “foreign funding” to seek registration as “foreign agents”, under the threat of administrative and criminal sanctions. They were also required to label their publications as originating from a “foreign-agent” organisation, post information on their activities on the Internet and submit to more extensive accounting and reporting requirements.

...

RELEVANT LEGAL FRAMEWORK AND MATERIAL

1. THE FOREIGN AGENTS ACT

A. Enactment of the Foreign Agents Act

1. Definitions

15. ... [The] Foreign Agents Act ... defin[ed] such an agent as:

“... a Russian non-commercial organisation receiving funds and other property from foreign States, their governmental bodies, international and foreign organisations, foreign nationals, stateless persons or persons authorised by [any of the above], or Russian legal entities receiving funds and other property from the above-mentioned sources ... (‘foreign sources’) and which engages in political activity, including political activity carried out in the interests of foreign providers of funds, in the territory of the Russian Federation.”

...

E. Updated definition of “political activity”

28. On 2 June 2016 the definition of political activity was updated to read:

“A non-commercial organisation, except for a political party, is considered to carry out a political activity in Russian territory if, regardless of its statutory goals and purposes, it engages in activities in the fields of statehood, the protection of the Russian constitutional system, federalism, the protection of the Russian Federation’s sovereignty and territorial integrity, the rule of law, public security, national security and defence, external policy, the Russian Federation’s social, economic and national development, the development of the political system, the structure of State and local authorities, [or] human rights, for the purpose of influencing State policy, the structure of State and local authorities, or their decisions and actions.

[The legislation defined political activities as including, inter alia, ‘organising and holding public events’, ‘attempting to obtain specific outcomes in elections or referenda’, ‘engaging in the activities of political parties’, ‘submitting public petitions to State and local authorities and officials’, ‘disseminating ... views on State authorities’ decisions and policy’, ‘shaping opinion on social and political issues’, involving citizens in any of those activities, and financing such activities.]

LEGAL MATERIAL REFERRED TO BY THE PARTIES

A. Fundamental Principles on the Status of Non-governmental Organisations in Europe ..., 13 November 2002, and Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (10 October 2007)

42. NGOs may solicit and receive funding – cash or donations in kind – from another country, multilateral agencies or an institutional or individual donor, subject to generally applicable foreign exchange and customs laws ... [This] is a fundamental principle, a natural consequence of their non-profit-making nature. Such contributions, along with the proceeds of any economic activity, are an NGO's vital means of financing the pursuit of its objectives. However, this possibility for NGOs to collect funding is not absolute and may be subject to regulation, with a view to protecting the target audience ...

...

B. The United States Foreign Agents Registration Act

44. The Foreign Agents Registration Act ... of 1938 ... as amended in 1942 and 1966 (22 U.S.C. §§ 611-621), was originally adopted to require that agents representing the interests of foreign powers in a “political or quasi-political capacity” disclose their relationship with the foreign government, so that “the government and the American people” could evaluate “the statements and activities of such persons”. In 1966 the Act was amended to target agents actually working with foreign powers who sought economic or political advantage by influencing governmental decision-making. The amendments shifted the focus of the law from propaganda to political lobbying and narrowed the meaning of “foreign agent”. ...

...

[Under the current text:]

(o) The term ‘political activities’ means any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party ...”

C. Hungary's Transparency Act

45. Hungary's Act no. LXXVI of 2017 on the Transparency of Organisations Financed from Abroad (“the Transparency Act”) required associations and foundations (except for sport and religious associations), political parties and ethnic minority associations to apply to be on a special register if the foreign funding part of their budget exceeded ... (approximately EUR 22,100) annually, under the threat of fines or dissolution. Organisations financed from abroad were subject to additional labelling and reporting requirements.

46. The Act was repealed in April 2021 following a finding by the Court of Justice of the European Union (Grand Chamber) that it was contrary to EU law (see judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476). The Court held in particular that the objective of increasing the transparency of the financing of associations, although legitimate, cannot justify the introduction of legislation based on a presumption – made on principle and applied indiscriminately – that any financial support paid by a non-national natural or legal person, and any civil society organisation receiving such financial support, were intrinsically liable to jeopardise the State's political and economic interests and the ability of its institutions to operate free from interference (§ 86). As concerns the grounds of public policy or public security, the Court found that

the financial thresholds triggering the application of the obligations put in place by the Transparency Act were fixed at amounts which clearly did not appear to correspond with the scenario of a sufficiently serious threat to a fundamental interest of society which those obligations are supposed to prevent (§ 94).

47. The Court further considered that the obligations put in place by Transparency Act constituted limitations on the right to freedom of association Those obligations ... create a generalised climate of mistrust vis-à-vis the associations ... [so as] to stigmatise them. ...

RELEVANT LEGAL MATERIAL

...

A. Intergovernmental organisations and advisory bodies

1. The Venice Commission

50. On 27 June 2014 the ... Venice Commission reached the following conclusions ... (CDL-AD(2014)025).

“132. ... The use of the term ‘foreign agent’ is highly controversial. By bringing back the rhetoric used during the communist period, this term stigmatises the NCOs to which it is applied, tarnishing their reputation and seriously hampering their activities. The Venice Commission therefore recommends that the term be abandoned.

133. The Venice Commission further considers that the legitimate aim of ensuring transparency of NCOs receiving funding from abroad cannot justify measures which hamper the activities of NCOs operating in the field of human rights, democracy and the rule of law. It therefore recommends reconsidering the creation of a special regime with autonomous registration, special register and a host of additional legal obligations.

...

THE LAW

...

ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

[The applicants claimed violations of Article 10, on freedom of expression, and Article 11, on freedom of association. The Court, having found that these rights had been interfered with, then considered whether the interference could be justified under the terms of the Convention. It found (para. 104) that the authorities had ‘applied an extensive and unforeseeable interpretation to the term “political activities”’ and did not distinguish actions taken in a personal capacity from those of the organizations. In the Court’s view, the ‘authorities extended the concept of “political activity” to any form of public advocacy on an extremely wide set of issues’ and the overall policy ‘produced incoherent results and engendered uncertainty among NGOs’. As to whether the impact of the requirements was sufficiently foreseeable, it found (para. 112) that the legislation was interpreted in practice in an ‘overbroad and unpredictable’ way that did ‘not meet the “quality of law” requirement and deprive[d] the applicants of the possibility to regulate their financial situation.’ As to the legitimacy of the aim of the legislation, the Court devoted particular attention to the question of whether it was ‘necessary in a democratic society’ to restrict the relevant sources of funding.]

165. ... While States may have legitimate reasons to monitor financial operations in accordance with international law, with a view to preventing money laundering and terrorism and extremism financing, the ability of an association to solicit, receive and use funding in order to be able to promote and defend its cause constitutes an integral part of the right to freedom of association. The limits placed

on a generalised restriction on the right to freedom of association and the availability of alternatives are also important factors in the assessment of its proportionality.

166. The Court concurs with the CJEU in that the objective of increasing the transparency of the financing of associations, although legitimate, cannot justify legislation which is based on a presumption, made on principle and applied indiscriminately, that any financial support by a non-national entity and any civil society organisation receiving such financial support are intrinsically liable to jeopardise the State's political and economic interests and the ability of its institutions to operate free from interference. A regulatory framework needs to correspond with the scenario of a sufficiently serious threat to a fundamental interest of society, which those obligations are supposed to prevent.

167. The Foreign Agents Act does not contain provisions prohibiting foreign funding altogether. However, it also does not establish a minimum amount or share of "foreign funding" in an organisation's budget, with the result that an organisation regularly funded from abroad, an organisation which has been awarded an international prize for its work, and an organisation receiving a computer or software licence from an international company would all indiscriminately be considered to be funded by "foreign sources". If an organisation receiving such funding is also deemed to have engaged in "political activities", it is liable to be registered as a "foreign agent". The Court has established above that in practice the domestic authorities gave an extremely wide and unforeseeable interpretation of the concepts of "foreign sources" and "political activities". Even the usual activities of civil society organisations which were explicitly excluded from the scope of "political activity" were construed in such a way that almost any actions were taken to constitute "political activity". This situation rendered it difficult for the applicants to foresee which specific actions on their part could lead to their registration as "foreign agents"

...

169. The Court considers that an enforced choice between accepting foreign funding and soliciting domestic State funding represents a false alternative. In order to ensure that NGOs are able to perform their role as the "watchdogs of society", they should be free to solicit and receive funding from a variety of sources. The diversity of these sources may enhance the independence of the recipients of such funding in a democratic society.

...

(v) Nature and severity of the penalties

...

185. Taking into account the essentially regulatory nature of the offences, the substantial amounts of the administrative fines imposed and their frequent accumulation, and the fact that the applicants were not-for-profit civil society organisations which suffered a reduction in their budgets due to restrictions on foreign funding, the Court holds that the fines provided for by the Foreign Agents Act cannot be regarded as being proportionate to the legitimate aim pursued. This finding would be applicable a fortiori to criminal sanctions

(vi) Conclusion on the necessity requirement

186. The Court has found above that the Government have not shown relevant and sufficient reasons for creating a special status of "foreign agents", imposing additional reporting and accounting requirements on organisations registered as "foreign agents", restricting their access to funding options, and punishing any breaches of the Foreign Agents Act in an unforeseeable and disproportionately severe manner. The cumulative effect of these restrictions – whether by design or effect – is a legal regime that places a significant "chilling effect" on the choice to seek or accept any amount of foreign funding, however insignificant, in a context where opportunities for domestic funding are rather limited, especially in respect of politically or socially sensitive topics or domestically unpopular causes. The measures accordingly cannot be considered "necessary in a democratic society".

(e) Overall conclusion

187. ... [T]here has been a violation of Article 11 of the Convention interpreted in the light of Article 10.

...

* * *

Within weeks of the Court's judgment, Russia adopted a new law, in force from December 2022. According to Human Rights Watch, 'Russia: New Restrictions for "Foreign Agents"' (1 December 2022), the new law replaces the previous definitions:

... with a consolidated, simplified, but endlessly broad definition to cover any person – Russian, foreign or stateless; any legal entity, domestic or international; or any group without official registration, if they are considered to have received foreign support and/or are considered to be "under foreign influence" and engaged in activities that Russian authorities would deem to be "political." ...

The law defines "foreign influence" as "support" from foreign sources that includes funding, technical assistance, or other undefined kinds of assistance and/or open-ended "impact" that constitutes coercion, persuasion, and/or "other means."

...

[It] also excludes "foreign agents" from key aspects of public life. These include bans on joining the civil service, participating in electoral commissions, acting in an advisory or expert capacity in official or public environmental impact assessments, in independent anti-corruption expertise of draft laws and by-laws, or electoral campaigns or even donating to such campaigns or to political parties.

Foreign agents are also banned from teaching or engaging in other education activities for minors or producing informational materials for them. They cannot participate in organizing public assemblies or support them through donations and are barred from a number of other activities.

...

As already noted, various other countries have followed a comparable approach. In June 2024 the Law on Transparency of Foreign Influence was adopted in Georgia despite massive demonstrations and a presidential veto. It requires organizations receiving more than 20% of their funding from overseas to register as 'agents of foreign influence', and imposes onerous disclosure requirements and fines for violations. India has also continued to ratchet up restrictions on civil society, as explained by Amnesty International and nine other groups in 'India Should Stop Using Abusive Foreign Funding Law' (19 January 2022):

The Centre for Promotion of Social Concerns, a prominent human rights organisation better known by its program unit People's Watch, monitors human rights abuses, works with socially and economically marginalized victims of abuses, including by police, and conducts human rights education and training. In 2016, the Ministry of Home Affairs rejected the group's application for renewal under the Foreign Contribution Regulation Act. They said it was "on the basis of a field agency report," which civil society leaders widely believe refer to reports of intelligence agencies or law enforcement personnel.

When the Centre for Promotion of Social Concerns challenged the government's decision in the Delhi High Court, the Home Affairs Ministry told the court that the group used foreign funding to share information with United Nations special rapporteurs and foreign embassies, "portraying India's human

rights record in negative light...to the detriment of India's image." The government characterized this as "undesirable activities detrimental to national interest."

...

This crackdown is part of a wider repression of civil society in India, including through the use of draconian laws such as sedition and terrorism. Since 2016, the authorities have revoked, suspended, refused to renew the FCRA license of hundreds of civil society groups, or accused them of evading the law and frozen their bank accounts. ...

...

[Despite criticism from the UN High Commissioner for Human Rights, and UN experts], in 2020, the Indian parliament [added] intrusive governmental oversight, additional regulations and certification processes, and operational requirements, which have further adversely affected civil society groups' access to foreign funding and their ability to carry out human rights work. ...

The UN's NGO Committee

The only UN mechanism for promoting NGO accountability has long been deeply politicized, with Russia playing a leading role. Article 71 of the UN Charter provides that:

The Economic and Social Council [ECOSOC] may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

The consultative status envisaged enables organizations to access UN premises, and to attend and often participate in the work of many UN bodies, including making written or oral statements, organizing 'side events', and meeting with government and other representatives. A UN website (www.csonet.org) states that '[t]o be eligible for consultative status, an NGO must have been in existence (officially recognized by a government) for at least two years, must have an established headquarters, a democratically-adopted constitution, authority to speak for its members, a representative structure, appropriate mechanisms of accountability and democratic and transparent decision-making processes. The basic resources of the organization must be derived mainly from contributions of the national affiliates or other components or from individual members.' To make an application, an organization must submit copies of its constitution, statutes etc.; its official registration; financial statements; and representative publications and statements. Over 6,000 organizations have consultative status.⁶⁷⁵

ECOSOC's Committee on Non-Governmental Organizations (NGO Committee) is made up of 19 UN member States and makes recommendations on NGO applications for ECOSOC accreditation – also called consultative status. It plays the key role in recommending, or withholding, the grant of status. Rana Siu Inboden, in 'China at the UN: Choking Civil Society', 32 *J. of Democ.* (2021) 124 explains why its approach has been problematic:

The NGO Committee, which effectively acts as a gatekeeper to the UN for civil society organizations, comprises nineteen UN member states ... , ... [They] serve four-year terms with no term limits The workload of the Committee ... makes it hard for smaller delegations with fewer resources to devote the time

⁶⁷⁵ See generally B. Ramcharan et al. (eds.), *The Protection Roles of Human Rights NGOs: Essays in Honour of Adrien-Claude Zoller* (2023).

and energy to participate. Thus, the Committee is heavily dominated by large countries with resources, such as China and Russia, and strongly motivated ones, including Cuba and Pakistan, with repressive agendas. This has allowed authoritarian countries ... to dominate the Committee.

... States sitting on the Committee are allowed to raise questions, even mundane, arbitrary, or seemingly innocuous ones about income or activities, that automatically delay the application, usually until the next session six months later. ...

Inboden reports that, between 2016 and 2019, additional information was sought primarily by China (340 times), South Africa (337), India (283), Cuba (220), and Russia (172). Applications by 964 NGOs were deferred at least once as a result of questions.

International Service for Human Rights, an organization devoted to facilitating the participation of civil society in UN activities, confirms that '[t]he Committee's membership overwhelmingly comprises States that do not support a vibrant civil society at the UN, ... and the body itself is known for excessive politicisation, even gaining the notorious reference of the 'Anti-NGO Committee'. At one typical session, in September 2022, 319 applications were deferred and nine NGOs were rejected, including groups working on 'human rights, genocide prevention, caste-based discrimination and religious freedom.' All of those nine had been blocked for some years, but the International Dalit Solidarity Network 'has now been deferred for fifteen years and has received 105 written questions from the Committee, including several repeat questions to which it has provided full and timely responses.'⁶⁷⁶

QUESTIONS

1. What considerations might inhibit greater partnership and cooperation among human rights NGOs?
2. How can social movements, including 'affected persons' organizations', contribute to bringing about the profound transformations that von Bernstorff suggests are needed? Are human rights groups likely to be major players in such endeavours? Should they be?
3. Does the closing of civil society space worldwide mean that the role of the large INGOs based mainly in the North is even more important, or does it instead mean that new models are needed?
4. What lessons might human rights groups learn from disability activists?
5. How would you analyze the accountability of human rights INGOs on the basis of the mechanisms described by Grant and Keohane? Should Amnesty's practice of commissioning external reviews in controversial cases be more widely followed?
6. How would you distinguish Russia's approach from that in the U.S. Foreign Agents Registration Act? Consider also this analysis from Canada's Public Safety Department:⁶⁷⁷

The global threat landscape Canada faces has significantly evolved, with threats from a variety of both state and non-state actors becoming sophisticated and pervasive. Today, Canada's security and intelligence community is focused, among other threats, on foreign interference. Foreign interference is activity undertaken by foreign states, or those individuals

⁶⁷⁶ International Service for Human Rights, 'ECOSOC: States must end unjustified barriers to 9 civil society groups in upcoming vote' (5 December 2022).

⁶⁷⁷ Public Safety Canada, 'Enhancing Foreign Influence Transparency: Exploring Measures to Strengthen Canada's Approach, Public and Stakeholder Consultation Paper' (10 March 2023).

and entities acting on behalf of a foreign state, to advance their own strategic objectives to the detriment of Canada's national interests. Such activity is deceptive, coercive, threatening and/or illegal. Foreign interference is distinct from normal activities undertaken by foreign states to exert influence, such as legitimate lobbying, advocacy efforts, and regular diplomatic activity.

[The Consultation Paper provides a scenario to illustrate the notion of 'malign foreign influence'.]

Scenario #2: An individual, employed by a foreign government, asks a prominent Canadian academic to write an op-ed opposing the Government of Canada's approach to a particular international issue, and urging Canadians to likewise disagree. The academic writes the op-ed and it is published in a widely circulated national newspaper. The academic is also asked to engage with student groups on campus to advocate a viewpoint that is favorable to the foreign government. The academic does not disclose their relationship with the individual employed by the foreign government. This is an example of malign foreign influence because the influence activities are undertaken covertly. The foreign interests being represented in the article, and in the engagement with student groups, is not transparent.

PART F: CURRENT TOPICS

Chapter 15. Climate Change, the Environment and the Right to Development

The existential threat of global warming and the growing uninhabitability of parts of the world have brought environmental issues to the fore within international law generally and human rights obligations have played an important part in the developments. Wide-ranging advisory opinions on climate change were handed down in May 2024 by the International Tribunal on the Law of the Sea, in May 2025 by the Inter-American Court of Human Rights, and in July 2025 by the International Court of Justice. While advisory opinions are not per se binding on states, they are often highly persuasive. The fact that two of the opinions were unanimous, and the third (by the IACrHR) was unanimous on most key points, increases the weight that will be accorded to them by courts, international tribunals, and governments. We consider the opinions below.

By way of background, it was the 1972 UN Conference on the Human Environment, in Stockholm, that first proclaimed that the environment is essential to human ‘well-being and to the enjoyment of basic human rights – even the right to life itself’ (UN Doc. A/CONF.48/14/Rev.1 (1973), 3). This realization prompted many states to accord constitutional recognition to the right to live in a healthy environment, starting with Portugal (1976) and Spain (1978). In 1994 a UN Sub-Commission Special Rapporteur, Fatma Zohra Ksentini, proposed 27 ‘draft principles on human rights and the environment’, the second of which was that ‘all persons have the right to a secure, healthy and ecologically sound environment.’ (UN Doc. E/CN.4/Sub.2/1994/9). Governments took no action on her report.

But by 2022, the UN Special Rapporteur on human rights and the environment, David Boyd, reported that the right was recognized in the constitutions of 110 States and incorporated in national legislation in over 100 states (see UN Docs. A/77/284 (2022) and A/HRC/43/53 (2019)). It is also reflected in regional treaties ratified by 133 States, including the African Charter on Human and Peoples’ Rights, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) and its Inter-American counterpart, the Escazú Agreement (2018), the San Salvador Protocol to the American Convention, and the Arab Charter on Human Rights.

The culmination of these efforts was the recognition of a ‘human right to a clean, healthy and sustainable environment’ by the UN Human Rights Council in 2021 (Res. 48/13) and the General Assembly in 2022 (Res. 76/300). This right subsequently featured prominently in the various advisory opinions.

Parallel to these developments, the existential threat to the planet and humankind posed by climate change has been on the international agenda since the 1992 UN Framework Convention on Climate Change (FCCC), supplemented first by the Kyoto Protocol of 1997, and then by the Paris Agreement of 2015. By 2024, there were 198 parties to the UNFCCC. A vital component in promoting informed awareness has been the work of the Intergovernmental Panel on Climate Change (IPCC), set up by the UN Environment Program and the World Meteorological Organization in 1988 to provide the best available scientific evidence to governments. In 2024, it consisted of 195 experts. Each of the international courts relied heavily on these reports, with the ICJ (para. 74) declaring it to represent ‘the best available science on the causes, nature and consequences of climate change’.

The IPCC’s 2023 Sixth Assessment Report confirmed that:

A.1 Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming [42 percent of cumulative net CO₂ emissions between 1850 and 2019 occurred after 1990.]

...

A.2.1 It is unequivocal that human influence has warmed the atmosphere, ocean and land. ... Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has further strengthened since [the previous assessment in 2014]. Human influence has likely increased the chance of compound extreme events since the 1950s, including increases in the frequency of concurrent heatwaves and droughts

A.2.2 Approximately 3.3–3.6 billion people live in contexts that are highly vulnerable to climate change. Human and ecosystem vulnerability are interdependent. Regions and people with considerable development constraints have high vulnerability to climatic hazards. ... Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability. ...

A.2.3 Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (high confidence). Hundreds of local losses of species have been driven by increases in the magnitude of heat extremes (high confidence) with mass mortality events recorded on land and in the ocean (very high confidence). Impacts on some ecosystems are approaching irreversibility such as the impacts of hydrological changes resulting from the retreat of glaciers, or the changes in some mountain (medium confidence) and Arctic ecosystems driven by permafrost thaw (high confidence).

Jeff Goodell, in *The Heat Will Kill You First: Life and Death on a Scorched Planet* (2023), at 18, puts the case in less technical terms:

The harshest truth about life on a superheated planet is this: as temperatures rise, a lot of living things will die, and that may include people you know and love. A study in *The Lancet* ... estimated that 489,000 people worldwide died from extreme heat in 2019. That's far more than all other natural disasters combined, including hurricanes and wildfires. It is also more than the number of deaths from guns or illegal drugs. And those are only the deaths that are directly attributable to heat. There are also deaths caused by the heat-related amplification of ground-level ozone pollution (aka smog), or the smoke from wildfires in desiccated forests. The smoke can drift thousands of miles, lofting tiny particulates into the atmosphere. When you inhale them, they can trigger a variety of health problems, from asthma to heart attacks. The toll is enormous: globally, between 260,000 and 600,000 people die each year inhaling smoke from wildfires. ...

Each year there is a Conference of the Parties (COP) to the FCCC to negotiate specific targets and commitments. In opening COP27 on 7 November 2022, UN Secretary-General, António Guterres, sought to ring the alarm bells:

We are in the fight of our lives. And we are losing. Greenhouse gas emissions keep growing. Global temperatures keep rising. And our planet is fast approaching tipping points that will make climate chaos irreversible. We are on a highway to climate hell with our foot still on the accelerator. ... It is unacceptable, outrageous and self-defeating to put it on the back burner.

Except for an 'in principle' agreement to establish a 'loss and damage' fund to compensate poorer nations, the conference achieved little in concrete terms. At COP28 in 2023, the major achievement was acknowledging for the first time the need for 'transitioning away from fossil fuels', but governments stopped short of calling for a 'phaseout' of reliance on oil, coal and gas. COP29, held in

Azerbaijan, reflected even less progress and participation arrangements were strongly criticized by Amnesty International and Human Rights Watch.⁶⁷⁸

In retrospect, the human rights community has been slow to react to the threat posed by climate change, although the former UN High Commissioner for Human Rights, Mary Robinson, has long called for a human rights approach to climate change, and climate justice. In 2005 she argued that:

[W]e can no longer think about climate change as an issue where the rich give charity to the poor to help them to cope with its adverse impacts. Rather, this has now become an issue of global injustice that will need a radically different framing to bring about global justice.⁶⁷⁹

The OHCHR began issuing regular climate change reports in 2009 (UN Doc. A/HRC/10/61; and for 2024, see A/HRC/57/30). The major international NGOs showed little interest until recently. In 2015, Amnesty's senior leadership team decided that 'climate change was not ... a priority in Amnesty's strategic goals for 2016–2019'.⁶⁸⁰ And the Executive Director of Human Rights Watch from 1993 to 2022, Kenneth Roth, often suggested that human rights were of marginal relevance and added little to environmental and climate change concerns.⁶⁸¹ Some scholars also questioned the value of the linkage. Kathryn Sikkink noted that 'climate change is one of the most pressing issues of our age, but it is not an issue where the framing in terms of human rights is particularly helpful'.⁶⁸² Instead, in her view, the emphasis should be on the responsibilities of governments, corporations, and other actors.

The following report provides a snapshot of some of the human rights-related challenges:

**PHILIP ALSTON, CLIMATE CHANGE AND POVERTY: REPORT OF THE SPECIAL RAPPORTEUR
ON EXTREME POVERTY AND HUMAN RIGHTS
UN DOC. A/HRC/41/39 (2019)⁶⁸³**

...

II. The scale of the challenge

3. David Wallace-Wells began *The Uninhabitable Earth* by observing that global warming "is worse, much worse, than you think". Carbon is being added to the atmosphere 100 times faster than at any point in pre-industrial human history and more damage has been done in the three decades since the [IPCC was established] in 1988 than in the whole of human history up to that time.

4. The last five years have been the hottest in the modern record and global carbon dioxide emissions began rising again in 2017 after three years of levelling off. World energy consumption is projected to grow 28 per cent between 2015 and 2040. The consequences today are attested to by record temperatures, rapidly melting icecaps, unprecedented wildfires, frequent so-called "thousand year" floods and devastating, more frequent hurricanes. Millions face malnutrition due to devastating drought and many more will have to choose between starvation and migration. Rising ocean temperatures are killing marine ecosystems that support food systems for hundreds of millions of people and climate change is threatening food production and posing dire economic and social threats.

5. The most widespread scientific benchmark for measuring global warming is the rise in temperature relative to pre-industrial levels, already 1°C. The 2015 Paris Agreement aims to ensure no higher than a 2°C rise by 2100 and endeavours to limit it to 1.5°C, but even those increases would be catastrophic for many people.

⁶⁷⁸ https://en.wikipedia.org/wiki/2024_United_Nations_Climate_Change_Conference#Controversies

⁶⁷⁹ M. Robinson, 'Climate Change and Justice', Barbara Ward Lecture, London (11 December 2006).

⁶⁸⁰ Amnesty International 33rd International Council meeting, 'Circular 10: human rights aspects of climate change'.

⁶⁸¹ See, for example, K. Roth, 'Discussion: Accountability Beyond States', in C. Booth Walling and S. Waltz (eds.), *Human Rights: From Practice to Policy* (2010) 68; and, at <http://bigthink.com/ideas/4064> (2007), he noted that 'rhetorical rights language doesn't add appreciable weight to the arguments against global warming'.

⁶⁸² K. Sikkink, 'Human Rights, Responsibilities, and Democracy', 52 *Vand J. Transnat'l L.* (2019) 1315.

⁶⁸³ See also, O. De Schutter, 'Weathering the Storm: Poverty, Climate Change and Social Protection', Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/59/51 (2025).

6. A rise of only 1.5°C rather than 2°C could mean reducing the number of people vulnerable to climate-related risks by up to 457 million; 10 million fewer people exposed to the risk of sea level rise; reducing exposure to floods, droughts, and forest fires; limiting damage to ecosystems and reductions in food and livestock; cutting the number of people exposed to water scarcity by half; and up to 190 million fewer premature deaths over the century.

7. However, the scale of change required to limit warming to 1.5°C is historically unprecedented and could only be achieved through “societal transformation” and ambitious emissions reduction measures. Even 1.5°C of warming – an unrealistic, best-case scenario – will lead to extreme temperatures in many regions and leave disadvantaged populations with food insecurity, lost incomes and livelihoods, and worse health. As many as 500 million people will be exposed and vulnerable to water stress, 36 million people could see lower crop yields and up to 4.5 billion people could be exposed to heat waves. In all of these scenarios, the worst affected are the least well-off members of society.

III. The impact on human rights, poverty and inequality

A. Human rights

8. Climate change threatens the full enjoyment of a wide range of rights (A/HRC/31/52, paras. 23–32). Rapid action and adaptation can mitigate much of this, but only if done in a way that protects people in poverty from the worst effects.

9. According to the World Bank, at 2°C of warming, 100–400 million more people could be at risk of hunger and 1–2 billion more people may no longer have adequate water. Climate change could result in global crop yield losses of 30 per cent by 2080, even with adaptation measures. Between 2030 and 2050, it is expected to cause approximately 250,000 additional deaths per year from malnutrition, malaria, diarrhoea and heat stress....

10. People in poverty face a very real threat of losing their homes [on displacement, see A/HRC/56/47 (2024)]. By 2050, climate change could displace 140 million people in sub-Saharan Africa, South Asia and Latin America alone. Flooding and landslides can weaken already degraded infrastructure and housing, especially for people living in unplanned or unserviced settlements. Since 2000, people in poor countries have died from disasters at rates seven times higher than in wealthy countries. In addition, the authorities have a history of prioritizing wealthier areas for protection, further endangering people in poverty.

B. Poverty

11. Climate change will ... have the most severe impact in poor countries and regions, and the places where poor people live and work. Developing countries will bear an estimated 75–80 per cent of the cost of climate change.

12. People in poverty tend to live in areas more susceptible to climate change and in housing that is less resistant; lose relatively more when affected; have fewer resources to mitigate the effects; and get less support from social safety nets or the financial system to prevent or recover from the impact. Their livelihoods and assets are more exposed and they are more vulnerable to natural disasters that bring disease, crop failure, spikes in food prices and death or disability.

...

C. Inequality

14. Perversely, the richest people, who have the greatest capacity to adapt and are responsible for and have benefited from the vast majority of greenhouse gas emissions, will be the best placed to cope

with climate change, while the poorest, who have contributed the least to emissions and have the least capacity to react, will be the most harmed. The poorest half of the world's population – 3.5 billion people – is responsible for just 10 per cent of carbon emissions, while the richest 10 per cent are responsible for a full half. A person in the wealthiest 1 per cent uses 175 times more carbon than one in the bottom 10 per cent.

15. In addition to the economic benefits rich countries have already reaped from fossil fuels, one recent study found that climate change itself has already worsened global inequality and that the gap in per capita income between the richest and poorest countries is 25 percentage points larger than it would be without climate change.

...

50. Rather than helping the world adapt to climate change, privatizing basic services and social protection may be a form of maladaptation. When hurricane Sandy wreaked havoc in New York in 2012, stranding low-income and vulnerable New Yorkers without access to power and healthcare, the Goldman Sachs headquarters was protected by tens of thousands of its own sandbags and power from its generator. Private white-glove firefighters have been dispatched to save the mansions of high-end insurance customers from wildfires. An over-reliance on the private sector could lead to a climate apartheid scenario in which the wealthy pay to escape overheating, hunger, and conflict, while the rest of the world is left to suffer.

Pushback

Despite the overwhelming strength of the scientific evidence, over the past three decades, climate denialism, often funded and promoted by fossil fuel companies like ExxonMobil and other corporate interests, has flourished (see UN Doc. A/HRC/41/39, paras. 32-35). Misinformation campaigns, large-scale advertising efforts, political campaign contributions, intensive lobbying, and reinforcement from major media actors such as News Corporation and its Fox News outlet, have provided the material on the basis of which conservative politicians in many countries have opposed efforts to mitigate global warming. U.S. President Donald Trump has called climate change a 'hoax', and his administration plans to revoke a 2009 scientific finding that greenhouse gases endanger public health. The 'endangerment finding' has underpinned the U.S. government's legal authority to combat climate change. Its elimination will leave the Environmental Protection Agency with no authority under the Clean Air Act to regulate greenhouse gas emissions. In 2025 the President issued an Executive Order spelling out the policies to be pursued:

PROTECTING AMERICAN ENERGY FROM STATE OVERREACH EXECUTIVE ORDER 14154, APRIL 8, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. My Administration is committed to unleashing American energy, especially through the removal of all illegitimate impediments to the identification, development, siting, production, investment in, or use of domestic energy resources — particularly oil, natural gas, coal, hydropower, geothermal, biofuel, critical mineral, and nuclear energy resources. ... Simply put, Americans are better off when the United States is energy dominant.

American energy dominance is threatened when State and local governments seek to regulate energy beyond their constitutional or statutory authorities. For example, when States target or discriminate against out-of-State energy producers by imposing significant barriers to interstate and international trade, American energy suffers, and the equality of each State enshrined by the Constitution is undermined. Similarly, when States subject energy producers to arbitrary or excessive fines through retroactive penalties or seek to control energy development, siting, or production activities on Federal land, American energy suffers.

Many States have enacted, or are in the process of enacting, burdensome and ideologically motivated “climate change” or energy policies that threaten American energy dominance and our economic and national security. ...

... Americans must be permitted to heat their homes, fuel their cars, and have peace of mind — free from policies that make energy more expensive and inevitably degrade quality of life.

These State laws and policies try to dictate interstate and international disputes over air, water, and natural resources; unduly discriminate against out-of-State businesses; contravene the equality of States; and retroactively impose arbitrary and excessive fines without legitimate justification.

These State laws and policies are fundamentally irreconcilable with my Administration’s objective to unleash American energy. They should not stand.

Sec. 2. State Laws and Causes of Action. (a) The Attorney General ... shall identify all State and local laws, regulations, causes of action, policies, and practices (collectively, State laws) burdening the identification, development, siting, production, or use of domestic energy resources that are or may be unconstitutional, preempted by Federal law, or otherwise unenforceable. The Attorney General shall prioritize the identification of any such State laws purporting to address “climate change” or involving “environmental, social, and governance” initiatives, “environmental justice,” carbon or “greenhouse gas” emissions, and funds to collect carbon penalties or carbon taxes.

(b) The Attorney General shall expeditiously take all appropriate action to stop the enforcement of State laws and continuation of civil actions identified in subsection (a) of this section that the Attorney General determines to be illegal.

...

A. RECOGNIZING A RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

1. The United Nations

Between 2012 and 2021, the UN Human Rights Council adopted seven resolutions on human rights and the environment. In 2012, John Knox was appointed an independent expert on the issue, and became Special Rapporteur in 2015. He and his successor, David Boyd, played an important role in cajoling and facilitating more significant engagement on the part of the Council, which finally paid off with its 2021 resolution, followed by General Assembly Res. 76/300 (28 July 2022) entitled ‘The human right to a clean, healthy and sustainable environment’:⁶⁸⁴

The General Assembly,

...

Reaffirming the [UDHR, the outcomes of the Vienna, Stockholm and Rio conferences, and the Declaration on the right to development] and relevant international human rights treaties, and noting other relevant regional human rights instruments,

Reaffirming also that all human rights are universal, indivisible, interdependent and interrelated,

...

⁶⁸⁴ See Symposium on UN Recognition of the Human Right to a Healthy Environment, 117 *Am. J. Int’l L. Unbound* (2023) 162.

Recalling States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change ...,

Recalling also Human Rights Council resolution 48/13 of 8 October 2021, entitled "The human right to a clean, healthy and sustainable environment",

...

Recalling the Guiding Principles on Business and Human Rights ...,

...

Noting also that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies,

1. Recognizes the right to a clean, healthy and sustainable environment as a human right;
2. Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
3. Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;
4. Calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

The resolution, initially co-sponsored by Costa Rica, Maldives, Morocco, Slovenia and Switzerland, was adopted by a vote of 161-0-8 (States abstaining were: Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, Syria). China explained its position by noting that there is no agreement as 'to the definition and scope of the right to the environment and its relationship with other human rights.' It also regretted that 'the principle of common but differentiated responsibilities is ... not included in the text'. India noted that because the terms clean, healthy and sustainable were not defined, they 'remain open to subjective interpretation, thereby diluting the very objective of the recognition' of the right (UN Doc. A/76/PV.97).

In an 'Explanation of Position' (28 July 2022), the United States indicated its acceptance of the importance of such a right, but added:

We note that [the resolution] is not legally binding or a statement of current international law. International law has yet to establish [such] a right ... as a matter of customary international law, nor does treaty law provide for such a right. ... [I]n voting "YES" on this resolution the United States does not recognize any change in the current state of conventional or customary international law. There is not yet a shared understanding of what the basis for the right would be and/or what its scope would entail. ...

[In relation to paragraph 3, we] do not agree with any suggestion that multilateral environmental agreements are implemented "under the principles of international environmental law" or have any bearing on any State's international legal obligations. There is no single set of principles under which multilateral environmental agreements operate, and such agreements are each implemented in accordance with their own provisions and are applicable only to

those States that have joined them. We emphasize that development and enforcement of strong domestic environmental laws and policies is what leads to a healthy environment.

U.S. support for the resolution ... does not establish or support legally binding requirements on the United States or a private right of action under U.S. law. ...

The United Kingdom took a more nuanced position. It stated that: '[t]here is no international consensus on the legal basis' of this right: '[r]ecognizing rights without due consideration and a common understanding at an international level of what those rights comprise creates ambiguity'; General Assembly resolutions are not legally binding; and this right 'derives from existing international economic and social rights law as a component of the right to an adequate standard of living or the right to the enjoyment of the highest attainable standard of physical and mental health' (UN Doc. A/76/PV.97, 11-12).

2. The Council of Europe

In 2021, the Parliamentary Assembly of the Council of Europe (Recommendation 2211) called upon the Member States to adopt an additional protocol to the European Convention on Human Rights (ECHR) concerning the right to a safe, clean, healthy and sustainable environment.⁶⁸⁵ The recommendation proposed the following text:

Section I – Definition

Article 1

For the purposes of this Additional Protocol, “the right to a safe, clean, healthy and sustainable environment” means the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being.

Section 2 – General principles

[Article 2]

Every generation has a duty to protect the environment and biodiversity and to prevent any irreparable and irreversible damage to life on Earth, so as to ensure the right of subsequent generations to live in a safe, clean, healthy and sustainable environment.

Every generation shall ensure that natural resources are used and managed in an environmentally sustainable manner, and that scientific and technological progress in all areas does not harm life on Earth.

Every generation is responsible for protection of the environment and has a duty to:

- a. prevent environmental damage;
- b. remedy environmental damage.

[Article 3]

- a. No one can be discriminated against on account of his/her belonging to a particular generation.

⁶⁸⁵ See also Council of Europe Parliamentary Assembly, Doc. 15955 of 28 March 2024.

b. Each High Contracting Party shall see to it that discrimination is prohibited and shall ensure equal and effective protection against discrimination to enable all individuals, groups and peoples to enjoy a safe, clean, healthy and sustainable environment.

c. Each High Contracting Party shall ensure that additional measures are taken to protect the rights of persons who are more vulnerable to or particularly threatened by environmental harm.

[Article 4]

Where a risk of harm to the environment and biodiversity has been established, measures for preventive action and rectification, as a priority at source, shall be put in to avoid the occurrence of environmental damage.

Where there are threats of severe damage to the environment or to human, animal or plant health, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent the degradation of the environmental and biodiversity.

a. Any rolling back of legal protection of the environment or of access to environmental justice shall be prohibited.

b. National and international provisions on the environment may be subject only to continuous improvement, having regard to the current state of scientific and technological knowledge.

In case of doubt, all matters before courts, administrative agencies and other decision-makers must be resolved in a way most likely to favour the protection and conservation of nature, with preference to be given to alternatives that are least harmful to the environment.

Section 3 – Substantive right

[Article 5]

Everyone has the right to a safe, clean, healthy and sustainable environment.

[Article 6]

Everyone is entitled to access information relating to the environment held by public authorities, without having to prove an interest.

If a project, programme or policy has an impact on the environment and biodiversity, everyone shall be entitled to be consulted in advance in order to be heard by the decision-making bodies regarding the authorization and development of that project.

Everyone has the right of access to justice in matters relating to the environment.

Everyone whose rights set forth in this Protocol are violated shall have an effective remedy.

A 2022 Briefing Paper by the UK-based Environmental Rights Recognition Project suggested the following benefits of such a protocol: (1) symbolism; (2) putting environmental considerations at the heart of policy making; (3) requiring legislators to factor environmental impact into their work; (4) increasing civic participation; (5) filling the gap that results from only 13 of the 46 Member States having no existing constitutional or legislative right to a healthy environment; (6) creating a level

playing field by setting a ‘pan-European baseline’; (7) clarifying obligations and promoting legal certainty; and (8) improving overall environmental performance.

But rather than deciding to draft a new protocol, the Committee of Ministers of the Council of Europe recommended to its 46 member governments that they ‘reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising [it] at the national level’ (Recommendation CM/Rec(2022)20 (27 September 2022)). It added that in implementing the recommendation, they should ‘ensure the respect of general principles of international environmental law, such as the no harm principle, the principle of prevention, the principle of precaution and the polluter pays principle, and take into account the need for intergenerational equity.’ In relation to the role of corporations, they recommended that:

Member States should encourage or, where appropriate, require business enterprises to act in compliance with their human rights responsibilities related to the environment, including by applying a smart mix of measures— national and international, mandatory and voluntary.

B. International Litigation

In the materials that follow, we survey some of the key international opinions, judgments and views adopted by international courts, tribunals and treaty bodies. Another such opinion is expected in due course from the African Court of Human and Peoples’ Rights which received a request dated 2 May 2025 from the Pan African Lawyers Union for an Advisory Opinion on the obligations of states with respect to the climate change crisis. As early as 2001, the African Commission on Human and Peoples’ Rights decided that the right to a healthy environment imposed on States the obligation to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.⁶⁸⁶

We start this survey by considering the approach adopted under the European Convention on Human Rights. Until 2024, the European Court of Human Rights had interpreted the ‘right to respect for private and family life’ in Article 8 of the ECHR cautiously in relation to environmental harm. But several major cases that had been referred to the Grand Chamber were decided on 9 April 2024. In the lead-up to these cases, commentators questioned whether the ‘Court’s often deferential, inconsistent and unreasoned remedial practice’ was likely to provide an adequate basis for remedies in relation to climate change.⁶⁸⁷ But while two of the cases were declared inadmissible, the third proved to be a major turning point in climate litigation.

In the first of the cases, *Carême v. France* (Grand Chamber, Application No. 7189/21 (9 April 2024)) the Court held inadmissible a complaint by the former mayor of the municipality of Grande-Synthe that France had failed to take sufficient steps to prevent climate change thereby violating his right to life and the right to respect for his private and family life and home. The complaint emphasized the risk of climate-change-induced flooding in the period 2030–40. But after submitting the complaint, the applicant had ceased to be mayor and had moved to another country, and retained no significant links to Grande-Synthe. Accordingly, the court found that he could not claim to have victim status under the approach spelled out in the *KlimaSeniorinnen* case below.

In the second case, *Duarte Agostinho and Others v. Portugal and 32 Others* (application No. 39371/20) of 9 April 2024, six young Portuguese nationals complained of the present and future impacts of climate change. They cited increased temperatures and extreme heat and resulting wildfires and claimed that Portugal and 32 other respondent states bore responsibility. They relied on provisions of the ECHR, the 2015 Paris Agreement, the UN Convention on the Rights of the Child, and various reports and

⁶⁸⁶ African Commission on Human and Peoples’ Rights, Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96 (Decision of 27 October 2001) paras. 52 and 53.

⁶⁸⁷ H. Keller, C. Heri, and R. Piskóty, ‘Something Ventured, Nothing Gained?: Remedies Before the ECtHR and Their Potential for Climate Change Cases’, 22 *Hum. Rts L. Rev.* (2022) 000; N. Kobylarz and E. Grant (eds.), *Human Rights and the Planet: The Future of Environmental Human Rights in the European Court of Human Rights* (2022).

expert findings. Most notably, they argued that their generation was particularly affected by climate change and that, given their ages, the interference with their rights was more marked than in the case of previous generations. The court held that territorial jurisdiction was established in respect of Portugal, but not in relation to the other states.

208. In sum, extending the Contracting Parties' extraterritorial jurisdiction on the basis of the proposed criterion of "control over the applicants' Convention interests" in the field of climate change – be it within or outside the Convention's legal space – would lead to an untenable level of uncertainty for the States. Action taken in relation to some of the basic human activities ... or any omission in managing the activity's potential harmful effects on climate change, could lead to the establishment of a State's extraterritorial jurisdiction over the interests of persons outside its territory and without any particular link with the State concerned. More importantly, accepting the applicants' arguments would entail an unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention towards people practically anywhere in the world. ...

And since the applicants had not pursued any legal avenue in Portugal that complaint was also inadmissible for non-exhaustion of domestic remedies. But, it was the 260-page judgment in the third case that proved to be path-breaking in many respects:

VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS V. SWITZERLAND
EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, APPLICATION NO. 53600/20 (9 APRIL 2024)

[The first applicant is Verein KlimaSeniorinnen Schweiz, a non-profit association established under Swiss law to promote and implement effective climate protection on behalf of its members. The latter are women living in Switzerland, and the average age of the more than 2,000 members is 73. The second to fifth applicants are individual members of the same association.]

...

C. The Court's assessment

1. Preliminary points

410. At the outset, the Court notes that climate change is one of the most pressing issues of our times.

...

...

412. Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements. The legal basis for the Court's intervention is always limited to the Convention

...

414. ... The particular nature of the problems arising from climate change in terms of the Convention issues raised has not so far been addressed in the Court's case law. ...

415. The Court's existing case law in environmental matters concerns situations involving specific sources from which environmental harm emanates. ...

416. In the context of climate change, the key characteristics and circumstances are significantly different. First, there is no single or specific source of harm. GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions. Secondly, CO₂ – the primary

GHG – is not toxic per se at ordinary concentrations. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders.

417. Thirdly, that chain of effects is both complex and more unpredictable in terms of time and place than in the case of other emissions of specific toxic pollutants. ... In the longer term, some of the consequences risk destroying the basis for human livelihoods and survival in the worst affected areas. ...

418. Fourthly, the sources of GHG emissions are not limited to specific activities that could be labelled as dangerous. ...

419. Fifthly, combating climate change, and halting it, does not depend on the adoption of specific localised or single sector measures. Climate change is a polycentric issue. Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. ...

420. ... [I]ntergenerational burden sharing assumes particular importance [F]uture generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change By their commitment to the UNFCCC, the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind

421. Lastly, while the challenges of combating climate change are global, both the relative importance of various sources of emissions and the necessary policies and measures required for achieving adequate mitigation and adaptation may vary to some extent from one State to another depending on several factors such as the structure of the economy, geographical and demographic conditions and other societal circumstances. ...

422. Because of these fundamental differences, it would be neither adequate nor appropriate to follow an approach consisting in directly transposing the existing environmental case law to the context of climate change. ...

...

(b) Issues of proof

427. One of the key features of climate change cases is the necessity for the relevant court to engage with a body of complex scientific evidence. ...

428. A mere allegation that the State failed to comply with certain domestic rules and environmental or technical standards is not in itself sufficient [I]n some cases, the Court may need to have regard to the relevant international standards

429. The Court also relies on studies and reports by relevant international bodies As regards climate change, the Court points to the particular importance of the reports prepared by the IPCC These reports provide scientific guidance on climate change regionally and globally, its impact and future risks, and options for adaptation and mitigation .

...

(c) Effects of climate change on the enjoyment of Convention rights

...

432. The findings of the IPCC ... have not been challenged or called into doubt by the respondent or intervening States. ...

433. Moreover, the IPCC findings correspond to the position taken, in principle, by the States in the context of their international commitments to tackle climate change. ... Moreover, the respondent Government in the present case, as well as the many third-party intervenor Governments, have not contested that there is a climate emergency.

...
 436. In sum, on the basis of the above findings, the Court will proceed with its assessment of the issues arising in the present case by taking it as a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5oC above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.
 ...

(e) The issue of the proportion of State responsibility

...
 442. ... [T]he global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States. ... [A] respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not.
 ...
 444. Lastly, as regards the “drop in the ocean” argument implicit in the Government’s submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State’s positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be shown that “but for” the failing or omission of the authorities the harm would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm.
 ...

(f) Scope of the Court’s assessment

...
 451. ... [T]here is force in the argument put forward by the UN Special Rapporteurs that the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights.
 ...

3. Admissibility

(a) Victim status/locus standi (representation)

...
 464. The Court reiterates that the issue of victim status should be distinguished from the issue of locus standi. The latter relates to the questions of representation of the (direct) victims’ complaints before the Court. ...

(α) Victim status of individuals

465. In order to fall into the category of direct victims, the applicant must be able to show that he or she was “directly affected” by the measure complained of. ...

466. However, this does not necessarily mean that the applicant needed to be personally targeted by the act or omission complained of. What is important is that the impugned conduct personally and directly affected him or her.

...

(β) Locus standi (representation) by associations

...

475. ... [A]lthough in the absence of a measure directly affecting them the Court does not normally grant victim status to associations, even if the interests of their members could be at stake, there may be “special considerations” where an association represents individuals, even in the absence of a measure directly affecting the association in question.

...

487. In sum, the Court finds that in order to claim victim status [in the climate change context] ... an applicant needs to show that he or she was personally and directly affected by the impugned failures. This would require the Court to establish ... the following ...:

(a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and

(b) there must be a pressing need to ensure the applicant’s individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.

488. The threshold for fulfilling these criteria is especially high. ... [T]he Court will have due regard to circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. The Court’s assessment will also include, but will not necessarily be limited to, considerations relating to: the nature and scope of the applicant’s Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant’s life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general), and the nature of the applicant’s vulnerability.

(β) Standing of associations

...

502. ... In order to be recognised as having locus standi to lodge an application [in a climate change case] ... the association in question must be: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

In this connection, the Court will have regard to such factors as the purpose for which the association was established, that it is of non-profit character, the nature and extent of its activities within the relevant jurisdiction, its membership and representativeness, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice. ...

...

(iii) Application of these principles to the present case

...

(b) Applicability of the relevant Convention provisions

...

(α) Article 2

...

513. In sum, in order for Article 2 to apply to complaints of State action and/or inaction in the context of climate change, it needs to be determined that there is a “real and imminent” risk to life. However, such risk to life in the climate-change context must be understood in the light of the fact that there is a grave risk of inevitability and irreversibility of the adverse effects of climate change, the occurrences of which are most likely to increase in frequency and gravity. Thus, the “real and imminent” test may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant. This would also imply that where the victim status of an individual applicant has been established ..., it would be possible to assume that a serious risk of a significant decline in a person’s life expectancy owing to climate change ought also to trigger the applicability of Article 2.

(β) Article 8

...

519. ... Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life.

520. However, in this context, the question of “actual interference” or the existence of a relevant and sufficiently serious risk entailing the applicability of Article 8 essentially depends on the assessment of similar criteria to those set out in paragraphs 487 to 488 above concerning the victim status of individuals, or in paragraph 502 above concerning the standing of associations. These criteria are therefore determinative for establishing whether Article 8 rights are at stake and whether this provision applies. ...

(ii) Application of these principles to the present case(α) Article 8 of the Convention

[The court found, on the basis of the criteria it had established, that the applicant association had the necessary locus standi in this case.]

...

533. However, while it may be accepted that heatwaves affected the [quality of life of applicants 2-5], it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection It cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country. It should also be reiterated that victim status in relation to future risk is only exceptionally admitted by the Court and the individual applicants have failed to demonstrate that such exceptional circumstances exist in their regard.

...

535. ... [A]pplicants nos. 2 5 do not fulfil the victim-status criteria ... [and so] their complaints should be declared inadmissible

...

[The Court decided to examine the association’s complaint solely in terms of Article 8, but noted that the same principles were largely applicable to an Article 2 analysis relating to environmental issues.]

...

(ii) Content of the States’ positive obligations

544. ... [T]he Court already held long ago that the scope of protection under Article 8 of the Convention extends to adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm. Similarly, the Court derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change.

545. ... In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights ... and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory

...

548. ... [E]ffective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. ... [F]or the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.

549. Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. ...

550. When assessing whether a State has remained within its margin of appreciation, the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

- (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
- (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
- (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a) (b) above);
- (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
- (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

...

(c) Application of the above principles to the present case

...

567. In these circumstances, given the pressing urgency of climate change and the current absence of a satisfactory regulatory framework, the Court has difficulty accepting that the mere legislative commitment to adopt the concrete measures “in good time”, as envisaged in the Climate Act, satisfies the State’s duty to provide, and effectively apply in practice, effective protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health.

...

573. In conclusion, there were some critical lacunae in the Swiss authorities’ process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, ... the State had previously failed to meet its past GHG emission reduction targets. By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

574. The above findings suffice for the Court to find that there has been a violation of Article 8 of the Convention.

...

657. In the present case, having regard to the complexity and the nature of the issues involved, the Court is unable to be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the present judgment. Given the differentiated margin of appreciation accorded to the State in this area (see paragraph 543 above), the Court considers that the respondent State, with the assistance of the Committee of Ministers, is better placed than the Court to assess the specific measures to be taken. It should thus be left to the Committee of Ministers to supervise, on the basis of the information provided by the respondent State, the adoption of measures aimed at ensuring that the domestic authorities comply with Convention requirements, as clarified in the present judgment.

...

PARTLY CONCURRING PARTLY DISSENTING OPINION OF JUDGE EICKE**INTRODUCTION**

1. To my regret, I am unable to agree with the majority either in relation to the methodology they have adopted or on the conclusions which they have come to both in relation to the admissibility (and, in particular, the question of “victim” status) as well as on the merits. ...

2. ... The disagreement is of a more fundamental nature and, at least in part, goes to the very heart of the role of the Court within the Convention system and, more generally, the role of a court in the context of the unique and unprecedented challenges posed to humanity (including in but also across our societies) by anthropogenic climate change.

3. ... [T]he majority in this case has gone well beyond what I consider to be, as a matter of international law, the permissible limits of evolutive interpretation.

4. In doing so, it has, in particular, unnecessarily expanded the concept of “victim” status/standing ... and has created a new right (under Article 8 and, possibly, Article 2) [see paras. 519 and 544 above] ... and/or imposed a new “primary duty” on Contracting Parties [see para. 545 above]

BACKGROUND

5. ... [M]y disagreement with the majority does not relate in any way to the nature or magnitude of the risks and the challenges posed by anthropogenic climate change. I completely share their understanding of the urgent need to address this issue

...

CONCLUSION

68. ... [T]he Court would already have achieved much if it had focused on a violation of Article 6 of the Convention and, at a push, a procedural violation of Article 8 relating in particular to (again) the right of access to court and of access to information necessary to enable effective public participation in the process of devising the necessary policies and regulations and to ensure proper compliance with and enforcement of those policies and regulations as well as those already undertaken under domestic law. However, in my view, the majority clearly “tried to run before it could walk” and, thereby, went beyond what was legitimate for this Court ... by means of “interpretation and application of the Convention”, to do.

69. I also do worry that, in having taken the approach and come to the conclusion they have, the majority are, in effect, giving (false) hope that litigation and the courts can provide “the answer” without there being, in effect, any prospect of litigation (especially before this Court) accelerating the taking of the necessary measures towards the fight against anthropogenic climate change. In fact, there is a significant risk that the new right/obligation created by the majority (alone or in combination with the much enlarged standing rules for associations) will prove an unwelcome and unnecessary distraction for the national and international authorities, both executive and legislative, in that it detracts attention from the on-going legislative and negotiating efforts being undertaken as we speak to address the – generally accepted – need for urgent action. Not only will those authorities now have to assess and, if considered necessary, design and adopt (or have adopted) new “regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change” but there is also a significant risk that they will now be tied up in litigation about whatever regulations and measures they have adopted (whether as a result or independently) or how those regulations and measures have been applied in practice and, where an applicant was successful, lengthy and uncertain execution processes in relation to any judgments. ...

...

QUESTION

Did the Court succeed in striking a balance among the many competing considerations in the *Verein KlimaSeniorinnen Schweiz* case, or did it overstep as argued by the sole dissenting member of the 17-judge Grand Chamber?

International Tribunal on the Law of the Sea

In 2021 Antigua and Barbuda and Tuvalu set up the Commission of Small Island States on Climate Change and International Law (COSIS). By 2024, it had nine member states. As an international organization, it was able to request an advisory opinion from the International Tribunal on the Law of the Sea (ITLOS). On 12 December 2022 it requested one on the scope of state obligations under the UN Convention on the Law of the Sea (UNCLOS) in relation to greenhouse gas emissions. Thirty-four states, nine international organizations, and a number of other groups subsequently made submissions to the Tribunal and participated in the proceedings.

The Tribunal’s unanimous Advisory Opinion, delivered on 21 May 2024, based itself on international environmental law, broadly defined, but made only one single fleeting reference to human rights and none to the implications of international human rights obligations. The Opinion found that greenhouse gas emissions (GHG) constitute pollution of the marine environment under the Convention and that States have an obligation to take all necessary measures to control such pollution. The Tribunal also found that States have special obligations to protect and preserve the marine environment in relation to climate change impacts. It characterized the findings of the IPCC as

reflecting the scientific consensus (para. 208) but added that in the absence of scientific certainty, States must apply the precautionary approach (para. 213).

The Tribunal recognized that the ‘principle of common but differentiated responsibilities’, acknowledged in the UNFCCC and the Paris Agreement, applies in relation to the law of the sea (para. 229). This meant that States parties ‘with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities’ (para. 227), and that developed States have a specific duty to assist developing States, and especially those vulnerable to climate change, in their efforts to address GHG-related marine pollution (paras. 338-339).

The Tribunal held that the Convention’s Art. 194 due diligence-type obligation in relation to marine pollution requires each state to put in place a national system, including legislation, administrative procedures, and an enforcement mechanism to regulate GHG emitting activities (para. 235), but no mention was made of human rights due diligence obligations.

The Inter-American System

The Inter-American system has gone furthest in recognizing environmental rights.⁶⁸⁸ The first major international case was lodged in 2005, when Sheila Watt-Cloutier, an Inuk woman and Chair of the Inuit Circumpolar Conference, petitioned the Inter-American Commission on Human Rights ‘seeking relief from violations resulting from global warming caused by acts and omissions of the United States’. She submitted it ‘on behalf of herself, 62 other named individuals, and all Inuit of the arctic regions of the United States of America and Canada who have been affected by the impacts of climate change described in [the 175-page] petition.’ Almost one year later, the Commission’s Assistant Executive Secretary, Ariel Dulitzky, indicated that it would not be taken up because ‘the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.’ Despite its rejection, the petition gave an important impetus to advocacy in international organizations and litigation in national and international courts invoking human rights-based claims to challenge governments, corporations, and other actors for fueling global warming.

The foundation for the current approach of the Court was laid in an Advisory Opinion (OC-23/17, of 15 November 2017) by the Court on ‘The Environment and Human Rights’. Colombia had sought clarification of states’ environment-related obligations under the Convention by reference to the right to life (Art. 4) and the right to humane treatment (Art. 5) in light of the Convention’s general Article 1 obligation to respect rights. The context involved largescale infrastructure projects that threatened transboundary harm to the Caribbean marine environment, thereby jeopardizing the human rights of coastal and island residents. Colombia’s dispute with Nicaragua before the International Court of Justice lay behind the request, but Nicaragua was not actually mentioned in the application.

The Court noted that Article 11 of the Protocol of San Salvador expressly recognizes ‘the right to live in a healthy environment’. But since only 16 states have ratified that treaty, it was highly significant that the Court also determined that the right is covered by the American Convention by virtue of the general provision in Article 26 relating to economic, social and cultural rights. It then addressed the nature of the right and its broader application to nature:

59. The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.

⁶⁸⁸ See D. Mejía-Lemos, ‘The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System’, 22 *Hum. Rts. L. Rev.* (2022) 000.

...

62. The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment ... because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature.

The Court also had to determine that it had jurisdiction in these matters, and held unanimously (para. 244) that:

...

2. The concept of jurisdiction under Article 1(1) ... encompasses any situation in which a State exercises authority or effective control over an individual, either within or outside its territory

...

4. ... [I]ndividuals whose rights under the Convention have been violated owing to transboundary harm are subject to the jurisdiction of the State of origin of the harm, because that State exercises effective control over the activities carried out in its territory or under its jurisdiction

5. ... States have the obligation to prevent significant environmental damage within or outside their territory and, to this end, must regulate, supervise and monitor activities within their jurisdiction that could produce significant environmental damage

6. States must act in accordance with the precautionary principle

7. ... States have the obligation to cooperate, in good faith, to ensure protection against significant transboundary harm to the environment. ...

8. ... States have the obligation to ensure the right of access to information concerning potential environmental damage, the right to public participation of persons subject to their jurisdiction in policies and decision-making that could affect the environment, and also the right of access to justice in relation to the State environmental obligations

The Inter-American Court subsequently applied this reasoning in relation to the right to a healthy environment in the *Case of Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, IACtHR Series C400 (6 February 2020), although there was also a strong dissent.⁶⁸⁹

**INTER-AMERICAN COURT OF HUMAN RIGHTS, ADVISORY OPINION ON CLIMATE
EMERGENCY AND HUMAN RIGHTS
OC-32/25 OF 29 MAY 2025, REQUESTED BY THE REPUBLIC OF CHILE AND THE REPUBLIC
OF COLOMBIA**

[In response to the twenty questions posed by the two requesting governments, the Court reformulated the questions it would address into three categories:

(1) What is 'the scope of the obligations to respect, guarantee and adopt the necessary measures to make effective [the various substantive articles of the ACHR and the Protocol of San Salvador] ... in the face of the effects or threats generated or exacerbated by the climate emergency?

(2) What is the scope of those obligations 'to make effective ... procedural rights such as access to information ..., the right to participation ... and access to justice' in that context.

⁶⁸⁹ For a critique of the judgment, see L. Mardikian, 'The Right to a Healthy Environment Before the Inter-American Court of Human Rights', 72 *ICLQ* (2023) 945.

(3) What is the scope of those obligations to enforce without discrimination ... the rights of children ..., environmental defenders, women, indigenous peoples, Afro-descendant and peasant communities' and other vulnerable groups in that context?

The 234-page opinion in Spanish took account of 263 third-party written interventions from 613 actors (including nine states) and information provided by 183 delegations at public hearings in Brasilia, Bridgeton, and Manaus. The Court devoted over 60 pages to analyzing scientific and other material relating to the 'climate emergency'. The Opinion is innovative in many respects. For present purposes it must suffice to note only two:

The doctrine of 'enhanced due diligence']

235. The manner in which enhanced due diligence is carried out in each case will depend on the specific risk faced, the measures required to protect the rights threatened, and the possible situation of vulnerability of the victims. ...

236. ... [I]n general terms, enhanced due diligence entails, among other relevant aspects: (i) the comprehensive, detailed and thorough identification and assessment of risks; (ii) the adoption of proactive and ambitious preventive measures to avoid the worst climate scenarios; (iii) the use of the best available science in the design and implementation of climate actions; (iv) the integration of a human rights perspective in the formulation, implementation and monitoring of all policies and measures related to climate change, so as to ensure that they will not create new vulnerabilities or exacerbate existing ones; (v) permanent and adequate monitoring of the effects and impacts of the measures adopted; (vi) strict compliance with the obligations derived from procedural rights, in particular, access to information, participation, and access to justice; (vii) transparency and continued accountability for State action on climate; (viii) adequate regulation and oversight of corporate due diligence; and (xi) enhanced international cooperation, especially in terms of technology transfer, finance, and capacity building.

...

[The rights of Nature]

282. ... [I]nterpretation of the rights protected in the inter-American system must be guided by an evolutionary perspective, in line with the progressive development of international human rights law. In this sense, the recognition of Nature as a subject of rights does not introduce a content alien to the inter-American *corpus iuris*, but rather represents a contemporary manifestation of the principle of interdependence between human rights and the environment. This interpretation, moreover, is in line with the advances of international environmental law, which has affirmed structural principles such as intergenerational equity, the precautionary principle and the duty of prevention, all aimed at preserving the integrity of ecosystems in the face of current and future threats.

283. Based on this understanding, the Court emphasizes that States must not only refrain from acting in ways that cause significant environmental harm, but also have a positive obligation to adopt measures to ensure the protection, restoration and regeneration of ecosystems. These measures must be compatible with the best available science and recognize the value of traditional, local and indigenous knowledge. They must also be guided by the principle of non retrogression and ensure full procedural rights.

...

VII. OPINION ...

THE COURT DECIDES

...

Unanimously, that:

1. According to the best available science, the current situation constitutes a climate emergency due to the accelerated increase in global temperature, the result of various anthropogenic activities,

produced unequally by the States of the international community, which are increasingly affecting and seriously threatening humanity and, especially, the most vulnerable people. This climate emergency can only be adequately addressed through urgent and effective actions for mitigation, adaptation and progress toward sustainable development, articulated with a human rights perspective, and under the prism of resilience

...

Unanimously, that:

3. Under the general obligation to ensure rights, States have the obligation to act in accordance with a standard of enhanced due diligence to counteract the human causes of climate change and to protect people under their jurisdiction from climate impacts, in particular those in a situation of heightened vulnerability

By a vote of six in favor and one against, that:

4. By virtue of the general obligation to ensure the progressive development of economic, social, cultural and environmental rights, States must allocate the maximum available resources to protect persons and groups that, because they are in situations of vulnerability, are exposed to the most severe impacts of climate change

Unanimously, that:

5. By virtue of the general obligation to adopt provisions of domestic law, States must integrate into their domestic legal framework the necessary regulation to ensure the respect, guarantee and progressive development of human rights in the context of the climate emergency

Unanimously, that:

6. By virtue of the obligation to cooperate, the States are obliged to cooperate in good faith to advance in the respect, guarantee and progressive development of human rights threatened or affected by the climate emergency

By a vote of four in favor and three against, that:

7. The recognition of Nature and its components as subjects of rights constitutes a normative development that makes it possible to reinforce the protection of the integrity and functionality of ecosystems in the long term, providing effective legal tools in the face of the triple planetary crisis and facilitating the prevention of existential damage before it becomes irreversible. This conception represents a contemporary manifestation of the principle of interdependence between human rights and the environment, and reflects a growing trend at the international level aimed at strengthening the protection of ecological systems against present and future threats

...

By a vote of four in favor and three against, that:

8. Under the principle of effectiveness, the imperative prohibition of anthropogenic conduct that may irreversibly affect the interdependence and vital balance of the common ecosystem that makes the life of species possible constitutes a norm of *jus cogens*

...

By five votes in favor and two partially against, that:

9. The right to a healthy climate, understood as a component of the right to a healthy environment, protects in its collective dimension the present and future humanity, as well as Nature

By a vote of six in favor and one partially against, that:

10. Under the right to a healthy climate, States must protect the global climate system and prevent human rights violations arising from its alteration. Therefore, they must mitigate GHG emissions, which implies (i) adopting regulations on the matter that define a mitigation goal and a mitigation strategy based on human rights, as well as regulating the behavior of companies ... ; (ii) adopting mitigation supervision and control measures ... , and (iii) determining the climate impact of projects and activities when appropriate

...

Unanimously, that:

11. By virtue of the right to a healthy environment, States must (i) protect nature and its components from the impacts of climate change, and (ii) establish a strategy to move towards sustainable development

By six votes in favor and one partially against, that:

12. By virtue of the rights to life, personal integrity, health, private and family life, property and housing, freedom of residence and movement, water and food, work and social security, culture and education, as well as all other substantive rights threatened by climate impacts, States have an immediately enforceable obligation to define and update, as ambitiously as possible, their national adaptation goal and plan ... as well as the duty to act with enhanced due diligence

...

Unanimously, that:

13. By virtue of the democratic principle, States must strengthen the democratic rule of law as an essential framework for protecting human rights, the effectiveness of public action, and open and inclusive citizen participation, and ensuring the full exercise of procedural rights

By six votes in favor and one partially against, that:

14. By virtue of the human right to science and the recognition of local, traditional and indigenous knowledge, protected by Articles 26 of the Convention and 14.2 of the Protocol of San Salvador, all persons have the right to access the benefits of measures based on the best available science and on the recognition of local, traditional or indigenous knowledge

...

Unanimously, that:

15. Under the right of access to information, States have obligations regarding (i) production of climate information ...; (ii) disclosure of information relevant to the protection of human rights in the face of climate change ..., and (iii) to adopt measures against disinformation

Unanimously, that:

16. Under the right to political participation, States must guarantee processes that ensure the meaningful participation of people under their jurisdiction in decision- making and policies related to climate change, as well as ensure prior consultation of indigenous and tribal peoples, where appropriate

By four votes in favor and three partially against, that:

17. By virtue of the right of access to justice, States must ensure central aspects regarding:

- (i) provision of sufficient means for the administration of justice in this context;
- (ii) application of the *pro actione* principle;
- (iii) speed and reasonable time in judicial proceedings;
- (iv) adequate provisions on standing;
- (v) evidence; and
- (vi) reparation; as well as
- (vii) application of inter-American standards

...

Unanimously, that:

18. By virtue of the right to defend human rights, States have a special duty to protect environmental defenders that translates into specific obligations, among others, to protect them, to investigate and, if necessary, punish attacks, threats or intimidations that they suffer, and to counteract the "criminalization" of the defense of the environment

...

19. States should adopt measures aimed at addressing the way in which the climate emergency aggravates inequality and has a differentiated impact on people living in multidimensional poverty ...

By four votes in favor and three partially against, that:

20. States have specific obligations in situations of special vulnerability such as those faced by (i) children, and (ii) indigenous peoples, tribes, Afro-descendants, and peasant and fishing communities, (iii) persons who suffer differentiated impacts in the context of climate disasters Likewise, States must adopt measures to protect persons who do not belong to the traditionally protected categories but who are in a situation of vulnerability for dynamic or contextual reasons

...

The International Court of Justice

In 2019 a group of law students at the University of the South Pacific launched a campaign to persuade states to seek an advisory opinion on climate change.⁶⁹⁰ The cause was taken up by the Government of Vanuatu, and eventually the UN General Assembly (Resolution 77/276 of 29 March 2023) endorsed the request.

INTERNATIONAL COURT OF JUSTICE, ADVISORY OPINION: OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE, 23 JULY 2025 INTERNATIONAL COURT OF JUSTICE, PRESS RELEASE, NO. 2025/36, 23 JULY 2025

[The General Assembly requested an] advisory opinion on the following questions:

“(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”

... During the written phase of the proceedings, 91 written statements and 62 written comments were filed ... by States and international organizations. [In public hearings in December 2024] 96 States and 11 international organizations presented oral statements. This is the highest level of participation in a proceeding in ... the history of this Court The ... Advisory Opinion [was adopted] unanimously — only the fifth time in its nearly eighty-year history that [this has happened]. To date, the Court has issued 29 advisory opinions.

In its Advisory Opinion, the Court responds to question (a) posed by the General Assembly as follows:

- The climate change treaties set forth binding obligations for States parties to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions. These obligations include the following:

⁶⁹⁰ S. Sefeti, “‘We were heard’: the Pacific students who took their climate fight to the ICJ — and won”, *The Guardian*, 25 July 2025.

- (a) States parties to the United Nations Framework Convention on Climate Change have an obligation to adopt measures with a view to contributing to the mitigation of greenhouse gas emissions and adapting to climate change;
 - (b) States parties listed in Annex I to the United Nations Framework Convention on Climate Change have additional obligations to take the lead in combating climate change by limiting their greenhouse gas emissions and enhancing their greenhouse gas sinks and reservoirs;
 - (c) States parties to the United Nations Framework Convention on Climate Change have a duty to co-operate with each other in order to achieve the underlying objective of the Convention;
 - (d) States parties to the Kyoto Protocol must comply with applicable provisions of the Protocol;
 - (e) States parties to the Paris Agreement have an obligation to act with due diligence in taking measures in accordance with their common but differentiated responsibilities and respective capabilities capable of making an adequate contribution to achieving the temperature goal set out in the Agreement;
 - (f) States parties to the Paris Agreement have an obligation to prepare, communicate and maintain successive and progressive nationally determined contributions which, inter alia, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels;
 - (g) States parties to the Paris Agreement have an obligation to pursue measures which are capable of achieving the objectives set out in their successive nationally determined contributions; and
 - (h) States parties to the Paris Agreement have obligations of adaptation and co-operation, including through technology and financial transfers, which must be performed in good faith.
- Customary international law sets forth obligations for States to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions.

These obligations include the following:

- (a) States have a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment, in accordance with their common but differentiated responsibilities and respective capabilities;
 - (b) States have a duty to co-operate with each other in good faith to prevent significant harm to the climate system and other parts of the environment, which requires sustained and continuous forms of co-operation by States when taking measures to prevent such harm.
- States parties to the Vienna Convention for the Protection of the Ozone Layer and to the Montreal Protocol on Substances that Deplete the Ozone Layer and its Kigali Amendment, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, have obligations under these treaties to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions.
 - States parties to the United Nations Convention on the Law of the Sea have an obligation to adopt measures to protect and preserve the marine environment, including from the adverse effects of climate change and to co-operate in good faith.

- States have obligations under international human rights law to respect and ensure the effective enjoyment of human rights by taking necessary measures to protect the climate system and other parts of the environment.

The Court responds to question (b) put by the General Assembly as follows:

- A breach by a State of any obligations identified in response to question (a) constitutes an internationally wrongful act entailing the responsibility of that State. The responsible State is under a continuing duty to perform the obligation breached. The legal consequences resulting from the commission of an internationally wrongful act may include the obligations of:

(a) cessation of the wrongful actions or omissions, if they are continuing;

(b) providing assurances and guarantees of non-repetition of wrongful actions or omissions, if circumstances so require; and

(c) full reparation to injured States in the form of restitution, compensation and satisfaction, provided that the general conditions of the law of State responsibility are met, including that a sufficiently direct and certain causal nexus can be shown between the wrongful act and injury.

...

* * *

The Advisory Opinion is a very rich source of analysis and addresses a wide range of issues. In addition to the Opinion itself, individual judges added over 100 pages of additional reflections, often pointing to important paths that they believe should also have been taken. The following excerpts from the unanimous opinion address the specific human rights dimensions:

F. Obligations of States under international human rights law

369. The Court recalls that the chapeau to the questions put to it by the General Assembly requests the Court to have “particular regard” to the ICCPR, the ICESCR, as well as to the rights recognized in the [UDHR]. The resolution also “[e]mphasiz[es] the importance of” the Convention on the Rights of the Child.

...

1. Adverse effects of climate change on the enjoyment of human rights

...

376. The Court is thus of the view that the adverse effects of climate change, including, inter alia, the impact on the health and livelihoods of individuals through events such as sea level rise, drought, desertification and natural disasters, may significantly impair the enjoyment of certain human rights. The Court will consider some of these rights, without attempting to be exhaustive.

[The Court then considers: the right to life (para. 377) citing, inter alia, *Teitiota v. New Zealand*, and the Human Rights Committee’s General Comment No. 36; the principle of non-refoulement (para. 379); the right to health (para. 380), citing the ESCR Committee’s General Comment No. 14 (2000); the right to an adequate standard of living (para. 380); the right to privacy, family and home (para. 381), citing *Daniel Billy and others v. Australia*; and the rights of women, children and indigenous peoples (para. 382), citing the Joint Statement on “Human Rights and Climate Change” adopted by five treaty bodies and CEDAW General recommendation No. 37. It also takes note of the Inter-American Court of Human Rights’s Advisory Opinion OC-32/25 of 29 May 2025 and the European Court of Human Rights 2024 Grand Chamber judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.]

2. Right to a clean, healthy and sustainable environment

[The Court noted, *inter alia*, the 1972 in the Stockholm Declaration, the 1992 Rio Declaration, various UN statements, the provisions of regional human rights treaties, provisions in national constitutions, reports of UN Special Rapporteurs, and General Assembly resolution 76/300 of 28 July 2022.]

393. Based on all of the above, the Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right. ...

...

UN Treaty Bodies

Many of the UN human rights treaty bodies have engaged with the issue of climate change in recent years. Consider the following examples.

IOANE TEITIOTA V. NEW ZEALAND

U.N. HUMAN RIGHTS COMMITTEE, FINAL VIEWS, UN DOC. CCPR/C/127/D/2728/2016 (24 OCTOBER 2019)

...

1.1 The author of the communication is Ioane Teitiota, a national of Kiribati born in the 1970s. His application for refugee status in New Zealand was rejected. He claims that the State party violated his right to life under the Covenant by removing him to Kiribati in September 2015. ...

...

Factual background

2.1 The author claims that the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in Kiribati to New Zealand. The situation in Tarawa has become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded, resulting in a housing crisis and land disputes that have caused numerous fatalities. Kiribati has thus become an untenable and violent environment for the author and his family.

2.2 The author has sought asylum in New Zealand, but the Immigration and Protection Tribunal issued a negative decision concerning his claim for asylum. ... The Court of Appeal and the Supreme Court each denied the author's subsequent appeals concerning the same matter.

...

Issues and proceedings before the Committee ... Consideration of the merits

...

9.2 The Committee notes the author's claim that by removing him to Kiribati, the State party subjected him to a risk to his life in violation of article 6 of the Covenant, and that the State party's authorities did not properly assess the risk inherent in his removal.

[The Committee recalls relevant provisions of its General Comment No. 31 (2004) and No. 36 (2018).]

9.5 ... [E]nvironmental degradation can compromise effective enjoyment of the right to life, and ... severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.

9.6 In the present case, ... the Immigration and Protection Tribunal found ... that there was no evidence that: (a) the author had been in any land disputes in the past, or faced a real chance of being physically harmed in such a dispute in the future; (b) the author would be unable to find land to provide accommodation for himself and his family; (c) the author would be unable to grow food or access potable water; (d) the author would face life-threatening environmental conditions; (e) the author's situation was materially different from that of every other resident of Kiribati; or (f) the Government of Kiribati had failed to take programmatic steps to provide for the basic necessities of life, in order to meet its positive obligation to fulfil the author's right to life. ...

9.7 In assessing whether the State party's authorities provided the author with an adequate and individualized assessment of the risk of a threat to his right to life, the Committee first notes the author's claim that the increasing scarcity of habitable land on Tarawa has led to violent land disputes that have resulted in fatalities. In that connection, the Committee considers that a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation. In assessing the author's circumstances, the Committee notes the absence of a situation of general conflict in Kiribati. ... While the Committee does not dispute the evidence proffered by the author, it considers that the author has not demonstrated clear arbitrariness or error in the domestic authorities' assessment as to whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati.

9.8 The Committee also notes the author's claims before the domestic authorities that he would be seriously harmed by the lack of access to potable water on Tarawa ... [but concludes] that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death.

9.9 The Committee further notes the author's claim before the domestic authorities that his right to life had been violated because he had been deprived of his means of subsistence, as his crops had been destroyed due to salt deposits on the ground. ... The information made available to the Committee does not indicate that when the author's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity. ...

...

9.12 In the present case, the Committee accepts the author's claim that sea level rise is likely to render Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. ...

...

9.14 Without prejudice to the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in Kiribati and new and updated data on the effects of climate change and rising sea levels thereupon, the Committee is not in a position to hold that the author's rights under article 6 of the Covenant were violated upon his deportation to Kiribati in 2015.

...

CHIARA SACCHI ET AL. V. TURKEY
COMMITTEE ON THE RIGHTS OF THE CHILD, DECISION UNDER THE OPTIONAL
PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON COMMUNICATION
NO. 108/2019, UN DOC. CRC/C/88/D/108/2019 (22 SEPTEMBER 2021)

[Complaints were also brought by the same authors against Argentina, Brazil, France, and Germany, resulting in separate but virtually identical analyses by the Committee.]⁶⁹¹

1.1 The authors of the communication are Chiara Sacchi, a national of Argentina [and nationals from Brazil, France, Germany, India, the Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and the USA. All were then under the age of 18.] They claim that, by failing to prevent and mitigate the consequences of climate change, the State party has violated their rights under articles 6, 24 and 30, read in conjunction with article 3, of the Convention. The Optional Protocol entered into force for [Turkey] on 26 March 2018.

...

Facts as submitted by the authors

2. The authors claim that, by causing and perpetuating climate change, the State party has failed to take the necessary preventive and precautionary measures to respect, protect and fulfil the authors' rights to life, health and culture. They claim that the climate crisis is not an abstract future threat. The 1.1°C rise in global average temperature is currently causing devastating heat waves, forest fires, extreme weather patterns, floods and sea level rise, and fostering the spread of infectious diseases, infringing on the human rights of millions of people globally. Given that children are among the most vulnerable, physiologically and mentally, to these life-threatening impacts, they will bear a far heavier burden and for far longer than adults.

Complaint

...

3.7 The authors request that the Committee find: (a) that climate change is a children's rights crisis; (b) that the State party, along with other States, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change; and (c) that, by perpetuating life-threatening climate change, the State party is violating the authors' rights to life, health and the prioritization of the best interests of the child, as well as the cultural rights of the authors from indigenous communities.

3.8 The authors further request that the Committee recommend: (a) that the State party review and, where necessary, amend its laws and policies to ensure that mitigation and adaptation efforts are accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to protect the authors' rights and make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and adaption; (b) that the State party initiate cooperative international action – and increase its efforts with respect to existing cooperative initiatives – to establish binding and enforceable measures to mitigate the climate crisis, prevent further harm to the authors and other children, and secure their inalienable rights; and (c) that, pursuant to article 12 of the Convention, the State party ensure the child's right to be heard and to express his or her views freely, in all international, national and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to the authors' communication.

...

⁶⁹¹ See also Committee on the Rights of the Child, General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change.

Issues and proceedings before the Committee

Consideration of admissibility

...

Jurisdiction

9.2 The Committee notes the State party's submission that the complaint is inadmissible for lack of jurisdiction as none of the authors reside in the State party and as they have no legal or factual relationship with it. The Committee also notes that authors' argument that they are within the State party's jurisdiction as victims of the foreseeable consequences of the State party's domestic and cross-border contributions to climate change and the carbon pollution knowingly emitted, permitted or promoted by the State party from within its territory. The Committee further notes the authors' claims that the State party's acts and omissions perpetuating the climate crisis have already exposed them throughout their childhood to the foreseeable, life-threatening risks of climate change caused by humans.

9.3 Under article 2 (1) of the Convention, States parties have the obligation to respect and ensure the rights of "each child within their jurisdiction". Under article 5 (1) of the Optional Protocol, the Committee may receive and consider communications submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in the Convention. The Committee observes that, while neither the Convention nor the Optional Protocol make any reference to the term "territory" in its application of jurisdiction, extraterritorial jurisdiction should be interpreted restrictively.

9.4 The Committee notes the relevant jurisprudence of the Human Rights Committee and the European Court of Human Rights referring to extraterritorial jurisdiction. Nevertheless, that jurisprudence was developed and applied to factual situations that are very different to the facts and circumstance of this case. The authors' communication raises novel jurisdictional issues of transboundary harm related to climate change.

...

9.7 [T]he Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights. This implies 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) 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. The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction.

9.8 The Committee notes the authors' claims that, while climate change and the subsequent environmental damage and impact on human rights it causes are global collective issues that require a global response, States parties still carry individual responsibility for their own acts or omissions in relation to climate change and their contribution to it. The Committee also notes the authors' argument that the State party has effective control over the source of carbon emissions within its territory, which have a transboundary effect.

9.9 The Committee considers that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect on the enjoyment of rights by individuals both within and beyond the territory of the State party. The Committee considers that, through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions.

9.10 In accordance with the principle of common but differentiated responsibilities, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change

does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.

9.11 Regarding the issue of foreseeability, the Committee notes the authors' uncontested argument that the State party has known about the harmful effects of its contributions to climate change for decades [Thus] the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party.

9.12 ... [T]he Committee must now determine whether there is a sufficient causal link between the harm alleged by the authors and the State party's actions or omissions for the purposes of establishing jurisdiction. ...

Victim status

9.13 ... The Committee considers that, as children, the authors are particularly affected by the effects of climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm.

9.14 Taking the above-mentioned factors into account, the Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established *prima facie* that they have personally experienced real and significant harm in order to justify their victim status. ...

Exhaustion of domestic remedies

9.15 ... [T]he Committee notes the State party's argument that domestic remedies are available to the authors ... [and] that non-nationals, including children, have standing in said procedures and that legal aid is available. The Committee further notes the authors' argument that it is most likely that the domestic courts would dismiss their claims for lack of standing.

...

9.17 In the present case, the Committee notes that the authors have not attempted to initiate any domestic proceedings in the State party In the absence of further reasoning from the authors as to why they did not attempt to pursue these remedies, other than generally expressing doubts about the prospects of success of any remedy, the Committee considers that the authors have failed to exhaust all domestic remedies that were reasonably effective and available to them to challenge the alleged violation of their rights under the Convention.

...

9.19 The Committee notes the authors' argument that pursuing remedies in the State party would be unreasonably prolonged and notes that the authors refer to one case in the State party which took 14 years to decide. Nevertheless, the Committee considers that the authors have failed to establish the connection of that case with the remedies that would be available within the State party to address their specific claims or to otherwise indicate how the deciding periods would be unreasonably prolonged or unlikely to bring relief The Committee concludes that ... the authors have failed to exhaust domestic remedies.

9.20 Consequently, the Committee finds the communication inadmissible for failure to exhaust domestic remedies under article 7 (e) of the Optional Protocol.

...

DANIEL BILLY ET AL. V. AUSTRALIA
HUMAN RIGHTS COMMITTEE, VIEWS UNDER THE OPTIONAL PROTOCOL,
COMMUNICATION NO. 3624/2019 (21 JULY 2022)

1.1 The eight authors of the communication are Daniel Billy, Ted Billy, Nazareth Faid, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warria, born in 1983, 1957, 1965, 1967, 1982, 1964, 1991 and 1973, respectively. They are nationals of Australia and residents of the Torres Strait region. They act in their own names and on behalf of five children ...

...

The facts as submitted by the authors

2.1 The authors belong to the indigenous minority group of the Torres Strait Islands and live on ... four islands ... The indigenous people of the Torres Strait Islands, especially the authors who reside in low-lying islands, are among the most vulnerable populations to the impact of climate change.

...

2.3 Sea level rise already caused flooding and erosion on the authors' islands, and higher temperature and ocean acidification produced coral bleaching, reef death, and the decline of seagrass beds and other nutritionally and culturally important marine species. ...

2.4 With respect to the impact of climate change on the islands, the village on Boigu ... is flooded each year. Erosion has caused the shoreline to advance and has detached a small area from the island. On Masig, a cyclone in March 2019 caused severe flooding and erosion and destroyed buildings. The cyclone resulted in the loss of three metres of shoreline. Approximately one metre of land is lost every year. In addition, a tidal surge in recent years has destroyed family graves, scattering human remains. On Warraber, high tides and strong winds cause seawater to flood the village centre every two to three years. On Poruma, erosion has washed away much of the island's sand over the past few decades.

2.5 Sea level rise has caused saltwater to intrude into soil of the islands, such that areas previously used for traditional gardening can no longer be cultivated. ... Patterns of seasons and winds play a key role in ensuring the authors' livelihoods and subsistence but are no longer predictable. Precipitation, temperature and monsoon seasons have changed, making it harder for the authors to pass on their traditional ecological knowledge. Seagrass beds and dependent species have disappeared. While crayfish is a fundamental source of food and income for the authors, they no longer find crayfish in areas where coral bleaching has occurred.

...

2.7 The State party has failed to implement an adaptation programme ... [d]espite numerous requests for assistance and funding made to the state and federal authorities ...

2.8 The State party has also failed to mitigate the impact of climate change. ... The State party ranked 43rd out of 45 developed countries in reducing its greenhouse gas emissions [between 1990 and 2016 and] has actively pursued policies that have increased emissions by promoting the extraction and use of fossil fuels, in particular thermal coal for electricity generation.

2.9 There are no available or effective domestic remedies to enforce their rights under articles 2, 6, 17, 24 and 27 of the Covenant. The authors' rights under the Covenant are not protected in the Constitution or any other legislation applicable to the federal Government. ...

...

Observations of the State party on admissibility and the merits

4.1 ... [T]he State party maintains that the communication is inadmissible. The alleged violations of international climate change treaties [and the ICESCR], are inadmissible *ratione materiae* because they are outside the scope of the present Covenant. ... [T]here are stark and significant differences between the Paris Agreement and the Covenant. The two instruments have different aims and scopes. ... [I]nterpreting the Covenant through the Paris Agreement would be contrary to the fundamental

principles of international law. The ordinary meaning of one treaty cannot be used to supplant the clear language of the Covenant.

4.2 ... [As for the authors claim to be victims, there] is no evidence that [they] face any current or imminent threat of a violation of any of the rights they invoked. Moreover, the authors have not shown any meaningful causation or connection between the alleged violations of their rights and the State party's measures or alleged failure to take measures. ... It is not possible, under the rules of State responsibility under international law, to attribute climate change to Australia. ... [T]he authors invoke a risk that has not yet materialized.

4.3 ... None of the alleged failures to take mitigation measures fall within the scope of the Covenant. It is not possible under international human rights law to attribute climate change to the State party. As a legal matter, it is not possible to trace causal links between the State party's contribution to climate change, its efforts to address climate change, and the alleged effects of climate change on the enjoyment of the authors' rights. ...

4.4 The authors' claims with respect to adaptation measures are also without merit, as the alleged adverse effects of climate change have yet to be suffered, if at all, by the authors. Nor are such alleged violations imminent.

4.5 The State party describes in detail the adaptation and mitigation measures it is taking with respect to climate change. ...

...

Issues and proceedings before the Committee **Consideration of admissibility**

...

7.5 ... The Committee observes that it is not competent to determine compliance with other international treaties or agreements. However, to the extent that the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant, the Committee considers that the appropriateness of such interpretations relates to the merits of the authors' claims under the Covenant. ...

7.6 [Australia's claim that it] ... cannot be held responsible – as a legal or practical matter – for the [relevant] climate change impacts ... require[s] the Committee to contemplate whether ... a State party may be considered to have committed a violation of the Covenant rights of an individual, where the harm to the individual allegedly resulted from the failure of the State party to implement adaptation and/or mitigation measures

7.7 With respect to adaptation measures, the [authors] have invoked articles 6, 17, 24 (1) and 27, each of which entails positive obligations of States parties to ensure the protection of individuals under their jurisdiction against violations of those provisions.

7.8 With respect to mitigation ... information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee also notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction

7.9 ... [A] person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely that requirement should be taken. However, individuals claiming to be a victim of a violation of a right protected under the Covenant must demonstrate either that a State party has, by act or omission, already impaired the exercise of their right or that such impairment is imminent If the law or practice has not already been concretely applied to the detriment of such an individual, it must in any event be applicable in such a way that the individual's risk of being affected is more than a theoretical possibility.

7.10 ... [T]he authors – as members of peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is uncontested that the authors’ lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them. ... [They] would likely be unable to finance adequate adaptation measures themselves, on an individual or community level, to adjust to actual or expected climate and its effects in order to moderate harm. The Committee therefore considers that the authors are among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts. ...

...

Consideration of the merits

...

Article 6

8.3 The Committee notes the authors’ claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the Covenant, owing to the State party’s failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party’s position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures to protect the right to life. The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3). The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. The Committee considers that such threats may include adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.

8.4 ... While the State party notes that socioeconomic entitlements are protected under a separate Covenant, the Committee observes that the preamble of the present Covenant recognizes that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

8.5 The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life ... the Committee notes that the TSRA, a government agency, recognised in its report entitled “Torres Strait Climate Change Strategy 2014-18” the vulnerability of the Torres Strait Islands to significant and adverse climate change impacts that affect ecosystems and livelihoods of the Islands’ inhabitants. ...

8.6 The Committee ... notes that while the authors evoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity. [Their claims] mainly relate to their ability to maintain their culture, which falls under the scope of article 27 of the Covenant.

8.7 Regarding the authors' assertion that their islands will become uninhabitable in 10 years (Boigu and Masig) or 10 to 15 years (Poruma and Warraber) in the absence of urgent action, the Committee recalls that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized. ... The Committee considers that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors' right to life with dignity.

8.8 In view of the foregoing, the Committee considers that the information before it does not disclose a violation by the State party of the authors' rights under article 6 of the Covenant.

Article 17

8.9 ... The Committee recalls that States parties must prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious. Thus, when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

8.10 The Committee recalls that the authors depend on fish, other marine resources, land crops, and trees for their subsistence and livelihoods, and depend on the health of their surrounding ecosystems for their own wellbeing. The State party has not contested the authors' assertions in that regard. The Committee considers that the aforementioned elements constitute components of the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can be considered to fall under the scope of protection of article 17 of the Covenant. ... [It] obligates States parties to adopt positive measures

8.11 The Committee takes note of the State party's extensive and detailed information that it has taken numerous actions to address adverse impacts caused by climate change and carbon emissions generated within its territory. ...

8.12 ... [The State party] has not contested the factual allegations set forth by the authors concerning the concrete climate change impacts on their home, private life and family. ... The Committee considers that when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. ... [B]y failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.

Article 27

8.13 The Committee recalls that article 27 establishes and recognizes a right which is conferred on individuals belonging to minority indigenous groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant. The Committee recalls that,

in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of the cultural identity. The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.

8.14 The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired ... [T]he State party has not refuted the authors' arguments that they could not practice their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing seawall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors. ... [T]he Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant.

...

* * *

The adoption of these different sets of views by the Human Rights Committee and the Committee on the Rights of the Child has, as was to be expected, significantly increased the relevant committee's level of awareness and concern in these areas. In August 2023, for example, the latter committee adopted General Comment No. 26 (2023) on 'children's rights and the environment, with a special focus on climate change'.

QUESTIONS

1. What are the strengths and weaknesses of the respective advisory opinions? To whom are they addressed and how, if at all, might they make a difference? In discussing them consider the caution urged by Benoit Mayer, in 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?', 115 *Am. J. Int'l L.* (2021) 409:

[H]ow far a human rights treaty requires a state to comply with its general mitigation obligations ... depends on the personal scope of the treaty and the importance of the right at issue, as well as the potential benefits of climate change mitigation for the enjoyment of the right, and its unintended consequences for the enjoyment of rights, within the state's territory or under its jurisdiction.

... [H]uman rights treaties may have a rather limited role to play with regard to climate change mitigation. In fact, the interpretation of human rights treaties as the source of mitigation obligations faces some of the major hurdles that have hindered international cooperation on climate change mitigation in the last three decades. For one thing, human rights treaties view nature mostly in instrumental terms, and largely ignore the interests of future generations. Overall, international human rights law encourages each state to protect the rights of individuals within its territory rather than to cooperate on the global common good. This

inherent tension between national interests and international cooperation will not be solved through an incremental extension of international human rights law, be it through the recognition of new rights (e.g., to a healthy environment or a sustainable climate), the identification of fictitious rights-holders (e.g., “future generations” or “Mother Earth”), or the extension of the extraterritorial application of human rights treaties—not, that is, without betraying the text, and the object and purpose, of human rights treaties, and using them as a Trojan horse at the service of extraneous objectives.

2. If the United States is moving to minimize or eliminate previous measures designed to slow global warming, can it be argued that the human rights community should change its approach in this area?

C. NATIONAL-LEVEL LITIGATION

Although litigation is only one of the many measures that can be taken to stem global warming and compel key actors to change their policies, there has been a surge of litigation in this area in recent years.

CÉSAR RODRÍGUEZ-GARAVITO, LITIGATING THE CLIMATE EMERGENCY
IBID. (ED.), LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND
LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION (2022) 9⁶⁹²

... [L]itigants have predominantly followed a two-pronged strategy. They have (1) asked courts to take the goals of the climate regime (as set out in the Paris Agreement, IPCC reports, and other authoritative sources) as benchmarks to assess governments’ climate action and (2) invoked the norms, frames, and enforcement mechanisms of human rights to hold governments legally accountable for such goals. In the face of governments’ reluctance or hostility toward taking the urgent measures that are needed to address the climate emergency, HRCC [Human Rights and Climate Change] litigation can be fruitfully viewed as a bottom-up mechanism

...

1.1 The Post-Paris Regime and Climate Rights Litigation

... [I]nternational climate governance went from an unsuccessful effort to establish an integrated, top-down regime (the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change) to an ongoing attempt to consolidate a bottom-up, experimental regime (the Paris Agreement) that creates incentives for states to act on climate change through an iterative process of international negotiations, domestic civil society pressure, emissions reporting based on IPCC methodologies, and periodic stocktaking and peer review of progress on climate mitigation and adaptation.

The Paris Agreement does not establish a binding obligation for states to implement their nationally determined contributions (NDCs) to emission cuts, nor does it specify any procedure to ensure that states are transparent in their accounting of those contributions. Since the success of the Paris system hinges on transparency, the model will only work if states have material and reputational incentives

The large majority of HRCC suits and complaints (which focus on emissions cuts) can be understood as strategies to provide the post-Paris climate regime with procedural and substantive mechanisms for translating the aforementioned targets into legally binding commitments at the domestic level. ... [S]tates are the target of all but 22 of the 148 cases filed between 2015 and 2021. ...

...

⁶⁹² See also C. Rodríguez-Garavito, *Climate Change on Trial Mobilizing Human Rights Litigation to Accelerate Climate Action* (2025).

1.2 Key Questions and Emerging Norms in Climate Rights Litigation

Despite the diversity of jurisdictions, litigants, and adjudicators involved in them, HRCC lawsuits tend to revolve around a common set of questions and norms. ...

...

The ideal-typical HRCC case proceeds in three steps ...:

...

1.2.1 The Baseline Norms: An International “Common Ground” on Climate Rights

... In determining the relevant legal standards ... litigants and courts have often used the European Court of Human Rights’ (ECtHR) doctrine of the legal “common ground” applicable to domestic human rights cases [which] includes other “elements of international law,” states’ interpretations of such elements, and state practice reflecting common values. As the ECtHR put it in *Demir and Baykara v. Turkey*, a judgment widely used by litigants and courts in European climate rights cases: “It is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern society.”

...

Importantly, the common ground [includes] the Paris Agreement and the IPCC’s reports. ...

...

If confirmed by future litigation, the emerging recognition of an international normative common ground would consolidate the convergence of human rights, environmental protection, and climate governance. ...

1.2.2 A Justiciable Right to Climate Action

... The key question here is: Do governments have justiciable legal obligations, as a matter of international human rights and climate change law, to reduce GHG emissions?

... [In] almost invariably answer[ing] this question in the affirmative ... two emerging norms have been upheld First, a justiciable right to a climate system capable of sustaining human life [S]ome rulings have homed in on the rights of young people and future generations to a livable planet.

...

The second norm relates to the legal competence of courts to enforce governments’ duties regarding climate action in general and emissions reduction in particular. The question of justiciability raises issues concerning the harmonization of (1) the protection of rights with deference for governmental policy discretion and (2) the duty of courts to provide remedies for rights violations with the principle of the separation of powers. Although common in human rights and public interest litigation writ large, those issues are compounded by the scale, temporality, and uncertainty that characterize the problem of global warming.

Unsurprisingly, judges have given a range of different answers to this question, in line with contrasting jurisprudential traditions on the redressability of rights violations by courts in different jurisdictions. ... Although granting governments latitude in setting climate goals and choosing policies to attain them, most courts have held that such decisions are not exempt from judicial review and that governmental discretion is not absolute. ...

... While adjudicators have recognized that governments have a wide margin of appreciation in dealing with the complexities of climate policy, they have tended to conclude that climate change is a regulatory and scientific issue that is amenable to judicial scrutiny based on national and international

standards on climate change and human rights, as opposed to a political issue in which governments have full policy discretion. ...

1.2.3 The Legally Enforceable “Fair Share” of Climate Mitigation

The final step [is to inquire]: What levels of ambition and urgency with regard to national emission reductions are compatible with such rights and duties? This is the question, for instance, at the core of the average European lawsuit In other suits, rather than the level of ambition itself, plaintiffs challenge the consistency of government-authorized projects or policies with the mitigation target that the government has formally adopted through national or international law. ...

Both modalities of litigation raise complex questions about how to set and enforce a country’s level of mitigation ambition. The controversy over different criteria of equity for determining countries’ appropriate share of GHG emission cuts involves core issues of climate ethics and politics [L]itigants and courts ... have tended to take a cautious approach by closely tying their claims and remedies to the ambition levels prescribed by the Paris Agreement and the IPCC.

This approach has been translated into two embryonic norms. First, with regard to a country’s share of emission reductions, HRCC cases have articulated a view that stresses individual states’ duties. States’ line of defense in mitigation lawsuits has hinged on the nature of the climate system as a public good. From this perspective, since emission reductions by one country will not make a dent in preventing global warming without other countries contributing their share, citizens have no justiciable rights-based claim to state climate action.

In contrast, litigants and courts have relied on a responsibility-based interpretation of the Paris Agreement. In this view, states have a duty to contribute their “minimum fair share” to emissions reduction, regardless of other countries’ actions. As noted, the determination of a country’s fair share has been guided by estimates stemming from the IPCC’s recommendations and reports.

The most explicit articulation of the “minimum fair share” norm can be found in the Dutch Supreme Court’s decision in [*State of the Netherlands v. Stichting Urgenda* (2019)]. According to the court, under the European Convention on Human Rights and the global climate regime, “the Netherlands is obliged to do ‘its part’ in order to prevent dangerous climate change, even if it is a global problem.” The court bases its legal opinion on an interpretation of the UNFCCC whereby “all countries will have to do the necessary” to attain global emission targets, as well as on the generally accepted principle of international law according to which countries must avoid causing harm to others. “This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect” in judicial forums. Using the heuristics of a “carbon budget” – the amount of GHG that is left for humanity to burn before surpassing the 1.5 degrees Celsius to 2 degrees Celsius threshold of global warming – the court concludes that “no reduction is negligible,” as all emissions contribute to using up the global budget, regardless of the size of the country or its emissions.

...
... [T]his norm remains underspecified. Given that the meaning of “minimum fair share” varies according to the criterion of fairness used, this remains an open question in HRCC litigation. ...

...

Litigation in national courts faces many obstacles.⁶⁹³ In *Friends of the Irish Environment v. Ireland*, (Appeal No: 205/19 (judgment of 31 July 2020)) a domestic advocacy group challenged the 2017 National Mitigation Plan, claiming that it violated the relevant legislation as well as the Irish Constitution and the government’s European Convention on Human Rights obligations relating to the right to life and the right to private and family life. On appeal, the Supreme Court ultimately ruled that the Plan was insufficient to meet the legislative obligation and ordered that a new plan be drawn up. But the court also held that FIE lacked standing to bring its rights-based claims under the Constitution or the ECHR,

⁶⁹³ For a comprehensive survey, see M. Wewerinke-Singh and S. Mead (eds.), *The Cambridge Handbook on Climate Litigation* (2025).

and Chief Justice Clarke, writing for the court, was deeply skeptical of the claim that there was or should be a derived constitutional right to a healthy environment:

8.10 ... What exactly does it mean? How does it fit into the constitutional order? Does it really advance rights beyond the right to life and the right to bodily integrity? If not, then what is the point of recognising such a right? If so, then in what way and within what parameters?

8.11 ... [The right] either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate.

In *Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796, the Federal Court of Australia considered whether the common law tort of negligence provided Torres Strait Islanders with a remedy for the federal government's alleged unreasonable and inadequate response to the risks posed to them and their culture by climate change. A closely-related claim was considered by the UN Human Rights Committee in 2022 in *Daniel Bilby et al. v. Australia* (see below). The Federal Court agreed that 'climate change poses an existential threat to the whole of humanity' and that the applicants 'face a bleak future if urgent action is not taken ...'.

But the court rejected the applicants' claim because the common law of negligence 'was an unsuitable legal vehicle'. The only solution is a change in the law, 'either by the incremental development or expansion of the common law by appellate courts, or by the enactment of legislation. Until then, the only recourse ... is ... via the ballot box' (para. 1275).

A recent survey of litigation in Africa by Michael Addaney, 'Addressing the Impacts of Climate Change on Human Rights through Adaptation-focused Litigation: Cases before the African Union's Human Rights Bodies, 24 J. Hum. Rts (2025) 353, concludes that adaptation-focused litigation is more viable and urgent than a mitigation focus.

In *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), 'twenty-one young citizens, an environmental organization, and a "representative of future generations"' sought 'an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO₂."' The court noted that '[s]ome plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property' and that the causes of action were based on due process, equal protection, and the public trust doctrine. Writing for the panel, Judge Hurwitz began by noting that 'the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.'

To establish redressability, the court held that the plaintiffs needed to identify relief that was both "(1) substantially likely to redress [its] injuries" and "(2) within the district court's power to award." In terms of the latter, the court said:

There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. ... These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives,

rather than by federal judges interpreting the basic charter of Government for the entire country.”

In dissent, Judge Staton replied:

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. ... But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. ... [E]ven a partial and temporary reprieve would constitute meaningful redress [and would be] much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned ... , ...

Compare the *Juliana* case with this case from the Supreme Court of the State of Hawai‘i:

***HAWAI‘I ELECTRIC LIGHT COMPANY, INC.,
APPEAL FROM THE PUBLIC UTILITIES COMMISSION
DOCKET NO. 2017-0122 (13 MARCH 2023)***

OPINION OF THE COURT BY EDDINS, J.

Over ten years ago, energy company Hu Honua ... sought regulatory approval to supply energy to Hawai‘i Island using a biomass power plant. Last summer, approval for that energy deal was denied. Hu Honua appeals the denial, arguing that the Public Utilities Commission (PUC) misunderstood its mandate and held Hu Honua to an unfair standard.

We disagree. The PUC understood its public interest-minded mission. It faithfully followed our remand instructions to consider the reasonableness of the proposed project’s costs in light of its greenhouse gas emissions and the project’s impact on intervenor Life of the Land’s members’ right to a clean and healthful environment. ...

...

II. ... B.

Hu Honua’s interpretation of HRS § 269-6(b) is equally strained. “HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission.” ...

HRS § 269-6(b) sets out specific factors the PUC must consider to determine whether the costs of a proposed energy project are reasonable. These include (1) price volatility; (2) export of funds for fuel imports; (3) fuel supply reliability risk; and (4) greenhouse gas emissions. The PUC then subjects these factors to “public interest-minded balancing.”...

Hu Honua maintains that when applying these factors to a renewable energy project, the “only permissible” comparison for the PUC to draw is with fossil-fuel plants. ... If Hu Honua is right, the only relevant question before the PUC was: is burning trees better than burning coal?

Neither the language of HRS § 269-6(b) nor the legislative intent behind it supports this blinkered approach. ...

But the legislature intended the PUC to consider “potentially harmful climate change due to the release of harmful greenhouse gases.” ... We do not lightly assume that the legislature would sabotage its climate goals by limiting the PUC to artificial and unhelpful analyses.

...

C.

...

The people of Hawai‘i have declared “a climate emergency.” Hawai‘i faces immediate threats to our cultural and economic survival: sea level rise, eroding the coast and flooding the land; ocean warming and acidification, bleaching coral reefs and devastating marine life; more frequent and more extreme droughts and storms. For the human race as a whole, the threat is no less existential.

...

The reality is that yesterday’s good enough has become today’s unacceptable. The PUC was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty.

Because the PUC’s actions aligned with its statutory and constitutional obligations, we affirm PUC Order Nos. 38395 and 38443.

CONCURRING OPINION BY WILSON, J.

I. Introduction

... In its emergency declaration, the Hawai‘i legislature called for “an immense increase of scale in endeavors to conserve our biosphere[.]” ...

The [PUC] ... has the daunting task of saving Hawai‘i from the existential threat of climate change by reducing carbon emissions from Hawai‘i’s energy system. In so doing, the PUC protects the constitutional right of Hawai‘i’s people to a life-sustaining climate system. ...

IV. Urgent State Action is Necessary

Although climate change is an international issue, the United States is responsible for approximately 20% of the world’s historic and cumulative greenhouse gas emissions. ... Unlike [some other] jurisdictions ... the federal courts of the United States have thus far abdicated responsibility to apply the rule of law to claims that allege knowing contamination of the atmosphere with deleterious levels of greenhouse gas emissions.

One of the most prominent examples of a federal court abdicating its responsibility to leave future generations a habitable planet is the Ninth Circuit’s [decision] ... in *Juliana v. United States*. ...

...

The conclusion that the due process right to “life, liberty [and] property” under Article I, section 5 subsumes the right to a life-sustaining climate is supported by the fact that a life-sustaining climate system underlies all other constitutional guarantees. *Juliana*, 217 F. Supp. 3d at 1248-49 (D. Or. 2016) (“Often, an unenumerated fundamental right draws on more than one [c]onstitutional source. The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated”) In other words, the right to a life-sustaining climate system is deserving of fundamental status as essential to our scheme of ordered liberty because it is “preservative of all rights.” ...

...

... A stable climate system is fundamental to Hawai‘i’s constitutional guarantees, including “the right to personal security[.]” and the right to bodily integrity. If the PUC continues to permit energy projects which emit high levels of greenhouse gases, it will be contributing to the destruction of resources essential to public health and Hawaiian culture, which in turn undermines all fundamental rights guaranteed by the Hawai‘i Constitution.

...
The climate system is a “natural resource” held in trust by the State for the benefit of present and future generations. ...

...
... The public trust “does not remain fixed for all time, but must conform to changing needs and circumstances.” ...

...
In applying the PUC’s public trust duty to its decision whether to approve or deny the amended PPA, Article XI, section 1 of the Hawai‘i Constitution requires the PUC to consider the Project’s contribution to, or mitigation of, the climate emergency. An agency’s constitutional public trust obligations are independent of its statutory mandates, but they operate in tandem. ...

...

VII. Conclusion

We are facing a sui generis climate emergency. The lives of our children and future generations are at stake. With the destruction of our life-sustaining biosphere underway, the State of Hawai‘i is constitutionally mandated to urgently reduce its greenhouse gas emissions

In addition to the *Urgenda* case, described by Rodriguez-Garavito, two other cases are especially important in illustrating different issues and approaches in this area, the first from Germany and the second from the Netherlands.

NEUBAUER ET AL. V. GERMANY **FEDERAL CONSTITUTIONAL COURT OF GERMANY (ORDER OF 24 MARCH 2021)**

Facts of the case:

[Four different groups filed complaints. Two were groups of young people, one was an environmental NGO, and another was a group of individuals from Bangladesh and Nepal. The complaints were considered jointly by the court.]

...[T]he complainants primarily claim that the state, in enacting § 3(1) and § 4(1) third sentence [of the Federal Climate Change Act of 12 December 2019 (the KSG)] in conjunction with Annex 2, has failed to introduce a legal framework sufficient for swiftly reducing greenhouse gases, ... to limit the increase in the Earth’s temperature to 1.5°C, or at least to well below 2°C. ... [T]he complainants – some of whom live in Bangladesh and Nepal – rely primarily on constitutional duties of protection arising from Art. 2(2) first sentence GG and Art. 14(1) GG, as well as on a fundamental right to a future in accordance with human dignity and a fundamental right to an ecological minimum standard of living, which they derive from Art. 2(1) GG in conjunction with Art. 20a GG and from Art. 2(1) GG in conjunction with Art. 1(1) first sentence GG. With regard to future burdens arising from the obligations to reduce emissions for periods after 2030 – which they describe as an “emergency stop” – the complainants rely on fundamental freedoms more generally.

[Note the following provisions of the Basic Law (the GG):

Art. 1(1): Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Art. 2(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

Art. 2(2): Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Art. 20a: Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.]

Key considerations of the Senate:

..

I. Where the complainants are natural persons, their constitutional complaints are admissible. The two environmental associations, however, have no standing to lodge a constitutional complaint. ...

II. It cannot be ascertained that duties of protection arising from Art. 2(2) first sentence GG and Art. 14(1) GG are violated due to the risks posed by climate change.

The protection of life and physical integrity under Art. 2(2) first sentence GG encompasses protection against impairments caused by environmental pollution, regardless of who or what circumstances are the source of the impairment. The state's duty of protection arising from Art. 2(2) first sentence GG also encompasses the duty to protect life and health against the risks posed by climate change, including climate-related extreme weather events such as heat waves, forest fires, hurricanes, heavy rainfall, floods, avalanches and landslides. It can furthermore give rise to an objective duty to protect future generations. Since climate change can moreover result in damage being caused to property such as agricultural land or real estate (e.g. due to rising sea levels or droughts), the fundamental right to property under Art. 14(1) GG also imposes a duty of protection on the state with regard to the property risks caused by climate change.

Given the leeway afforded to the legislator in fulfilling these duties of protection, no violation of these duties can be ascertained. ...

There is no need to decide at this point whether duties of protection arising from fundamental rights also place Germany under an obligation vis-à-vis the complainants living in Bangladesh and Nepal to take action against impairments – both potential and actual – caused by global climate change. Ultimately, no violation of a duty of protection arising from fundamental rights could be ascertained here either.

III. However, fundamental rights are violated by the fact that the emission amounts allowed until 2030 ... substantially narrow the remaining options for reducing emissions after 2030, thereby jeopardising practically every type of freedom protected by fundamental rights. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against comprehensive threats to freedom caused by the greenhouse gas reduction burdens that are mandatory under Art. 20a GG being unilaterally offloaded onto the future. The legislator should have taken precautionary steps to ensure a transition to climate neutrality that respects freedom – steps that have so far been lacking.

1. The challenged provisions have an advance interference-like effect on the freedom comprehensively protected by the Basic Law. ...

...

2. It cannot presently be ascertained that § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 violate Art. 20a GG.

a) Art. 20a GG places the state under an obligation to take climate action and is aimed at achieving climate neutrality. Climate action does not take absolute precedence over other interests. In cases of conflict, it must be balanced with other constitutional interests and principles. However, given that climate change is currently deemed to be almost entirely irreversible, any behaviour that leads to an exceeding of the critical temperature threshold for achieving the constitutional climate goal would only

be justifiable under strict conditions – such as for the purpose of protecting fundamental rights. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies.

The obligation to take climate action arising from Art. 20a GG is not invalidated by the fact that the climate and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own. The climate action mandate enshrined in Art. 20a GG possesses a special international dimension. Art. 20a GG obliges the state to involve the supranational level in seeking to resolve the climate problem. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states. On the contrary, the particular reliance on the international community here gives rise to the constitutional necessity to actually implement one's own climate action measures at the national level and not to create incentives for other states to undermine the required cooperation.

The open normative content of Art. 20a GG and its explicitly formulated reference to legislation do not preclude constitutional review of compliance with the obligation to take climate action; Art. 20a GG is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations who will be particularly affected.

In declaring under § 1 third sentence KSG that the Act is based on the Paris target, the legislator is exercising its mandate and prerogative to specify the constitution by formulating the climate goal of Art. 20a GG in a permissible manner, setting out that the increase in the global average temperature should be limited to well below 2°C and preferably 1.5°C above pre-industrial levels. This must also form part of the basis for constitutional review.

b) ...

... [Based on IPCC figures], the German Advisory Council on the Environment has calculated a specific remaining national budget for Germany from 2020 onwards that would be compatible with the Paris target. Due to the uncertainties and assumptions involved in the approach, the calculated size of the budget cannot, at this point, serve as an exact numerical benchmark for constitutional review. Some decision-making leeway is retained by the legislator. However, the legislator is not entirely free when it comes to using this leeway. If there is scientific uncertainty regarding causal relationships of environmental relevance, Art. 20a GG imposes a special duty of care on the legislator. This entails an obligation to even take account of mere indications pointing to the possibility of serious or irreversible impairments, as long as these indications are sufficiently reliable.

At this point, no violation of the aforementioned duty of care can be ascertained. ...

3. § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 do not, however, satisfy the requirement arising from the principle of proportionality that the reduction in CO₂ emissions to the point of climate neutrality that is constitutionally necessary under Art. 20a GG be distributed over time in a forward-looking manner that respects fundamental rights.

a) According to this requirement, one generation must not be allowed to consume large portions of the CO₂ budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom. At some point in the future, even serious losses of freedom may be deemed proportionate and justified under constitutional law in order to prevent climate change. This is precisely what gives rise to the risk of having to accept considerable losses of freedom. However, since the current provisions on allowable emission amounts have now already established a path to future burdens on freedom, the impacts on future freedom must be proportionate from today's perspective. Furthermore, the objective duty of protection arising from Art. 20a GG encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to continue preserving these foundations are not forced to engage in radical abstinence.

The efforts required under constitutional law to reduce greenhouse gas emissions after 2030 will be considerable. Whether they will be so drastic as to entail unacceptable impairments of fundamental rights from today's perspective is impossible to determine. However, the risk of serious burdens is significant and can only be reconciled with the potentially affected fundamental rights if precautionary steps are taken to manage the reduction efforts anticipated after 2030 in ways that respect fundamental rights. This also requires initiating the transition to climate neutrality in good time. In specific terms, this means that transparent guidelines for the further structuring of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty. Here, it is imperative under constitutional law that further reduction measures are defined in good time for the post-2030 period, extending sufficiently far into the future. Moreover, further annual emission amounts and reduction measures must be defined in such detail that sufficiently specific orientation is provided.

...

c) ... The legislator must at the very least determine the size of the annual emission amounts to be set for periods after 2030 itself or impose more detailed requirements for their definition by the executive authority responsible for issuing the ordinance.

[*Note:* In response, the legislature adopted new reduction targets, effective from 31 August 2021, to achieve a 65 percent reduction in GHGs from 1990 levels by 2030.]

MILIEUDEFENSIE ET AL. V. ROYAL DUTCH SHELL PLC
THE HAGUE DISTRICT COURT (JUDGMENT OF 26 MAY 2021)

[The co-plaintiffs were Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief, ActionAid, and 17,379 individual claimants. Royal Dutch Shell (RDS) is a public limited company, established under the laws of England and Wales, and with its head office in The Hague. It is the top holding company of the Shell group, which also includes 'intermediate parents, Operating Companies and Service Companies'. RDS is the direct or indirect shareholder of over 1,100 separate companies worldwide. It was claimed that Shell's contributions to global warming violated its duty of care under Dutch law and human rights.]

...

4.2. Admissibility

1. Admissibility of class actions

...

4.2.2. The class actions of Milieudefensie et al. are public interest actions. Such actions seek to protect public interests, which cannot be individualized because they accrue to a much larger group of persons, which is undefined and unspecified. The common interest of preventing dangerous climate change by reducing CO₂ emissions can be protected in a class action. ... [The issue is whether] the interests in question [are] suitable for bundling so as to safeguard an efficient and effective legal protection of the stakeholders.

4.2.3. The court is of the opinion that the interests of current and future generations of the world's population ... is not suitable for bundling. Although the entire world population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the global population at various locations will be affected by global warming

4.2.4. However, the interests of current and future generations of Dutch residents and ... of the inhabitants of the Wadden Sea area, a part of which is located in the Netherlands ... are suitable for bundling, even though in the Netherlands and in the Wadden region there are differences in time, extent and intensity [of future climate change] caused by CO₂ emissions. ...

4.2.5. The interest served with the class action must align with the objects stated in the articles of association and must also actually be promoted. Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends and Jongeren Milieu Actief meet this requirement. ActionAid does not meet this requirement, as it does not promote the interests of Dutch residents sufficiently for its collective claim to be allowable. ActionAid's object ... pertains to the world with a special focus on Africa. ...

...

2. *Locus standi of individual claimants*

4.2.7. ... [B]esides a class action there is only room for the claims of individual claimants if they have a sufficiently concrete individual interest. That is not the case here

...

4.4. RDS' reduction obligation

4.4.1. RDS' reduction obligation ensues from the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. From this standard of care ensues that when determining the Shell group's corporate policy, RDS must observe the due care exercised in society. The interpretation of the unwritten standard of care calls for an assessment of all circumstances of the case in question.

4.4.2. In its interpretation of the unwritten standard of care, the court has included: (1.) the policy-setting position of RDS in the Shell group, (2.) the Shell group's CO₂ emissions, (3.) the consequences of the CO₂ emissions for the Netherlands and the Wadden region, (4.) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region, (5.) the UN Guiding Principles, (6.) RDS' check and influence of the CO₂ emissions of the Shell group and its business relations, (7.) what is needed to prevent dangerous climate change, (8.) possible reduction pathways, (9.) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand, (10.) the ETS system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group, (11.) the effectiveness of the reduction obligation, (12.) the responsibility of states and society, (13.) the onerousness for RDS and the Shell group to meet the reduction obligation, and (14.) the proportionality of RDS' reduction obligation. ...

...

(1.) the policy-setting position of RDS in the Shell group

4.4.4. From the facts as presented ... it follows that RDS determines the general policy of the Shell group. The companies in the Shell group are responsible for the implementation and execution of the policy, and must comply with applicable legislation and their contractual obligations. The implementation responsibility of the Shell companies does not alter the fact that RDS determines the general policy of the Shell group.

(2.) the Shell group's CO₂ emissions

4.4.5. ... [T]he Shell group is a major player on the worldwide market of fossil fuels [and] ... is responsible for significant CO₂ emissions all over the world. ...

(3.) the consequences of CO₂ emissions for the Netherlands and the Wadden region

4.4.6. The temperature rise in the Netherlands (approximately 1.7 degrees above the pre- industrial temperature) has so far developed about twice as fast as the global average

...

(4.) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region

4.4.9. Milieudefensie et al invoke the right to life and the right to respect for private and family life [in the ECHR and the ICCPR]. ... [They] cannot directly invoke these human rights with respect to RDS. Due to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between Milieudefensie et al. and RDS. Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care.

4.4.10. From the Urgenda ruling it can be deduced that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to CO₂ emissions induced global warming. [The court then refers to the Human Rights Committee's General Comment No. 36 and the 2019 report of the Special Rapporteur on environment.] ...

RDS' argument that the human rights invoked by Milieudefensie et al. offer no protection against dangerous climate change therefore does not hold. The serious and irreversible consequences of dangerous climate change ... pose a threat to the human rights of Dutch residents and the inhabitants of the Wadden region.

(5.) the UN Guiding Principles (UNGP)

4.4.11. In its interpretation of the unwritten standard of care, the court follows the UN Guiding Principles (UNGP). The UNGP constitute an authoritative and internationally endorsed 'soft law' instrument Due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website to support the UNGP. [The court then undertakes a lengthy analysis of the UNGP.]

...

4.4.37. In answering the question what can be expected of RDS, the court considers that an important characteristic of the imminent environmental damage in the Netherlands and the Wadden region at issue here is that every emission of CO₂ and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase. ... [The fact] that RDS is not the only party responsible for tackling dangerous climate change in the Netherlands and the Wadden region does not absolve RDS of its individual partial responsibility to contribute to the fight against dangerous climate change according to its ability. ... [M]uch may be expected of RDS in this regard, considering it is the policy- setting head of the Shell group, a major player on the fossil fuel market and responsible for significant CO₂ emissions, which incidentally exceed the emissions of many states

...

(11.) the effectiveness of the reduction obligation

4.4.49. RDS argues that the reduction obligation will have no effect, or even be counterproductive, because the place of the Shell group will be taken by competitors. Even if this were true, it will not benefit RDS. Due to the compelling interests which are served with the reduction obligation, this argument cannot justify assuming beforehand there is no need for RDS to not meet this obligation.

...

4.4.50. The question also is whether this argument of RDS is actually valid. What this argument assumes is perfect substitution, whereby the place of the Shell group will be taken over one-on-one by other parties. However, it remains to be seen whether this circumstance will transpire. ...

(12.) the responsibility of states and society

4.4.51. ... According to RDS, private parties cannot take any steps until states determine the frameworks. RDS also argues that government policy is needed to bring about the required change of

the energy market. RDS also claims that the energy transition must be achieved by society as a whole, not by just one private party. ...

4.4.52. ... [The undisputed] responsibility of other parties and the uncertainty whether states and society as a whole will manage to achieve the goals of the Paris Agreement, do not absolve RDS of its individual responsibility Due to the compelling interests which are served with the reduction obligation, RDS must do its part with respect to the emissions over it has control and influence. It is an individual responsibility that falls on RDS, of which much may be expected. ...

(13.) the onerousness of the reduction obligation on RDS

4.4.53. RDS argues that imposing a reduction obligation on it will lead to unfair competition and a disruption of the 'level playing field' on the oil and gas market. RDS has failed to specify this argument. ... The court assumes that the reduction obligation will have far-reaching consequences for RDS and the Shell group. ... However, the interest served with the reduction obligation outweighs the Shell group's commercial interests Due to the serious threats and risks to the human rights of Dutch residents and the inhabitants of the Wadden region, private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO₂ emissions to prevent dangerous climate change. For these reasons, RDS' argument, namely that accepting the reduction obligation, as advocated by Milieudefensie et al., is highly unusual and has no precedent, does not benefit RDS.

...

Conclusion on RDS' reduction obligation

4.4.55. The court concludes that RDS is obliged to reduce the CO₂ emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions It is up to RDS to design the reduction obligation, taking account of its current obligations. The reduction obligation is an obligation of result for the activities of the Shell group. ...

4.5. Policy ...

...

4.5.3. ... There is no room for weighing interests. Therefore, the court disregards RDS' argument about the desirability/undesirability of claims such as this one, and whether or not this invites everyone in global society to lodge claims against each other. RDS' argument that it is not appropriate to impose a court order on one private party fails on the basis of the considerations on RDS' legal obligation ...

.

...

* * *

Note: On 12 November 2024, the Hague Court of Appeal upheld Shell's appeal against the 2021 judgment. It endorsed the broad consensus on the need to achieve a 45% reduction to limit global warming to 1.5°C but did not accept that it was appropriate to apply this target specifically to Shell. Commentators have suggested that the judgment contains encouraging statements 'in relation to shared responsibility of companies, horizontal application of human rights to companies, the openings offered on the possible illegality of investment in new oil and gas fields and the obligations for scope 3 emissions, and the recognition that the EU due diligence directive now is the decisive legal framework for the obligations and responsibilities of companies like Shell.'⁶⁹⁴ In the meantime, Milieudefensie has launched a new round of litigation against Shell.

⁶⁹⁴ A. Nollkaemper, 'Lessons of a Landmark Lost: The Judgment of the Hague Court of Appeal in Shell v Milieudefensie', *Verfassungsblog*, 12 November 2024.

M K RANJITSINH & ORS. V. UNION OF INDIA & ORS.
SUPREME COURT OF INDIA ORIGINAL CIVIL JURISDICTION, WRIT PETITION (CIVIL) NO.
838 OF 2019
JUDGMENT OF MARCH 21, 2024

DR DHANANJAYA Y, CHANDRACHUD, CJI

[The case involved an application for measures to protect the Great Indian Bustard and the Lesser Florican, both of which are threatened with extinction. The Indian Government and others objected to the sweeping nature of the orders given by the Court on 19 April 2021, and appealed for modifications.]

...

C. The mission to combat climate change

I. India's commitment under international conventions

[The Court reviewed India's engagement in the Kyoto Protocol, the UNFCCC, and the Paris Agreement.]

II. The right to a healthy environment and the right to be free from the adverse effects of climate change

19. ... [T]here is no single or umbrella legislation in India which relates to climate change and the attendant concerns. However, this does not mean that the people of India do not have a right against the adverse effects of climate change.

20. Article 48A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Clause (g) of Article 51A stipulates that it shall be the duty of every citizen of India to protect and improve the natural environment Although these are not justiciable provisions of the Constitution, they are indications that the Constitution recognises the importance of the natural world. The importance of the environment ... becomes a right in other parts of the Constitution. Article 21 recognises the right to life and personal liberty while Article 14 indicates that all persons shall have equality before law and the equal protection of laws. These articles are important sources of the right to a clean environment and the right against the adverse effects of climate change.

21. In *M.C. Mehta v. Kamal Nath*, this Court held that Articles 48A and 51A(g) must be interpreted in light of Article 21

22. In *Virender Gaur v. State of Haryana*, this Court recognised the right to a clean environment in the following terms:

“7. ... The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. ... [T]here is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.”

23. In *Karnataka Industrial Areas Development Board v. C. Kenchappa*, this Court took note of the adverse effects of rising sea levels and rising global temperatures. In *Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group*, this Court recognised that climate change posed a “major threat” to the environment.

24. Despite a plethora of decisions on the right to a clean environment ..., it is yet to be articulated that the people have a right against the adverse effects of climate change. ... As the havoc caused by climate change increases year by year, it becomes necessary to articulate this as a distinct right. It is recognised by Articles 14 and 21.

25. Without a clean environment which is stable and unimpacted by the vagaries of climate change, the right to life is not fully realised. The right to health (which is a part of the right to life under Article 21) is impacted due to ... [many factors]. The inability of underserved communities to adapt to climate change or cope with its effects violates the right to life as well as the right to equality.

...
...

27. The right to equality under Article 14 and the right to life under Article 21 must be appreciated in the context of the decisions of this Court, the actions and commitments of the state on the national and international level, and scientific consensus on climate change and its adverse effects. ...

28. [The Court quoted extensively from a 2019 joint statement by five UN treaty bodies noting that] "...State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations."

[The Court invoked the preamble of the Paris Agreement linking climate change and human rights, referred to analyses by the UN Special Rapporteur on Human Rights and the Environment, and noted the Inter-American Court's 2017 advisory opinion in 2017 on the right to a healthy environment.]

35. ... [T]he right to a healthy environment encapsulates the principle that every individual has the entitlement to live in an environment that is clean, safe, and conducive to their well-being. By recognizing the right to a healthy environment and the right to be free from the adverse effects of climate change, states are compelled to prioritize environmental protection and sustainable development, thereby addressing the root causes of climate change and safeguarding the well-being of present and future generations. It is imperative for states like India, to uphold their obligations under international law, including their responsibilities to mitigate greenhouse gas emissions, adapt to climate impacts, and protect the fundamental rights of all individuals to live in a healthy and sustainable environment.

...

IV. Climate change litigation in other jurisdictions

44. Climate change litigation serves as a pivotal tool in advancing rights-based energy transitions and promoting energy justice, intertwined with human rights principles. ...

45. Internationally, courts have been confronted with the challenging task of adjudicating cases where significant issues related to climate change are at stake....

[The Court then recounts the details of several cases, including *State of the Netherlands v. Urgenda Foundation*, *Sacchi, et al. v. Argentina* (UN Committee on the Rights of the Child), *Ioane Teitiota v. New Zealand* (UN Human Rights Committee).]

50. These cases, all instituted and decided in the past decade, indicate the type of concerns which will travel to the courts in the next few years.

...

58. India's international obligations and commitments in the present case (detailed in the preceding segments of this judgment) have not been enacted in domestic law. Regardless, the Court must be alive to these obligations while adjudicating writ petitions which seek reliefs that may hinder these obligations from being fulfilled or otherwise interfere with India's international commitments as well as the right to be free from the adverse effects of climate change.

...

61. Moreover, the decision on whether to convert the overhead power transmission lines into underground lines is a matter of environmental policy. While adjudicating writ petitions which seek reliefs which are of the nature sought in the present case, this Court must conduct judicial review while relying on domain experts. Those who are equipped and trained to assess the various facets of a problem which is litigated before the Court must be consulted before a decision is taken. If this is not done, the Court may be in danger of passing directions without a full understanding of the issue in question. Consequently, in the absence of evidence which forms a certain basis for the directions sought, this Court must be circumspect in issuing sweeping directions. ... [I]t will be appropriate if an expert committee is appointed. The committee may balance the need for the preservation of the GIB which is non-negotiable, on one hand, with the need for sustainable development, especially in the context of meeting the international commitments of the country towards promoting renewable sources of energy, on the other hand. By leveraging scientific expertise and engaging stakeholders in meaningful consultations, this approach ensures that conservation efforts are grounded in evidence and inclusive of diverse perspectives.

...

70. We request the Committee to complete its task and submit a report to this Court through the Union Government on or before 31 July 2024.

...

C. CIVIL AND POLITICAL RIGHTS

An important but neglected dimension of the relationship between climate change and human rights is the threat posed to democracy and civil and political rights. These threats come from various directions. Eve Darian-Smith, in *Global Burning: Rising Antidemocracy and the Climate Crisis* (2022) 136, draws attention to the relevance of growing authoritarianism:

As far-right leaders roll back environmental protections and promote extractive industries such as logging, mining, and industrial-scale agriculture, they are also rolling back elements of democracy such as a free press, nonpartisan judges, public health programs, public education, and the right to vote and protest injustice and suppression. The call for law and order and the mobilization of militarized police are common among authoritarian leaders anxious to prevent public demonstrations against them. Violently suppressing citizens opposing the government is deeply entangled with leaders defending extractive industries through state-backed military and police force. Anti-environmentalism has become a marker of extreme-right parties and political agendas as well as a common theme among the radical media and movements that support them.

Declarations of emergency are increasingly common in the context of severe weather upheavals and these often involve significant restrictions on the exercise of rights. As popular protests grow in response to the widespread reluctance of governments to take the measures needed to meet the Paris goals, many governments have sought to restrict protests. In October 2022, the Home Secretary of the United Kingdom successfully amended a bill to restrict protests to allow her to apply for injunctions against anyone she deems 'likely' to carry out protests that could cause 'serious disruption' to 'key national infrastructure', prevent access to 'essential' goods or services, or have a 'serious adverse effect on public safety'. The police could arrest anyone suspected of breaching such an injunction.⁶⁹⁵

In the United States, many comparable measures are already in place, according to the International Center for Not-for-profit Law, 'Analysis of US Anti-Protest Bills', updated 12 January 2022:

Many anti-protest bills restrict the freedom of assembly by creating extreme penalties for common infractions connected to protests. A 2020 law enacted in

⁶⁹⁵ <https://bills.parliament.uk/bills/3153/stages/16631/amendments/10001084>.

Tennessee makes obstructing a sidewalk or street an offense punishable by a year in jail, even though most protests occur on sidewalks and streets. ... In Louisiana, a law enacted in 2018 makes it a felony, punishable by five years in jail, to trespass near a pipeline

...

Many anti-protest bills use sweeping definitions of “rioting” and other offenses that can penalize nonviolent protest activity. In Florida, a law enacted in 2021 makes it a felony to “riot.” However, “rioting” is defined in a manner that can capture peaceful protesters who are simply part of a larger crowd where a few individuals engage in property destruction—even something as minor as kicking over a trash can. In fact, under the law, no actual property destruction needs to occur for those in a crowd to be guilty of “rioting”—just the “imminent danger” of damage is sufficient. ...

...

A number of anti-protest bills create chilling new risks for organizations and individuals who are not directly involved in protests. Under a 2017 law enacted in Oklahoma, organizations that “conspire” with protesters who trespass near an oil or gas pipeline are liable for up to \$1 million

...

Many anti-protest bills create new protections for individuals who harm protesters. An Iowa law enacted in 2021 ... shields drivers from civil liability if they injure or kill someone who is unlawfully blocking a road during a “protest, demonstration, riot, or unlawful assembly,” as long as the driver was exercising “due care.” In 2020 alone, there were over one hundred instances of protesters being hit by vehicles. ... [A] Florida law enacted in 2021, protect someone who injures or even kills a protester from being sued, as long as the victim was most likely participating in a “riot.” ...

Another dimension is that the uncertainty and insecurity generated by global warming, combined with large-scale movements of people both internally and across borders, will pose immense and unprecedented challenges to governance. Migration flows through Mexico to the United States and from Syria and other countries into Europe have already caused upheavals. Mass migration is likely to stimulate nationalist, xenophobic, racist and other responses. Maintaining a balanced approach to civil and political rights, whether in a society that is determinedly seeking to mitigate climate change or one that is in denial, will be extremely challenging.

Finally, there is the attraction of authoritarian responses to intractable problems. Ross Mittiga, in ‘Political Legitimacy, Authoritarianism, and Climate Change’, 116 *Am. Pol. Sci. Rev.* (2022) 998, discerns a ‘growing chorus of praise for “authoritarian environmentalism.” ... [W]hile authoritarianism is in general lamentable, having a government unencumbered by democratic procedures or constitutional limits on power could be advantageous when it comes to implementing urgently needed climate action.’ He concludes that:

[L]egitimacy requires that governments ensure the safety and security of their citizens, now and into the future; governments that cannot or will not perform this function, are, for that reason, illegitimate. ... Legitimacy also requires that governments exercise their power in broadly acceptable ways. What counts as acceptable, however, varies considerably across generational and cultural lines and in light of different circumstances. For this reason, even the most widely celebrated standards—including the protection of basic rights and adherence to democratic processes—remain open to contestation and reconfiguration and, in this sense, are contingent.

D. FUTURE DIRECTIONS

There is no shortage of proposed measures to combat global warming while using the framework of human rights and seeking to ensure that any measures taken are compatible with human rights standards. In this final section, we consider two dimensions. The first is the potential role that might be played by private investors funding strategic litigation. Their role is complex and controversial, but appears to be growing, especially as some governments and many fossil-fuel companies seek to prevent or undermine more traditional forms of strategic litigation. The second is the central importance of ‘defossilization’, or the need to radically reduce global reliance on fossil fuels.

Strategic Litigation

Amnesty International (<https://www.amnesty.org/en/strategic-litigation/>) defines ‘strategic human rights litigation’ as litigation that is ‘consciously designed to advance the clarification, respect, protection and fulfilment of rights. The idea is to change laws, policies and practice, and to secure remedies or relief following violations. [It] is also often about raising public awareness of an injustice.’ While this technique has long been used in a wide range of cases, as illustrated by *Brown v. Board of Education of Topeka* (347 U.S. 483, 1954) which found school racial segregation in the United States to be unconstitutional, it is assuming particular prominence today in the areas of environmental protection and climate change.⁶⁹⁶

Prominent public interest actors working in the human rights field include the Open Society Justice Initiative⁶⁹⁷ and the European Center for Constitutional and Human Rights.⁶⁹⁸ But private investors and commercial law firms are also increasingly involved. Suneal Bedia and William C. Marra, in ‘The Shadows of Litigation Finance’, 74 *Vand. L. Rev.* (2021) 563, define litigation finance as ‘the practice where a third party provides capital to a litigant or law firm in connection with a legal claim. [It] is usually provided to plaintiffs seeking money damages ... [and] provided by a funder with a profit motive.’ They note that the starting premise for those in this business is ‘that a legal claim is an asset, the same way a person’s home or a company’s inventory is an asset. Litigation finance allows claimholders, or law firms with contingent fee interests in claims, to secure financing against those assets ...’

One of the principal benefits, according to the authors, is that such litigation promotes the goals of the legal system ‘by ensuring legal outcomes track the strength of a party’s claim, not the size of its bank account.’ But they also note concerns that ‘litigation finance will spur frivolous litigation and allow profit-seeking investors to take over our civil justice system [and questions about] whether litigation finance threatens the legal profession, interferes with counsel’s professional independence, and impairs the principle of party control.’ In their view, litigation financiers: (i) introduce greater competition into the market for legal services; (ii) provide capital that allows law firms to litigate plaintiff-side cases that they otherwise would be reluctant to pursue; and (iii) provide a broader suite of options to liquidity- and risk-constrained clients.

One of the largest groups working on environmental and climate litigation is ClientEarth (<https://www.clientearth.org/>). In the Netherlands, the non-profit Planet Prosperity Foundation enabled Roger Cox to litigate both the *Urgenda* and *Milieudefensie* cases, excerpted above. But a recent example of for-profit litigation financing is provided by Camilla Hodgson, in ‘The Money Behind the Coming Wave of Climate Litigation’, *The Financial Times* (5 June 2023). After a 2009 oil spill in the Timor Sea, a petroleum exploration company, PTTEP Australasia, without admitting liability, paid compensation of US\$127 million to settle the claims of some 15,000 Indonesian farmers. A British

⁶⁹⁶ See generally S. Baer, ‘Democracy in Peril: A Call for Amici and Amicae Curiae and Critical Lawyering’, 10 *Transnat’l Legal Theory* (2019) 140; J. Goldston, ‘Human Rights in the Crosshairs’, *Just Security* 23 August 2022.

⁶⁹⁷ OSJI, *Strategic Litigation Impacts: Insights from Global Experience* (2018).

⁶⁹⁸ W. Kaleck, *Law versus Power: Our Global Fight for Human Rights* (2019).

firm, Harbour Litigation Funding, spent over \$21 million on the case, and received \$53 million in return, or just over 40 percent of the award.

A report by the European Parliamentary Research Service, *Responsible Private Funding of Litigation* (2021) acknowledged that third-party litigation funding (TPLF) ‘may represent a tool to support private citizens and businesses in accessing justice and constitute a mechanism for transferring the risk of the uncertain outcome of the dispute to the litigation funder.’ But it also cautioned that ‘it may pose risks and entail conflicts of interests. If not properly regulated, it could lead to excessive economic costs and to the multiplication of opportunity claims, problematic claims and so called “frivolous claims”.’ For victims of human rights violations and groups advising or representing them, the question is whether, or under what circumstances, such approaches are an ideal, or perhaps just adequate, way to proceed. What are the advantages and disadvantages, and the potential pitfalls of strategic litigation, both in general and when privately funded?

Defossilization

Human rights actors are increasingly focusing on the role played by the major fossil fuel companies. We consider first a report by a National Human Rights Institution, from the Philippines and then a report by the UN Special Rapporteur on climate change.

COMMISSION ON HUMAN RIGHTS OF THE PHILIPPINES, NATIONAL INQUIRY ON CLIMATE CHANGE REPORT (DECEMBER 2022)

On 22 September 2015, Greenpeace Southeast Asia, Philippine Rural Reconstruction Movement, Philippine Alliance of Human Rights Advocates, Philippine Human Rights Information Center, and other groups and individuals petitioned the Commission on Human Rights of The Philippines (CHRP) to investigate the role of the ‘Carbon Majors’ in relation to climate change-caused human rights violations. They named the world’s largest 47 fossil fuel producers, including Chevron, ExxonMobil, British Petroleum, and Royal Dutch Shell. The Philippines is hit by some twenty typhoons each year and Typhoon Haiyan in 2013 killed over 6,000 people.

The CHRP is an independent office created by the Constitution and is the official National Human Rights Institution (NHRI). The Commission reported in May 2022, having held eight public hearings in Manila, two in New York, and two in London, hearing 65 witnesses and receiving 239 submissions. It had neither subpoena power nor the capacity to issue penalties, and proceeded on the basis of persuasion and cooperation. It summed up the spirit in which it proceeded by observing that:

The challenge to NHRIs is to test boundaries and create new paths; to be bold and creative, instead of timid and docile; to be more idealistic or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards.

...

It took administrative notice of IPCC reports. It found that the Carbon Majors had ‘engaged in willful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system [and delaying] meaningful environmental and climate action (at 108). It concluded that carbon majors within Philippine jurisdiction ‘may be compelled to undertake human rights due diligence and to provide remediation.’ It noted that the ‘non-binding nature’ of the UNGPs did not prevent their incorporation into domestic law. It also found that, on the basis of the ‘enterprise theory of corporate personhood’, the responsibility to refrain from contributing to climate change impacts extends to all business enterprises within each Carbon Major’s respective value chains (at 112-13).

In its extensive recommendations, the Commission called upon states to, inter alia: discourage dependence on fossil fuels, including by terminating tax breaks and subsidies, offering tax credits and other incentives for renewable or clean energy technologies; require private actors and businesses receiving any form of assistance to have decarbonization and net-zero plans; collaborate on innovative climate action and guarantee that the benefits of science and technology are enjoyed by all, including ensuring that global intellectual property regimes do not obstruct climate change efforts; cooperate in creating a legally binding instrument to strengthen the implementation of the UNGPs, and provide redress mechanisms for victims of human rights harms caused by businesses; concretize the responsibility of businesses in the context of climate change; ensure that all persons have the necessary capacity to adapt to climate change, and guarantee equality and non-discrimination in climate adaptation and mitigation measures; ensure a just transition towards an environmentally sustainable economy; fulfill climate finance commitments and devise new mechanisms for loss and damage; support and provide adequate legal protection to environmental defenders and climate activists; promote climate change awareness and education; include the military in carbon accounting; and strengthen shared efforts to conserve and accelerate the restoration of forests and other terrestrial ecosystems.

For their part, the Carbon Majors (and other carbon-intensive industries) should: publicly disclose due diligence and climate and human rights impact assessment results; desist from all activities that undermine the findings of climate science; cease further exploration of new oil fields, keep fossil fuel reserves in the ground, and lead the transition to clean energy; contribute to a green climate fund for the implementation of mitigation and adaptation measures; and continually engage with experts, CSOs and other stakeholder for the assessment and improvement of corporate climate response.

Other recommendations were also addressed to financial institutions and investors, the UN and other international bodies, NHRIs, courts, NGOs, CSOs and the legal profession, and global citizens.

ELISA MORGERA, THE IMPERATIVE OF DEFOSSILIZING OUR ECONOMIES, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS RIGHTS IN THE CONTEXT OF CLIMATE CHANGE, UN Doc. A/HRC/59/42 (15 MAY 2025)

[In October 2021, the UN Human Rights Council appointed a Special Rapporteur to address climate change. Resolution 48/14 received 42 votes in favor, one against (Russia), and four abstentions (China, Eritrea, India and Japan. Her 2025 report focuses on defossilization.]

...

II. Intergenerational human rights impacts of fossil fuels

...

A. The main cause of climate change keeps growing

8. The burning of fossil fuels is the main historical and current driver of greenhouse gas emissions. It has been responsible for 81 to 91 per cent of the total historic anthropogenic carbon dioxide emissions Coal was the source of 41 per cent of these emissions in 2023, oil 32 per cent and gas 23 per cent.

9. Indirect greenhouse gas emissions released during fossil fuel extraction, transport and waste management also contribute to climate change. Fossil fuel production and distribution are the second-largest source (35 per cent) of methane emissions, which are responsible for around 30 per cent of the global temperature rise since the Industrial Revolution. ...

...

11. And yet, fossil fuels still account for 80 per cent of the global primary energy supply, and production is projected to be around 110 per cent higher in 2030 compared to levels that would be consistent with limiting warming to 1.5°C, with industry investment leading to overcapacity.

...

C. Locking in fossil fuels through plastics and petrochemicals

25. The increasing production of plastics and petrochemicals is embedding dependence on fossil fuels in our economies within and beyond the energy sector

26. Almost all plastics are made from non-renewable petrochemicals, sourced from oil, gas and coal. Currently, primary plastic production accounts for 12.5 per cent of global oil demand and 8.5 per cent of global gas demand and is projected to account for 50 per cent of global oil demand by 2050.

...

...

III. To whose economic benefit?

30. Fossil fuel companies are quite diverse: many are State-owned, with upstream petroleum assets worldwide moving from publicly listed to private companies. Out of the 122 of the world's largest fossil fuel producers from 1854 to 2022, more than 70 per cent of global carbon dioxide emissions historically can be attributed to 78 corporate and State producing entities – the “Carbon Majors”. Half of global carbon dioxide emissions in 2023 can be attributed to 36 fossil fuel companies.

31. The fossil fuel industry has benefited from extremely large profits, while being heavily subsidized. Following record profits in 2022 due to the global energy crisis, in 2023 oil and gas companies globally earned \$2.4 trillion, and coal companies \$2.5 trillion. Fossil fuel subsidies for that year were conservatively estimated at \$1.4 trillion for Organisation for Economic Co-operation and Development (OECD) members and 48 other countries, encompassing mainly consumer-side subsidies (\$1 trillion). ... Removal of fossil fuel subsidies is projected to reduce emissions by up to 10 per cent by 2030.

32. Production-side subsidies are still significant – \$400 billion, while climate harm from fossil fuels is estimated at \$300 billion, and this is without counting subsidies for plastics production. ...

33. Tax evasion and financial secrecy further help fossil fuel expansion, taking even more funding away from adaptation and responses to loss and damage. In 2024, at least \$100 billion to \$240 billion was lost in unpaid tax, equivalent to 4 to 10 per cent of the fossil fuel industry's global revenue. In addition, financial secrecy in “tax havens” enables the entrenching of high-carbon development pathways, allowing fossil fuel company owners to abuse their tax responsibilities, break monopoly laws, avoid international sanctions, launder money or funnel money into political processes. Financial secrecy also makes it difficult to monitor the accuracy of banks' sustainability reporting on divesting from fossil fuels. ...

...

35. ... [M]ultinational fossil fuel companies benefit from undue protection against climate action under bilateral investment agreements, contracts, and investor-State dispute settlement. They are awarded compensation for climate measures that threaten their expected profits, including in circumstances where damages would not be available under national law, and in amounts that historically have been “roughly equivalent to the gross domestic product of 45 of the world's poorest or smallest countries put together” (\$82.8 billion). ...

36. The availability of recourse to investor-State dispute settlement has a chilling effect on the development of climate law and policy, prevents States from complying with their international environmental obligations and encourages further investments in fossil fuels, prolonging climate change impacts on human rights, while undermining the obligation to devote the maximum available resources to the full realization of economic, social and cultural rights.

...

V. Conclusions

42. Several international human rights law obligations underpin the fossil fuel phaseout. Strict due diligence is required to protect the right to self-determination, which is a peremptory norm of international law

43. Strict due diligence implies a continuous obligation to prevent significant harm, especially across borders, requiring States to proactively identify and monitor risks, and take all available reasonable measures to prevent foreseeable harm, including by private actors, and to remedy it. Peremptory norms of international law are universally binding, regardless of consent, and allow no derogation.

44. The phaseout obligation should be interpreted also as a specification of States' duty to respect, protect and fulfil the right to life The increasing intensity of climate events exacerbating human physical and mental suffering in circumstances of tremendous environmental hardship can be characterized as inhuman and degrading treatment, due to the compounding violations of the human rights to health, food, water and sanitation, housing and education, and of cultural rights.

...

49. States, including in the global South, should consider the phaseout as part of an obligation to develop new economic models that provide goods and services that enhance human and planetary well-being, reducing the production of unnecessary and toxic products, and deprioritizing the demands of the richest groups of society who worsen social exclusion and extreme poverty. In other words, the phaseout should be understood as a precondition for the emergence of a healthier economic model at the nexus of biodiversity, water and food, health and climate change, that fully aligns the right to development with all substantive elements of the right to a healthy environment.

...

52. Impacts on fossil fuel workers should then be jointly assessed and prevented: a job guarantee scheme should be in place to provide undersupplied services and poverty reduction to workers' communities and support household income, which is a major determinant of health. Place-based efforts are best suited to be co-designed with workers and their communities – including informal workers, as informality has also been affected by climate-induced mobility – to foster diverse livelihoods and effective remedies that support decent jobs, affordable public services and goods, and a healthier environment. ...

53. While revenue instability and fiscal deficits are expected to arise from the phaseout for fossil fuel-exporting countries, governments can mitigate these risks through holistic, anticipatory and diversified economic and policy adaptation, long-term investment frameworks in infrastructure, human capital development and social protection, and technological change to restructure entrenched economic systems and political interests that lock in fossil fuels. Crucially, the human rights-based approach supports rooting the phaseout in common but differentiated responsibility, equity and justice, transparency, targeted compensation, and the inclusion both in decision-making and benefit-sharing of actors facing social vulnerabilities. Human rights norms clarify and should guide how States should take such deliberately holistic, inclusive and equitable strategies in the phaseout

...

QUESTIONS

1. In an ideal scenario, what would be the impact of the UN's recognition of the human right to a clean, healthy and sustainable environment in General Assembly Resolution 76/300 (28 July 2022)?

2. In its 'Explanation of Position' on the resolution, the United States objected that there is still no 'shared understanding' of what such a right entails. Is that a fatal flaw, or can a right be recognized before all of its implications have been identified? How helpful is the Council of Europe's Parliamentary Assembly's resolution in this regard?

3. Researchers have claimed that global warming projections documented by—and in many cases modeled by—Exxon and ExxonMobil Corp scientists between 1977 and 2003 accurately forecast much of what has happened in terms of climate change, while at the same time the company's public statements denying the reality of global warming contradicted the

relevant data.⁶⁹⁹ Under the UN Guiding Principles on Business and Human Rights, would the company have any obligations to publicly acknowledge such findings, or to take any action as a result?

4. What are the main threats that climate change might pose to the enjoyment of civil and political rights, today, in ten years, and in fifty years?

5. What are the strengths and weaknesses of strategic litigation in this area? Use examples from the cases studied above.

6. Consider the following criticisms⁷⁰⁰ of the approach adopted in *Billy v. Australia*: (i) ‘the majority did not rigorously apply General Comment 36 on the right to life’, see Ch. 9, above; (ii) the ‘real and foreseeable risk’ standard applied is appropriate in a refugee case such as *Teitiota v. New Zealand*, but sets the bar too high in this situation;⁷⁰¹ and (iii) the Committee overlooked Article 6 violations that have already occurred, while accepting assurances about projects yet to be completed.

7. A common approach in both litigation and broader advocacy is to rely in part on the interests of future generations.⁷⁰² In 2023, a group of experts adopted the Maastricht Principles on the Human Rights of Future Generations.⁷⁰³ Principle 13 provides that:

- a) States have obligations to respect, protect, and fulfil the human rights of future generations.
- b) These obligations extend to all conduct of States, whether through actions and omissions, and whether undertaken individually or collectively, including decisions made in their capacity as members of international or regional organizations. Such conduct includes, but is not limited to, the adoption or implementation of policies, practices, programs and legislation.
- c) Failure to comply with these obligations constitutes a violation of the rights of future generations.
- d) States must ensure an effective remedy for failure to respect, protect and fulfil these rights as set out in section.

Compare that approach with the following analysis:

*An appeal to the responsibility towards future generations is attractively simple: an exhortation to act, drawing on a powerful imagery of obligation, an altruistic duty towards our children and grandchildren, an invitation to global solidarity. [But, in fact, such an appeal] instead stands to elide numerous existing loci of responsibility in climate matters that are more concrete, more coherent, more demanding, more easily understood and more effectively articulated in law. It tends to fold those to whom responsibility is owed in the present into those owing responsibility and so annihilates the former's claim to a present and a future alike. Responsibilities towards those alive today surround us; they swell, if we choose to see them. And, if acted upon, the consequences will flow into the future ...*⁷⁰⁴

E. THE RIGHT TO DEVELOPMENT

Claims for a right to development emerged at around the same time as the environmental rights considered above. Some commentators have pointed to the links between the two, but much depends on the way in which the right to development is defined.

⁶⁹⁹ G. Supran et al., ‘Assessing ExxonMobil’s Global Warming Projections’, 379 *Science* (2023).

⁷⁰⁰ N. Barrett and A. Gupta, ‘Why Did the UN Human Rights Committee Refuse Broader Protections for Climate Change Victims?’, *Opinio Juris* (10 May 2022).

⁷⁰¹ Cf. M. Foster and J. McAdam, ‘Analysis of “Imminence” in International Protection Claims: *Teitiota v. New Zealand* and Beyond’, 71 *Int’l & Comp. L. Q.* (2022) 975.

⁷⁰² B. Lewis, ‘Protecting Environmental Human Rights for Future Generations’, in W. Baber and J. May (eds.), *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges* (2023) 31.

⁷⁰³ A. M. Suárez Franco and S. Liebenberg, ‘The Maastricht Principles on the Human Rights of Future Generations’, *Spotlight on Global Multilateralism* (2023) 58.

⁷⁰⁴ S. Humphreys, ‘Against Future Generations’, 33 *Eur. J. Int’l L.* (2022) 1061, at 1091.

Article 56 of the UN Charter commits all member states to take ‘joint and separate action in co-operation’ with the UN for the achievement of the purposes identified in Article 55, which includes human rights, ‘higher standards of living ... and conditions of economic and social progress and development’ and ‘solutions of international economic, social, health and related problems’. Similarly, Article 28 of the UDHR provides that ‘[e]very one is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’. These provisions, although expressed at a level of great generality, have often been invoked by those who posit the existence of a broad international ‘duty to cooperate’ or a ‘right to solidarity’. In a world of deep-rooted and growing inequalities among nations, the question inevitably arises whether the international community bears some responsibility for assisting states whose resources are inadequate to ensure the human rights of their own citizens, or for providing direct assistance to those individuals in dire need.

Since 1977 much of this debate has been pursued within the field of human rights under the rubric of the ‘right to development’. The debate touches upon a number of themes raised in earlier chapters: the basis for recognition of new rights, the priority to be accorded to the different sets of rights, the links between human rights and democratic governance and the relationship between individual and collective rights (including peoples’ rights).

The list of internationally recognized human rights is by no means immutable. Just as the British sociologist T. H. Marshall characterized the eighteenth century as the century of civil rights, the nineteenth as that of political rights and the twentieth as that of social rights so, too, have some commentators over the past three decades put forward claims for the recognition of the new rights, in particular a category known as the ‘third generation of solidarity rights’. By analogy with the slogan of the French Revolution these rights have been said to correspond to the theme of *fraternité*, while first-generation civil and political rights correspond with *liberté* and second-generation economic and social rights with *égalité*. Karel Vasak’s list of solidarity rights included ‘the right to development, the right to peace, the right to environment, the right to the ownership of the common heritage of mankind, and the right to communication’.⁷⁰⁵

Of these, the most debated and contentious at the international level has been the right to development. First recognized by the UN Commission on Human Rights in 1977 (CHR Res. 4 (XXXIII)), it was enshrined in the Declaration on the Right to Development (General Assembly Res. 41/28 (1986)). The 1993 Vienna World Conference on Human Rights declared it to be ‘a universal and inalienable right and an integral part of fundamental human rights’. Subsequently, a Working Group was established in 1998, a Special Rapporteur was appointed in 2016,⁷⁰⁶ and an Expert Mechanism created in 2019. In October 2023, The Human Rights Council (Res. 54/18 adopted by a vote of 29-13-5) submitted this draft ‘covenant’ to the General Assembly ‘for its consideration, negotiation and subsequent adoption’.

⁷⁰⁵ K. Vasak, ‘A 30-Year Struggle’, UNESCO Courier, November 1977, 29; for a critique, see S. Jensen and C. Walton, ‘Not “Second-Generation Rights”: Rethinking the History of Social Rights’, in *ibid.*, *Social Rights and the Politics of Obligation in History* (2022) 1.

⁷⁰⁶ Special Rapporteur Surya Deva has spelled out a new vision for the right to development in UN Docs. A/HRC/54/27 (2023) and A/78/160 (2023).

DRAFT INTERNATIONAL COVENANT ON THE RIGHT TO DEVELOPMENT
UN DOC A/HRC/54/50 (2023)

Preamble

...

Part I

Article 1 Object and purpose

The object and purpose of the present Covenant is to promote and ensure the full, equal and meaningful enjoyment of the right to development by every individual and all peoples everywhere, and to guarantee its effective operationalization and full implementation at the national and international levels.

...

Article 3 General principles

To achieve the object and purpose of the present Covenant and to implement its provisions, the States Parties shall be guided by, inter alia, the principles set out below:

(a) Development centred on the individual and peoples: the individual and peoples are the central subjects of development and must be the active participants and beneficiaries of the right to development;

(b) Principles common to all human rights: the right to development should be realized in a manner that reflects the universality, inalienability, indivisibility, interdependence and interrelatedness of all human rights and integrates the principles of equality, non-discrimination, intersectionality, empowerment, participation, transparency, accountability, equity, inclusion, accessibility and subsidiarity;

(c) Human rights-based development: as development is a human right that is indivisible from and interrelated and interdependent with all other human rights, the laws, policies and practices of development, including development cooperation, must be normatively anchored in a system of rights and corresponding obligations established by international law. Accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms;

...

Part II

Article 4 Right to development

1. Every individual and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to and enjoy civil, cultural, economic, environmental, political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.

2. Every individual and all peoples have the right to active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

Article 5 Relationship with the right of peoples to self-determination

1. The right to development implies the full realization of the right of all peoples to self-determination.

...

Article 6 Relationship with other human rights

States Parties reaffirm that all human rights, including the right to development, are universal, inalienable, interrelated, interdependent, indivisible and equally important.

States Parties agree that the right to development is an integral part of human rights and must be realized in conformity with the full range of civil, cultural, economic, environmental, political and social rights.

Article 7

Relationship with the responsibility of everyone to respect human rights under international law

... [A]ll natural and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development.

Part III

Article 8 General obligations of States Parties

States Parties shall respect, protect and fulfil the right to development for all, without discrimination of any kind

Article 9 General obligations of international organizations

... [I]nternational organizations also have the obligation to refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach any obligation that the State or the latter organization may have with regard to the right to development.

Article 10 Obligation to respect

States Parties shall refrain from conduct, whether expressed through law, policy or practice, that:

- (a) Nullifies or impairs the enjoyment and exercise of the right to development;
- (b) Impairs the ability of another State or an international organization to comply with that State's or that international organization's obligations with regard to the right to development;
- (c) Aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, another State or an international organization to breach that State's or that international organization's obligations with regard to the right to development;
- ...

Article 11 Obligation to protect

States Parties shall adopt and enforce all necessary, appropriate and reasonable measures, including administrative, legislative, investigative, judicial, diplomatic and others, to ensure that natural or legal persons, peoples, groups or any other State or agents that the State is in a position to regulate do not nullify or impair the enjoyment and exercise of the right to development within or outside their territories when:

- (a) Such conduct occurs, partially or fully, on the territory of the State Party;
- (b) The natural or legal person has the nationality of the State Party;
- (c) The State Party has the requisite legal duty under either domestic or international law to supervise, regulate or otherwise exercise oversight, through, *inter alia*, requiring human rights due diligence, of the conduct of the legal person engaging in business activities, including those of a transnational character.

Article 12 Obligation to fulfil

1. Each State Party shall take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development

2. To this end, each State Party shall take all necessary measures at the national level, and shall ensure, inter alia, non-discrimination and equality of opportunity, including through digital inclusion where applicable, for all individuals and peoples in their access to basic resources, education, health services, food, housing, water and sanitation, employment, and social security and protection, and in the fair distribution of income, and shall carry out appropriate economic and social reforms with a view to eradicating all social injustices.

Article 13 Duty to cooperate

States Parties reaffirm and shall implement their duty to cooperate with each other, through joint and separate action, in order to:

(a) Solve international problems of an economic, social, cultural, political, environmental, health-related, educational, technological or humanitarian character;

(b) End poverty in all its forms and dimensions, including by eradicating extreme poverty;

...

2. To this end, States Parties have primary responsibility, in accordance with the general principle of international solidarity described in the present Covenant, for the creation of international conditions favourable for the realization of the right to development for all, and shall take deliberate, concrete and targeted steps, individually and jointly, including through cooperation within international organizations and engagement with civil society:

(a) To ensure that natural and legal persons, groups and States do not impair the enjoyment of the right to development;

...

3. States Parties shall ensure that financing for development and all other forms of aid and assistance given or received by them, whether bilateral or under any institutional or other international framework, adhere to internationally recognized development cooperation effectiveness principles and are consistent with the provisions of the present Covenant.

4. States Parties recognize their duty to cooperate to create a social and international order conducive to the realization of the right to development by, inter alia:

(a) Promoting a universal, rules-based, open, non-discriminatory, equitable, transparent and inclusive multilateral trading system;

(b) Implementing the principle of special and differential treatment for developing countries, in particular least developed countries, as defined in applicable trade and investment agreements;

(c) Improving the regulation and monitoring of global financial markets and institutions, and strengthening the implementation of such regulations;

(d) Ensuring enhanced representation and voice for developing countries, including least developed countries, in decision-making in all international economic and financial institutions, in order to deliver more effective, credible, accountable and legitimate institutions;

...

Part IV

[In terms of implementation, the draft envisages the establishment of a Conference of States Parties which would ‘periodically examine voluntary reports by States Parties’ and an ‘implementation mechanism’ of independent experts ‘to facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance’ with the Covenant. This treaty body would ‘make suggestions and general recommendations’ based on states’ reports, and ‘review requests by rights holders to comment on situations in which their right to development has been adversely affected’.]

* * *

The right to development has never ceased to be controversial among governments as well as among scholars and commentators, although it has achieved constitutional recognition in 31 countries.⁷⁰⁷ In international debates, the right is generally grounded in claims relating to the material conditions required to ensure realization of the full range of existing human rights, but it is also sometimes grounded in claims of appropriate reparations for colonialism and other forms of exploitation of the South by the North, or on arguments that the existing international economic order is loaded against developing countries and that compensation should follow.⁷⁰⁸ China has been an enthusiastic promoter and an official 2016 government White Paper (The Right to Development: China’s Philosophy, Practice and Contribution) states that:

Development is a universal human theme, providing for people’s basic needs and giving them hope of better life. The right to development is an inalienable human right, symbolizing dignity and honor. Only through development can we address global challenges; only through development can we protect basic civil rights of the people; only through development can we promote the progress of human society.

In 2023, the United States explained its opposition to the proposed covenant:

... [T]he Right to Development resolution creates a detrimental narrative which would elevate the process of development above human rights, undermine the human rights system, and harm development rather than promote it. ... [T]he text appears to protect states instead of individuals. States do not have human rights; they guarantee them to individual human beings.

[The right] is not recognized in any of the core UN human rights conventions, does not have an agreed international meaning, and is not recognized as a universal right held and enjoyed by individuals. We are also concerned about ... the lack of meaningful negotiations’ on the draft covenant.⁷⁰⁹

The contrast between the 2023 formulation of the right to development and the historical vision of some of its early Global South proponents is dramatic. The ‘genealogical starting point’ for the right is the set of demands for economic and political justice contained in the NIEO.⁷¹⁰

James Thuo Gathii, in ‘Africa and the Radical Origins of the Right to Development’, 1 *TWAIL Review* (2020) 28, notes that in 1967 Senegal’s Foreign Minister, Doudou Thiam, argued that ‘the right to development belonged to the third world ...’. He conceptualized it as a collective right to correct the wrongs wrought by colonial rule. The revolutionary agenda that he envisaged would require developing countries to:

⁷⁰⁷ R. Hirschl, ‘Economic and Social Rights in National Constitutions’, 62 *Am. J. Comp. L.* (2015) 1043, n. 35.

⁷⁰⁸ These arguments were examined in detail in the first major UN report on the right to development. See UN Doc. E/CN.4/1334 (1978).

⁷⁰⁹ Eric Merron (USA), Explanation of Vote, Third Committee of the UN General Assembly, November 7, 2023.

⁷¹⁰ N. Gilman, ‘The New International Economic Order: A Reintroduction’, 6 *Humanity* (2015) 1 at 7.

tear down all the practices, institutions and rules on which international economic relations are based, in so far as these practices, institutions and rules sanction injustice and exploitation and maintain the unjustified domination of a minority over the majority of men The right of peoples to self-determination, the sovereign equality of peoples, international solidarity - all these will remain empty words ... until relations between nations are viewed in the light of economic and social facts. ...

In 1979, a former Algerian Foreign Minister, later to become a judge on the International Court of Justice (from 1982 to 2001), Mohamed Bedjaoui, published a manifesto entitled *Towards a New International Economic Order* underscoring the extent to which international law had facilitated colonial subjugation and insisting that the new order must provide ‘for the development of all nations in the world’.⁷¹¹ He further developed the role of the right to development in that context in ‘The Right to Development’, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 1182. He characterized it as ‘the *core right* from which all the others stem’, and described its international dimension as being ‘nothing other than *the right to an equitable share in the economic and social well-being of the world.*’ He understood its basis in the following terms:

22. The ‘right to development’ flows from this right to self-determination and has the *same nature*. There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize at the same time a ‘right to development’ for the peoples that have achieved self-determination. This right to development can only be an ‘inherent’ and ‘built-in’ right forming an inseparable part of the right to self-determination.

23. ... [This makes the right to development] much more a right of the State or of the people, than a right of the individual, and it seems to me that it is better that way.

In terms of the content of the right, he identified several aspects including that the state must be able to ‘claim a ‘*fair price*’ for its raw materials and for whatever it offers in its trade with the more developed countries’, and that ‘the State is *entitled if not to the satisfaction of its needs at least to receive a fair share of what belongs to all, and therefore to that State also.*’ He elaborated that this ‘should be perceived as a right and not as an act of charity’ and that it ‘should be made effective by *norms and institutions.*’ In stark contrast to other jurists who argued about the degree of normativity of the right, Bedjaoui insisted that ‘the right to development is, by its nature, so incontrovertible that it *should* be regarded as belonging to *jus cogens.*’

A more nuanced perspective is provided below by another iconic Global South scholar, Georges Abi-Saab (Egypt). That excerpt is followed by another from the same era, by Jack Donnelly who calls the right unfounded and dangerous.

**GEORGES ABI-SAAB, THE LEGAL FORMULATION OF A RIGHT TO DEVELOPMENT
HAGUE ACADEMY OF INTERNATIONAL LAW, THE RIGHT TO DEVELOPMENT AT THE
INTERNATIONAL LEVEL (1980) 163**

[Abi-Saab begins by noting that, for the right to development to be considered a legal right, it must be possible to identify the active and passive subjects of the right and its content. But those elements depend on the legal basis of the right, which in turn depends on whether the right is an individual or collective one.]

It is possible to think of different legal bases of the right to development as a collective right. The first possibility ... is to consider the right to development as the aggregate of the social, economic and cultural rights not of each individual, but of all the individuals constituting a collectivity. In other words, it is the sum total of a double aggregation of the rights and of the individuals. This version ...

⁷¹¹ See generally, U. Özsu, “‘In the Interests of Mankind as a Whole’: Mohammed Bedjaoui’s New International Economic Order”, 6 *Humanity* (2015) 129.

has the merit of shedding light on the link between the rights of the individual and the right of the collectivity; a link which is crucial. ...

Another way ... is to approach it directly from a collective perspective ... by considering it either as the economic dimension of the right of self-determination, or alternatively as a parallel right to self-determination, partaking of the same nature and belonging to the same category of collective rights.

...

As far as the beneficiaries or active subjects are concerned, the first answer that comes to mind is that they are those societies possessing certain characteristics which lead the international community to consider them wanting in terms of development and to classify them as 'developing' or 'less developed' countries (LDC). ...

...

... Up to now, we have used societies, communities, countries and States as interchangeable, which they are not. In fact, here as with self-determination, the common denominator of these different ways of describing the beneficiary collectivity is the 'people' they designate, which constitutes the socially relevant entity or group in this context. ... Suffice it to say here that the distinction between 'people' and 'State', though in theory it is as important in relation to the right to development as to the right of self-determination, in practice it is not. ...

...

... [T]he passive subject of the right to development can only be the international community as such. But as the international community does not have at its disposal the means (organs, resources) of directly fulfilling its obligations under the right to development, it can only discharge them through a category of its members, that of the 'developed' States. ...

...

... [S]atisfaction of the collective right is a necessary condition, a condition-*precedent* or a prerequisite for the materialization of the individual rights. Thus without self-determination it is impossible to imagine a total realization of the civil and political rights of the individuals constituting the collectivity in question. Such rights can be granted and exercised at lower levels, such as villages and municipalities, but they cannot reach their full scope and logical conclusion if the community is subject to colonial or alien rule.

...

The same with the right to development, which is a necessary precondition for the satisfaction of the social and economic rights of the individuals. And here, even more than in the case of self-determination, the causal link between the two levels is particularly strong; for without a tolerable degree of development, the society will not be materially in a position to grant and guarantee these rights to its members, i.e., of providing the positive services and securing the minimum economic standards which are required by these rights.

...

**JACK DONNELLY, IN SEARCH OF THE UNICORN: THE JURISPRUDENCE AND POLITICS OF
THE RIGHT TO DEVELOPMENT
15 CALIF. WESTERN INT'L L. J. (1985) 473, 482**

III. Legal Sources of the Right to Development

...

... If the right to development means the right of peoples freely to pursue their development, then it can be plausibly argued to be implied by the Covenants' right to self-determination. However, such a right to development is without interest; it is already firmly established as the right to self-determination.

A substantially broader right to development, however, cannot be extracted from this right to self-determination. The right to self-determination recognized in the Covenants does not imply a right to live in a developing society; it is explicitly only a right to *pursue* development. Neither does it imply an *individual* right to development; self-determination, again explicitly, is a right of peoples only. In no sense does it imply a right to be developed. Thus the claim that the right to development is simply the

realization of the right to self-determination is not based on the Covenants' understanding of self-determination.

It might also be argued that because development is necessary for self-determination, development is itself a human right. Such an argument, however, is fallacious. ... Even assuming that development is necessary for, rather than a consequence of, full enjoyment of the right to self-determination, it simply does not follow that peoples have a right to development.

Allowing such an argument to prevail would result in a proliferation of bizarre or misguided rights. ...

[Second, one] might question whether 'development' falls under the notion of a social and international order referred to in Article 28 [of the UDHR]. 'Development' suggests a process or result; the process of development or the condition of being developed. 'Order', by contrast, implies a set of principles, rules, practices or institutions; neither a process nor a result but a structure. Article 28, therefore, is most plausibly interpreted as prohibiting *structures* that deny opportunities or resources for the realization of civil, political, economic, social or cultural human rights. ...

... Suppose, though, that Article 28 *were* to be taken to imply a human right to development. What would that right look like? It would be an *individual* right, and only an individual right; a right of persons, not peoples, and certainly not States. It would be a right to the enjoyment of traditional human rights, not a substantively new right. It would be as much a civil and political as an economic and social right – Article 28 refers to *all* human rights – and would be held equally against one's national government and the international community. ...

...

[V. Subjects of the Right to Development]

...

If human rights derive from the inherent dignity of the human person, collective human rights are logically possible only if we see social membership as an inherent part of human personality, and if we argue that as part of a nation or people, persons hold human rights substantively different from, and in no way reducible to, individual human rights. This last proposition is extremely controversial. ...

The very concept of human rights, as it has heretofore been understood, rests on a view of the individual person as separate from, and endowed with inalienable rights held primarily in relation to, society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail. The idea of collective *human* rights represents a major, and at best confusing, conceptual deviation.

I do not want to challenge the idea of collective rights *per se* or even the notion of peoples' rights; groups, including nations, can and do hold a variety of rights. But these are not *human* rights as that term is ordinarily understood. ...

...

A further problem with collective human rights is determining who is to exercise the right; the right-holder is not a physical person, and thus an institutional 'person' must exercise it. In the case of a right held by a people, or by society as a whole, the most plausible 'person' to exercise the right is, unfortunately, the state. Again this represents a radical reconceptualization of human rights – and an especially dangerous one.

...

* * *

Nico Schrijver has argued, in 'A New Convention on the Human Right to Development: Putting the Cart before the Horse?', 38 *Neth. Q. Hum. Rts* (2020) 84, that the right should be taken more seriously than it has been for three reasons: (i) it is a 'cluster right' that brings together the rights to a decent standard of living, food, water, clothing, housing, work, education, life, and freedom of expression

and association; (ii) it is an ‘integrative right’ that brings together CPR, ESCR, and peoples’ rights; and (iii) it is a ‘bridging right’ connecting the ‘rights of individuals (citizens) with those of groups and peoples’.

James Thuo Gathii, in ‘Africa and the Radical Origins of the Right to Development’, 1 *TWAIL Rev.* (2020) 28 emphasizes a radical approach to the right to development which:

examines the international order through a lens of marginalization and domination of the third world and its peoples by international law. ... Critical scholars in the TWAIL movement reveal how ... liberatory goals [such as sovereign equality, self-determination, human rights, development and equality] coexist alongside economic hierarchy and subordination between nations and carry forward within them the legacy of colonial conquest and European imperialism.

He contrasts this with ‘[t]he reconceptualizing of development as a right ... by donor agencies in cooperation with formerly colonial countries, abandoning the more radical vision ... in at least three ways’: (i) shifting the ‘focus away from external and north-south issues and the constitutive role of colonial rule and its legacies [to] domestic and internal development issues’; (ii) presenting North-South development relationships ‘as cooperative instead of confrontational’; and (iii) enabling ‘international financial institutions, western donors and investors to identify non-western peoples and states as development failures in need of assistance, which lays the basis for their intervention as experts with specialized knowledge and resources.’

Elsabé Boshoff, in ‘Rethinking the Premises Underlying the Right to Development in African Human Rights Jurisprudence’, 31 *Rev. Eur. Comp and Int’l Env. L.* (2022) 27, argues that the African Charter, as interpreted by the African Commission and Court, opens up possibilities for ‘a revised understanding of development, not as wealth-based, but rather as centred on human well-being situated within a healthy and satisfactory environment.’ She calls for ‘elements of African environmental ethics’ to be recognized in interpreting the right to development’. An important case in this regard is one already encountered in Chapter 11:

AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS V. REPUBLIC OF KENYA
APPLICATION NO. 006/2012, JUDGMENT (26 MAY 2017)

Alleged violation of Article 21 of the Charter

...

The Applicant [the African Commission] contends that the Respondent [Kenya] has violated the rights of the Ogieks to freely dispose of their wealth and natural resources in two ways. Firstly, by evicting them from the Mau Forest and denying them access to the vital resources therein, and secondly, by granting logging concessions on Ogiek ancestral land without their prior consent and without giving them a share of the benefits in those resources.

...

The Court’s Assessment

Article 21 of the Charter states that:

“1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

...

... [T]he Charter does not define the notion of “peoples”. ... [Its drafters] deliberately omitted to define the notion in order to “permit a certain flexibility in the application and subsequent interpretation by future users of the legal instrument, the task of fleshing out the Charter being left to the human rights protection bodies.”

It is generally accepted that, in the context of the struggle against foreign domination in all its forms, the Charter primarily targets the peoples comprising the populations of the countries struggling to attain independence and national sovereignty.

In the circumstances, the question is whether the notion “people” used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State. ...

In the view of the Court, the answer to this question is in the affirmative, provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter’s consent. ... [N]othing prevents other peoples’ rights, such as the right to development (Article 22), the right to peace and security (Article 23) or the right to a healthy environment (Article. 24) from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a State.

...

The Court ... has already recognised for the Ogieks a number of rights to their ancestral land In so far as those rights have been violated by the Respondent, the Court holds that the latter has also violated Article 21 of the Charter since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands.

Alleged violation of Article 22 of the Charter

Applicant’s Submission

The Applicant contends that the Respondent has violated the Ogieks’ right to development by evicting them from their ancestral land in the Mau Forest and by failing to consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest. ...

...

Respondent’s Submission

The Respondent argues that it has not violated the right to development of the Ogieks ... [and] that the Applicant has not demonstrated how it has failed in undertaking development initiatives for the benefit of the Ogieks or how they have been discriminated against and excluded in the process of conducting development initiatives.

...

The Court’s Assessment

Article 22 of the Charter provides that:

“1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

The Court reiterates its view above with respect to Article 21 of the Charter that the term “peoples” in the Charter comprises all populations as a constitutive element of a State. These populations are entitled to social, economic and cultural development being part of the peoples of a State. Accordingly, the Ogiek population, has the right under Article 22 of the Charter to enjoy their right to development.

...

...[T]he Ogieks have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development. They have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

146. The Court therefore holds that the Respondent violated Article 22 of the Charter.

QUESTIONS

1. Compare the different conceptions of the right to development put forward by Abi-Saab, Bedjaoui and Donnelly with the text of the 1986 General Assembly Declaration. Key concerns voiced by some of the governmental and other opponents of the right to development include objections to collective human rights and especially to any idea that a human right can be vested in a state, resistance to the idea that resource transfers from the North to the South are obligatory and fears that a right to development gives priority to development over human rights. To what extent does the Declaration provide a foundation for each of these concerns?
2. Does the African Commission's approach in the Ogiek case suggest a way forward for making the right to development operational beyond the realm of indigenous peoples' rights?
3. What is the relationship between climate change and the right to development? Consider the separate opinion appended to the unanimous 2025 ICJ Advisory Opinion on climate change by Judge Xue (from China) who noted that Article 3(4) of the Framework Convention on Climate Change provides that '[t]he Parties have a right to, and should, promote sustainable development.' In her view (para. 30) '[t]his provision reaffirms the right to development. This right, definitely, is not absolute. It must be exercised on a sustainable basis. Accordingly, climate policies and measures must be integrated with national development agendas. ... At the world level, the ultimate goal for the global action against climate change is to promote through international co-operation a supportive and open international economic system that would lead to sustainable economic growth and development in all States, in particular developing countries ...'.

Chapter 16. Responding to Mass Violations: Prosecutions

This chapter looks at the responses of international law in general, and of the international human rights regime in particular, to mass violations of *human* rights and humanitarian law. The primary focus is on the evolution of the field of international criminal law (ICL) since the Nuremberg judgment, with emphasis on the role of the International Criminal Court (ICC). The ICC was created by the Rome Statute of 1998, and brought into existence when the Statute entered into force on 1 July 2002, after sixty states had ratified the treaty. The ad hoc tribunals set up by the Security Council in relation to the former Yugoslavia in 1993 and Rwanda in 1994 played a crucial role in developing both the legal and procedural foundations of this body of law.⁷¹²

THE EVOLUTION OF INTERNATIONAL CRIMINAL LAW

The creation of an international criminal tribunal was agreed upon in the Treaty of Versailles after World War I. Although German Kaiser Wilhelm II was the principal target, the Netherlands refused to extradite him, and a few desultory trials were held in Leipzig in 1921 before German courts. The Nuremberg and Tokyo war crimes trials of the late 1940s set important precedents but the Cold War quickly dimmed enthusiasm for institutionalizing such a system on a continuing global basis. While scholars such as Georg Schwarzenberger and Cherif Bassiouni sought to rekindle the debates,⁷¹³ it was not until after the fall of the Berlin Wall in 1989, combined with the outrage generated by well-documented atrocities in the former Yugoslavia and Rwanda in the early 1990s, that sufficient political will could be mustered. The first step was the creation of the two ad hoc tribunals, followed by agreement on the ICC Statute in 1998. The record of the ICC over the past two decades has been somewhat chequered, with various missteps along the way. By 2019, the barrage of criticism of the Court's record was so great that the Assembly of States Parties appointed a group of independent experts to provide 'concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole'. The review, chaired by Richard Goldstone, made 384 recommendations in a 348-page report.⁷¹⁴ Nevertheless, most observers acknowledge that the court's very existence is an immense achievement, that the standards enshrined in the Statute have definitively changed the legal landscape, and that much potential remains to be realized. While the flurry of activity around the situations in Ukraine and Gaza since 2022 should have breathed new life into the overall ICL system, the pushback from key states, including the United States under President Trump, makes for a precarious prospect for the court. This is exacerbated by the fact that in 2025 there is only one ongoing trial and no other case is expected to reach trial stage.

When the ad hoc tribunals were established, they were given primacy over national court systems, which had to yield to the relevant international tribunal. Over time, both began to develop a more nuanced division of responsibility with the national legal systems. In contrast, Articles 17 and 19 of the Rome Statute embody the crucial principle of complementarity which ensures that primacy is given to national-level jurisdictions, as long as the relevant case is being 'genuinely' investigated or prosecuted by a state that has jurisdiction.⁷¹⁵

Despite the many overlaps between ICL on the one hand, and human rights and humanitarian law on the other, they are by no means synonymous, as noted by Darryl Robinson, in 'The Identity Crisis of International Criminal Law', 21 *Leiden J. Int'l L.* (2008) 925, at 946:

... ICL practitioners often assume that the ICL norms are coextensive with their human rights or humanitarian law counterparts, and uncritically transplant

⁷¹² See generally R. Cryer, D. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn., 2019).

⁷¹³ See G. Schwarzenberger, 'The Problem of an International Criminal Law', 3 *Current Legal Problems* (1950) 263; and M. C. Bassiouni, *International Criminal Law* (3 vols., 3rd edn., 2008).

⁷¹⁴ *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report* (30 September 2020).

⁷¹⁵ P. Seils, *Handbook on Complementarity* (International Center for Transitional Justice, 2016).

concepts and jurisprudence from other domains to flesh out their content. Such assumptions overlook the fact that these bodies of law have different purposes and consequences and thus entail different philosophical commitments.

Human rights law and humanitarian law apply to collective entities – states or parties to conflict. They focus on systems, seeking to improve the practices of states (or parties to conflict) in order to advance protection of and respect for identified beneficiaries. The remedies in each area of law are roughly comparable to civil remedies, such as a cessation of the conduct, an apology, an undertaking of non-repetition, and possibly compensation or other efforts to restore the status quo ante.

The primary focus of ICL, on the other hand, is on the culpability of individuals. ... [T]he scope of ICL is much narrower: it addresses only the most serious crimes of concern to the international community as a whole. Moreover, ICL is enforced through a particularly robust method – the arrest, stigmatization, punishment, and imprisonment of individual human beings found responsible for crimes. ...

...

[Two kinds of] substantive and structural conflation [are common]. The crude form is the assumption that, because a prohibition is recognized in human rights or humanitarian law, it therefore must be (or ought to be) criminalized in ICL as well. Such arguments tend to overlook questions of legality and personal culpability and whether criminal law is the appropriate tool to deal with the problem.

The more subtle, and more interesting, variation occurs with respect to those norms that are indisputably recognized as criminalized in ICL, and which are drawn from human rights law or humanitarian law. Where an ICL prohibition is drawn from another area of law, it is understandable to assume that the norms have the same scope as they have in their original domain. Through the resulting unreflective transplantation or mimicry of human rights or humanitarian law norms, norms are absorbed into criminal law without awareness that they may be novel to criminal law and hence without scrutiny as to whether they comply with the fundamental principles peculiar to criminal law.

The existing regime of ICL accords priority to four ‘core’ crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. These are increasingly referred to as ‘atrocities crimes’, a label that, as we shall see below, is not without its critics. International law recognizes various other crimes, including piracy, slavery, torture, terrorism and drug trafficking, and new crimes have also been proposed such as ‘ecocide’⁷¹⁶ and ‘domicide’ (the systematic and deliberate mass destruction of homes during violent conflict (UN Doc. A/77/190 (2022))).

In the materials that follow, we first take note of the legacy of the ICTY and ICTR, the work of which significantly influenced today’s ICC. We then introduce the ICC and the scope of its jurisdiction, before considering definitions of the core crimes and examining a major recent case.

⁷¹⁶ Provisionally defined as ‘unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts’: Stop Ecocide Foundation, Independent Expert Panel for the Legal Definition of Ecocide (June 2021), Art. 8 *ter* (1); see also R. Mwanza, ‘The Right to a Healthy Environment as a Catalyst for the Codification of the Crime of Ecocide’, 117 *AJIL Unbound* (2023) 189; and C. G. Gonzalez, ‘Racial Capitalism, Climate Change, and Ecocide’, 41 *Wisconsin Int’l L. J.* (2024) 479 (‘the move to codify ecocide does not challenge the laws, institutions, or ideologies that reproduce racial capitalism’).

A. INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

The two ad hoc tribunals were the result of very specific historical circumstances, as Milena Sterio and Michael Scharf explain in their introduction to *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments* (2019) 1:

Prior to its dissolution in 1991–92, Yugoslavia was not so much an ethnic melting pot as a boiling cauldron of ethnic tension with deep historic roots. The ascent of a hardline Serbian nationalist government in Serbia headed by Slobodan Milosevic prompted Croatia and Slovenia to declare their independence on June 25, 1991, with Bosnia following suit on March 1, 1992. The Bosnian Serbs, under the leadership of their self-styled president, Radovan Karadzic, and military leader, Ratko Mladic, immediately launched attacks against the Croatian and Muslim populations in northeast and southern Bosnia, with the goal of connecting Serb-populated regions in north and west Bosnia to Serbia in the east. Within a few months, the Serbs had expelled, killed, or imprisoned 90 percent of the 1.7 million non-Serbs who once lived in Serbian-held areas of Bosnia.

With Russia's assumption of the permanent seat and veto of the Soviet Union in the Security Council in December 1991, the Security Council emerged from the Cold War paralysis of the previous forty years and was experiencing a rare (though short-lived) era of cooperation. The first test for the reinvigorated Council was the deepening crisis in the Balkans. The Security Council adopted a series of measures aimed at restoring peace and halting the bloodshed, including imposing economic sanctions on Serbia, establishing a no-fly zone, creating safe areas, authorizing force to ensure the delivery of humanitarian aid, and excluding Serbia from participating in the General Assembly. Finally, on May 25, 1993, the Security Council adopted Resolution 827, establishing "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991." Within two years, the Tribunal had been set up at The Hague, its eleven judges had been elected by the General Assembly, its Chief Prosecutor had been selected by the Security Council, and its first trial was ready to begin.

While the ICTY was preparing its first case, a genocidal conflagration was ignited in the small African nation of Rwanda by the death of its Hutu president when his plane was shot down by a surface-to-air missile on April 6, 1994. Nearly 800,000 people (mostly of the minority Tutsi tribe) were slaughtered during the next hundred days at a rate nearly three times greater than the rate of the loss of Jewish lives during the Holocaust. When the massacres began in Rwanda, the Security Council's first reaction was to withdraw nearly all the United Nations peacekeeping troops from the country for their safety. In July 1994, the Security Council established a Commission of Experts, which issued a report on October 2, 1994, confirming that genocide had been committed by the Hutus against the Tutsis and recommending the establishment of an International Criminal Tribunal to prosecute the perpetrators. A month later, on November 8, 1994, the Security Council adopted Resolution 955, providing for the establishment of a second ad hoc tribunal for Rwanda, which would have its own trial chambers to be headquartered in Arusha, Tanzania, but share the Prosecutor and the Appeals Chamber of the ICTY.

In 2010, the Security Council established the International Residual Mechanism for Criminal Tribunals (IRMCT) to carry out the remaining essential functions of the two ad hoc tribunals. Among its tasks

are to locate and arrest the four remaining persons indicted by the ICTR, and assist national jurisdictions in handling requests related to prosecuting international crimes committed in the former Yugoslavia and Rwanda. The Council's resolution (Res. 1966 of 2010) directed that the IRMCT 'should be a small, temporary and efficient structure, whose functions and size will diminish over time, but it is currently scheduled to operate until the end of 2024.

Legacies of the Ad Hoc Tribunals

By the time the ICTY closed in December 2017, it had indicted 161 individuals, resulting in 91 convictions, 18 acquittals, and 13 cases being referred to national courts. Thirty-seven of those indicted either died (including, most notably, Slobodan Milošević, the former Serbian President) or had their indictments withdrawn. Other prominent defendants included Ratko Mladic, head of the Bosnian Serb army which carried out the Srebrenica massacre, sentenced to life imprisonment, and Radovan Karadžić, president of the Republika Srpska (a Serbian enclave in Bosnia) who evaded capture until 2008 and in 2016 was sentenced to 40 years in prison.

On its own legacy website, the ICTY claims to have 'irreversibly changed the landscape of international humanitarian law, provided victims an opportunity to voice the horrors they witnessed and experienced, and proved that those suspected of bearing the greatest responsibility for atrocities committed during armed conflicts can be called to account' (<https://www.icty.org/>).

The ICTR closed down in December 2015, having indicted 93 individuals, of whom 62 were convicted, 14 were acquitted or released, and two died before judgment. Those convicted included a former Rwandan Prime Minister, former army chief of staff, the former Defence Ministry chief of staff, as well as corporate and media figures.

On its legacy website, the ICTR notes that it was 'at the forefront of the global fight against impunity, prosecuting those considered most responsible for the gravest crimes committed in 1994. ... [I]ts legacy lays the foundation for a new era in international criminal justice' (<https://unictr.irmct.org/>). Sara Kendall and Sarah Nouwen, in 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda', 110 *Am. J. Int'l L.* (2016) 212 note, however, that the website 'foregrounds ICTR trials without noting the thousands of domestic criminal trials that took place under Rwanda's 1996 law governing the prosecution of genocide-related crimes or the prosecution of around 400,000 individuals through community-based *gacaca* courts.' It 'also claims that the ICTR has also led to "healing" without mentioning the work of other actors, such as civil society organizations and the Rwandan state. Meanwhile, accounts of decreasing political freedom in Rwanda are conspicuously absent.'

The following readings provide insights into different aspects of the legacy of the two tribunals.

CARSTEN STAHN, THE ICTY IS DEAD! LONG LIVE THE ICTY! STAHN ET AL. (EDS.), LEGACIES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2020) 71

Historically, the Tribunal went through different phases. ... [It] was created in what we now view as the 'heroic' age of international justice. Like other criminal institutions, the ICTY had teething problems. Initially, there was a feeling that the Tribunal would not get off the ground. Some feared that a failure of the ICTY 'would also mark the end of any international criminal justice'. Relatively small cases broke the ice. The ICTY used a 'pyramid strategy', through which it sought to gradually build cases against senior leaders through investigation and prosecution of mid- or low-level perpetrators. The Tadić case⁷¹⁷ became the signature case ... although Duško Tadić was overall a relatively minor figure in the Yugoslav conflict. ...

⁷¹⁷ *Prosecutor v Duško Tadić* (Appeals Chamber Decision) IT- 94- 1- AR72 (2 October 1995).

... Tadić's story formed the backbone of some of the most important legal moments in the development of international criminal justice: the famous 1995 Interlocutory Appeal on Jurisdiction, which articulated the modern law on non-international armed conflict, or the legendary 1999 Appeals Judgment which reframed the test for the qualification of international armed conflicts ('overall control') and (re-) invented Joint Criminal Enterprise (JCE) beyond its post-Second World War context. Most importantly, Tadić illustrated like hardly any other case the emancipation of international criminal justice in the United Nations system after 1945. Both ad hoc tribunals asserted their independence from their creator. Criminal adjudication was formally separated from the executive authority.

Then, the Tribunal faced the 'big fish versus small fish' dilemma. It was questionable whether the ICTY had enough power to go after the most responsible leaders. With growing arrests through international forces and political pressure, the tribunal was expected to try high-level defendants. It ran mega trials, like the Slobodan Milošević trial. This practice showed the complexity of cases, but also the risks of extensive charging and the limits of self-representation. The ICTY became a laboratory for procedural adjustment and innovation. It sought to devise a system that is best suited to atrocity crimes. Initially, rules were largely drafted in analogy to domestic systems. But they had to adjust to the context of international criminal proceedings. One of the biggest successes of the procedural law is that it managed to identify certain weaknesses of a purely adversarial culture and to develop certain special rules for effective adjudication of international crimes. In some areas, such as sexual and gender-based violence, they are ahead of domestic systems.

Over time, the tribunal almost became a victim of its success. Its caseload grew. This led to heightened expectations by affected communities, including victim groups. But it also posed capacity constraints. States soon became interested in downsizing. The tribunal solved this partly through the Completion Strategy. It had some positive spin-offs. It led to a 'rediscovery of complementarity', which has become crucial for other international criminal courts and tribunals as well. ...

A ... major innovation of the ICTY is that it adjusted the law to changing patterns of violence, including the role of non-State actors in the commission of crimes. This is reflected, *inter alia*, in the wide definition of armed conflict, which includes conflicts between armed groups, the reading of the policy element of crimes against humanity, or the extension of torture or command responsibility to civilian structures. The ICTY also adapted to changing means of warfare. It established, *inter alia*, that rape was used as a weapon of war in the municipality of Foča, and that the shelling and sniping of Sarajevo constituted an act of terror against the civilian population.

Through its jurisprudence, the ICTY tried not only to establish individual criminal responsibility but to contribute to the coherence of the international legal order. The Tribunal partly constituted the law that it enacted. In particular, it has taken an active stance on the development of international customary law. It found that *opinio juris* may be more important than practice for the establishment of customary law in the humanitarian field and grounded crimes in custom. The reliance on customary law as a source was also a means to preserve its own legacy, namely to ensure that other courts follow its interpretations.

* * *

The ICTY also had a significant impact *within* Serbia, as documented by Diane Orentlicher in *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (2018) 424:

The ICTY helped catalyze a serious, if plainly incomplete, process of judicial reckoning in Serbia ... [T]he [Office of the Prosecutor] bolstered the professionalism and independence of its Serbian partner ... [and] Serbian lawyers' participation in the ICTY's Visiting Young Professionals and Liaison Prosecutors programs ... helped seed a new generation of professionals committed to principles of impartial justice. ...

The domestic institutions have always operated in a constrained environment, and have come under heightened pressure during the era of “reformed” nationalist leadership. Serbia’s government has ... “actively engaged in creating a social environment where the prosecution of those responsible for war crimes, especially those who held medium or high ranks, has become virtually impossible.’ To be sure, recent reversals are not unusual. Looking to experience in other post-conflict settings, transitional justice processes are anything but “neat and straightforward” but instead are “complex and messy.” Progress is often followed by setbacks, which, in turn, might be followed by further advances.

... In time, what began as a modest enterprise can take root, deepen into a habit of accountability, mold public expectations and deepen a society’s moral commitments.

An overview of the legacy of the ad hoc tribunals is provided by Michael Scharf and Milena Sterio, in ‘Conclusion’ in Sterio and Scharf, p. 000 above, at 357:

... The tribunals have successfully prosecuted several defendants of genocide and other genocidal offenses; they have prosecuted defendants and developed important case law regarding crimes of sexual violence; they have fine-tuned various modes of liability useful toward the prosecution of various defendants, such as superior responsibility and joint criminal enterprise liability; they have established a legacy of cooperation with national prosecutorial authorities and an operational legacy regarding complex case management; they have developed a procedural legacy regarding international criminal proceedings, through the elaboration of sophisticated rules of procedure and evidence; and they have established a legacy of defense rights, applicable to all defendants, including those accused of the most heinous violations of international criminal law. On the other hand, the ICTY and the ICTR have been far less successful in achieving national reconciliation and goals of societal transformation. This may be an important lesson for future tribunals: while it may be appropriate to ask such future international criminal courts to render justice and develop international criminal law, it may be futile to demand that such courts accomplish extrajudicial goals of societal change and reconciliation. ...

Second, ... the ICTY and the ICTR have contributed significantly to the development of international criminal law in both the normative as well as the operational sense. ... [They] have established that the same principles of individual liability apply to international as well as to internal armed conflict; in addition, they have successfully convicted defendants of genocidal offenses, and thereby confirmed the importance of imposing genocide liability on particular defendants within particular conflicts. Moreover, the ICTY and the ICTR have developed case law on the prosecution of speech crimes, by imposing additional liability on defendants for inciting the commission of serious crimes within international criminal law. The tribunals have elaborated on various modes of liability, including superior responsibility and advanced modes of joint criminal enterprise, which have enabled the prosecution of nondirect perpetrators of international crimes. The ICTY and the ICTR have also focused on defense rights, by establishing that duress can be a mitigating factor in the imposition of a criminal sentence, and both tribunals have contributed to a sentencing legacy, by establishing a uniform and coherent sentencing approach in the field of international criminal law. In addition, the tribunals have created an operational legacy, by creating specific case management procedures and courtroom management techniques which ensure that international criminal trials proceed in a fair and just manner. ...

While less has been written about the ICTR's legacy, it too is both impressive and less comprehensive than once hoped, as noted by Sara Kendall and Sarah Nouwen, at p. 000 above, 218:

Perhaps the least contested element of the ICTR's legacy is the fact that its case law has made significant contributions to doctrinal international criminal law and has demonstrated that individuals in certain positions can be held to account for grave crimes. The ICTR legacy website claims that the Tribunal is responsible for many inaugural moments in the field: it was "the first" international tribunal to enter a judgment for genocide; to interpret the definition of genocide set out in the 1948 Genocide Convention; to define rape in international criminal law and to recognize it as a means of perpetrating genocide; and, since Nuremberg, to issue a judgment against a former head of state, among other things. ...

The Tribunal has also promoted international criminal law as a professional field. As anthropologist Nigel Eltringham has argued, "there can be no doubt that a significant legacy of the ICTR is . . . the creation of a cadre of lawyers and judges who are equipped to populate international courtrooms in the future." ...

Finally, the ICTR, like the ICTY, has helped make individual criminal accountability a response to mass atrocity. ... The institutionalization of international criminal law has resulted in this particular conception of justice becoming more preeminent than alternative conceptions, such as restorative and distributive justice. The ICTR has thus contributed to the idea of international criminal law being the path towards "justice to all people, everywhere." According to some commentators, the development and preservation of that legacy requires that the application of international criminal law becomes a standard and universal response to mass atrocity.

...

By rendering judgment against seventy defendants, the ICTR has "done" a considerable amount of retributive justice. The Tribunal promoted individual criminal responsibility for genocide, crimes against humanity, and war crimes in Rwanda and beyond, by holding people to account who might have otherwise escaped accountability. From the perspective of promoting the rule of law, the fact that it has prosecuted senior members of the former government, including a prime minister, is particularly significant, as it demonstrates that even those once in the highest positions of power can be held legally accountable for their actions.

Nonetheless, the pro-accountability and anti-impunity message has been weakened by the fact that the ICTR has opened no cases against people with ties to the incumbent government for crimes allegedly committed by the RPF/Army during the 1994 conflict. According to ... Alison Des Forges, at least 25,000 to 30,000 people, including civilians, may have been killed by the RPF. Des Forges argued that these killings were widespread and systematic rather than "unconnected crimes" carried out by individual soldiers, and that RPF commanders must have known about and at least tolerated these abuses. ...

... Key among [the reasons why the ICTR did not move against the RPF] is the Tribunal's extensive dependence upon the Rwandan government for cooperation, ranging from granting permission for its investigators to enter Rwanda to not blocking Rwandans from testifying before the ICTR. Rather than fearing international condemnation or even sanctions for noncooperation, the Rwandan government has managed to maintain financial and political support by leveraging the West's guilt for its failures during the genocide.

While the achievements of the ad hoc tribunals are important, along with their jurisprudential legacy, their perceived excesses and shortcomings also shaped the debates around a future ICC, as traced by Stuart Ford, in ‘The Impact of the Ad Hoc Tribunals on the International Criminal Court’, in Sterio and Scharf, p. 000 above, at 307:

While states had expressed a belief at their creation that the ad hoc tribunals would not have the ability to create new international law, the reality was slightly different. The text of the ICTY Statute was, for political reasons, quite vague about the details of the crimes within the jurisdiction of the court. This gave the judges considerable latitude to interpret the text. And interpret it they did. For example, in one of its earliest decisions, the ICTY Appeals Chamber held that the court had jurisdiction over crimes committed in noninternational conflicts, and that there was individual criminal responsibility for violations committed during noninternational conflicts. This was arguably inconsistent with the most straightforward reading of the Statute and contrary to the position taken by many states when these issues were debated during the negotiation of Additional Protocol II to the Geneva Conventions. Moreover, the ICTY Appeals Chamber justified this decision, in part, on the grounds that international law had moved away from a “State-sovereignty-oriented approach,” and had moved toward a “human-being-oriented approach.” In the same decision, the court went on to adopt a definition of “armed conflict” that was broader than that which states had accepted in the Additional Protocols. The decision “stunned” international lawyers with its breadth. And states were probably not happy to hear judges at the ICTY declare that state sovereignty was no longer at the center of international law.

While the Rome Statute ended up incorporating most of the changes to the laws of war that were pioneered by the judges at the ICTR and ICTY, states were concerned that the judges had gone too far in expanding the scope of international law. This made states nervous, particularly as many of the accused at international criminal tribunals are agents of a state. Thus, the drafters of the Rome Statute did several things designed to limit the ability of the judges at the ICC to create new international law.

One thing the drafters did was to define the crimes within the jurisdiction of the ICC in great detail. While the crime of genocide is laid out quite briefly in the Rome Statute, the definition of crimes against humanity has more than twenty sub-parts, and that of war crimes has more than fifty sub-parts. These crimes are then further expanded upon in the Elements of Crimes. Contrast this with the Statute of the ICTY, which is far less detailed. For example, the ICTY Statute simply lists “persecutions on political, racial and religious grounds” as a crime against humanity. The Rome Statute has a much longer and more detailed definition of persecution. It is then further defined in a separate definitions section. The components of the crime are then also explained in the Elements of Crimes. The difference is even more striking for war crimes. The Statute of the ICTY granted the court jurisdiction over violations of “the laws and customs of war.” It then provided a nonexhaustive list of such violations. The Rome Statute takes a completely different approach. It grants the court jurisdiction over war crimes, but it provides the judges with an extremely detailed definition of war crimes. There is no provision in Article 8 of the Rome Statute like the open-ended “including but not limited to” language in Article 3 of the ICTY Statute. The effect is to constrain the ability of judges to expand the scope of international criminal law through their decisions.

Hybrid Courts

Before turning to the ICC, it should be noted that a range of hybrid or partly internationalized criminal courts have been set up. Laura Dickinson, in ‘The Promise of Hybrid Courts’, 97 *Am. J. Int’l L.* (2003) 295, at 310, argues that such bodies ‘may be more likely to be perceived as legitimate by local and international populations because both have representation on the court’. In addition, they increase the capacity of domestic legal institutions, and might facilitate broader adaptation and dissemination of the relevant norms and processes.

The most prominent examples include:

- (i) the Special Court for Sierra Leone,⁷¹⁸ set up following a civil war between 1991 and 2002. Sierra Leone appointed a minority of the judges, with the UN Secretary-General appointing the rest. Between 2002 and 2013, it convicted eight of thirteen persons indicted, including former President Charles Taylor, who was sentenced to 50 years’ imprisonment for war crimes and crimes against humanity.
- (ii) the Extraordinary Chambers in the Courts of Cambodia,⁷¹⁹ which conducted investigations and trials between 2006 and 2022. It will continue its operations until 2025, with a promotional mandate, and to consider reparations. The tribunal’s purpose was to try leaders of the Khmer Rouge regime, which governed from 1975 to 1979, during which 1.7 million people are estimated to have died by execution, forced labour, or starvation. It was a national court involving local and foreign judges. The former Head of State, Khieu Samphan, was convicted of genocide, crimes against humanity and war crimes,⁷²⁰ and he and two others (‘Duch’, the former head of a notorious interrogation centre, and Nuon Chea, former Deputy Secretary of the Communist Party) were sentenced to life imprisonment. The court had originally been expected to try as many as 30 defendants. One achievement was that 165,000 Cambodians attended the first two trials between 2009 and 2015.

A media report marking the closing of the tribunal summed up its challenges:

The tribunal’s awkward pairing of two judicial systems, and two often-conflicting views of its purpose, led to delays and sometimes-acrimonious disputes. Besides coming under criticism for its high cost and slow pace, the tribunal was marred by corruption and succumbed to pressure from Prime Minister Hun Sen, himself a former Khmer Rouge cadre, to limit the scope of the prosecutions.⁷²¹

- (iii) the Special Tribunal for Lebanon,⁷²² which was set up in 2009 to prosecute those responsible for the 2005 killing of Lebanese Prime Minister Rafik Hariri and 21 others. All the judges were appointed by the UN Secretary-General, but the Tribunal applied Lebanese law and criminal procedures. Three individuals were tried in absentia and ultimately convicted, after the Appeals Chamber reversed two earlier acquittals. The court held 499 hearings and gathered 174,000 pages of evidence before its mandate ended in December 2023. This assessment of the most significant conviction is instructive:

... [The Trial] Chamber must settle with a story and a finding that is incomplete and at least a little unconvincing. ... At best, the decision might serve as a resource to inform dialogue and discussion within Lebanon about how to apportion responsibility within its fragile political

⁷¹⁸ C. Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (2020).

⁷¹⁹ J. Bernath, *The Khmer Rouge Tribunal: Power, Politics, and Resistance in Transitional Justice* (2023); and S. Meisenberg and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (2016).

⁷²⁰ J. Ciorciari, ‘Case 002/02 Against Khieu Samphan’, 62 *Int’l Leg. Mat.* (2023) 937.

⁷²¹ S. Mydans, ‘6 Years, 3 Convictions: The Khmer Rouge Trials Come to an End’, *The New York Times* (22 September 2022).

⁷²² O. Kavan, ‘The Special Tribunal for Lebanon and its Outreach Programme’, 20 *J. Int’l Crim. Just.* (2022) 81.

system. At worst, it will further destabilize the Lebanese polity and render any positive reading of [international criminal justice] suspect and unconvincing. ...⁷²³

(iv) the Extraordinary African Chambers of the Courts of Senegal. For details see Ch. 12, above.⁷²⁴

(v) the Kosovo Specialist Chambers⁷²⁵ were set up in 2015 with jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law, committed in Kosovo between 1998 and 2000 by or against citizens of Kosovo or the Federal Republic of Yugoslavia. This followed a report by the Parliamentary Assembly of the Council of Europe (Doc. 12462 of 7 January 2011) alleging that Serbians and Albanian Kosovars had been imprisoned ‘in secret places of detention under [Kosovo Liberation Army] control in northern Albania and were subjected to inhuman and degrading treatment, before ultimately disappearing.’ Trafficking in human organs was also alleged. The Chambers were set up under an international agreement with the European Union, ratified by the Kosovo Assembly. They are based in The Hague, composed of international judges and other personnel, and funded by the EU, Canada, Norway, Switzerland, Turkey, and the United States. In April 2023, an especially important case began against the former KLA leader and President of Kosovo, Hashim Thaçi, and three other former senior officials for war crimes and crimes against humanity.

(vi) the Special Criminal Court for the Central African Republic (CAR) was established by Organic Law No. 15-003 of 22 April 2015 adopted by the CAR National Assembly to prosecute the most serious crimes committed in CAR since 2003. It is composed of Central African and non-Central African judges and personnel, and financed mainly by the UN and international donors. In its third major case, the Ndélé 2 case, six defendants were found guilty in 2025 of crimes against humanity and sentenced to between 18 and 25 years’ imprisonment. Four of those were, however, tried in absentia.⁷²⁶

The tribunals in Sierra Leone, Cambodia, and Lebanon were all set up following negotiated agreements with the UN. In the latter case, the Security Council had to pass a resolution to bring the provisions of the agreement into force. The Kosovo tribunal resulted from negotiations with the European Union. A major looming problem for some, however, is the immediate and almost total withdrawal in early 2025 of funding previously provided by the United States.

B. THE INTERNATIONAL CRIMINAL COURT⁷²⁷

The General Assembly first instructed the International Law Commission to study the possibility of establishing a permanent criminal court in 1948. While extensive work was undertaken, it was not until 1992 that the Assembly requested the Commission to draft a statute, which then became the basis for intensive negotiations at the Rome Conference in 1998. The ICC treaty came into force in 2002 and, as of 2025, 125 countries are states parties to it (33 from Africa, 19 from Asia-Pacific, 20 from Eastern

⁷²³ M. Burgis-Kasthala, ‘Time for Justice? Reflections on Narrative Absences and Presences in the Special Tribunal for Lebanon’s *Ayyash* Decision’, 33 *Eur. J. Int’l L.* (2022) 1213, at 1241.

⁷²⁴ J. P. Perez-Leon-Acevedo, ‘The Extraordinary African Chambers in the Senegalese Courts and the Development of International Criminal Law in Africa’, in J. Sarkin and E. Siang’andu (eds.), *Africa’s Role and Contribution to International Criminal Justice* (2021) 53.

⁷²⁵ <https://www.scp-ks.org/en>.

⁷²⁶ M. Swart, ‘Earning its Keep: Assessing the Legitimacy of the Special Criminal Court for the Central African Republic’, 23 *J. Int’l Crim. Justice* (2025) 000; and J. Soufi, ‘The Challenge to the Special Criminal Court in the Central African Republic Delivering on its ‘Defence’ Promise’, 23 *J. Int’l Crim. Justice* (2025) 000.

⁷²⁷ See C. Stahn (ed.), *The International Criminal Court in Its Third Decade: Reflecting on Law and Practices* (2024).

Europe, 28 from Latin America and the Caribbean, and 25 from the group of ‘Western European and other’ States). Burundi withdrew from the Statute in 2017 and the Philippines in 2019, each after preliminary investigations had been opened in relation to situations in those countries, and Hungary announced its intended withdrawal in May 2025. Non-parties include China, Egypt, India, Indonesia, Iran, Israel, Libya, Pakistan, Russia, Rwanda, Sudan, Syria, the United States and Zimbabwe.

In addition to the Court, the Rome Statute established the Assembly of States Parties, which oversees the management of the Court, elects the judges and the Prosecutor, and approves the budget. There is also a Trust Fund for Victims, which implements reparations ordered by the court and provides physical, psychological, and material support to victims and their families. The court itself consists of four principal organs: the Presidency; the Judicial Divisions (18 judges are allocated among the Pre-Trial, Trial and Appeals divisions); the Office of the Prosecutor (OTP), which investigates crimes and initiates criminal proceedings; and the Registry, which manages the court’s administration, including its headquarters, detention unit, and public defense office. For 2025, the ICC had a budget of €195 million, and employed over 900 personnel from some 100 countries.

By 2025, 33 cases had been brought before the court and 12 investigations were ongoing by the OTP into the following situations: the DRC, Darfur (Sudan), Libya, Côte d’Ivoire, Mali, Burundi, Bangladesh/Myanmar, Afghanistan, Palestine, the Philippines, Venezuela I and Ukraine.

The ICC held its first hearing in 2006, concerning war crimes charges against Thomas Lubanga Dyilo, a Congolese warlord accused of recruiting child soldiers; his subsequent conviction in 2012 was the first in the court’s history. The OTP has opened twelve official investigations and is conducting an additional nine preliminary examinations. A total of 46 individuals have been indicted. High-ranking individuals have included Ugandan rebel leader Joseph Kony, former President Omar al-Bashir of Sudan, President Uhuru Kenyatta of Kenya, Libyan head of state Muammar Gaddafi, President Laurent Gbagbo of Ivory Coast and former Vice President Jean-Pierre Bemba of the Democratic Republic of the Congo, although of these only the last was so far convicted. On 7 March 2025, Pre-Trial Chamber I issued a warrant of arrest for Rodrigo Roa Duterte, former President of the Philippines for the crime against humanity of murder, allegedly committed between 1 November 2011 and 16 March 2019 in connection with his war on drugs. He was taken into ICC custody five days later.

1. The ICC Statute: Jurisdiction

The extent of the court’s jurisdiction was at the core of debates at the Rome Conference. Issues included the respective roles to be played by the Prosecutor, states parties and the Security Council in relation to investigations and prosecutions, the circumstances under which non-parties could consent to jurisdiction, the powers of the Security Council to make referrals and to pause cases, and the limits to be placed upon the independence of the Prosecutor.

The agreed starting points were that the court’s jurisdiction was ‘limited to the most serious crimes of concern to the international community as a whole’ (Article 5), namely the four core crimes, and that the complementarity principle would prioritize effective action at the national level over international involvement.⁷²⁸ In temporal terms, the ICC has jurisdiction only over crimes committed after 1 July 2002 and, in relation to a given state, only after the Statute enters into force for it.

The jurisdictional arrangements are of critical importance because of the legal and political compromises struck, and of how carefully they were negotiated. There is no substitute for studying the key provisions, and they are reproduced below. As reflected in Articles 12-14, the court has jurisdiction in situations where the accused is the national of a state party, or of a state that consents to the court’s jurisdiction, or where the conduct occurred on a state party’s territory, or that of a consenting state. In situations in which neither the state where the crime occurred nor the accused’s

⁷²⁸ P. Labuda, *International Criminal Tribunals and Domestic Accountability* (2023).

state of nationality is a party to the Statute, the only option is for the Security Council to refer the case under Chapter VII of the UN Charter.

Among the most contentious issues at the Rome Conference were those relating to the jurisdiction of the court:

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to [genocide, crimes against humanity, and war crimes].
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. ...

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

...

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

...

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber

4. If the Pre-Trial Chamber ... considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation

Article 16 Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17 Issues of admissibility

1. ... [T]he Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, ...;

(d) The case is not of sufficient gravity to justify further action by the Court.

Article 53 Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Security Council Referral

As of 2025, the Security Council had used its authority under Article 13(b) to refer a situation to the ICC only in relation to Sudan in 2005 and Libya in 2011. But various other such cases have been mooted and the role of the Council has generated considerable controversy. Three of the Council's permanent five members are not parties to the Rome Statute (China, Russia and the United States), and both referrals have related to African states, while atrocity situations elsewhere have not obtained the necessary consensus. The referrals have also been problematic because they impose an additional financial burden on the Court which must be borne only by states parties, and because nationals of Security Council members who are not state parties have been exempted from the ICC's jurisdiction.

In the view of Tom Dannenbaum, in 'Legitimacy in War and Punishment: The Security Council and the ICC', in Kevin Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020) 129, at 151, such referrals present a major legitimacy challenge to the Court:

... Unless permanent members discard the veto altogether in this context, an uptick in Security Council referrals to the ICC would likely exacerbate, rather than remedy the divide between legality and legitimacy. Short of Rome Statute ratification by the current non-party permanent members, two options for strengthening the Court's legitimacy in this respect stand out. First, the Court could move to a universal jurisdiction model, as proposed during Rome Statute drafting. ... Realistically, however, such a reform is unlikely to gain political traction. ...

The alternative route to a more legitimate ICC would be for the Court to revert to a nationality and territorial jurisdiction model. Short of an unlikely statutory amendment eliminating the Security Council referral trigger, this could be achieved in two ways. First, in direct contrast to the path to legitimacy in responding to atrocity with appropriate force, the Council could step back from referring atrocity situations to the Court. Second, and more radically, the prosecutor could use her discretion to refrain from opening investigations or pursuing charges in Council-referred situations on the grounds that pursuing those avenues would not be in the 'interests of justice'. ...

2. The Definition of Crimes

While the definition of genocide is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the definitions of crimes against humanity and war crimes were, as Stuart Ford noted at p. 000 above, intensively debated at the Rome Conference. One proposal pushed from the outset by the United States was for the Conference to adopt a statement of the 'elements of the crime', which would clarify and elaborate upon the elements that would need to be proven in relation to each of the offences specified in Articles 6-8. Most delegations were reluctant to impose a checklist on the court but, in order to obtain a consensus, agreed that such a document could be adopted if it were non-binding. The elements were developed after the conference by the Preparatory Commission and adopted by the Assembly of States Parties by a two-thirds majority. Article 9 indicates that their role is to 'assist' the court in interpreting the relevant crimes. They are thus a primary source of law for the Court, but subject to its interpretation of the specific provisions of the Statute itself.⁷²⁹

The ICTY had a major impact on the understanding of the term genocide. Carsten Stahn, 'ICTY and the New Law on Genocide', in Steven van Hoogstraten (ed.) *New Challenges to International Law: A View from The Hague* (2018) 126, at 130, notes that:

⁷²⁹ See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., 2016) 322; and K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003).

... [Its] main innovation lies in the fact that it adjusted the interpretation of genocide to different contexts, in particular killings and destruction carried out against parts of groups in limited geographic areas, such as enclaves and towns. It accepted that genocide is not a game of numbers. It ruled that destruction of a part of a group is sufficient if that part is 'emblematic' of the overall group. ...

In its first genocide conviction in relating to events in Srebrenica, namely the Krstić case, the ICTY accepted the argument that genocide may occur even when the exterminatory intent extends only to a limited geographic zone—something that has been called 'localized genocide'. The ICJ has shown a rather wide degree of deference to ICTY case law in its genocide cases. ...

The message in relation to genocidal intent in relation to attacks in other municipalities has remained more ambiguous. The Prosecution sought to establish that genocide took place in all of Bosnia and Herzegovina. However, Karadžić and Mladić were acquitted for counts of genocide relating to other Bosnian municipalities, based on different reasons, such as the failure to establish specific genocidal intent or to destroy a substantial part of the group. This may fuel a perception that genocide only occurred in Srebrenica. The overall record contains certain gaps and loopholes. ...

While treaties exist defining genocide and war crimes, there is no equivalent for crimes against humanity. In 2019, after five years of work by Sean Murphy, its Rapporteur on the subject, the International Law Commission sent a set of draft articles on prevention and punishment of crimes against humanity to the UN General Assembly for its consideration (UN Doc. A/74/10 (2019), 11). Russia's invasion of Ukraine in 2022 led to the breaking of a deadlock in the Assembly's Sixth Committee, and a resolution seeking to consider a final draft in 2024 (Res. 77/249 (2022)). Successful adoption of a treaty would provide greater clarity on the relevant crimes, oblige states parties to incorporate the definition and prohibition of the relevant offences into their national law, and provide additional protections for civilian populations.

Articles 6-8 of the Rome Statute, spelling out the definitions of genocide, crimes against humanity, and war crimes, follow.

Article 6 Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

...

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

...

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

...

3. The *Ongwen* Case

In order to bring these provisions alive, the following materials focus on the ICC case of Dominic Ongwen, which began with a warrant issued in 2005 and ended with the completion of the appeals phase in December 2022. The case is significant for many reasons. It was the first case to be self-referred to the court by a state party, it involved the largest number of charges brought and the most modes of liability invoked against a single defendant, it was the first time a defendant pleaded defenses such as mental disease and duress, and it led to convictions for previously untried crimes.

Ongwen was a high-level member of the Lord's Resistance Army (LRA), established by Joseph Kony in the 1980s to further an armed rebellion against the Ugandan government. The LRA also targeted civilians in Northern Uganda whom they considered to be pro-government, especially those living in government-established camps for Internally Displaced Persons (IDP camps). The camps were part of an anti-insurgency strategy to remove people from rural areas where they might assist the rebels. Ongwen himself was abducted by the LRA in 1987 at around nine years of age and experienced brutality and suffering. He eventually rose to become a battalion commander of the LRA's Sinia Brigade.

Uganda became a party to the Rome Statute on 14 June 2002, and referred the situation in northern Uganda to the Court on 16 December 2003. On 29 July 2004, the Prosecutor launched an investigation and, on 8 July 2005, the Trial Chamber issued sealed warrants for five LRA leaders, including Joseph Kony and Dominic Ongwen. Starting in 2010, United States Special Forces and others made extensive but unsuccessful efforts to capture them. Ongwen voluntarily surrendered to forces in the Central African Republic, and was transferred to ICC custody on 20 January 2015. His case was separated from that of the other leaders, and the trial ran from December 2016 to November 2019. A total of 116 witnesses testified for the prosecution and 63 for the defence. Over 4,000 victims were represented by two separate legal teams, which made submissions, presented evidence, and called seven witnesses.⁷³⁰

Ongwen was charged with 70 counts of war crimes and crimes against humanity that took place between 1 July 2002 and 31 December 2005. On 4 February 2021, the Trial Chamber convicted him of 61 crimes. He was found responsible as: (i) an indirect perpetrator of crimes including attacks against the civilian population, murder, torture, enslavement, pillaging, destruction of property and persecution, committed in the context of attacks against two IDP camps (in Lukodi and Abok) in May-June 2004; (ii) an indirect co-perpetrator of similar crimes committed in attacks on two other IDP camps (Pajule and Odek) in 2003-2004; (iii) an indirect co-perpetrator of sexual and gender-based crimes (SGBC), including forced marriage as a form of other inhumane acts, torture, rape, sexual slavery, and enslavement, and the crime of conscription of children under the age of 15 years and their use in armed hostilities; and (iv) as a direct perpetrator of a number of other SGBC, including forced marriage as a form of other inhumane acts, torture, rape, sexual slavery, enslavement, forced pregnancy, and outrages upon personal dignity.

In appealing the convictions, the defence raised 90 separate grounds, alleging legal, factual and procedural errors. In particular, the defence alleged that Ongwen's fair trial rights had been violated, including in relation to the notice and scope of the charges brought against him. It challenged the

⁷³⁰ See generally: Special issue on the *Ongwen* Case, 23 *Int'l Crim. L. Rev.* 667 (2023); and T. Kirabira, 'Looking Beyond Ongwen: What Next for Transitional Justice in Northern Uganda?', 23 *J. Int'l Crim. Justice* (2025) 000.

modes of liability and criminal responsibility under which he was convicted as an indirect perpetrator and co-perpetrator, the Trial Chamber's failure to have adequate regard to his defences of mental disease and duress, the Chamber's interpretation and factual findings concerning SGBC, and the appropriateness of imposing cumulative convictions. All the convictions were upheld in the judgment of the Appeals Chamber on 15 December 2022. The sentence of 25 years' imprisonment was also upheld. The Trial Chamber's judgment was 1,077 pages long, and the judgment of the Appeals Chamber totalled 811 pages, giving some sense of the magnitude and complexity of the case.

The following materials explore selected aspects of the case, starting with the Court's overview of the charges relating to crimes against humanity, and in particular SGBC. These materials should be read against the background of significant criticism of the ways in which the ad hoc tribunals had dealt with such issues. This includes, in particular, their approach to gender-related crimes. Indira Rosenthal, Valerie Oosterveld, and Susana SáCouto, in 'Introduction', in *ibid.* (eds.), *Gender and International Criminal Law* (2022) 1, note that:

Despite nearly thirty years of unprecedented attention on the commission of sexual violence and other gender-based crimes under international law, these crimes, their causes, and their consequences remain poorly understood. The result has been a series of investigative, prosecutorial, and judicial decisions in international criminal courts and tribunals that reveal deeply held misconceptions about the role of gender in the commission, experience, investigation, prosecution, and punishment of crimes under international law. ... [T]hese mistaken beliefs ... remain pervasive among ICL practitioners—investigators, prosecutors, defence counsel, and judges—as well as in the media.

In a subsequent chapter in the same book, Kirsten Campbell and Gorana Mlinarević, in 'A Feminist Critique of Approaches to International Criminal Justice in the Age of Identity Politics', at 75, observe that the ICTY charged 78 persons with sexual violence, of whom 32 were convicted. They acknowledge that the ICTY and the ICTR 'shifted conflict-related sexual violence from being an "invisible crime" to being seen as prosecutable as an international crime as such.' However, they also criticize its approach:

The ICTY Statute only provided for individual criminal responsibility ... in contrast to the approach taken at ... Nuremberg ... which treated the SS, Gestapo, and other groups as criminal organizations, as well as providing for individual criminal responsibility. ...

Because of this ... the ICTY confronted a crucial problem concerning its prosecutions of mass atrocities. On the one hand, it focused on the individual, to the exclusion of the systems, structures, and collectivities that enabled mass atrocities to occur. On the other hand, it needed to account for the collective nature of these crimes.

... [T]he ICTY addressed what it called 'collective criminality' through the doctrine of joint criminal enterprise (JCE) ... [requiring]: (1) a plurality of persons; (2) the existence of common plan, design, or purpose; and (3) participation of the accused in the common design of the crimes under the Statute. ... JCE is conceptualized as a form of individual liability for participation in group criminality.

...

Without addressing system criminality, it was neither possible to adequately address the patriarchal nature of the conflict, criminality, and victimization, nor to properly prosecute gender-based crimes. ... [T]he individualized conceptualization of criminal responsibility hides the gender 'dimension' of crimes by obscuring (1) the gendered patterns and effects of CRSV [conflict-

related sexual violence] and (2) the gendered structures that create these crimes.

...

...

Taking a broader perspective ... shows how gender shapes patterns of victimization and perpetration, both in terms of who become victims and perpetrators and what crimes are committed. It also shows that these patterns of victimization and perpetration are connected to the wider gendered power relations of war, in that it reveals that the majority of perpetrators of CRSV were men participating in patriarchal masculinized (valued) military, police, and political groups, and the majority of the victims were women who were unarmed, feminized (devalued) civilians. Understood as such, patterns of sexual violence are an important aspect of understanding how CRSV is a gender-based crime, and how those crimes are connected to gender power relations.

An important recent development in this regard was the issuance of arrest warrants on 8 July 2025 for the Supreme Leader of the Taliban, in Afghanistan, Haibatullah Akhundzada, and the Chief Justice of the Taliban, Abdul Hakim Haqqani.⁷³¹ Both are said to have exercised de facto authority in Afghanistan at least from 15 August 2021. They are charged with persecution (on gender grounds) as a crime against humanity under Article 7(1)(h) of the Statute. While the warrants remain under seal, the Court's public statement refers to crimes against girls, women and other persons non-conforming with the Taliban's policy on gender, gender identity or expression; and on political grounds against persons perceived as 'allies of girls and women'. The 'Taliban severely deprived, through decrees and edicts, girls and women of the rights to education, privacy and family life and the freedoms of movement, expression, thought, conscience and religion'.

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...

IV. ASSESSMENT OF EVIDENCE

...

D. Grounds excluding criminal responsibility

...

2. Duress

i. Introduction

2581. Duress in Article 31(1)(d) of the Statute has three elements. The first element is that the conduct alleged to constitute the crime has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person. The threat in question may either be: (i) made by other persons or (ii) constituted by other circumstances beyond that person's control. The threat is to be assessed at the time of that person's conduct.

2582. From the plain language of the provision, the words 'imminent' and 'continuing' refer to the nature of the threatened harm, and not the threat itself. It is not an 'imminent threat' of death or a 'continuing or imminent threat' of serious bodily harm – the Statute does not contain such terms. Rather, the threatened harm in question must be either to be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm'). On this understanding, duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon. A merely abstract danger or simply an

⁷³¹ For an overview of the convoluted background to the charges, see M. Jackson, 'Gender Persecution at the International Criminal Court: The ICC Issues Arrest Warrants against Taliban Leaders for Crimes against Humanity', *EJIL: Talk!*, 11 July 2025.

elevated probability that a dangerous situation might occur – even if continuously present – does not suffice.

2583. The second element ... is that the person acts necessarily and reasonably to avoid the threat. The person is not required to take all conceivable action to avoid the threat, irrespective of considerations of proportionality or feasibility. The Chamber must specifically consider what, if any, acts could ‘necessarily and reasonably’ avoid the threat, and what the person should have done must be assessed under the totality of the circumstances in which the person found themselves. Whether others in comparable circumstances were able to necessarily and reasonably avoid the same threat is relevant in assessing what acts were necessarily and reasonably available.

2584. Finally, the third element ... is that the person does not intend to cause a greater harm than the one sought to be avoided. This is a subjective element – it is not required that the person actually avoided the greater harm, only that he/she intended to do so. The Chamber considers that assessment of whether one intended harm is ‘greater’ than another depends on the character of the harms under comparison.

...

viii. Conclusion

2668. ... [T]here is no basis in the evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes. ... [H]e was not in a situation of complete subordination vis-à-vis Joseph Kony, but frequently acted independently and even contested orders received from Joseph Kony. ... [I]n the period of the charges [he] did not face any prospective punishment by death or serious bodily harm when he disobeyed Joseph Kony. Dominic Ongwen also had a realistic possibility of leaving the LRA, which he did not pursue. Rather, he rose in rank and position, including during the period of the charges. Finally, he committed some of the charged crimes in private, in circumstances where any threats otherwise made to him could have no effect.

...

2672. ... [T]he Defence also made some legally unspecified submissions emphasising that Dominic Ongwen was himself a victim of crimes, on account of his abduction at a young age by the LRA. The Chamber ... notes that [he] committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes – beyond the potential relevance of the underlying facts to the grounds excluding criminal responsibility expressly regulated under the Statute. The separate and more specific Defence assertion that ‘Article 21(3)⁷³² prohibits charging a victim of a crime with the same crime’ is equally without merit: a rule that would immunize persons who suffer human rights violations from responsibility for all similar human rights violations that they may themselves commit thereafter manifestly does not exist in international human rights law.

...

V. LEGAL FINDINGS

A. Applicable law

...

i. Contextual elements

a. Crimes against humanity

[The Chamber recalls the provisions of Article 7(1) of the Statute.]

i Attack against any civilian population

⁷³² Article 21(3): ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender ... age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’

2674. An ‘attack’ in this context means a ‘course of conduct involving the multiple commission of acts referred to in [Article 7(1)]’. The requirement that the acts form part of a ‘course of conduct’ indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts. The ‘multiple commission of acts’ sets a quantitative threshold involving a certain number of acts falling within the course of conduct.

2675. The course of conduct must be ‘directed against any civilian population’, namely a collective, as opposed to individual civilians. The civilian population must be the primary target of the attack and not an incidental victim of it. The presence within a civilian population of individuals who do not fall under the definition of ‘civilians’ does not deprive the population of its civilian character. ...

ii Organisational policy

2676. The ‘course of conduct involving the multiple commission of acts’ must take place ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’ The Elements of Crimes specify that the “‘policy to commit such attack” requires that the [...] organization actively promote[s] or encourage[s] such an attack against a civilian population’. For the purposes of this judgment, only the ‘organisational policy’ prong is relevant.

2677. As regards the ‘organisation’ pursuing the policy, the Chamber adheres to the definition established by Trial Chamber II:

In the Chamber’s view, the connection of the term “organisation” to the very existence of the attack and not to its systematic or widespread nature presupposes that the organisation has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7(2)(a) of the Statute. It therefore suffices that the organisation [has] a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population.

2678. As the terms ‘pursuant to or in furtherance of’ imply, the policy requirement ensures that the multiple acts forming the course of conduct are linked. It ensures that acts which are unrelated or perpetrated by individuals acting randomly on their own are excluded.

2679. A policy may consist of a pre-established design or plan, but it may also crystallise and develop only as actions are undertaken by the perpetrators. The ‘policy’ may be inferred from a variety of factors, such as: (i) a recurrent pattern of violence; (ii) the existence of preparations or collective mobilisation orchestrated and coordinated by the organisation; (iii) the use of public or private resources to further the policy; (iv) the involvement of organisational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the organisation condoning or encouraging the commission of crimes; and (vi) an underlying motivation. In principle, a state or organisation committing a systematic attack against a civilian population will satisfy the policy requirement.

iii Widespread or systematic attack

2680. The alternative qualifiers of ‘widespread’ or ‘systematic’ serve to characterise the ‘attack’ itself.

2681. The term ‘widespread’ connotes the large-scale nature of the attack and the number of targeted persons. The assessment of whether the attack is widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case.

2682. The term ‘systematic’ reflects the organised nature of the violent acts, referring often to the existence of ‘patterns of crimes’ and the improbability of their random or accidental occurrence.

b. War crimes – armed conflict not of an international character

2683. The war crimes charged in this case exclusively concern a non-international armed conflict. An armed conflict not of an international character exists when there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. Such a conflict exceeds situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature.

2684. When evaluating the intensity of the conflict to determine its ‘protracted’ character, chambers consider factors such as: (i) the seriousness and frequency of attacks and armed clashes; (ii) the spread of clashes over territory and the group’s ability to control territory over a period of time; (iii) whether any ceasefire orders had been issued or agreed to; (iv) the type and number of armed forces deployed, including any involvement of the government; (v) the type of weapons used; (vi) whether the situation had attracted the attention of the UN Security Council, or involvement of other international organisations; (vii) whether those fighting considered themselves bound by international humanitarian law and (viii) the effects of the violence on the civilian population, including the extent to which civilians left the relevant area, the extent of destruction, and the number of persons killed. Exercise of control over a part of the territory is not required, though the importance of this factor increases in the absence of active hostilities. It is also not required that the violence be continuous and uninterrupted – the Chamber need only find that the violence goes beyond isolated or sporadic acts.

2685. When evaluating whether an entity qualifies as an ‘organised armed group’, chambers consider factors such as: (i) the existence of a command structure, the existence of headquarters, the issuing of political statements, and the use of official spokespersons; (ii) the military (operational) capacity of the armed group, which may be shown by, for example, the ability to define a unified military strategy, the use of military tactics, the ability to carry out (large scale or coordinated) operations, the control of territory, and having a territorial division into zones of responsibility; (iii) the logistical capacity of the armed group, indicated, among others, by the existence of a supply chain for military equipment, as well as by the group’s ability to move troops around and to recruit and train personnel; (iv) the existence of an internal disciplinary system and the ability to implement international humanitarian law; and (v) the group’s ability to speak with one voice, indicated, for example, by the capacity of the leadership to act on behalf of its members in political negotiations and to conclude agreements, such as cease-fire or peace agreements.

2686. A situation that starts out as a non-international armed conflict may become international, if another State intervenes in the conflict directly (through its troops) or indirectly (when some of the groups involved act on behalf of that other State). ...

2687. To assess whether an international armed conflict exists as a result of such indirect participation of a State, the Chamber must appraise the degree of control exerted by that State over the armed group in question. In doing so, the Chamber will rely on the ‘overall control’ test, whereby it must be established that the State had ‘a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’. An international armed conflict therefore exists if a degree of control is exercised by the intervening third State over a non-State actor fighting in opposition to, or without the consent of, the government, that goes beyond the mere financing and equipping of the armed group. It does not require, however, that such control extends to the issuance of specific orders or instructions relating to single military actions.

c. Nexus requirement and perpetrators’ awareness

...

2689. The war crimes charged in the present case require, as their contextual elements, that the relevant took [sic] place in the context of and was associated with an armed conflict not of an international character. The perpetrator’s conduct need not take place as part of hostilities, meaning that the nexus

requirement could still be satisfied for crimes temporally or geographically remote from the actual fighting. ...

...

ii. The crimes

2694. In the following, the Chamber will set forth the relevant applicable law of the individual crimes with which Dominic Ongwen is charged. The crimes are embedded in the context that gives them their international character and differentiates them from ordinary crimes.

2695. Unless otherwise provided in the Statute, the material elements of the crimes must have been committed with ‘intent’ and ‘knowledge’ within the meaning of Article 30 of the Statute. ...

a. Murder and attempted murder (Article 7(1)(a) and Article 8(2)(c)(i))

2696. The crime of murder is committed in case a person is killed as a result of the perpetrator’s act or omission. In the case of attempted murder, substantial steps have been taken to execute the crime but it does not occur because of circumstances independent of the perpetrator’s intentions.

2697. For the purpose of murder as a war crime, Article 8(2)(c) of the Statute prescribes that the crime must be committed ‘against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause’. Taking an active part in the hostilities is understood as acts of war that by their nature or purpose strike at the personnel and matériel of enemy armed forces. It is not considered taking an active part in the hostilities when persons otherwise protected under international humanitarian law exercise their right to individual self-defence.

2698. Lastly, while the Prosecutor must demonstrate, to the extent possible, the location, date and means of killing, she is not required to demonstrate for each killing the identity of the victim or that the corpse of the deceased has been found.

...

b. Torture (Article 7(1)(f) and Article 8(2)(c)(i))

2700. The crime of torture, whether as a crime against humanity or war crime, is committed either by act or omission and has a common material element that ‘[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons’.

2701. The severity implies an important degree of pain and suffering and may be met by a single act or by a combination of acts when viewed as a whole. This can be assessed only on a case-by-case basis in the light of all the circumstances of the case. It is not necessary to prove that the pain or suffering involved specific physical injury (such as organ failure), impairment of a bodily function or death. The pain and suffering may be either physical or mental. The consequences of torture do not have to be visible, nor must the injury be permanent.

2702. There are some notable differences between the elements of torture as a crime against humanity versus a war crime.

2703. For torture as a crime against humanity, Article 7(2)(e) of the Statute further requires that ‘[s]uch person or persons were in the custody or under the control of the perpetrator’. Torture as a crime against humanity also requires that the pain or suffering did not arise only from, and was not inherent or incidental to, lawful sanctions.

2704. In contrast, for torture as a war crime, the custody/control element is not required. Instead, for the war crime of torture there is an additional mental element specified below. The war crime must

also be committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*.

2705. In addition to the mental elements specified in Article 30, the war crime of torture further requires that:

The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

...

c. Rape (Article 7(1)(g) and Article 8(2)(e)(vi))

2708. The crime of rape, whether as a crime against humanity or war crime, is committed when the following two material elements are fulfilled:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

2709. The establishment of one of the coercive circumstances or conditions set out in the second element is sufficient for penetration to amount to rape. It is not necessary to prove the victim's lack of consent and there is no requirement of resistance on the part of the victim.

2710. Coercive circumstances need not be evidenced by a show of physical force – threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion. Coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population. Several factors may contribute to creating a coercive environment, such as the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes.

d. Enslavement (Article 7(1)(c))

2711. Article 7(2)(c) of the Statute defines 'enslavement' as the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children. The Elements of Crimes include a non-exhaustive list of the various forms in which ownership over a person may be exercised, namely 'by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'.

2712. Indicia for the exercise of the powers attaching to the right of ownership include: (i) control or restrictions of someone's movement and, more generally, measures taken to prevent or deter escape; (ii) control of physical environment; (iii) psychological control or pressure; (iv) force, threat of force or coercion; (v) duration of the exercise of powers attaching to the right of ownership; (vi) assertion of exclusivity; (vii) subjection to cruel treatment and abuse; (viii) control of sexuality; (ix) forced labour or subjecting the person to servile status; and (x) the person's vulnerability and the socio-economic conditions in which the power is exerted.

...

e. Sexual Slavery (Article 7(1)(g) and Article 8(2)(e)(vi))

2715. The crime of sexual slavery is a specific form of the crime of ‘enslavement’, penalising the perpetrator’s restriction or control of the victim’s sexual autonomy while held in the state of enslavement. The crime of sexual slavery, whether as a crime against humanity or war crime, is committed when the material element of enslavement is fulfilled and the perpetrator also caused such person or persons to engage in one or more acts of a sexual nature.

...

f. Forced pregnancy (Article 7(1)(g) and Article 8(2)(e)(vi))

2717. This is the first time forced pregnancy is to be considered by a trial chamber of this Court. The crime of forced pregnancy is grounded in the woman’s right to personal and reproductive autonomy and the right to family.

2718. The Statute adopted a ‘narrow’ definition of forced pregnancy, largely because the provision was ‘one of the most difficult and controversial to draft’. Negotiations for the crime of forced pregnancy were largely driven with atrocities of the Bosnian conflict in mind, where Bosnian women were raped and then unlawfully detained with the intent to change the ethnic composition of their group by giving birth to half-Serb children.

...

2721. The resulting definition of forced pregnancy in the Statute is a delicate compromise that specified the *mens rea* requirement as ‘affecting the ethnic composition of any population or carrying out other grave violations of international law’. A final sentence was added, saying that this crime ‘shall not in any way be interpreted as affecting national laws related to pregnancy’. This final sentence does not add a new element to the offence – and is thus not reproduced in the Elements of Crimes – but allays the concern that criminalising forced pregnancy may be seen as legalising abortion.

2722. As with any crime, forced pregnancy must be interpreted in a manner which gives this crime independent meaning from the other sexual and gender based violence crimes in the Statute. This is demanded by the rule against surplusage, a basic principle of statutory interpretation that presumes that the legislator does nothing in vain and that the court must endeavour to give significance to every word of a statutory instrument. This also implicates the principle of fair labelling, and how the proper characterisation of the evil committed, that is to say, calling the crime by its true name, is part of the justice sought by the victims. It is not enough to punish it merely as a combination of other crimes (e.g., rape and unlawful detention), or subsumed under the generic “any other form of sexual violence”. The crime of forced pregnancy depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy.

i Material elements (actus reus)

2723. The crime of forced pregnancy, whether as a crime against humanity or a war crime, is committed when the perpetrator ‘confined one or more women forcibly made pregnant’. The forcible conception of the woman could occur prior to or during the unlawful confinement. The perpetrator need not have personally made the victim forcibly pregnant – confining a woman made forcibly pregnant by another is necessary and sufficient for the crime of forced pregnancy.

2724. The material element of this crime can be split into two components. The first of these is ‘unlawful confinement’, which means that the woman must have been restricted in her physical movement contrary to standards of international law. ...

2725. The second component of the material element is that the woman has been ‘forcibly made pregnant’. This is understood as encompassing the same coercive circumstances described for other sexual violence crimes in the Statute. This means that the woman need not have been made pregnant through physical violence alone. ‘Forcibly’ in this context means force, or threat of force or coercion,

such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against her or another person, or by taking advantage of a coercive environment, or that the woman made pregnant was a person incapable of giving genuine consent. The existence of such coercive circumstances undermines the woman's ability to give voluntary and genuine consent.

ii Mental elements (mens rea)

2726. Not every confinement of a forcibly impregnated woman constitutes the crime of forced pregnancy. In addition to the mental elements specified in Article 30, the perpetrator must act with the specific intent of 'affecting the ethnic composition of any population or carrying out other grave violations of international law'.

2727. This requirement of special intent is phrased alternatively, meaning that the crime of forced pregnancy under the Statute is committed with the intent either to affect the ethnic composition of the population or to carry out other grave violations of international law, e.g., confining a woman with the intent to rape, sexually enslave, enslave and/or torture her.

...

2729. On this understanding, the crime of forced pregnancy consists in the confinement of a forcibly pregnant woman in order to carry out other grave violations of international law, regardless of whether the accused specifically intended to keep the woman pregnant.

...

h. Other inhumane acts, including forced marriage (Article 7(1)(k))

2741. Dominic Ongwen is charged with the crime of other inhumane acts, including forced marriage, within the meaning of Article 7(1)(k) of the Statute. In conformity with the principle of legality, this category of crimes against humanity must be interpreted conservatively and – with due regard to Article 22(2) of the Statute – must not be used to expand uncritically the scope of crimes against humanity. Judicial interpretation within Article 7(1)(k) of the Statute must be consistent with the essence of the offence and in a manner which could have been reasonably foreseen.

...

2743. The crime of other inhumane acts is committed, either by act or omission, when the following two material elements are fulfilled:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.

2744. International case-law suggests that serious beatings, subjection to deplorable conditions of detention and requiring persons to witness the beatings or killings of others can constitute other inhumane acts. Other international jurisdictions have also recognised forced marriage as an 'other inhumane act' falling under crimes against humanity.

...

2747. ... The Chamber can enter a conviction under Article 7(1)(k) if the perpetrator inflicts great suffering, or serious injury to body or to mental or physical health, by means of a course of conduct which, despite comprising also acts falling under one or more of the enumerated crimes, is, in its entirety, not identical, but is nonetheless 'similar' in character in terms of nature and gravity, to those enumerated crimes.

2748. The Chamber considers forced marriage – and the enumerated acts charged out of the same overall course of conduct in this case – to be just such an example. Every person enjoys the fundamental right to enter a marriage with the free and full consent of another person. Marriage creates a status based on a consensual and contractual relationship – it is an institution and also an act or rite. The central element, and underlying act of forced marriage is the imposition of this status on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with

marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim’s physical and psychological well-being. The victim may see themselves as being bonded or united to another person despite the lack of consent. Additionally, a given social group may see the victim as being a ‘legitimate’ spouse. To the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and child-bearing.

2749. Accordingly, the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim’s dignity, and the deprivation of the victim’s fundamental rights to choose his or her spouse.

...

B. Legal characterisation of the facts

...

7. Sexual and gender-based crimes perpetrated directly by Dominic Ongwen (Counts 50 to 60)

i. Forced marriage (Count 50)

...

3023. [The numbers used by the court, such as P-0099, enable witnesses to be identified but to remain anonymous.] P-0099, P-0101, P-0214, P-0226 and P-0227, who were ‘distributed’ to Dominic Ongwen, were not allowed to leave. Dominic Ongwen placed them under heavy guard. They were told or came to understand that if they tried to escape they would be killed. These women were ultimately considered Dominic Ongwen’s so-called ‘wives’ and had to maintain an exclusive conjugal relationship with him. Being Dominic Ongwen’s so-called ‘wife’ did not cease until P-0099, P-0101, P-0214, P-0226 and P-0227 escaped or were released from the LRA.

3024. ... [T]he Chamber finds that Dominic Ongwen executed the specific legal elements of forced marriage as an other inhumane act, pursuant to Article 7(1)(k) of the Statute.

3025. As concerns the mental elements, due to the nature of the acts performed by Dominic Ongwen and due to the sustained character of the acts over a long period of time, the Chamber considers that Dominic Ongwen meant both to engage in his relevant conduct and to cause the consequence.

...

ii. Torture (Counts 51-52)

...

3028. The Chamber found that P-0101, P-0214, P-0226 and P-0227 were subjected to beating at Dominic Ongwen’s command at any time. They were hit with canes and sticks. Some beatings knocked them unconscious, left them unable to walk and left permanent scars. On this basis, the Chamber finds that the first element of torture as a crime against humanity, ... and torture as a war crime ..., i.e. that the perpetrator inflicted on the victim severe physical or mental pain or suffering, is met.

3029. At the relevant times P-0101, P-0214, P-0226 and P-0227 were abducted and as so-called ‘wives’ they were in custody and under control of Dominic Ongwen. The second element of torture as a crime against humanity, pursuant to Article 7(1)(f) of the Statute is also met.

...

3031. Considering in particular the circumstances of their abduction, as well as of their stay within the LRA, and more specifically in Dominic Ongwen’s household, the Chamber is also satisfied that P-0101, P-0214, P-0226 and P-0227 were civilians at the relevant time. ...

3032. As concerns the mental elements, due to the nature of the acts performed by Dominic Ongwen and due to the sustained character of the acts over a long period of time, the Chamber considers that

Dominic Ongwen meant to engage in his relevant conduct and to cause the consequence. Considering that Dominic Ongwen knew the victims personally, he also knew of their civilian status.

3033. Finally, and recalling again that failure on the part of P-0101, P-0214, P-0226 and P-0227 to perform the domestic duties assigned to them led to punishment by beating, the Chamber is also satisfied that Dominic Ongwen acted with the purpose of coercing, intimidating or punishing, and that the special intent requirement applicable to torture as a war crime, pursuant to Article 8(2)(c)(i) of the Statute, is therefore met.

...

iii. Rape (Counts 53-54)

...

3040. ... [D]uring the period relevant to the charges, Dominic Ongwen had sex by force with P-0101, P-0214, P-0226 and P-0227. This happened on a repeated basis whenever Dominic Ongwen wanted. On this basis, the Chamber finds that the first legal element of rape as a crime against humanity, ... and rape as a war crime, ... is met.

3041. Likewise, considering that P-0101, P-0214, P-0226 and P-0227 were abductees, detained and beaten on Dominic Ongwen's command, and thus living under threat of force in a coercive environment, the Chamber finds that the second legal element of rape as a crime against humanity, pursuant to Article 7(1)(g) of the Statute, and rape as a war crime, pursuant to Article 8(2)(e)(vi) of the Statute is met.

3042. As concerns the mental elements, due to the nature of the acts performed by Dominic Ongwen and due to the sustained character of the acts over a long period of time, the Chamber considers that Dominic Ongwen meant to engage in the relevant conduct.

...

iv. Sexual slavery (Counts 55-56)

...

3045. The Chamber found that the seven women 'distributed' to Dominic Ongwen were not allowed to leave. Dominic Ongwen placed them under heavy guard. They were told or came to understand that if they tried to escape they would be killed. They were also subjected to beating at Dominic Ongwen's command at any time. They were hit with canes and sticks. Some beatings knocked them unconscious, left them unable to walk and left permanent scars. The seven women had to perform different domestic duties Failing to perform these tasks led to punishment by beating.

3046. ... Considering that Dominic Ongwen, as described, deprived them of their personal liberty, restricted and dictated their movement, including by threats and subjecting them to armed guard, subjected them to forced labour, and physically and psychologically abused them, the Chamber finds that Dominic Ongwen exercised powers attaching to the right of ownership over these women by imposing on them a deprivation of liberty The first element of sexual slavery as a crime against humanity, ... and sexual slavery as a war crime, ... is therefore met.

3047. The Chamber further found that Dominic Ongwen had sex by force with P-0101, P-0214, P-0226 and P-0227. This happened on a repeated basis whenever Dominic Ongwen wanted during the time in which these women were deprived of their personal freedom. Accordingly, the Chamber finds that the second element of sexual slavery as a crime against humanity, ... and sexual slavery as a war crime, ... – i.e. that the victims were caused to engage in one or more acts of sexual nature, which, in the present case took the form of repeated rapes – is also met.

3048. As concerns the mental elements, due to the nature of the acts performed by Dominic Ongwen and due to the sustained character of the acts over a long period of time, the Chamber considers that Dominic Ongwen meant to engage in the relevant conduct.

...

vi. Forced pregnancy (Counts 58-59)

...

3057. The Chamber found that Dominic Ongwen had sex by force with his so-called ‘wives’, including with P-0101 and P-0214 [each of whom gave birth to children]. ...

3058. ... [D]uring their pregnancies [they] were not allowed to leave. Dominic Ongwen placed them under heavy guard. They were told or came to understand that if they tried to escape they would be killed.

3059. On this basis, the Chamber finds that Dominic Ongwen confined P-0101 and P-0214, who had been forcibly made pregnant. The objective element of forced pregnancy as a crime against humanity, ... and forced pregnancy as a war crime, ... is met.

3060. As concerns the mental elements, due to the nature of the acts performed by Dominic Ongwen and due to the sustained character of the acts over a long period of time, the Chamber considers that Dominic Ongwen meant to engage in the relevant conduct.

3061. Moreover, the Chamber finds that Dominic Ongwen confined P-0101 and P-0214, who had been forcibly made pregnant, with the intent of sustaining the continued commission of other crimes found, in particular of forced marriage, torture, rape and sexual slavery. The special intent requirement of the crime of forced pregnancy is therefore equally met.

...

vii. Outrages upon personal dignity (Count 60)

...

3064. The Chamber found that on 1 July 2002, Dominic Ongwen forced P-0226 to beat to death a captured UPDF soldier near Patongo, Northern Uganda. P-0226 hit him once, as did other girls. She had blood splattered on her clothes. P-0226 had never killed anyone before, and this was part of the reason Dominic Ongwen gave as to why he selected her to do this. This experience caused her severe anguish. ...

3065. The Chamber finds that by forcing P-0226 to beat a person to death, in the circumstances as described, constituted a violation of her dignity, and that this violation of the dignity was so severe as to be generally recognised as an outrage upon personal dignity. ... The first and second elements of outrages upon personal dignity as a war crime, pursuant to Article 8(2)(c)(ii) of the Statute are met.

...

**THE PROSECUTOR V. DOMINIC ONGWEN SENTENCE,
TRIAL CHAMBER IX (6 MAY 2021)**

...

386. ... [F]rom the perspective of the extreme gravity of the crimes committed by Dominic Ongwen, including the degree of his culpable conduct, a joint sentence of life imprisonment would surely be in order [T]he Chamber has, however, decided not to sentence Dominic Ongwen to life imprisonment

...

388. The Chamber is confronted in the present case with a unique situation of a perpetrator who willfully and lucidly brought tremendous suffering upon his victims, but who himself had previously endured grave suffering at the hands of the group of which he later became a prominent member and leader. ... The fact [of Ongwen’s abduction and brutal socialization] ... in no way justifies or rationalises the heinous crimes he willfully chose to commit as a fully responsible adult; however, these circumstances ... make the prospective of committing him to spend the rest of his life in prison ... excessive.

389. ... By no means does Dominic Ongwen's personal background overshadow his culpable conduct and the suffering of the victims Nevertheless, the specificity of his situation cannot be put aside in deciding whether he must be sentenced to life imprisonment for his crimes. ...

390. Envisaging a concrete prospect for Dominic Ongwen to eventually re-build his life – while adequately punished for the crimes committed – in a new, more healthy environment ... is one of the conflicting driving forces for the Chamber's ultimate consideration

391. It is with these considerations in mind that the Chamber has decided not to sentence Dominic Ongwen to the – exceptional – penalty of life imprisonment.

...

393. ... [N]o imprisonment for a period shorter than 25 years could constitute an adequate, proportionate and just joint sentence in light of all relevant circumstances of the present case. ...

394. In addition, while not an aggravating factor in and of itself or an element otherwise impinging as such on the length of the prison sentence to be imposed in the present case, the Chamber cannot overlook the absence, in Dominic Ongwen's submissions during the hearing on sentence, of any expression of empathy for the numerous victims of his crimes – and even less of any genuine remorse – supplanted by a lucid, constant focus on himself and his own suffering eclipsing that of anyone else.

...

PARTLY DISSENTING OPINION OF JUDGE RAUL C. PANGALANGAN

...

11. Indeed we must take into account Dominic Ongwen's circumstance as former child soldier whose life might have taken a different turn altogether had it not been for that fateful morning of his abduction. ...

12. However, the Court must weigh those individual circumstances against the 'gravity of the crime' under Article 78 and other factors, among them, "the extent of the damage caused, in particular the harm caused to the victims and their families" (Rule 145(1)(c)).

13. It is exactly because of the extreme gravity of the crimes, including the degree of Dominic Ongwen's culpable conduct and, in particular, the deep and permanent physical and psychological harm caused to the victims and their families, that I find that the 'adequate, proportionate and just joint sentence in light of all relevant circumstances of the present case' is a sentence of imprisonment for 30 years.

...

THE PROSECUTOR V. DOMINIC ONGWEN **THE APPEALS CHAMBER (15 DECEMBER 2022)**

[The Appeals Chamber unanimously rejected the 90 grounds of appeal against conviction put forward by Ongwen's defence team. It also unanimously rejected ten out of the 11 grounds of appeal raised in the sentencing appeal. The principal area of contention was whether the approach used by the Trial Chamber had inappropriately double-counted certain offences. The other contested issue concerned the significance that should be attached to Ongwen's abduction and brutalization as a child soldier himself. Four of the five judges in the Appeals Chamber agreed with the Trial Chamber that it was appropriate to address the issue only in the context of sentencing. The President of the Appeals Chamber dissented. Her Opinion follows.]

PARTLY DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

...

XI. CONCLUSION

...

196. The dissenting judge considers it appropriate at this concluding stage to recapitulate all the points made in this opinion.

a. There has been a clear legal error in the reasoning of the Trial Chamber. It attached weight twice to the number of victims, as part of the gravity assessment and as an aggravating factor in relation to 20 out of the 61 individual sentences imposed on Mr Ongwen. This resulted in unfairness in the sentencing proceedings ...

b. The most appropriate relief in this case is to reverse the joint sentence impose and to remand the matter for the Trial Chamber to impose a new sentence;

c. Mr Ongwen's abduction, conscription, violent indoctrination, being forced to carry out and participate in criminal acts, when he was still a defenceless child of about nine years of age and his upbringing in the coercive environment of the LRA had a long-lasting impact on his personality, the development of his brain and moral values, and future opportunities. These circumstances merit significant weight in mitigation when imposing a new sentence on Mr Ongwen;

d. In addition, Judge Ibáñez Carranza wishes to use this opportunity to acknowledge the violation of Mr Ongwen's basic human rights that affected his dignity as a human being. Given the expressive nature of judicial decisions, and specifically of international criminal judgments, recognising in this case the crimes of which Mr Ongwen was a victim provides the means to acknowledge his victim status and re-instate the dignity that was taken away from him when he was a defenceless child;

...

Issues Raised by the *Ongwen* Case

The excerpts above from the 2021 Trial Chamber judgments and the 2022 Appeals Chamber illustrate many aspects of the way in which the ICC functions. They also illustrate the Statute's narrow definition of duress which would exclude criminal responsibility, the elements of specific crimes, definitional approaches, how different crimes relate to one another, and the type of evidence considered by the court. The role of cultural considerations in cases before the court has also been contentious.⁷³³ In the materials that follow, we focus on several of the more contentious issues raised.

A. GENDER

The *Ongwen* case was path-breaking in relation to the emphasis placed upon sexual and gender-based crimes and in charging certain crimes for the first time. Nonetheless, critics have suggested that it did not go far enough. It has been argued, for example, that the crime of forced pregnancy could have been treated in greater depth, thereby better situating 'this crime and its impact as well as plac[ing] the victims at the forefront of consideration.'⁷³⁴ Others have argued that the separate crime of gender persecution should have been investigated and prosecuted in order to increase the visibility of this issue, to recognize the direct harms suffered by victims, and to lay the groundwork to address the situation of people of different sexual orientations and gender identities in future prosecutions.⁷³⁵

Following the *Ongwen* case, and in response to a range of suggestions that a more systematic approach be adopted in future, the Office of the Prosecutor, announced a new Policy on the Crime of Gender Persecution in December 2022. The policy specified (para. 4) that '[g]ender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender', and noted that (para. 5) LGBTQI+ persons were included in this regard. The Policy states (para. 10) that the 'perpetrators' discriminatory intent may intersect with other grounds for persecution prohibited under the Statute, and also reflect existing social constructs or criteria used to define targeted groups based on, for example, race, ethnicity or culture, or impose new ones.' In

⁷³³ B. Parentella, 'Cultural Arguments and Cultural Defences in the Ongwen Case', 23 *J. Int'l Crim. Just.* (2025) 000.

⁷³⁴ T. Kirabira, A. Ringin and R. Grey, 'Feminist Judgments at the International Criminal Court: The Case of Dominic Ongwen', iCourts Working Paper Series, no. 294, (2022).

⁷³⁵ M. Kumskova, 'Invisible Crimes against Humanity of Gender Persecution: Taking a Feminist Lens to the ICC's *Ntaganda* and *Ongwen* Cases', 57 *Tex. Int'l L. J.* (2022) 239.

December 2023, the OTP announced a ‘Policy on Gender-based Crimes’ covering crimes involving sexual, reproductive and other gender-based crimes.

B. SENTENCING

Article 77 of the Rome Statute authorizes the Court to impose: ‘(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.’ While the *Ongwen* case illustrates different perspectives on the appropriate sentence, the ICC has been very significantly influenced by the practice of the ICTY in this area, as described by Margaret M. deGuzman, in ‘Punishing for Humanity’, in Carsten Stahn et al. (eds.), *Legacies of the International Criminal Tribunal for the Former Yugoslavia* (2020) 391:

The ICTY’s judges chose to forge new global norms rather than adhere to, or even be strongly guided by, the sentencing norms of the former Yugoslavia. The ICTY Statute itself diverged from national norms in some respects, in particular by rejecting the death penalty, but also required the judges to consult national practices in determining sentences. The judges interpreted this requirement loosely, reserving to themselves a wide discretion that enabled them to identify a range of global sentencing objectives and factors to apply in pursuit of those objectives.

... [T]he Rome Statute and the ICC Rules of Procedure draw significantly on the norms developed at the ICTY. The ICC’s judges have followed ICTY jurisprudence, for instance, in holding that the gravity of the offense ‘is a principal consideration in imposing a sentence’[, and in emphasizing] their discretion to determine relevant factors in the gravity analysis as well as aggravating circumstances. ICC judges have cited ICTY judgments liberally in support of their gravity analyses, ... for their holding that gravity factors cannot be double counted as aggravating factors ... that admission of guilt can be a mitigating circumstance, that efforts to promote peace and reconciliation can be counted in mitigation, and that statements of remorse can affect sentencing.

C. THE VICTIM-PERPETRATOR DILEMMA

The Trial Chamber gave greater consideration to this issue in the sentencing phase than in its original judgment. Consider the following comments:

Ayodele Akenroye and Kamari Clarke, ‘Deconstructing the Complexities of Violence: Uganda and the Case against Dominic Ongwen’, in Sarah Federman and Ronald Niezen (eds.), *Narratives of Mass Atrocity: Victims and Perpetrators in the Aftermath* (2022) 78, at 101:

... During the sentencing hearing, Dominic Ongwen spoke extensively for more than one hour where he gave chilling accounts of how he was made to kill people, drank human blood, was forced to commit inhumane acts while a minor, and the life changing consequence on him. Yet, the ICC judgment failed to deal with the impact of trauma and Dominic’s “loss of humanity,” and instead found him not to be damaged and that immediately he turned eighteen he had the agency to decide what is morally right from what is morally wrong, including choosing not to escape like other abductees.

Mark Drumbl, “‘Getting’ an Unforgettable Gettable: The Trial of Dominic Ongwen”, *Justice in Conflict* blog (5 February 2021):

... Now we have a former child soldier convicted in the solemnity and seriousness of a vaunted and vaulted one-of-a-kind court designed to prosecute

those most responsible world-wide for atrocity. Yes, this man hurt many others. No one denies it. Had the ICC wished to convict, however, a more honest track would have been to explicitly say: this man is broken, he was kidnapped at the age of ten, brutalized and beaten so he brutalized and beat others, he raped and killed so many and so cruelly, but we just don't care about his childhood, we just don't care about his victimization, we don't care about his neurological development – all we care about is what he did, regardless of why, and *tout comprendre c'est tout pardonner* [to understand all is to forgive all], and we refuse that for reasons that have nothing to do with him, as perpetrator, but instead with us, as judges, hungry for a role, and for the victims, aching deserving of redress.

Instead, the judgment leaves us with an artifice of sorts. We have a man who had no childhood, shoehorned into one box, a reductionism of sorts.

...

... [I]n pursuing this case the ICC continues its trajectory of specializing its judicial efforts on rebels who lost their rebellions, mostly in Africa, and its path of successfully prosecuting implicated mid-level characters. This, too, is fine; these characters have committed terrible crimes. But is it not fair to wonder whether this is what was intended on that euphoric day, July 17, 1998, when all this formally began?

In convicting and spectacularizing Ongwen, while pursuing its goals of convicting who it can, the ICC also indirectly buoys those it cannot, will not, or lacks the spine to try to convict. While Ongwen faces his reckoning for violence between 2002 and 2005, President Museveni benefits from impunity for his conduct But without President Museveni's nod, the ICC would not have delivered judgment against Ongwen. ...

...

[M]uch of life 'just happens', perhaps, and so too with much of atrocity, which tragically is part of human condition. Yet this is not how international criminal law constructs its accused. International criminal law constructs them as plotters and planners, as intentional movers and shakers, as willful and wanton. It needs to construct them this way. After all, courts punish to deter others. Courts punish to ensure that others not make the same patterned choices. The immediate lesson from Ongwen, then, is that little children and adolescents kidnapped into invidious armed groups should try not to become socialized into hurtful adults. They should try to 'grow up right', on their own. They should resist. They should act far more respectfully than the adults and authority figures around them. They should be disobedient. This is the conduct immediately encouraged by the Ongwen verdict.

...

To 'us', to the judges, to the legal industry of international criminal law, Ongwen is truly the 'other'. Hence, his trial becomes a bit of a spectacle. Perhaps a jury of actual peers tasked with processing all of this and authenticating it in some sort of judgment would have proceeded differently, and spoken and written in an alternate cadence, even if arriving at a similar outcome.

QUESTIONS

How do you react to the suggestion that international criminal justice is still very much a concept in the making and that the ICC is learning from past mistakes and changing its approach as new cases arise? Consider the following comment, comparing the approach adopted in the Ongwen case with that reflected in three earlier cases, all of which involved suspects from the DRC. Those cases were contentious and led to two acquittals as well as two convictions:

The mixed record of the Congo trials prompted widespread reflection among Court stakeholders – but any lessons learned seemed to widen the gaps. Both Prosecution and Defense repositioned themselves in tactical ways, seeking to avoid prior hazards. Judges in all phases were unable to hide the rifts that surfaced in the *Bemba* appeals process, while remaining as decorous as possible in their disagreements.

1. *The Prosecution multiplied charges and modes of liability.* In contrast to the simple charges and single events tested out in the Ituri trials, the Prosecution now asserted all of its charging options at the pre-trial confirmation stage. The next trials would encompass multiple criminal charges, all modes of liability, and a proliferation of criminal events or attacks, swelling the “facts and circumstances” controlling the scope of proceedings. ...

2. *The Prosecution submitted mountains of evidence,* confident of avoiding early filters of admissibility, and hopeful that the mantra of holism would leverage the weaker parts – including quantities of anonymous hearsay and circumstantial evidence. ...

3. *The Defense spread itself thin to meet these shape-changing master narratives,* while searching for some overarching doctrinal backstop. For Ntaganda, that line of defense was standard military necessity; for Ongwen, it was the embattled doctrine of psychological duress. Both were unable to block the evidentiary flood. ...⁷³⁶

4. Backlash Against African Prosecution

By 2017, the ICC had been in existence for 15 years, but all of the situations it had under review were in Africa. The situations in Uganda, the Central African Republic, the Democratic Republic of the Congo and Mali were all referred by the respective governments, and all involved rebel leaders. Two other situations, Darfur (Sudan) and Libya were referred by the Security Council and led to indictments against the respective heads of state, Omar al-Bashir, and Muammar Gaddafi. Two other situations, involving Kenya and Côte d'Ivoire, were initiated by the Prosecutor using his *proprio motu* powers.

This stark imbalance led to backlash from different quarters. Various African governments accused the Court of racial bias. Several African states—led by Kenya, whose prominent political figures, including two future presidents, were under indictment—mounted a powerful counter-attack. Non-African governments were aware of the unsustainability of the situation and the OTP began to engage in more determined inquiries and investigations elsewhere. Scholars also weighed into this battle.⁷³⁷ Christopher Gevers, in ‘Africa and International Criminal Law’, in Kevin Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020) 154 argues that the relationship between Africa and international criminal law needs to be seen in light of a much longer history than just that of the ICC. ‘[T]he question [then] becomes not whether ICL (or the ICC) might be a field that operates on neo-

⁷³⁶ R. Gaskins, *The Congo Trials in the International Criminal Court* (2020) 457.

⁷³⁷ A. B. Rukooko and J. Silverman II, ‘The International Criminal Court and Africa: A Fractious Relationship Assessed’, 19 *Afr. Hum. Rts. L. J.* (2019) 85.

colonial and racist lines, but whether it might have been anything else (or might yet be).’ Consider the following critique of the Court for ‘criminalizing Blackness’.

**RACHEL LÓPEZ, BLACK GUILT, WHITE GUILT AT THE INTERNATIONAL CRIMINAL COURT
MATIANGAI SIRLEAF (ED.), RACE AND NATIONAL SECURITY (2023) 211**

Introduction

All but one defendant convicted at the International Criminal Court (ICC) has been a Black man. This is not a coincidence. ... [T]he jurisdictional and substantive law that governs the ICC systematically results in Black guilt being heightened while White guilt is minimized. With these convictions, the ICC builds on a long history of criminalizing Blackness Since the ICC supposedly prosecutes only “the most serious crimes of international concern,” these convictions express the not-so-subtle suggestion that the “worst of the worst” criminals on the planet are Black men. More troubling still, given the longstanding characterization of international crimes as evil, it perpetuates well-documented stereotypes of darker skin being associated with wickedness, thereby building on a pernicious narrative of the “evil Black body.”

...

I. Institutionalizing Black Guilt

...

... [T]he outsized role of the U.N. Security Council in the matters handled by the court is partly to blame. ...

... The Security Council has only asked the ICC to investigate crimes in two African nations, Sudan and Libya, but issued no referrals for documented torture and war crimes by the United States and United Kingdom in Iraq and Afghanistan. While Article 16 of the Rome Statute was meant to allow the Security Council to step in and delay prosecutions if doing so is in the interest of maintaining peace and security, so far, it has only been used to immunize White guilt, shielding the citizens of majority White nations from the court’s reach. In fact, the first evocation of the Security Council’s deferral power was only made after the United States threatened to veto a resolution renewing the U.N. peacekeeping mission in Bosnia (as well as all other future peacekeeping operations) unless a provision immunizing its troops from criminal liability was included. Since then, the Security Council has invoked Article 16 two additional times, each time at the United States’ behest to immunize soldiers from any criminal liability resulting from military operations authorized by the Security Council.

While the Security Council has used Article 16 to minimize the guilt of White majority nations, it refused to use this power to defer investigations in two African nations, Sudan and Kenya, despite repeated requests from the African Union to do so. Functionally, this has meant that White leaders who authorized torture like George W. Bush and Donald Rumsfeld have evaded criminal liability before the ICC, while Black and Arab-African heads of state like Uhuru Muigai Kenyatta and Omar al-Bashir faced charges.

... [T]he temporal and definitional limitations on what counts as a prosecutable crime before the ICC renders White violence less visible and consequential. ... [T]he crimes committed before the Rome Statute entered into force on July 1, 2002 are off the table. ... [T]his narrow temporal gaze often obfuscates the role of colonial powers in the violence under investigation by the ICC and shields them from prosecution for their past empire-building crimes, most notably slavery and genocide. In a broader sense, these rules have criminalized the processes by which Global North became wealthy, at the same time as effectively granting them de facto amnesty for those same acts.

The impunity for colonial era crimes of the Global North is compounded by the fact that the type of violence currently perpetrated by these majority White nations also tends to be untouched by international criminal law, while those crimes which typify Western stereotypes of Black men have been vigorously pursued. First, as Kamari Clarke illuminated in her groundbreaking book, *Fictions of*

Justice, the choice of acts considered to be the “most serious crimes of international concern” under the Rome Statute and therefore prosecutable by the ICC exacerbates Black guilt, while mitigating White guilt. Omitted from actionable crimes are those most likely to be committed by majority White nations, such as colonial domination, economic aggression, the use of nuclear weapons, the recruitment, use, financing, and training of mercenaries, and environmental atrocities. These crimes were all dropped during the negotiation of the Rome Statute because they were considered to “devalu[e] the concept of crimes against the peace and security of mankind.” ...

...

II. Prosecuting Evil

In response to allegations of anti-African bias, supporters of the ICC have claimed that the focus on Africa is not racially motivated, but rather is just the unfortunate result of following the rules. For example, former ICC prosecutor, Luis Moreno Ocampo ... characterized allegations of African bias as “hypocrisy,” saying “we are in Africa for two reasons: the most serious crimes under ICC jurisdiction are in Africa...and African leaders requested the court’s intervention.” In essence, his argument, much like those of other proponents of the ICC, is that we should not be concerned with racism at the court, because the exclusive prosecution of African defendants resulted from a race-neutral application of the law.

...

Conclusion

... The broader effect of such systemic bias at the ICC is particularly invidious because it reinforces well-documented racialized associations of dark skin with evil. A deeper reckoning with the rules that yield such consistently racially discriminatory results is imperative especially given the increased prominence of expressive theories of punishment in international criminal law, which justify criminal prosecutions for their role in communicating the international community’s sense of right and wrong.

...

Kenya and the ICC

In seeking to understand how the Court got into this situation, it is helpful to explore two of the situations – those relating to Uganda and to Kenya – in more detail.

The ICC’s attempted engagement with the situation in Kenya stands in marked contrast to the Ongwen case. The latter involved a single individual who had eventually surrendered and who had no political support. He was charged with specific crimes, and the ICC was able to obtain access to and detailed evidence from many key witnesses. In Kenya, the principal defendants were very high-level politicians, with continuing links to the government in power, access to a well-funded and high-powered defence team, and in a position to obstruct investigations within Kenya.

By way of background, post-election violence in six of Kenya’s eight provinces, in 2007-2008 led to the killing of over 1,000 people, 900 documented acts of rape and sexual violence, 350,000 people displaced, and over 3,500 seriously injured. On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor’s request to open an investigation *proprio motu* (on their own initiative). It did so after noting the Prosecutor’s submission alleging ‘...elements of brutality, for example burning victims alive, attacking places sheltering IDPs, beheadings, and using pangas and machetes to hack people to death’, and that perpetrators, among other acts, allegedly ‘terrorized communities by installing checkpoints where they would select their victims based on ethnicity, and hack them to death, commonly committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch.’

The ICC’s website (<https://www.icc-cpi.int/kenya>) notes dryly that:

The investigation has produced two main cases, originally with six suspects, involving charges which include the following crimes: crimes against humanity: murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts. However, charges were not confirmed or were withdrawn concerning these six suspects.

The suspects included two senior politicians: Uhuru Kenyatta, a member of the Kikuyu ethnic group, and William Ruto, a Kalenjin, who were accused of masterminding the ethnic violence against one another's communities in the 2007 election. As the threat of international prosecution before the ICC grew, the two formed a successful alliance in the 2013 election. Kenyatta was elected President, and Ruto Vice-President. What happened thereafter is recounted by Susanne D. Mueller, in 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law', 8 *J. East. Afr. Stud.* (2014) 25:

Winning the election was part of a key defense strategy to undercut the ICC by seizing political power, flexing it to deflect the ICC, and opening up the possibility of not showing up for trial if all else failed. The strategy entailed using a series of delaying tactics to ensure that the ICC trials would not start until after the defendants had won the election and gained power at the highest level. The tactics ranged from mobilizing international organizations against the ICC, making numerous legal challenges designed to delay the court, and the intimidation of potential witnesses, allegedly by defense sympathizers and go betweens, to keep them from assisting the ICC. The tactics were part of a larger design to undercut the ICC. Demonizing opponents, politicizing ethnicity, and attacking the ICC as a tool of the West both before and during the presidential campaign served this end and victory in the election. ...

...

Indicative of attempts to undermine the ICC process were the plethora of attacks against witnesses. This included intimidating, bribing, and killing them. The message being sent both by the state, which did nothing to protect witnesses and victims as required by the Rome Statute, and allegedly by the defendants and their supporters, was that if individuals cooperated with the ICC's investigations, they would pay heavy costs. Many did. As each trial date neared, more witnesses dropped out, thereby forcing the ICC to find others. This compelled the defense to ask for more time to review the new evidence, precipitating a vicious circle of delays and the need for more witnesses and more time. Politics began to trump the law as the defendants' political risk increased. Early on it appears there was a plan to eliminate, intimidate, and bribe people who knew too much about the [post-election violence], key individuals who were part of it, and civil society activists who were assisting and sheltering potential witnesses. Leaving none to tell the story was an apparent tactic to get rid of key witnesses while simultaneously attacking the credibility of others. The aim was to get the cases dropped for lack of evidence even before the ICC's investigation began and charges were confirmed. Later, it was to destroy the credibility of other witnesses who remained and to delay or halt the onset of trials both before and after the 2013 presidential election.

Eventually, all six cases collapsed and the ICC was left to try two defendants for 'offences against the administration of justice consisting in corruptly influencing witnesses regarding cases from the situation in Kenya'. Only one defendant came into the Court's custody, and he died in October 2022 before his trial could be completed.

Mark Kersten, in 'Will Justice catch up with those responsible for Post-Election Violence in Kenya?', *Justice in Conflict* blog (1 September 2022), focuses on another dimension of the situation:

Over this period, Kenya's government and its allies focused on two claims. The first was that the ICC was an illegitimate court and 'plaything' of colonial powers. To this end, Kenyatta's government hired British public relations experts to spread its word and undermine the standing of the Court.

Kenyatta and Ruto's second claim was that Kenya was able and willing to investigate any alleged wrongdoing itself. Senior officials, including the Attorney General Githu Muigai, repeatedly stated that Nairobi would set up an International and Organized Crimes Division as part of its judiciary capable of investigating and prosecuting any perpetrators of atrocities. It never happened. What did transpire, however, was that Kenyatta and Ruto stayed in and consolidated their power, as much of the world slowly forgot about the 2007/08 atrocities.

Kenyatta and Ruto remained in office until August 2022, but by then had fallen out over various issues. Ruto won the election in that year and became President. Kersten draws an important lesson from this series of events:

...[T]his means that the country's last two heads of state will have been implicated in atrocities and tried, unsuccessfully, at the ICC.

Where does that leave justice and accountability efforts in Kenya?

Exactly as they were. There is no reason to believe that a Ruto government will show any interest in revisiting, let alone doing something, about the rights violations committed in 2007/08.

...

One of the most important yet neglected lessons of the world's experiment with international criminal law is that it is not the ICC, the United Nations or any international body which is most responsible for those rare moments when justice and accountability is delivered; it is changes in the domestic political arena. When investigating and prosecuting atrocities becomes important to the national leaders in charge, it becomes possible.

The context in Kenya has never been ripe for justice and accountability. Not once since 2007/08 has there been a serious attempt to address the widespread and systematic crimes that were committed following the presidential election. There has been a lot of talk and many empty promises.

If ever accountability is to be pursued, it won't be because of the ICC or any international institution, but because the Kenyan people want it and because leaders not implicated in violence, atrocity, and corruption can successfully run for office.

Uganda and the ICC

It is also helpful to see the Ugandan case in its broader political and legal context. Compare the next two readings. The first, by a leading Ugandan scholar, explains how the referral of the situation involving the Lord's Resistance Army to the ICC fitted in with the interests of the Ugandan Government. The second, by a German scholar who observed the trial of Dominic Ongwen, raises the question of whether the trial was little more than the continuation of colonialism by different means.

**JOE OLOKA-ONYANGO, UNPACKING THE AFRICAN BACKLASH TO THE INTERNATIONAL
CRIMINAL COURT (ICC):
THE CASE OF UGANDA AND KENYA
4 STRATHMORE L. J. (2020) 41**

...The initial reference of the Northern Uganda situation by President Museveni to the ICC in December 2003 was done over strenuous objections from domestic civil society and the local human rights community ...

... President Museveni's actions were not simply to internationalise the conflict in northern Uganda. They were also designed to buttress his credentials as the regional power broker, and to divert attention from a costly misadventure in the DRC. It is not by coincidence that the overtures to the ICC were taken in parallel to the judicial claim filed by the DRC at the International Court of Justice (ICJ) with the proceedings against Uganda being commenced in mid-2003 while a judgment was eventually returned against the country at the end of 2005. Meanwhile, arrest warrants were issued on 8 July 2005 and 27 September 2005 for Joseph Kony and four members of the LRA high command on 33 separate counts of war crimes and crimes against humanity, including murder, rape, enlisting of children, and sexual enslavement.

When peace talks were initiated between the Government and the LRA in mid-2006, the ICC insisted on pursuing the referrals irrespective of the Juba peace negotiations taking place between the two sides. This angered the Ugandan President and led to the first souring in the relationship. Although the ICC made a pretense of supporting the measures taken by Uganda with regard to the traditional justice rites of *Mato Oput* and its ilk, it was a lukewarm embrace. In a way however, the ICC process did undermine efforts at a victim-oriented resolution of the conflict by focusing attention on capture, prosecution and conviction of only the LRA. At an international conference in Nuremburg, the ICC Prosecutor was quoted as saying, 'calling for amnesties, the granting of immunities and other ways to avoid prosecutions.... are not consistent with the Rome Statute.... there can be no political compromise on legality and accountability'. Regardless of local developments, these remarks demonstrated that the ICC wanted to see the LRA prosecution through to its logical conclusion. Additionally, international organisations had a role to play in influencing the Prosecutor not to back down.

Matters were also not helped by the fact that the ICC approach was opposed by the local political leadership in Acholi land, Ugandan civil society at large, as well as by several academics and media pundits. Given the prominent manner in which the traditional justice elements featured in the peace settlement alongside the question of amnesty, the ICC felt that it was being blind-sided by the Ugandan Government. The referrals of the LRA obviously raised many questions about the role of the other party to the conflict, the Uganda Peoples' Defence Forces (UPDF).

... [After] the Kenyan referrals were announced. Museveni must have felt they were too close to home for comfort. Hence, at the inauguration of President Kenyatta in early 2013, Museveni saluted the Kenyan voters for rejecting what he described as ICC 'blackmail', even claiming that 'the usual opinionated and arrogant actors' wanted to install leaders of their choice in Africa and '... eliminate the ones they do not like'.

...

An element of duplicity on the part of the Ugandan Government with regard to the ICC becomes even more apparent [with] its reaction to Sudanese President Bashir's referral to the Court in 2009 [In] 2014, Uganda had accused Sudan of resuming its support for the LRA rebels to the extent that Uganda filed a complaint with the Organisation of Islamic Cooperation (OIC). One would imagine that Uganda would not be quick in leaping to the defence of Bashir as against the ICC when in the past, it accused him of supporting/funding rebels in a case it 'voluntarily' referred to the same Court. That it would do so can only, *ipso facto*, point to double standards. It is plausible to thus assume that although Uganda joined the cacophony of African states expressing concern about the Sudan referrals, Kampala was not overly distressed about the lodestone placed on Bashir's neck.

... [T]he referral of Libya to the ICC was another matter because it involved President Gaddafi, a long-time ally of the regime in Uganda. Museveni then declared that he was ‘totally allergic to foreign, political, and military involvement in sovereign countries, especially the African countries’. True to his (new) word, Museveni became one of the most vociferous opponents of the ICC within the African Union (AU) and instigated some of the discussions around not simply non-cooperation with the office of the Prosecutor, but complete withdrawal from the Rome Statute.

However, duplicity was not just confined to Kampala or The Hague. Behind the scenes, the United States saw an opportunity in the Kony referrals to pursue its global anti-terrorism agenda, and hence supported the actions of the Ugandan Government against the LRA up to its elusive search for Kony and his lieutenants in the jungles of the DRC and the CAR.

The Government’s mixed signals over its ‘Kony problem’-to wit seeking the prosecution of the LRA rebels internationally (before the ICC) on the one hand, while also advocating for domestic prosecution (and traditional forms of justice or ‘peaceful reconciliation’) ... [did not lead it to object] to the Hague trial of Dominic Ongwen The inconsistency in the Government’s position was thus stark and logically suggestive of duplicity.

At the end of the day, in his relations with the ICC, Museveni was both able to have his cake and to eat it, deftly selecting when, where, how and on what terms and issues he chose to cooperate with the institution and on those over which he did not. He was also adept at jumping on the victimisation band-wagon when circumstances suited him, pushing the AU to adopt increasingly more hostile positions towards the institution. Ultimately, the Ugandan victims of both the LRA and the UPDF were short-changed in the process as efforts directed towards truth and reconciliation were given short shrift and wider questions of accountability thus ignored. In contradistinction to the noble ‘justice-oriented’ aims for which the Rome Statute and the Court under it were envisioned, Uganda and the ICC had resorted to an alliance without ‘righteous foundation’. Little good could therefore come out of it.

**JONAS BENS, THE SENTIMENTAL COURT: THE AFFECTIVE LIFE OF INTERNATIONAL
CRIMINAL JUSTICE
(2022) 171**

Epilogue: Affect and Colonialism

On February 4, 2021, ... the judges of the ICC found Dominic Ongwen guilty of war crimes and crimes against humanity. Two weeks earlier, Yoweri Kaguta Museveni had won the general election and, despite allegations of election fraud and violent suppression of the political opposition, entered his sixth term as president of Uganda. Ongwen’s conviction, which carries a prison sentence of twenty-five years, most likely marks the end of the ICC’s criminal prosecution in northern Uganda. ...

The judgment was presented by the presiding judge, Bertram Schmitt, from Germany. He made his remarks slowly and carefully, his face showing a solemn expression. ... [He stated:]

Let me emphasise that it was difficult for the Chamber to ascertain the names of every victim of the several crimes. Yet, in many cases the Chamber was able to do so. These victims have a right not to be forgotten. They have the right to be mentioned explicitly today, as they are in the judgment as well. Please bear with me if I pronounce names incorrectly.

This brief scene profoundly affected me, but in several quite ambivalent ways. It triggered an intense awareness of the colonial structure of our contemporary world. What struck me immediately, and maybe this was just on the surface of the arrangement, was the constellation of bodies: a white European man sitting in judgment over a black African, deciding his fate. This encapsulates the colonial constellation in a nutshell. Second, Schmitt evokes the African victims of violence to legitimize this constellation of bodies in which he speaks. He presents himself and his colleagues at the bench as

people who take the side of the victims and do not want them to be forgotten. The “specter of the victim” as a prevalent trope of colonialism at the center of international criminal justice has been formidably and critically analyzed by Kamari Clarke in *Fictions of Justice* (2009). Colonialism can mean many different things, but at its core, it means intervening in the sphere of others and deriving the legitimation for this intervention from one’s own system of rules. Schmitt is aware that he is meddling in the affairs of others whose names he has difficulty pronouncing. He is doomed to let this awareness show in his awkward apology to the audience. This small scene brings the colonial constellation to life in an uncanny way – it is a colonial awkwardness that feels all too familiar.

...

[The author then refers to the critique by Mahmood Mamdani, in Ch. 2, above, of the Nuremberg model as the wrong template for bringing justice in the aftermath of violence.] ... In Mamdani’s analysis, the Nuremberg tribunals did not even work in Germany in the late 1940s. In his book, Mamdani proposes something else: instead of constructing victims and perpetrators after violent conflict, a society should come together as survivors of violence

I agree with Mamdani’s analysis, which is shared by most of the anthropologists who write about transitional justice, that the system of international criminal justice cannot be separated from the colonial structures governing the global capitalist order in which it was conceived and in which it operates. But ... I find Mamdani’s suggestion that “Nuremberg” was a mistake, that it was the wrong thing to do, thoroughly repellent. It feels inconceivable to me that Jewish Germans who survived the death camps and former Nazi officials could ever somehow come together as “survivors of the Third Reich.” ... The proposition that it would have been better to avoid a criminal justice approach to Nazi perpetrators would probably only find support on the very extreme right in Germany.

...

... Colonialism is such an omnipresent structure that shapes the sentiments of people. One cannot but navigate and partly reproduce these sentiments. When people are in a position to reproduce colonial sentiment, when they feel compelled by forces larger than themselves and try to do the right thing nevertheless, then the kind of colonial awkwardness emerges that one can feel in Judge Schmitt’s apology. Even those who see themselves as fighters against colonial injustice will not be able to avoid feeling such colonial awkwardness. The question is: Do we perceive these affective dynamics of colonialism merely as a mechanism of subjugation, or as an unavoidable starting point for resistance against a world that produces and reproduces enormous inequality every day? ...

THE BROADER RACE ISSUE

Moving beyond the specifics of the Ongwen and other Ugandan cases, it has been argued that the ICC needs to move beyond a posture of race-neutrality and confront the deeper structures involved.⁷³⁸ Although the following critiques preceded the warrants sought in relation to the situations in Ukraine and Palestine (Gaza), they have not lost their relevance.

**RANDLE C. DEFALCO AND FRÉDÉRIC MÉGRET, THE INVISIBILITY OF RACE AT THE ICC:
LESSONS FROM THE U.S. CRIMINAL JUSTICE SYSTEM
7 LONDON REV. INT'L. L. (2019) 55**

...
Conclusion: The Unbearable 'Whiteness' of the ICC?

Accusations that the ICC is racist have created a degree of panic among certain international criminal justice advocates. The threatened and actual withdrawal of African states from the Court has been widely perceived as a catastrophe. We are concerned, by contrast, that the blanket dismissal of race-based critiques of the ICC may inhibit critical assessments of how the ICC and other international criminal justice institutions are actually operating, and what their effects are, including in terms of their roles in the global production of race and racism. ...

Much like the U.S. Supreme Court in its selective blindness to certain manifestations of racism, especially structural racism, international criminal justice actors at times behave as if any acknowledgement of the multi-dimensional complexities of race and racism will necessarily open a Pandora's box of insurmountable racial justice challenges that the law is ill-equipped to address. The perceived safer avenue selected by the ICC, at least thus far, has been selectively to see race in much the same way as US courts do—that is, to acknowledge the role of race/racism as a cause or consequence of crime and atrocity, but not to see race when it comes to questions of structural or distributive justice that the Court itself is implicated in.

The most evident danger is that the ICC will become a forum exclusively for prosecuting atrocity crimes committed by or within predominantly Black, Arab or other racialised communities, whilst exempting itself from the need to ever see itself as part of the ongoing perpetuation of a racially fragmented and polarised world. ...

... [W]hat is at stake in these and other cases concerning intersections between race and criminal justice are questions of distributive justice. How are the burdens inherent in employing the technique of criminal law—investigatory actions, surveillance and intrusions of privacy, arrest, detention, prosecution, social stigma, and the like, and, in the international arena, the possibility of sanctions or even foreign intervention—distributed amongst the populations subject to a given criminal justice system? Who benefits from the law most in terms of being made safer (or at least being made to feel subjectively safer) and less at risk of being victimised, be it by criminals or criminal justice actors (such as police officers or prosecutors) themselves? Under the cover of working to prevent atrocities in Africa, the international community may appear to be engaged in systemic global policing of racialised Africans.

... International criminal justice does not proceed from a safe place of racial innocence. It exists in a world that is structured by racial constructions, and it ignores those constructions and their relevance at its peril. ... [H]ow might one go about decolonising or improving the racial politics of international criminal justice?

In recent years, the ICC has inched towards a more nuanced approach to grappling with the racialised dimensions of international criminal justice. During the mandate of former ICC Prosecutor Moreno-

⁷³⁸ See also S. Manley, P. Tehrani and R. Rasiyah, 'The (Non-) Use of African Law by the International Criminal Court', 34 *Eur. J. Int'l L.* (2023) 555.

Ocampo, the rhetoric emanating from the OTP was especially tone deaf, characterised by bombastic all-or-nothing claims about the Court's unimpeachable virtue. Under the guidance of Fatou Bensouda, the OTP has at least made efforts to address crimes beyond those committed by Black and/or Arab-African men, by investigating potential international crimes occurring in Afghanistan, Georgia, the Ukraine, Israel/Palestine, and Iraq, including those allegedly committed by (mostly White) US and British nationals. Such initiatives may have the potential to begin to subvert dominant racialising narratives, but, if anything, the rebalancing of prosecutorial focus beyond Africa is framed more in geographic and national terms than explicitly racial ones, once again avoiding the discomfort of acknowledging the significance race continues to exhibit globally.

The ICC's anti-racist credentials have been challenged for a while by those who are on the receiving end of international criminal justice's racial politics. To discuss race and to challenge its construction, is to discuss power and to challenge its production. Doing so requires that individuals and institutions acknowledge their own roles in perpetuating—as enablers, bystanders, and/or uncritical conduits—such power structures, along with the privileges they enjoy because of their racial associations (or various other identity categories) that others do not. It also requires an urgent emphasis on transparency and accountability in prosecutorial decisions, given the importance of discretion in allowing racial prejudice to seep into the substance of criminal justice, be it domestically or internationally. And it requires doing so in ways that do not unwittingly end up reinforcing and reifying racial categorisations in the name of anti-racism, but that constantly locate the problem of racism in the very construction of such categories.

One need look no further than the US for a cautionary example of how the dogged refusal to see certain forms of racism, especially structural ones, can deeply undermine the credibility of a criminal justice system, to the point that it becomes a source of—rather than a bulwark against—pervasive human rights violations and the perpetuation of racialised oppression. Dogmatic adherence to race-neutrality, in this context, risks blinding international criminal justice to its own role in historical and structural patterns of racial production and thereby further eroding its already precarious credibility.

QUESTIONS

1. What lessons might be drawn from the successful undermining of the Kenyan cases?
2. Given Joe Oloka-Onyango's description of the politics surrounding the LRA referral, under what circumstances do you think the OTP should accept self-referrals of rebels by the governments that they are fighting?
3. What conclusions do you draw from Jonas Bens' description of what he sees as the colonialist overtones reflected in the *Ongwen* case?

5. The United States and the ICC

The U.S. participated actively in drafting and shaping the Rome Statute. But it was one of seven countries that voted against its adoption in 1998. The others were China, Iraq, Israel, Libya, Qatar, and Yemen. On 31 December 2000, the last day on which it was possible to do so, President Clinton signed the treaty. But he also recommended that the Senate should not be asked for its advice and consent to ratification until fundamental concerns were satisfied. In particular, these related to the 'unchecked' power of the Prosecutor and the risk that U.S. soldiers and officials could be subjected to politicized prosecutions. Under Article 18 of the Vienna Convention on the Law of Treaties, a signatory State is obliged not to 'defeat the object and purpose of a treaty prior to its entry into force'. On 6 May 2002, some eight months after the attacks of 9/11, and as the U.S. invasion of Afghanistan was in full force, President Bush 'unsigned' the Rome Statute (which is not in fact possible) by

informing the UN Secretary-General that ‘the United States does not intend to become a party to the treaty [as a result of which it] has no legal obligations arising from its signature ...’. Israel used the same formula to ‘unsign’ three months later.

In 2002, the American Service-Members’ Protection Act prohibited certain forms of U.S. cooperation with the ICC, required military and other aid to states parties to the Rome Statute to be cut unless those states signed an agreement not to surrender U.S. personnel to the Court, and authorized ‘all means necessary, including military force’ to be used to release U.S. persons arrested by the ICC. It was informally called ‘The Hague Invasion Act’.

The Bush administration also negotiated bilateral agreements with some 100 states, not all of which were states parties. The agreements provided that no nationals, current or former officials, or military personnel of either party may be surrendered or transferred by the other state to the ICC for any purpose. These were said to be based on Article 98(2) of the Statute,⁷³⁹ but this claim was widely contested. In 2002, the administration threatened not to support a peace-keeping operation unless the Security Council used its power under Article 16 to defer any investigation or prosecution for a period of 12 months in cases ‘involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation’ (Res. 1422 (2002)). The suspension was renewed again in 2003, but rejected by Council members the following year.

During this period, the U.S. made exceptions when it suited it. In 2005, it permitted the Security Council to refer the Darfur case to the Court and, in 2011, the Obama administration voted to refer Libya for investigation. The U.S. also played a key role in delivering Bosco Ntaganda, of the DRC, and Dominic Ongwen, of Uganda, to the custody of the ICC.

In September 2018, President Trump told the UN General Assembly that the U.S. would ‘provide no support or recognition to the ... Court. As far as America is concerned the ICC has no jurisdiction, no legitimacy, and no authority.’ In March 2019, Secretary of State Mike Pompeo announced that the U.S. would impose visa bans on ICC officials involved in a potential investigation of U.S. citizens alleged to have committed crimes in Afghanistan. The threat was subsequently extended to cover investigations affecting nationals of allied countries, including Israelis. In 2019, it was confirmed that the U.S. visa of Prosecutor Fatou Bensouda had been revoked. In May 2020, Pompeo threatened ‘consequences’ if the court pursued its inquiries in relation to Palestine.

On 11 June 2020, President Trump issued Executive Order 13928, entitled ‘Blocking Property of Certain Persons Associated with the [ICC]’. Relevant sanctions included asset freezes and family entry bans against some ICC officials and those who assist certain court investigations, thus deterring other nations from cooperating with the Court. President Biden revoked that Executive Order on 1 April 2021 and sanctions on ICC personnel were lifted. The following day, Secretary of State Blinken emphasized that the U.S. ‘disagree[s] strongly with the ICC’s actions relating to the Afghanistan and Palestinian situations’ and maintained its ‘longstanding objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel.’

The U.S. could always avoid a situation in which the Court seeks to exercise jurisdiction over an American by satisfying the complementarity principle and investigating and prosecuting in its domestic courts. But:

To do so is to concede the authority of the ICC to subject US actions to its scrutiny. This the United States steadfastly refuses to do. In turning the argument into one about jurisdiction, the United States seeks to challenge not the merits of the probe but the Court’s very authority to hold non-signatories

⁷³⁹ Article 98(2): ‘The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court ...’.

responsible ... [As a result, we] ... hold ourselves out as champions of international law — provided we are not subject to its norms and processes.⁷⁴⁰

Following the invasion of Ukraine, Congress approved a ‘War Crimes Accountability’ provision, which authorized the U.S. government to render assistance to the ICC ‘to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.’⁷⁴¹ The U.S. has subsequently provided extensive funding to a wide range of civil society and other groups, as well as to prosecutors in Ukraine, and to the ICC, to support such efforts. In contrast, the U.S. rejected the actions of the ICC in relation to Israel’s Prime Minister and Defence Minister in May 2024 as ‘outrageous’.

On 6 February 2025, President Trump issued Executive Order 14,203 entitled ‘Imposing Sanctions on the International Criminal Court.’ In addition to denying entry to the US to non-citizens ‘determined by the Secretary of State to be employed by, or acting as an agent of, the ICC,’ the order provides for individuals to be designated in this context, and listed the ICC Prosecutor. Subsequently four ICC judges were added. Two had authorized the Afghanistan investigation (potentially implicating US personnel) and two approved the arrest warrants for Israel’s Prime Minister Netanyahu and Defence Minister Gallant. Designated individuals and their families are denied entry to the US, their US-related assets are blocked, and anyone is prohibited from providing them with ‘funds, goods, or services’.⁷⁴²

6. Russia and Ukraine: The ICC and the Crime of Aggression

Ukraine is not a state party to the Rome Statute but, in 2013, shortly before Russia’s invasion and annexation of Crimea, it accepted the Court’s jurisdiction over alleged crimes committed on its territory (Article 12(3) of the Statute). Immediately after Russia’s 2022 invasion, the Prosecutor indicated he would seek authorization to open an investigation, but this became unnecessary when 43 states parties formally referred the situation to the Court. Four other states subsequently joined, and an investigation was opened on 2 March 2022, less than one week after the invasion.

After the Prosecutor appealed for assistance, Western States committed unprecedented levels of funding to support the OTP’s Trust Fund for Advanced Technology and Specialized Capacity and committed national personnel to assist the Office. The European Union, the United States and the United Kingdom established the Atrocity Crimes Advisory Group to assist the Office of the Prosecutor-General of Ukraine, which has opened thousands of war crimes investigations. And within a year, the ICC Prosecutor had made four visits to Ukraine.

One investigative effort funded by the U.S. led to a report by the Humanitarian Research Lab at Yale School of Public Health, entitled ‘Russia’s Systematic Program for the Re-education & Adoption of Ukraine’s Children’ (14 February 2023).

Following an application by the OTP on 22 February 2023, Pre-Trial Chamber II issued arrest warrants on 17 March 2023 for Russian President Vladimir Putin and Maria Lvova-Belova, Russia’s Commissioner for Children’s Rights. On 24 June 2024, warrants were also issued for the arrest of Sergei Shoigu and Valery Gerasimov, former Minister and First Deputy Minister of Defence of the Russian Federation. The charges relate to a large number of strikes against numerous electric power plants and sub-stations in 2022-23.⁷⁴³

Putin and Lvova-Belova were indicted for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the

⁷⁴⁰ L. Douglas, ‘The United States and the ICC: The Court that Cannot Operate Against Us’, 19 *J. Int’l. Crim. Just.* (2021) 477, at 484.

⁷⁴¹ Consolidate Appropriations Act (2023). See P. Williams et al., ‘Introducing the Symposium on U.S. Support for the ICC’s Trust Fund for Victims’, *Just Security* (13 February 2023).

⁷⁴² See J. Galbraith, ‘U.S. Sanctions on the International Criminal Court: The Details and The Pattern’, *Verfassungsblog*, 7 June 2025.

⁷⁴³ Each person is charged with the war crime of directing attacks at civilian objects (article 8(2)(b)(ii) of the Rome Statute) and the war crime of causing excessive incidental harm to civilians or damage to civilian objects (article 8(2)(b)(iv) of the Rome Statute), and the crime against humanity of inhumane acts under article 7(1)(k) of the Rome Statute.

Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The Chamber held that '[t]here are reasonable grounds to believe that Mr Putin bears individual criminal responsibility for the aforementioned crimes, (i) for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute), and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the Rome Statute).'

The warrants remained sealed in order to protect victims and witnesses, and to safeguard continuing investigations. But in a statement on the day the warrants were announced, the Prosecutor, Karim Khan, said:

Incidents identified by my Office include the deportation of at least hundreds of children taken from orphanages and children's care homes. Many of these children, we allege, have since been given for adoption in the Russian Federation. The law was changed in the Russian Federation, through Presidential decrees issued by President Putin, to expedite the conferral of Russian citizenship, making it easier for them to be adopted by Russian families.

My Office alleges that these acts, amongst others, demonstrate an intention to permanently remove these children from their own country. At the time of these deportations, the Ukrainian children were protected persons under the Fourth Geneva Convention.

We also underlined in our application that most acts in this pattern of deportations were carried out in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014.⁷⁴⁴

The allusion to acts of aggression was most likely intended to signal that, although the ICC lacks jurisdiction to prosecute Russian officials for the crime of aggression, relevant actions would be addressed indirectly in the war crimes prosecutions.⁷⁴⁵ President Putin's spokesperson announced that Russia did not recognize the Court or its jurisdiction and former President, Dmitry Medvedev, called the Court a 'legal non-entity' and warned that any attempt to arrest Putin 'would be a declaration of war on the Russian Federation'. The prosecution of President Putin raises many issues, but two of the most important concern the immunity enjoyed by heads of state, and the possibility of a prosecution for aggression.

Head of State Immunity

Two provisions of the Rome Statute are of particular relevance to the question of whether President Putin could be argued to enjoy immunity from either arrest or prosecution:

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, ... shall in no case exempt a person from criminal responsibility under this Statute

⁷⁴⁴ K. A. A. Khan, Statement on the issuance of arrest warrants against President Vladimir Putin and Ms. Maria Lvova-Belova (17 March 2023).

⁷⁴⁵ F. Mégret, 'Why Prosecuting Aggression in Ukraine as a Crime Against Humanity Might Make Sense', 28 *J. Conflict and Security L.* (2023) 467.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

* * *

In the *Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ 1, the International Court of Justice confirmed the absolute and functional immunity of current and former heads of state and foreign ministers, based on customary international law. The assumption is that any such arrest is incompatible with the principles of sovereign equality and non-interference. The Court also found that customary international law did not support the existence of any form of exception to the rule in relation to war crimes or crimes against humanity.

Nevertheless, this issue has been extensively litigated in relation to the outstanding arrest warrants issued by the ICC for then President Omar Al-Bashir, of Sudan, on 4 March 2009 and 12 July 2010, for war crimes, crimes against humanity and genocide. Because Sudan was not a party to the Rome Statute, the situation in Darfur had been referred to the Court by the Security Council in Resolution 1593 (2005), which was adopted under Chapter VII of the UN Charter and was thus binding on states. President Al-Bashir subsequently travelled to several states, including Jordan, Malawi, and South Africa, none of which took steps to arrest him and render him to The Hague.

On the application of the Prosecutor, the Pre-Trial Chamber held that the relevant states were required to arrest Al-Bashir. In response, Jordan appealed. The Appeals Chamber agreed with the Pre-Trial Chamber that Article 27(2) meant that states parties to the Rome Statute could not invoke the principle of immunity to justify a failure to arrest and surrender an accused to the Court. It added that Article 27(2) also reflected customary international law, and that the order of the Security Council effectively brought Sudan, a non-state party, into the overall regime requiring cooperation with the Court as if it were a state party. Thus, Al-Bashir would have no immunity, in accordance with Article 27(2). A brief excerpt follows from the Appeals *Chamber's Judgment in the Jordan Referral re Al-Bashir Appeal* (ICC-02/05-01/09-397) (6 May 2019):

113. ... [T]here is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, ... such immunity has never been recognised in international law as a bar to the jurisdiction of an international court. ...

114. The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. ... [N]o immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.

The judgment proved to be very controversial. Consider the following responses:

Leila Nadya Sadat, 'Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising', *Just Security* (12 July 2019):

... [T]he decision was (1) unsurprising, (2) correctly decided, and (3) consistent with the Court's judicial mandate. ...

...

... [T]he *travaux préparatoires* ... indicate that Article 27(1) ... codifies the customary international law rule that whatever immunities an official might have before national courts cannot be pled as a bar or a defense to criminal responsibility, *ratione materiae*, before the ICC regarding the *jus cogens* crimes in the Rome Statute. Article 27(2) complements this provision by ensuring that no procedural immunities bar the ICC from exercising this jurisdiction. ...

...

... [I]n taking up the question of head of State immunity under customary international law, rather than relying upon the effect of U.N. Security Council Resolution 1593 to answer the question (as it could have done), the Appeals Chamber acted consistent with its judicial mandate and properly reaffirmed the autonomous nature of international criminal law before the ICC.

...

... [T]he political objective of immunizing heads of state (and presumably other high government officials) cannot properly be achieved through judicial reinterpretation of the Rome Statute, but can only be undertaken by the States Parties themselves, as the African Union has attempted in the Malabo Protocol.

... The Appeals Chamber has rendered a very significant decision regarding the scope and nature of the ICC's jurisdiction over core crimes.

Yet questions remain. First, the decision will not stop either the political or the scholarly debate over head of state immunity. Second, it does not answer the "vexing" question of when efforts to change customary international law ... could reach the tipping point necessary for such a change to come into effect. ... Moreover, if the core crimes and the provision of non-immunity for core crimes before international courts are *jus cogens* (peremptory norms), query whether [they can] be changed by contrary state practice at all? ...

Dov Jacobs, 'You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the *Bashir* case', *Spreading the Jam* (6 May 2019):

... [T]his Judgment means that immunities cannot be claimed by nationals of non-State parties, even when the situation is not referred to the Court by the UNSC. ...

... This is probably one of the weirdest consequences of the Judgment: because the Appeals Chamber claims the existence of a rule not just in the Rome Statute, but in customary international law, that there are no immunities before "international tribunals", one could arguably claim that the obligation to arrest and surrender a person would rest not only on State parties but also on non-State parties, because customary law is binding on all States... this is of course a ridiculous proposition, but it shows the absurdity of the Judgment.

... [T]he AC makes no mention of the Malabo Protocol, which explicitly provides for Head of State immunity. ...

Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals', *EJIL:Talk!* (6 May 2019):

This is stunning and appears to be deeply misguided. It is also, in my opinion, a very dangerous and unwise move for the Court to make. This reasoning appears to assert that parties to the Rome Statute have, by creating the Court, taken away the rights of non-party states under international law. Dangerous because this reasoning is likely to stiffen opposition to the Court by non-parties. The John Bolton's [sic] of this world and many people far more reasonable will point to this ruling to set out precisely why it is important to oppose this court and other international criminal courts. ... [T]he issue of the immunity of heads of state before international criminal courts is not what is at issue What [is] at issue is the immunity of heads of states from arrest by other states acting at the request of an international criminal court. That the head of state may not have immunity before the international criminal court does not, without more, say anything about whether he or she may have immunity before a foreign state.

ICC, Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in The Jordan Referral Re *Al-Bashir* Appeal (ICC-PIOS-Q&A-SUD-02-01/19), May 2019:

...

The judgment has generated animated discussion in blogosphere. what is the court's view on that?

There is nothing new, extra-ordinary [sic] or wrong about judgments of courts of law generating discussion among those who have a view. ...

In the era of social media, it is hoped that observers would properly study the Court's judgments and decisions before rushing to comment on them. ...

Lawyers engaging in public commentary should exercise particular caution and remain mindful of the cardinal principles that guide the conduct of lawyers, including that of honesty, integrity and fairness. This principle adequately covers the need to be fair when criticising courts and judges. ...

[*Note:* In related developments, the incoming German Chancellor stated in February 2025 that he would 'find ways and means' for Prime Minister Netanyahu to visit Germany and 'to leave again without being arrested'. He stated that 'it is a completely absurd idea that an Israeli prime minister cannot visit' Germany. In March 2025, Pre-Trial Chamber II of the ICC confirmed that Mongolia's failure to arrest President Putin when he visited violated the cooperation obligations in the Rome Treaty.]

The Crime of Aggression

At the Rome Conference in 1998, states were unable to agree on proposals to criminalize aggression. Definitional questions and the possible role of the Security Council were the principal stumbling blocks, in addition to fears on the part of powerful states of the ramifications of such a move.⁷⁴⁶ After extensive negotiations, a 2010 Review Conference of the ICC Statute, held in Kampala,⁷⁴⁷ agreed by consensus to several amendments, including the following:

Article 8 bis Crime of aggression

⁷⁴⁶ '... [T]he United States delegation expressed trepidation that the Kampala amendments might stimulate states to enact implementing statutes giving their domestic courts universal jurisdiction over the crime of aggression.' M. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harv. Int'l L. J.* (2012) 357, at 359.

⁷⁴⁷ All relevant documents are available at <https://asp.icc-cpi.int/reviewconference/crime-of-aggression>.

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment ...;
- (c) The blockade of the ports or coasts ...;
- ...
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 15 bis

Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

...

... 4. The Court may ... exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. ...

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. ...

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months ..., the Prosecutor may proceed with the investigation ... provided that the Pre-Trial Division has authorized the commencement of the investigation ..., and the Security Council has not decided otherwise

* * *

As of July 2025, 49 states have ratified the amendments relating to the crime of aggression. As of 2023, sixteen of those states had implemented the relevant provisions into domestic law, and nine had expanded the scope of their universal jurisdiction laws to include aggression.⁷⁴⁸

⁷⁴⁸ A. Hartig, *Making Aggression a Crime Under Domestic Law: On the Legislative Implementation of Article 8bis of the ICC Statute* (2023) 7-8.

Agreement on the definition of the crime of aggression represents major progress, but the many limits on the Court's jurisdiction for this crime reflect the determination of major powers to greatly reduce the possibility that they might be subject to such prosecutions. As a result, the most likely scenario for activation of the provisions would involve an outlier state committing an act of aggression which the Permanent Five members of the UN Security Council agree violates Article 8 *bis* and leads them to make a referral to the Court. This would exacerbate the criticism that the Court is only likely to constrain the least powerful, rather than the most powerful and aggressive.⁷⁴⁹

Russia, like the United States, is not a State Party and, because both states wield a veto in the Security Council, neither is ever likely to be the subject of a referral. To make up for this gap, the European Commission opened the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) in July 2023 as a hub to support national investigations. Including an initial US contribution of US\$1 million, the centre has a budget of over US\$10 million in its first year.

In response to these developments, various commentators have raised the issue of double standards, with some pointing to the U.S. invasion of Iraq in 2003 which did not lead to any investigations or prosecutions. Others observe that the United States, which has strongly supported initiatives against Russia, is not a party to the ICC, sought to ensure that it would never be the subject of a prosecution for the crime of aggression, and has resisted providing information to the ICC in the Russia case, reportedly because 'American military leaders ... fear setting a precedent that might help pave the way for it to prosecute Americans.'⁷⁵⁰ Following the outbreak of the Gaza war in October 2023, many commentators warned of the risk of double standards if the ICC Prosecutor did not pursue both sides in that conflict for alleged crimes.

Double standards have long been a seemingly unavoidable feature in the evolution of international human rights law.⁷⁵¹ Are they any more problematic when the issue is international criminal justice? Consider the following divergent perspectives.

Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice, U.S. State Department, Remarks at Nuremburg Principles Meeting, Catholic University of America (27 March 2023):

[At Nuremberg and in response to the atrocities committed in the former Yugoslavia and in Rwanda] the world came together to deliver a measure of justice in the face of atrocities. I am proud that at each of these moments, the United States supported the advancement of international criminal law and accountability. ...

Again now, at this critical moment in history, I am pleased to announce that the United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine. Although a number of models have been under consideration, ... we believe an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements—in the form of substantive law, personnel, information sources, and structure. It might also be located elsewhere in Europe, at least at first, to reinforce Ukraine's desired European orientation, lend gravitas to the initiative, and enable international involvement, including through Eurojust.

⁷⁴⁹ The Assembly of States Parties, meeting in July 2025, considered a proposal to extend the Court's jurisdiction over aggression to situations in which only one of the parties to the conflict had ratified the amendment. The issue was deferred for further consideration in 2029.

⁷⁵⁰ C. Savage, 'Pentagon Blocks Giving Hague Court Evidence of Possible Russian War Crimes', *The New York Times* (8 March 2023).

⁷⁵¹ For a strong defence of the proposed special tribunal, see P. Labuda, 'Countering Imperialism in International Law', 49 *Yale J. Int'l L.* (2023) 000.

...

We are committed to working with Ukraine, and peace-loving countries around the world, to stand up, staff, and resource such a tribunal in a way that will achieve comprehensive accountability for the international crimes being committed in Ukraine.

...

A tribunal of this type will complement the work that will be undertaken by the new International Centre for the Prosecution of the Crime of Aggression (ICPA) ... [which] will coordinate the investigation of acts of aggression committed against Ukraine and build criminal dossiers against those leaders responsible for planning, preparing, initiating, or waging this war of aggression for future trials. ...

...

The United States remains unwavering in its support of the government and people of Ukraine as they defend their country and their freedom. ...

Alice Spieri, 'Momentum Grows on Special Tribunal to Prosecute Putin's Aggression in Ukraine', *The Intercept* (13 February 2023):

Reed Brody, a human rights attorney specialized in mass atrocities and author of "To Catch a Dictator," stressed that the only reason a special tribunal might be necessary for Ukraine is that countries now calling for it restricted the ICC's jurisdiction over this crime. "People talk about a gap and a loophole. Well, how did that gap get created? It was purposeful," he told *The Intercept*. "You have to balance, is it better to have some justice at the cost of consecrating double standards? I'm not sure that everyone understands how toxic this justified perception is that international justice only kicks in against, you know, enemies or outcasts or low-value countries."

Asked about the extent to which concerns over double standards have hindered discussions over a special tribunal for Ukraine, Van Schaack told *The Intercept* "very little." She added, "The reality is that Russian aggression is so egregious, it's such a clear and manifest violation of the U.N. charter. ...

[Andriy] Kostin, the Ukrainian [Prosecutor-General], also dismissed those concerns.

"I don't want to spend time discussing the past. We can talk about the double, triple standards in the history of many countries, many organizations, but we have no time for this," he told reporters during his U.S. visit. "After the war, when we win, we will have time to analyze, to discuss and to find out what has happened before."

"We can't leave the situation as it is," he added. "If an aggressor starts an aggression and there is no valid, effective instrument to punish them, we need to invent this instrument together and punish the aggressor. Not only for this aggression, but to deter any other aggressor in any other place or time in the future." ...

Kai Ambos, 'Ukraine and the Double Standards of the West', 20 *J. Int'l Crim. Just.* (2022) 875, at 891:

Western claims to be defending a rules-based international order, in the context of the Ukraine situation or beyond, can only legitimately be made if the West itself complies with international law. While one may, arguably, see a difference

between the Russian war of aggression and the US-led invasion of Iraq or between the Russian *ius in bello* violations in Ukraine and the Western ones in Iraq and Afghanistan, these differences, if accepted at all, are at best ones of degree but not of principle. The same applies to drone killings by the US outside armed conflict and extra-legal executions by the Russians in the UK or elsewhere. In all these situations international law is violated, and the one violator cannot, legitimately and credibly, lecture the other one about compliance ...

QUESTION

The Parliamentary Assembly of the Council of Europe unanimously adopted Resolution 2482 (26 January 2023) calling upon the 46 member states of the Council (Russia was expelled in 2022) to establish a special tribunal. It proposed that:

7.1 its jurisdiction would be limited to the crime of aggression committed against Ukraine and would extend *ratione temporis* to the aggression started by the Russian Federation in February 2014. Its jurisdiction would include the role and complicity of the leaders of Belarus in the war of aggression against Ukraine ...

What are the arguments for and against extending the jurisdiction of this special tribunal to cover all member states of the Council of Europe?

7. Israel and Palestine: The Gaza Crisis

The killings and kidnappings carried out in Israel by Hamas on 7 October 2023, followed by the prolonged invasion of Gaza by Israeli forces and the massive loss of life that ensued, generated renewed pressure on the Prosecutor to act. On 5 February 2021, the ICC's Pre-Trial Chamber I had determined that the Court could, on an ongoing basis, exercise its criminal jurisdiction in the Situation in the State of Palestine, including Gaza and the West Bank. As a result, the Court has jurisdiction over crimes committed by both nationals of States Parties and by the nationals of non-States Parties on the territory of a State Party.⁷⁵²

STATEMENT OF ICC PROSECUTOR KARIM A.A. KHAN KC:

APPLICATIONS FOR ARREST WARRANTS IN THE SITUATION IN THE STATE OF PALESTINE, 20 MAY 2024

Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (Deif), Ismail Haniyeh

On the basis of evidence collected and examined by my Office, I have reasonable grounds to believe that **Yahya SINWAR** (Head of the Islamic Resistance Movement ("Hamas") in the Gaza Strip), **Mohammed Diab Ibrahim AL-MASRI**, more commonly known as DEIF (Commander-in-Chief of the military wing of Hamas, known as the *Al-Qassam Brigades*), and **Ismail HANIYEH** (Head of Hamas Political Bureau) bear criminal responsibility for the following war crimes and crimes against humanity committed on the territory of Israel and the State of Palestine (in the Gaza strip) from at least 7 October 2023:

- Extermination as a crime against humanity, contrary to article 7(1)(b) of the Rome Statute;

⁷⁵² For analyses of the jurisdictional and head of state/government immunity issues in this case, see K. Ambos et al, 'Without Fear or Favour: For an Effective International Criminal Court', *VerfBlog*, 14 June 2024, at <https://verfassungsblog.de/without-fear-or-favour/>; and T. Obel Hansen, 'State Objections to the ICC Prosecutor's Request for Arrest Warrants in the Palestine Investigation', *EJIL: Talk!*, 27 May 2024.

- Murder as a crime against humanity, contrary to article 7(1)(a), and as a war crime, contrary to article 8(2)(c)(i);
- Taking hostages as a war crime, contrary to article 8(2)(c)(iii);
- Rape and other acts of sexual violence as crimes against humanity, contrary to article 7(1)(g), and also as war crimes pursuant to article 8(2)(e)(vi) in the context of captivity;
- Torture as a crime against humanity, contrary to article 7(1)(f), and also as a war crime, contrary to article 8(2)(c)(i), in the context of captivity;
- Other inhumane acts as a crime against humanity, contrary to article 7(1)(k), in the context of captivity;
- Cruel treatment as a war crime contrary to article 8(2)(c)(i), in the context of captivity; and
- Outrages upon personal dignity as a war crime, contrary to article 8(2)(c)(ii), in the context of captivity.

My Office submits that the war crimes alleged in these applications were committed in the context of an international armed conflict between Israel and Palestine, and a non-international armed conflict between Israel and Hamas running in parallel. We submit that the crimes against humanity charged were part of a widespread and systematic attack against the civilian population of Israel by Hamas and other armed groups pursuant to organisational policies. Some of these crimes, in our assessment, continue to this day.

My Office submits there are reasonable grounds to believe that SINWAR, DEIF and HANIYEH are criminally responsible for the killing of hundreds of Israeli civilians in attacks perpetrated by Hamas (in particular its military wing, the al-Qassam Brigades) and other armed groups on 7 October 2023 and the taking of at least 245 hostages. ...

It is the view of my Office that these individuals planned and instigated the commission of crimes on 7 October 2023, and have through their own actions, including personal visits to hostages shortly after their kidnapping, acknowledged their responsibility for those crimes. We submit that these crimes could not have been committed without their actions. They are charged both as co-perpetrators and as superiors pursuant to Articles 25 and 28 of the Rome Statute.

...
My Office also submits there are reasonable grounds to believe that hostages taken from Israel have been kept in inhumane conditions, and that some have been subject to sexual violence, including rape, while being held in captivity. We have reached that conclusion based on medical records, contemporaneous video and documentary evidence, and interviews with victims and survivors. My Office also continues to investigate reports of sexual violence committed on 7 October.

... I again reiterate my call for the immediate release of all hostages taken from Israel and for their safe return to their families. This is a fundamental requirement of international humanitarian law.

Benjamin Netanyahu, Yoav Gallant

On the basis of evidence collected and examined by my Office, I have reasonable grounds to believe that **Benjamin NETANYAHU**, the Prime Minister of Israel, and **Yoav GALLANT**, the Minister of Defence of Israel, bear criminal responsibility for the following war crimes and crimes against humanity committed on the territory of the State of Palestine (in the Gaza strip) from at least 8 October 2023:

- Starvation of civilians as a method of warfare as a war crime contrary to article 8(2)(b)(xxv) of the Statute;
- Wilfully causing great suffering, or serious injury to body or health contrary to article 8(2)(a)(iii), or cruel treatment as a war crime contrary to article 8(2)(c)(i);
- Wilful killing contrary to article 8(2)(a)(i), or Murder as a war crime contrary to article 8(2)(c)(i);

- Intentionally directing attacks against a civilian population as a war crime contrary to articles 8(2)(b)(i), or 8(2)(e)(i);
- Extermination and/or murder contrary to articles 7(1)(b) and 7(1)(a), including in the context of deaths caused by starvation, as a crime against humanity;
- Persecution as a crime against humanity contrary to article 7(1)(h);
- Other inhumane acts as crimes against humanity contrary to article 7(1)(k).

... We submit that the crimes against humanity charged were committed as part of a widespread and systematic attack against the Palestinian civilian population pursuant to State policy. These crimes, in our assessment, continue to this day.

My Office submits that the evidence we have collected ... shows that Israel has intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival.

This occurred through the imposition of a total siege over Gaza that involved completely closing the three border crossing points, Rafah, Kerem Shalom and Erez, from 8 October 2023 for extended periods and then by arbitrarily restricting the transfer of essential supplies – including food and medicine – through the border crossings after they were reopened. The siege also included cutting off cross-border water pipelines from Israel to Gaza – Gazans’ principal source of clean water – for a prolonged period beginning 9 October 2023, and cutting off and hindering electricity supplies from at least 8 October 2023 until today. This took place alongside other attacks on civilians, including those queuing for food; obstruction of aid delivery by humanitarian agencies; and attacks on and killing of aid workers, which forced many agencies to cease or limit their operations in Gaza.

My Office submits that these acts were committed as part of a common plan to use starvation as a method of war and other acts of violence against the Gazan civilian population as a means to (i) eliminate Hamas; (ii) secure the return of the hostages which Hamas has abducted, and (iii) collectively punish the civilian population of Gaza, whom they perceived as a threat to Israel.

The effects of the use of starvation as a method of warfare, together with other attacks and collective punishment against the civilian population of Gaza are acute, visible and widely known, and have been confirmed by multiple witnesses interviewed by my Office, including local and international medical doctors. They include malnutrition, dehydration, profound suffering and an increasing number of deaths among the Palestinian population, including babies, other children, and women.

Famine is present in some areas of Gaza and is imminent in other areas. As UN Secretary-General António Guterres warned more than two months ago, “1.1 million people in Gaza are facing catastrophic hunger – the highest number of people ever recorded – anywhere, anytime” as a result of an “entirely manmade disaster”. Today, my Office seeks to charge two of those most responsible, NETANYAHU and GALLANT, both as co-perpetrators and as superiors pursuant to Articles 25 and 28 of the Rome Statute.

Israel, like all States, has a right to take action to defend its population. That right, however, does not absolve Israel or any State of its obligation to comply with international humanitarian law. Notwithstanding any military goals they may have, the means Israel chose to achieve them in Gaza – namely, intentionally causing death, starvation, great suffering, and serious injury to body or health of the civilian population – are criminal.

...

Today we once again underline that international law and the laws of armed conflict apply to all. No foot soldier, no commander, no civilian leader – no one – can act with impunity. Nothing can justify wilfully depriving human beings, including so many women and children, the basic necessities required for life. Nothing can justify the taking of hostages or the targeting of civilians.

...

It is critical in this moment that my Office and all parts of the Court, including its independent judges, are permitted to conduct their work with full independence and impartiality. I insist that all attempts to impede, intimidate or improperly influence the officials of this Court must cease immediately. My Office will not hesitate to act pursuant to article 70 of the Rome Statute if such conduct continues.

...

Let us today be clear on one core issue: if we do not demonstrate our willingness to apply the law equally, if it is seen as being applied selectively, we will be creating the conditions for its collapse. In doing so, we will be loosening the remaining bonds that hold us together, the stabilising connections between all communities and individuals, the safety net to which all victims look in times of suffering. This is the true risk we face in this moment.

...

Responses to the Prosecutor's statement⁷⁵³

Immediately after this statement, it was claimed by *The Guardian* and two Israeli-based magazines +972 and *Local Call* that, for almost a decade, Israel ran a 'secret "war" against the court. The country deployed its intelligence agencies to surveil, hack, pressure, smear and allegedly threaten senior ICC staff in an effort to derail the court's inquiries.' This allegedly included intercepting phone calls, messages, emails and documents involving the Prosecutor and his predecessor.⁷⁵⁴

Even before the Prosecutor made his announcement, he received a letter dated 24 April 2024 and signed by 12 US Senators warning that any warrants against Israeli officials would amount to actions that are 'illegitimate and lack legal basis, and if carried out will result in severe sanctions against you and your institution.' It characterized any such action as an attempt 'to punish Israel for taking legitimate actions of self-defense against their Iranian-backed aggressors' and argued that the issuance of warrants would call 'into question the legitimacy of Israel's laws, legal system, and democratic form of government.' They also noted that it would expose the ICC's 'hypocrisy and double standards' since it has never issued warrants against the leaders of Iran, Syria, or China.

Finally, neither Israel nor the United States are members of the ICC and are therefore outside of your organization's supposed jurisdiction. If you issue a warrant for the arrest of the Israeli leadership, we will interpret this not only as a threat to Israel's sovereignty but to the sovereignty of the United States. ...

The United States will not tolerate politicized attacks by the ICC on our allies. Target Israel and we will target you. If you move forward with the measures indicated in the report, we will move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States. You have been warned.

On 4 June 2024, the House of Representatives by a vote of 247-155, adopted 'H.R.8282 - Illegitimate Court Counteraction Act' which essentially proposed the re-enactment of the Trump-era sanctions against the Court.⁷⁵⁵ The entirety of President Biden's official response on 20 May 2024 was:

The ICC prosecutor's application for arrest warrants against Israeli leaders is outrageous. And let me be clear: whatever this prosecutor might imply, there is no equivalence — none — between Israel and Hamas. We will always stand with Israel against threats to its security.

Prime Minister Netanyahu called the announcement 'a moral outrage of historic proportions', given that Israel was 'waging a just war against Hamas, a genocidal terrorist organisation that perpetrated the worst attack on the Jewish people since the Holocaust.' He also called the Prosecutor one of the 'great antisemites in modern times,' whose warrants against Israeli officials amounted to 'callously pouring

⁷⁵³ For detailed and updated information, see R. Ingber, 'Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant', *Just Security* blog, 6 March 2025.

⁷⁵⁴ 'Spying, hacking and intimidation: Israel's nine-year "war" on the ICC exposed', *The Guardian*, 28 May 2024

⁷⁵⁵ <https://www.congress.gov/bills/118th-congress/house-bill/8282/text>

gasoline on the fires of antisemitism that are raging around the world.⁷⁵⁶ On 21 November 2024, ICC Pre-Trial Chamber I unanimously rejected challenges by Israel, and issued the arrest warrants for Netanyahu and Gallant.

QUESTIONS

1. What are the principal legal challenges that the Prosecutor is likely to face?
2. In January 2025, following Donald Trump's re-election as US President, the independent Special Counsel, Jack Smith, who had been preparing a criminal case against him in connection with the riots in the US Capitol on 6 January 2020, announced that no charges would be pursued as a result of 'a longstanding and binding Justice Department policy prohibiting criminal cases from moving forward against sitting presidents.'⁷⁵⁷ Does the same logic suggest that the ICC should not prosecute sitting Presidents or Prime Ministers?

8. Evaluating International Criminal Justice and the ICC

Both international criminal law as a field, and the work of the ICC as an institution, have been the subject of sustained criticism from scholars and practitioners.⁷⁵⁸ Gerry Simpson suggests, in 'International Criminal Law: The Next Hundred Years', in Kevin Jon Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020) 841, at 849-50, that international criminal law 'may now be the most critiqued field in human history.' He then adds his own critique which is that what the field does 'is to bring into being a narrow and compromised image and practice of justice, enact and reproduce a particular victim and perpetrator subjectivity, and encourage a sometimes distracting form of anti-politics.' In the same volume, at 1, the editors identify three enduring controversies that have marred the discipline's self-understanding:

... ICL has increasingly raised issues of hierarchy. The very nature of ICL is to create a hierarchy between the norms it backs and all other norms, the latter of which are presumed not to have an (internationally) penal character. But do norms of ICL always trump 'ordinary' norms of international law, as in the case of immunities? Issues of hierarchy can be found within ICL itself between its 'core' crimes and those presumed to lie at its periphery; in the relationship between international criminal tribunals themselves (is the ICC a *primus inter pares* or merely one among many international criminal jurisdictions?); and between international criminal tribunals and domestic courts (issues of complementarity and primacy). Questions of hierarchy also emerge in the practice of international criminal justice, such as in the tension between the rights of the defence and the rights of victims, or between the pursuit of justice and the pursuit of peace.

ICL also increasingly raises questions of equality that are at least partly in tension with the vertical thrust of hierarchy. How should ICL treat like cases alike? To what extent is international criminal justice the repository of ideological presuppositions that lead it to emphasize the importance of some harm or some evil at the expense of others? Certain hierarchical criteria (e.g., the relative gravity of crimes) inevitably provide the basis for claims that less grave instances of crime are being treated with too much severity—and vice versa. Negotiating this distributive dimension has become the stock and trade of

⁷⁵⁶ 'What the ICC arrest warrants mean for Israel and Hamas', BBC News, 21 May 2024.

⁷⁵⁷ A. Feuer and C. Savage, 'Four Takeaways From the Special Counsel's Report on the Trump Election Case', *New York Times*, 14 January 2025.

⁷⁵⁸ See, for example, M. Bergsmo et al. (eds.), *Power in International Criminal Justice* (2020).

international criminal tribunals, which constantly have to deal with allegations that their choices reflect some a priori bias.

Finally, ICL raises intractable questions of authority in a context where its impact on certain constituencies is real and dramatic. Although ICL seems to presuppose consensus in its very definition, that consensus is prone to crumble as soon as one seeks to implement it. What seems agreeable from a distance often looks uglier when the hard political costs for various actors are computed from up close. Who, in such conditions, gets to establish international criminal tribunals? How are international criminal cases constructed—and by whom? Who exercises prosecutorial discretion? Who speaks for international criminal justice? For victims? And why would states, victims, or even defendants decide to defer to certain institutional actors and not others?

**SERGEY VASILIEV, THE CRISES AND CRITIQUES OF INTERNATIONAL CRIMINAL JUSTICE
KEVIN JON HELLER ET AL. (EDS.), THE OXFORD HANDBOOK OF INTERNATIONAL
CRIMINAL LAW (2020) 626**

... Every international criminal tribunal, past or present, has had to face charges of legality and fairness deficits, victor's justice, selectivity, neo-colonialism, or other criticisms ... Such critiques ... aim at exposing the project's intimacy with hegemonic power: its provenance, embedding, and complicity in the structures of geopolitical (economic, cultural, gender-based) domination. ...

... Instituted by states directly or via international organizations, [the tribunals'] authority comes with strings attached. It can only be enforced on the strength of donors' continued operational, political, and financial support. At the same time, courts pretend that authority to be transcendent, decoupled from any one stakeholder, and universal in addressees. They purport to do justice *pro omnibus*, in the name of the 'international community', 'humanity', 'civilization' or 'us'—the subjects they themselves constitute. Their brand of justice is *erga omnes* and dispensed, among others, vis-à-vis the powers-that-be on which they depend for functioning and survival.

... [The tribunals] seek to transcend politics by proffering justice as a superior alternative. But the rhetoric of legalism holds little sway. Although power camouflages itself artfully in technical juridical enterprises hinging upon expertise and rule-following, the courts are inevitably political actors that pool, process, and deploy power. ... Rather than 'speaking truth to power', the tribunals have mostly piggybacked on the latter, with their pursuit of justice only extending as far as political expedience permits.

Selectivity and unequal enforcement—regular features of the international criminal justice landscape—cannot be entirely explained by mere jurisdictional and admissibility constraints, despite *bona fide* attempts. Those features may flow from the anticipation of backlash and internalization of outside pressures ...

...
Mainstream accounts paint international criminal law's history as indivertible and irreversible progress from the heroic primitivism of Nuremberg (and the less presentable Tokyo) to the conveyor belt and technocratic *punctilio* of modern judicial bureaucracies to the glorious culmination in eternity, the permanent [ICC]. Such linear master-narratives, which are also eagerly sustained by the institutions and their insiders themselves, cast the journey 'from Nuremberg to The Hague through Rome and beyond' as an aspect and the premise of the humanity's progress. However, the credibility of sanitized and self-serving histories has increasingly been questioned.

The turn to the critical history of the discipline brings to light blind spots, untested assumptions, and epistemological twists of the mainstream takes. ...

...

B. *Critical Turn*

Increasingly, international criminal law scholarship has opened itself up to critical voices and become more introspective. Accounts highlighting aspects of courts' underperformance have multiplied and criticisms grown ever more strident, which also had an influence on how practitioners and insiders positioned themselves in the debate. The internal (efficacy) critiques belonging to the liberal type and its derivative a-liberal genre have focused respectively on the instances when the law or practice fell short of liberal justice principles or was constrained by their domestic articulations too unreflectively. The liberal ('pre-fab') critiques are essentially benevolent and often practised by the actors of the 'mainstream', i.e. those situated professionally and ideologically within the project.

Even more consequential has been the coming to the fore of the so-called 'radical critiques': a mixed bag of approaches interrogating international criminal law from the Third World Approaches to International Law (TWAAIL), postcolonial, Marxist, feminist, and other angles. This genre of critiques fundamentally questions the project's moral and epistemic credentials, its rationality, and virtuousness. Such structural critiques upset the field's certainties, lay bare its contradictions, and arouse its anxieties. By unpacking its contentious origins, workings, and effects, those accounts expose the extent to which international criminal justice may be a part of the problem rather than solution.

...

... It is yet to be seen whether the rise of critique will bring about an epistemological renewal of the discipline. ...

As for the practice, the effects of the 'critical turn' have not been immediately felt or, at least, been very visible. As the proverbial dogs bark, the caravan of international justice goes on. The professionals in The Hague and elsewhere have been carrying on with their chores. ...

...

III. Legitimacy Skirmishes and Mediatory Spaces

...

A. *What Critics Want*

...

... [R]adical critiques seek to expose [ICL's] linkages to the dominant global (or localized) geopolitical, economic, and socio-cultural power structures, and its role in perpetuating rather than remedying injustices and inequalities of the existing order. Insofar as these accounts bring into sharper relief its perceived irrelevance (moral bankruptcy, vacuity, hypocrisy, and irrationality), they are potentially far deadlier to the legitimacy of the international criminal justice enterprise than the critiques performed within a liberal frame of reference, which presume that any defect can be repaired through a stricter adherence to law and/or expansion of its reach. ...

...

Other than the motive of unsettling the orthodoxies of the field that animates all radical critiques, there exists no unity regarding the ultimate goals of the critical project, the admissible extent of participation and engagement, or the question of whether critics should invest in improving and reforming the enterprise that is being critiqued. For some, the goal is epistemic: production of transformative knowledge needed to rebuild ICL on new, fairer foundations. Getting closer creates a risk of losing critical detachment and compromising critical identity: a critic 'selling out' for relevance and becoming complicit with the object of critique. Others will pursue engagement beyond critical knowledge production and invest in a 'constructive' agenda to spawn reform and 'fix' the system. Those who still harbour faith in the emancipation and empowerment through international (criminal) law take its transformative promise seriously and are determined to hold it to its professed ideals. They are not prepared to withdraw just yet.

...

The political power of critiques is amplified when they resonate with an 'anti-mainstream' and 'counter-hegemonic' pushback by individual states, intergovernmental organizations, and other actors defying international criminal justice in its current form. Whenever it converges with the politics of structural resistance to the project, the critique itself becomes deeply political and starts being seen as a threat, and not just rhetorically. The critics' situational alignment with those wishing the project's

demise may be in discord with their prior involvement with the project and engender mistrust about their loyalties, agendas, and motivations. Some defenders might also still expect the critics to be less vocal in their critiques so as not to further exacerbate the position of the institutions as the real underdogs in their clashes with recalcitrant sovereign powers. The critical agenda of challenging the hegemony incarnated in international criminal justice, they will reason, should logically extend to all hegemons, including those who attack the project. The Al-Bashirs, Dutertes, Boltons, and Putins of this world, who oppress subjects on whose behalf the critics engage (developing peoples, poor classes, people of colour, women, victims of state-sponsored violence), are now trying to beat the ICC into submission. It is those hegemons, and not the ICC, that ought to become primary targets of critique.

There is an expectation that critics would form a tactical alliance with the defence camp particularly when the project is threatened; this is not unreasonable, unless one embraces the dubious wisdom that ‘an enemy of an enemy is a friend’. Directing the sword of critique to the project’s ‘foes’ does not render the critic complicit, because a critique of those who attack it is not the same as defending it; it simply means being true to one’s own method. This is why the defenders may consider it inconsistent if the critics do not turn against the powerful detractors of the institutions, and if they do not use their celebrated critical sensibility as readily in order to expose and condemn those attackers’ self-interest, hypocrisy, and track record of oppression, exclusion, and atrocity.

While the most radical of the critical projects would be to demand the dismantling of the system of international criminal justice, few critics, if any, would contemplate this outcome or be prepared to push for it to the end. As critique is ontologically dependent—some would say parasitic—on its object, many ‘crits’ are in fact quite invested in the project that they need as an indispensable target, or a ‘convenient punch-bag’. ... Yet, a significant number of critics stop short of rejecting the foundational ideas and rationales underlying international criminal justice. Rather, they endorse it insofar as it carries, if theoretically, a promise for at least starting to address the systemic causes for exclusion and oppression. International criminal justice continues to be seen as a potentially transformative and critical project in itself; a tool that can be wielded by the weak in order to constrain power, not only by the powerful in order to oppress the weak. ...

...

IV. Legitimacy as Crisis Management

Is there a solution to the never-ending legitimacy crises of international criminal justice? ...

[D]iscarding the project’s emancipatory promise would mean throwing the baby out with the bathwater. It is the reason why the project continues to arouse strong emotions and interest in those who want to see its promise fulfilled. Some of the ‘radical critics’ challenge it precisely because they believe it could be reinvented or refashioned as an instrument of justice and equality to the benefit of the invisible, voiceless, and downtrodden. The courts can do little to fix the global power structures of which they are a progeny. But critical sensibility could infiltrate the mainstream and permeate the intimate sphere of decision-making. If and when the project’s insiders come to be sensitized to the critical concerns to the point of making them their own, this could become the tipping point for the genuine transformation of institutional politics of international criminal law. ...

To most of the radical critiques, there are no persuasive and ready-made answers (yet). The legitimacy curse of international criminal justice can hardly be undone and most of the available solutions will be partial and attitudinal. That said, the legitimacy ‘crises’ can be managed more expertly than has been the case so far. Legitimacy is a plant that needs to be watered regularly. ...

PHILIP ALSTON, ‘CRIMINALIZING HUMAN RIGHTS’
15 *J. HUM. RTS. PRAC.* (2023) 660

[Note that this analysis is not directed specifically at the work of the ICC, but at the evolution of the broader system.]

The priorities reflected in the overarching system that includes the [IHRL, IHL and ICL regimes] are currently undergoing a gradual but highly significant transformation. The cause is a growing preoccupation with ‘atrocity crimes’ including their documentation, investigation, and prosecution, the imposition of criminal sanctions in response to an ever-increasing range of violations, and the recasting of other violations as crimes. ...

The pre-occupation with atrocity crimes, and other endeavours to expand the list of such crimes, such as those around ecocide, domicile, and omnicide, and the urge to apply the label of genocide wherever possible, diminishes the attention given to significant violations that do not reach the threshold of an atrocity. It makes it less likely that the most high-profile and well-resourced activities in the field, which are increasingly concerned with atrocity crimes, will seriously engage with the full range of violations and will make use of the spectrum of available responses. It also facilitates the neglect of structural issues such as extreme inequality, entrenched racism and sexism, and extreme poverty. And it leaves even less space for tackling the non-criminal dimensions of newer but equally pressing challenges such as climate change, and human rights threats posed by digital technologies and artificial intelligence. A closely related phenomenon is the trend towards responding to serious violations through the imposition of criminal sanctions, rather than through more nuanced and tailored measures. Criminal law, at both the international and domestic levels, is increasingly becoming the principal fulcrum around which many enforcement responses now revolve.

In the IHRL and ICL fields, some of these issues have been canvassed in instructive debates focused on the preoccupation with combating impunity.⁷⁵⁹ But in much of the literature the focus on the opposite of impunity—punishment—leads to an unduly narrow understanding of the consequences of what is happening. For example, some critics focus primarily on how the definition of atrocity crimes might be expanded, while others explore techniques that might be used to broaden the prosecutorial focus.⁷⁶⁰ But the spotlight remains on prosecution rather than on the wider spectrum of available tools.⁷⁶¹ ‘Criminalization’, rather than anti-impunity, is a more encompassing and evocative way of describing a process that has been gathering speed over the past two decades. It is a term ... used here in a more encompassing sense than comparable approaches such as ‘anti-impunity’,⁷⁶² the proliferation and legitimization of punitive responses in human rights law,⁷⁶³ judicialization or juridification,⁷⁶⁴ or ‘human rights penalty’.⁷⁶⁵ The present usage draws upon those insights but seeks to emphasize the combined impact of what are often examined as distinct phenomena.

In broad terms, criminalization reflects a mentality—a way of understanding and implementing the goals of a complex set of regimes. It reflects a particular philosophy of how societies can best be regulated, and it assumes that law enforcement officers, prosecutors and judges should be at the core of the overall system. It thus adopts a very narrow and specific approach to the much broader challenge of how to promote and uphold respect for human rights within societies.

More specifically, examples of the criminalization process can be found in: the preoccupation with ‘atrocity crimes’ in the work of the International Criminal Court and other tribunals, thus greatly narrowing the effective scope of ICL; the parallel narrowing of principal concerns in the IHL field away from the full range of issues and towards violations that might be prosecuted under ICL; the growing emphasis within UN commissions of inquiry (COIs) on ‘atrocity crimes’ and on gathering evidence that would satisfy the standards of criminal tribunals in order to establish individual criminal responsibility; and the high levels of funding being invested into international investigative mechanisms and atrocity crime COIs, in contrast to the patently inadequate funding of core activities such as treaty body monitoring and the accountability roles of Special Procedures mandate-holders. An important recent civil society initiative proposing the creation of a Standing Independent

⁷⁵⁹ K. Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights’, 100 *Cornell L. Rev.* (2015) 1069.

⁷⁶⁰ R. DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (2022).

⁷⁶¹ B. Sander, ‘The Anti-Impunity Mindset’, in M. Bergsmo et al. (eds.), *Power in International Criminal Justice* (2020) 325.

⁷⁶² K. Engle, n. 41 above.

⁷⁶³ M. Pinto, ‘Historical Trends of Human Rights Gone Criminal’, 42 *Hum. Rts. Q.* (2020) 729.

⁷⁶⁴ C. Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order* (2019).

⁷⁶⁵ S. Tapia Tapia, *Feminism, Violence Against Women, and Law Reform: Decolonial Lessons from Ecuador* (2022).

Investigative Mechanism, which would have a very broad mandate and a large staff, epitomizes some of these trends. While accountability is a leitmotif for the entire IHRL/IHL/ICL system, this initiative defines it very narrowly so that in order to qualify as an ‘accountability mechanism’ the relevant body must engage in evidence collection, the identification of perpetrators, or the preparation of casefiles. Another example is the overwhelming emphasis on a plethora of comparatively lavishly funded criminal investigations in Ukraine.

A similar dynamic is occurring within more specific sectors of human rights. Being seen to ‘crack down’ by prosecuting and punishing individual wrongdoers has become the preferred response in some key areas. In the field of women’s rights, for example, governments and international institutions and courts are increasingly focused on those violations that involve criminal conduct, such as rape and violence against women. And as we shall see below, in areas such as counter-terrorism and transitional justice there is a premium on criminalizing certain forms of behaviour and prosecuting violators, rather than on trying to grapple with the broader context in which solutions need to be sought. Other areas, beyond the scope of this article, that warrant future analysis in this regard are labour rights and modern slavery laws, and refugee and migration law. States are rapidly expanding their criminal codes, turning to the police and security forces to uphold human rights, and concentrating their efforts on a limited number of wrongdoers.

A similar trend is discernible in terms of the human rights foreign policies of many Western governments that now engage less substantively with a broader range of issues and have instead prioritized the imposition of sanctions against individuals accused of corruption or human rights abuses. These targeted sanctions have become a favoured technique of Western governments, and have been mimicked by China and Russia. Such sanctions are, arguably, a form of criminal punishment, in which named individuals are publicly accused of crimes, and a punishment or sanction is prescribed and implemented. Similarly, very considerable resources are now being invested at the national level, especially in western Europe, in order to prosecute individuals for crimes committed in foreign jurisdictions on the basis of assertions of universal jurisdiction.

In some ways, the most paradoxical aspect of these trends is that few human rights proponents would be likely to oppose any of the developments when looked at individually on their own merits. Who would contest the propositions that accountability is crucial, impunity must be countered, and the guilty must be prosecuted and punished? In addition, the voluminous literature around international criminal justice argues that many other benefits potentially flow from processes of criminalization, such as deterrence, historical record-building, victim-participation, reparations and so on. And, from the perspective of those working in these areas, there is cause for satisfaction: considerable additional resources are being mobilized, new civil society and professional initiatives are flourishing at both the international and national levels by way of adaptation to the new environment, important new skills are being developed, a professional core of investigators, prosecutors, defence counsel, and judges has emerged, some accountability mechanisms are being better-resourced, and entirely new international mechanisms are being created.

But these advantages come at a considerable price

* * *

But many other assessments have been less critical. Nancy Amoury Combs, in ‘International Criminal Justice’, in Barbora Holá et al. (eds.), *The Oxford Handbook of Atrocity Crimes* (2022) 617, at 626, focuses on the system’s more practical achievement in relation to impunity:

Before the 1990s, no one expected perpetrators of mass atrocities to be held criminally accountable. Today, as a statistical matter, no one should expect perpetrators of mass atrocities to be held criminally accountable, because most still are not. But the advent of the international criminal justice project transformed the world from one in which impunity following international

crimes is expected to one in which impunity following international crimes is decried.

And Carsten Stahn, in 'The ICC in Its Third Decade: Setting the Scene', in Carsten Stahn and Rafael Braga da Silva (eds.), *The International Criminal Court in Its Third Decade: Reflecting on Law and Practices* (2024) 3, 10, notes the Court's important jurisprudential contributions:

to the reading and clarification of substantive criminal law, including the understanding of the policy requirement of crimes against humanity, sexual and gender crimes against women and men, intra-party offences against children, destruction of cultural property, reproductive rights, and the reconceptualization of modes of liability beyond the jurisprudence of the *ad hoc* tribunals.

...

... In some areas, such as sexual and gender-based violence, victim participation⁶⁰ or reparative practices for victims and survivors, emerging ICC practices are often at the forefront or ahead of developments domestically, despite their imperfections.

Evaluating the ICC

There have been many efforts to evaluate the effectiveness of the ICC.⁷⁶⁶ Some of these have focused on the more institutional and procedural dimensions, while others have adopted a broader empirical approach. The former is illustrated by Douglas Guilfoyle, in 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis', 16 *Melb. J. Int'l. L.* (2019) 401, at 449:

It is hard to escape the conclusion that the Court has not been well served to date by either its Prosecutors or, collectively, its judiciary. What is required is a new motivating ethic of modesty throughout the entire institution: modesty as to how much it can achieve; modesty among the senior office-holders as to the scope of their roles and the divisions of responsibility among the Court's arms; modesty in terms of strict application of the Rome Statute and avoidance of judicial overreach. In particular, the Court must retire some of its more grandiose universalist rhetoric and set more realistic expectations in its communications with victims and other stakeholders. Universalism may have fostered its legitimacy among some audiences, but it has led to missteps, and risked alienating major constituencies, including among the ASP.

As regards the OTP, 'it is hard to see how the Court can succeed if the Office of the Prosecutor is failing to present convincing cases'. Numerous factors appear to have led to this result: poor resource allocation (opening too many preliminary investigations or investigations in too many situations); poor strategy (turning quite late to the idea of prosecuting mid-level leaders first); poor case preparation (a lack of 'linking' evidence connecting high leaders with the crimes actually committed); a certain ignorance or naivete about local political conditions; as well as actual obstruction by states and a degree of judicial uncertainty as to applicable standards of evidence.

Many of these concerns were addressed by the 2020 Independent Expert Review of the ICC (p. 000 above) which confined its 348 recommendations to concrete reforms. For example, it observed (at 332) that:

⁷⁶⁶ See S. Ford, 'Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention', 43 *Loy. L.A. Int'l & Comp. L. Rev.* (2020) 101; H. Jo and B. Simmons, 'Can the International Criminal Court Deter Atrocity?', 70 *Int'l Org.* (2016) 443; C. Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya', 42 *Int'l Interactions* (2016) 616; and J. Meernik, 'The International Criminal Court and the Deterrence of Human Rights Atrocities', 17 *Civil Wars* (2015) 318.

The Court, and senior management specifically, need to make efforts to rebuild and strengthen internal trust and re-shape the working culture at the Court. The leadership of the Court should adopt and demonstrate a clear commitment to a multi-pronged strategy to deal with predatory behaviour in the workplace, namely bullying, harassment and especially sexual harassment.

But the Review, perhaps wisely, effectively sidestepped the question of the Court's effectiveness:

368. Assessing the Court's effectiveness means evaluating the impact of the Court on affected local communities and victims, as well as the Court's deterrent effect. Different indicators and methodology are required, including qualitative indicators assessed through – for example – polls and questionnaires among local communities. For an objective assessment of the Court's impact, such analysis would best be carried out by entities external to the Court. Civil society organisations and academics can play an essential role in this regard ...

Consider, in contrast, the following attempt to arrive at an empirically-grounded assessment.

**GEOFFREY DANCY, THE HIDDEN IMPACTS OF THE ICC:
AN INNOVATIVE ASSESSMENT USING GOOGLE DATA
34 LEIDEN J. INT'L L. (2021) 729**

... In evaluation science, assessing the performance of an organization requires a systematic consideration of how efficiently or effectively it operates to produce outputs that translate into intended outcomes. ... Some have wondered whether it is even possible to reliably assess the ICC's accomplishments: the Rome Statute does not clearly outline the Court's aims or objectives; and its extrapolated goals are multi-faceted and possibly contradictory. ...

... [T]his article argues that ... the ICC has diffuse yet measurable impacts on social discourse, and these impacts are overlooked in most assessments. The data presented demonstrate that ICC interventions – including preliminary examinations and investigations – are associated with a significant and sustained increase in Google searches for 'human rights' in situation countries. ... [T]here is no more significant predictor of sudden spikes in a country's Google searches for human rights than the onset of an OTP investigation. This mostly likely indicates that ICC involvement leads to information-seeking among the public, hinting that the Court may indeed have 'socio-pedagogical' effects that often remain hidden.

...

2. Two perspectives on ICC performance

2.1 *The rationalist approach*

The most common approach to evaluating the ICC's performance is rationalism. ... This ontology ... assumes social, legal, and political behaviour can be perfected through good insight and design. Journalists informally adopt rationalism when they point to the OTP's low conviction rate, or when they call into question the ICC's sluggish process, great expense, or lack of 'bang for the buck' as evidence of inefficiency. Some ask outright whether the ICC has 'failed', citing the fact that atrocities still take place in states like Syria, Yemen, or Myanmar. The implication is that, if only it followed better procedures or its personnel were more competent, the Court would achieve greater success in deterring violence in the world.

Rationalism also undergirds more formal 'effectiveness criticism' directed at the ICC. This involves identifying the Court's mandated aims – like providing victim satisfaction or deterring future atrocities – and positing that certain operational shortcomings prevent those aims from being reached. One common underlying assumption is that the ICC has carefully calculating audiences that are keeping a close watch. When those audiences observe missteps, they receive signals to update their attitudes and

behaviour in relation to the Court. For instance, consider the often disparaged slow pace of investigations and proceedings, which results not only from the institutional structure of the Court but also prosecutorial strategy. Concern over the ICC's expeditiousness, carried over from criticism of the ad hoc tribunals of the 1990s, is rooted in the presumption that slow justice leads to waning hopes among victims. If victims are not satisfied, the thinking goes, the Court will lose legitimacy. Similarly, drawing on criminology, scholars argue that selective prosecutions and infrequent convictions will do little to change the cost–benefit analysis of would-be atrocity criminals. In other words, insufficient trial outputs will fail to achieve deterrence. Why? Because atrocity criminals are plodding, careful actors who follow the Court's record, and update their prior beliefs with new information. But each of these effectiveness critiques is theoretical: we possess very little hard evidence that victims are disappointed with the ICC, or that violent state leaders discount the Court for being toothless.

Rationalist performance evaluations are not just employed for criticism. The ICC itself has adopted a highly rationalist, some say technocratic, approach to monitoring its own operations. The Second Court's Report on Development of Performance Indicators outlines a set of four goals – fair and expeditious trials, effective leadership and management, adequate security, and victim access – and presents a bevy of indicators for auditing the Court's pursuit of those goals. ...

2.2 *The constructivist approach*

An alternative approach to assessing ICC performance is available. Drawing on international relations theory ... [c]onstructivism is concerned with the ways that ideas and norms permeate interactions, thus conditioning 'the nature of agents and subjects'. Philosophically, this diverges from rationalism in many ways, most notably by assuming that humans are social beings whose preferences are shaped by a dense network of rules that constitute society. In short, people are not individual cost-benefit calculators; they are complex rule navigators.

Constructivist performance evaluation has been proposed by a handful of management scholars, but not widely adopted in the study of law and society. This alternative essentially involves considering how an organization may itself alter social relations. There are two main reasons that reviewers might consider this departure from a rational systems approach. First, the ICC is not easily reduced to a corporate forum for creating predictable legal 'outputs' that produce desired 'outcomes'. The trajectory of Court practice does not follow a clearly designed logic model because some of the Court's outputs and outcomes are unpredictable. For example, the purpose of the OTP's preliminary examinations was given relatively scant attention in the Rome Statute, but over time these examinations have evolved, playing an increasingly important role in monitoring states' compliance with international criminal law. Furthermore, research demonstrates that advancing to the investigation stage has unintended positive impacts on situation countries, encouraging legal mobilization and increasing low-level prosecutions of state agents. ...

A second reason to consider a constructivist approach is that an overly instrumentalized view of the Court's work ignores that international legal institutions and global society are co-constitutive. ... The need to merely belong, or be recognized as belonging, to that community, might alter behaviour. Understanding this means moving beyond a narrow, managerial understanding of organizational outputs and outcomes. ... For example, empirical research demonstrates that Rome Statute ratifications alone are associated with declines in indiscriminate violence committed by government and rebel forces, even while civil war is ongoing. States party to the Rome Statute are home to almost no massacres, and very few new civil wars. That political violence is increasingly concentrated in non-party states suggests the Rome regime is influential, though it is hard to attribute this pattern to individual choices made by rational leaders in direct response to Court actions. It could be that the role of the ICC regime is not just causal, but constitutive.⁴⁸ It not only produces independent outputs that translate into outcomes; it embodies and defines rules of global society. ...

7. Conclusion

... [First, in] countries where the ICC has intervened, interest in human rights spiked, and sustained. The new and higher level of Google searches for human rights is quite enduring, lasting for years. ... It would be a mistake to write off Google search trends as meaningless. The data suggest that the ICC drives sustained curiosity about human rights, which may signal a broader ability to contribute to long-term social and ideational change. ...

Second, an excessively rationalist account [of] ICC outputs and outcomes will probably miss some broader constitutive social effects attributable to the Court. Evaluating performance solely based on its use of resources, the perceived fairness and expeditiousness of trial proceedings, or the extent to which victims participate is too managerial an exercise. ... It is quite possible that most of the ICC's impacts are subtle and indirect. Uncovering these impacts means being open to a holistic understanding of international criminal law and engaging in the persistent and creative search for evidence of law's social effects among audiences in various contexts.

Third ..., evaluators need not choose between ... [r]ationalism and constructivism [Both] can complement one another. ... [C]onsidering the multi-dimensional nature of ICC performance would at the very least push us beyond either blind apology or obsession with crisis, toward a pragmatic grounding in the real opportunities the ICC offers.

Regional Approaches

In looking to the future evolution of this field Leila N. Sadat, in 'The International Criminal Law of the Future', in David L. Sloss (ed.), *Is the International Legal Order Unraveling?* (2022) 397, at 423, draws attention to two important elements. The first is the need for a system of global criminal justice that focuses on the broad range of crimes beyond those dealt with in the Rome Statute. To the extent that such prosecutions are currently pursued unilaterally, she cautions that:

Efforts by the United States and other countries to extend their national jurisdictions extraterritorially to serve as the investigators and police of the world are likely to succeed only sporadically and are likely to increase interstate tensions. ... For that reason, it may be useful to create mechanisms enabling some transnational crimes to become the subject of international adjudication so that their enforcement becomes more effective and multilateral. Indeed, an effort is now ongoing to establish a new global corruption court.

She also draws attention to the important potential role that might be played by regional criminal courts:

... [A]t its best, a global system of criminal justice would have the ICC as its centerpiece, with many satellite courts at the international level and national jurisdictions filling in where regional and international courts are not engaged, are overwhelmed, or cannot exercise jurisdiction. Although the ICC will not directly exercise its jurisdiction in many cases, given its status as a court of last resort, its activities will be central to the system as a whole. Ideally, such a system will be human rights friendly, incorporating protections for the accused found in international human rights law, and state actors engaging in national prosecutions will be encouraged to use best practices in their national systems. It will also respond to modern calls for a more restorative approach to criminal justice. The real danger is not that ICL will disappear. Rather, the risk is that attacks on its international and multilateral manifestations, such as the ICC, will cause it to become increasingly illiberal and unilateral, increasing friction between states and endangering international peace and security.

On 27 June 2014, the African Union adopted a treaty designed to set up such a regional system. But, as of 2024, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, known as the Malabo Protocol, has been signed by 15 of the 55 African Union

member states and ratified by none of them. Eki Yemisi Omorogbe, in ‘The Crisis of International Criminal Law in Africa: A Regional Regime in Response?’, 66 *Neth. Int’l L. Rev.* (2019) 287 describes the background to this initiative:

Between 2009 and 2011 African states reacted negatively to a German court’s warrant for the arrest of a Rwandan who at the time had become an aide to Rwandan President Paul Kagame, to the ICC’s arrest warrant for Libyan President Gaddafi, and the Kenyan prosecutions in the ICC.

The AU’s response to the ICC proceedings [involving Kenya] was swift. In October 2013, the AU Assembly in extraordinary session expressed its reservation about the effect of these ICC proceedings on the sovereignty, stability, peace and security of that state and the wider region.³³ It called for the suspension of ICC proceedings against Ruto and Kenyatta until they leave office.³⁴ It also widened its policy of non-cooperation

...

Significantly, the AU Assembly also requested the speeding up of the process of including international crimes within the mandate of the African Court on Human and Peoples’ Rights [leading to the adoption of the Malabo Protocol.]

...

Certain provisions of the Protocol reflect the AU-ICC conflict. The key provision is Article 46A *bis* of the Protocol which provides:

No charges shall be commenced or continued before the Court against any serving Head of State or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

In parallel, the obligation of states to cooperate with the ICL is limited in Article 46L(g) to ‘Any other assistance not prohibited by the law of the requested State’ in respect of the arrest, surrender and transfer of accused persons to the Court.³⁹ These provisions when read alongside the AU’s policy of non-cooperation with the ICC in the arrest of any African Head of State shows that the objective is to remove incumbent leaders from the overview of all international courts and tribunals.

Finally, no reference is made [to] the Rome Statute or the ICC in the Protocol. That silence is intentional. ... [M]aking reference to the ICC would have required engagement with it.

Omorogbe notes that Article 28B of the Protocol incorporates the important jurisprudence of the ICTR in *Prosecutor v. Akayesu*, by including within the definition of genocide: ‘(f) Acts of rape or any other form of sexual violence when these are committed with the intent to destroy a national, ethnic or religious group.’ He also notes that, unlike the Rome Statute, the Protocol (Article 46C) provides jurisdiction over legal persons, thus making it possible to prosecute multinational corporations for crimes against humanity.

But Amnesty International, in *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court - Snapshots* (2 May 2017) has expressed:

... concerns about the implications of vague/broadly defined crimes in the ACJHR Statute, and in particular, with respect to the crimes of terrorism and unconstitutional change of government, which may therefore be used to clamp down on the legitimate exercise of freedom of expression, association, assembly and human rights. The broad formulation of the crimes as currently drafted,

raise serious concerns as to compliance with the principle of legality established under international law.

Consider the following provisions:

Article 28G
Terrorism

For the purposes of this Statute, ‘terrorism’ means any of the following acts:

A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
3. create general insurrection in a State.

...

Article 28E
The Crime of Unconstitutional Change of Government

1. For the purposes of this Statute, ‘unconstitutional change of government’ means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a) A putsch or coup d’état against a democratically elected government;
- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.

Funding

One element in evaluating the effectiveness of the various criminal courts and tribunals is their cost. By way of comparison, in 2022, the UN regular budget appropriated \$134 million for all of the activities undertaken by the Office of the High Commissioner for Human Rights (UN Doc. A/77/6 (Sect. 24) (2022) 60). That amount was supplemented by \$227.7 million in extra-budgetary contributions, mostly from states.

For 2024, the ICC's budget was €197 million or around US\$217 million. This was a 16 percent increase from 2023. The increase reflected inflation as well as the Court's expanding workload.⁷⁶⁷ By comparison the total cost of the two ad hoc tribunals (the ICTY and the ICTR) was \$3.8 billion. Unlike the ICC, which is paid for only by States Parties, that budget was covered by regular UN budget assessments applicable to all member states. That meant that the United States paid 22 percent of the total. In Cambodia, the ECCC cost \$337 million over 16 years. Of the total, \$45 million was from Cambodia with the rest paid for by 39 foreign countries.

Consider the following justification of such expenses by Milena Sterio and Michael Scharf, p. 000 above, at 357:

... [W]hile international justice has not come cheaply, these costs are a fraction of the costs of a peacekeeping mission or military operation. At the Pentagon, the cost for one B-2 stealth bomber is \$3 billion, the cost for a Virginia-class attack submarine is \$2.7 billion, and one Arleigh Burke-class guided missile destroyer costs American taxpayers \$1.7 billion. In 2017, the United States was spending \$3.1 billion per month to wage war in Afghanistan. It is noteworthy that in the two and a half decades since the creation of the ad hoc tribunals, neither war nor genocide has returned to the former Yugoslavia or Rwanda.

⁷⁶⁷ S. Ford, 'Funding the ICC for Its Third Decade', in C. Stahn (ed.), *The International Criminal Court in Its Third Decade* (2024) 368.

QUESTIONS

1. Are many of the critiques of ICL also applicable to some domestic legal systems or do international criminal tribunals have some unique characteristics?
2. Which critiques of ICL seem most compelling and what alternative approaches would you consider in response? Do adjustments need to be made, or is a wholesale reconceptualization necessary to satisfy the strongest critiques?
3. Should radical critics of ICL pay any heed to the possible (probable?) misuse of their work by those opposing the ICL agenda in order to protect the impunity of perpetrators?
4. Randle C. DeFalco, in ‘(Re)Conceptualizing Atrocity Crimes as Public Health Catastrophes’, in Jocelyn Getgen Kestenbaum et al. (eds.), *Public Health, Mental Health, and Mass Atrocity Prevention* (2021) 17, calls for ‘a conceptual shift away from a myopic focus on spectacular acts of violence within international criminal justice and toward the recognition of a broader array of manifestations of power over the health and lives of human populations.’ In what ways do you think the growing emphasis on ‘atrocity crimes’, promoted by the limited scope of international criminal law, might have influenced the evolution of the overall human rights regime?
5. What role does, and should, politics play in international criminal justice. Consider the following observation by Nancy Amoury Combs, in ‘International Criminal Justice’, in Barbora Holá et al. (eds.), *The Oxford Handbook of Atrocity Crimes* (2022) 617, at 638:

What is innovative—and inspiring—about the modern-day international criminal justice project is not its imposition of accountability per se, but its effort to impose that accountability universally and pursuant to neutral principles. ... [But this rhetoric] obscures the reality that its ideals are unachievable at present. Prosecutors pretend that political considerations play no role in atrocity selection, for instance, when we all know that the practical ability to carry out a prosecution must be an important factor in the decision to initiate the prosecution to begin with. International criminal law must pretend to be apolitical, yet its ultimate success is largely predicated on its ability to navigate around the numerous land mines that politics places in its path.

Chapter 17. Transitional Justice and Reparations

The preceding chapter explored criminal accountability as an essential response to massive violations of human rights, starting with the Nuremberg and Tokyo trials. But for all the benefits of criminal prosecutions, they can only address a small part of the overall set of challenges that arise for the survivors and victims, for the communities, for the affected state(s), and for the international community in the aftermath of such events.

The focus of the materials that follow is on what has come to be called ‘transitional justice’, and on the rapid expansion of the ‘right to an effective remedy’ (Article 8 of the UDHR), which is an integral part of international human rights law. International law has long recognized the importance of reparations, especially in the context of a state’s obligation to repair the consequences of a breach of international law for which it is responsible. In human rights law, the more common generic term is ‘remedies’ which is used to encompass reparations, as well as restitution, compensation, satisfaction, and guarantees of non-repetition. These different elements have all become crucial components of the approach to transitional justice, which was originally developed as an approach to facilitate the transition from authoritarianism to democracy, but is now also used to encompass post-conflict transitions. In addition, the relevant principles are increasingly being invoked in situations in which demands are made for comprehensive measures to redress historic and ongoing injustices, including slavery, colonialism, and the ravaging of indigenous societies.

A. TRANSITIONAL JUSTICE

Despite its prominence in the field and a burgeoning literature, transitional justice remains an ill-defined concept that is constantly evolving. The best-known definition was put forward in a 2004 report by the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (UN Doc. S/2004/616, para. 8):

The notion of “transitional justice” ... comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

In practice, transitional justice generally seeks to bring a flexible and tailored approach and also provides a framework within which complex and controversial trade-offs can be shaped and negotiated, often in ways that might not fit easily into formal human rights frameworks.⁷⁶⁸

A more elaborate definition, offered by Pablo de Greiff, the first UN Special Rapporteur on truth, justice and reparation, who did much to develop the concept in practice, views it:

... as a comprehensive policy implemented to cope with the legacies of massive and systematic human rights violations and abuses, and to restore or establish anew the currency of human rights. Such a policy has as its core elements truth, justice, reparations, and guarantees of non-recurrence. In addition to the immediate function each element of a comprehensive transitional justice policy is supposed to serve, namely, to impart (criminal) justice, disclose truth, redress violations, and prevent their recurrence, a comprehensive transitional justice also pursues two ‘mediate’ ends, to provide recognition to victims, not only as victims but as rights-holders, and to promote civic trust. Such a policy also

⁷⁶⁸ See *Transitional Justice: A Strategic Tool for People, Prevention and Peace*, Guidance Note of the UN Secretary-General (2023).

pursues two ‘final’ goals, to strengthen the rule of law, and to promote social integration or reconciliation.⁷⁶⁹

The implications of the ‘right to an effective remedy’ in terms of the phenomenon of impunity and the granting of amnesties long remained unclear. Emblematic cases emerged in Chile and Argentina in the aftermath of the military dictatorships of the 1970s. In Chile, the regime of General Augusto Pinochet issued Amnesty Decree Law No. 2191 on 10 March 1978, which provided a wide-ranging amnesty for crimes committed in the years following the 1973 coup d’état.

In Argentina, prosecutions of military personnel that took place after the return to democracy in late 1983 generated a strong military backlash. To avoid chaos, the government of President Raúl Alfonsín invoked a ‘compelling need for national reconciliation and consolidation of the democratic system’ and passed the ‘full stop law’ of 24 December 1986 to limit new prosecutions. But continued judicial activity led to the ‘due obedience law’ of 5 June 1987, which granted automatic immunity from prosecution to all members of the military except top commanders. Within days, the Supreme Court upheld its constitutionality.

Setting Relevant Human Rights Standards

It was against this background that two separate, but ultimately closely related, standard-setting initiatives emerged within the United Nations. In the mid-1980s, Louis Joinet undertook a study of amnesty laws (UN Doc E/CN.4/Sub.2/1985/16/Rev.1 (1987)) which laid the foundations for a ‘Set of Principles for the protection and promotion of human rights through action to combat impunity’ (UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (1997)). Joinet also introduced transitional justice as a so-called fourth pillar of anti-impunity measures focused on the non-recurrence of violations.

The Joinet principles on impunity were subsequently updated by Diane Orentlicher and presented to the UN Commission on Human Rights in 2004 (UN Doc E/CN.4/2004/88 (2004)). Although the Commission ‘noted’ them as ‘a guideline to assist States’, it never formally endorsed them. They have, nevertheless, become an ‘authoritative reference point’ in discussions about impunity,⁷⁷⁰ which they define broadly as arising whenever a state fails: (i) to investigate serious human rights violations; (ii) to prosecute, try, and duly punish perpetrators of such violations; (iii) to provide victims with effective remedies and reparation for the harm suffered; and (iv) to take the appropriate steps to prevent a repetition of violations.

A separate UN process, begun in 1989 and led by Theo van Boven, focused on the ‘right to restitution, compensation and rehabilitation for victims of gross violations of human rights’. His study led to the adoption of an important set of guidelines on reparations in 2005. Before examining those, it is important to note that the Joinet study had originally focused also on economic, social and cultural rights, but in 1994 the Commission split the study into two separate tracks. Although a final report by El Hadji Guissé was presented in relation to these rights (UN Doc. E/CN.4/Sub.2/1997/8 (1997)), no tangible outcome emerged as a result. Similarly, because the van Boven study was undertaken against the background of the crimes listed in the Rome Statute, it too failed to explore where these rights fit into the broader picture of reparations. Instead, principle 26 noted that they are relevant to all violations.

⁷⁶⁹ P. de Greiff, ‘The Vernacularization of Transitional Justice: Is Transitional Justice Useful in Pre-conflict Settings?’, in P. Alston (ed.), *Capturing the Complexity of Human Rights* (2024) 117.

⁷⁷⁰ F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: A Commentary* (2018) 4.

**BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW
GENERAL ASSEMBLY RES. 60/147 (2005)**

...

IV. *Statutes of limitations*

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law [Note: this phrase is abbreviated below to 'gross/serious violations'] which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations ... should not be unduly restrictive.

...

VII. *Victims' right to remedies*

11. Remedies for [gross/serious violations] include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

...

IX. *Reparation for harm suffered*

15. Adequate, effective and prompt reparation is intended to promote justice by redressing [gross/serious violations]. ... In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

...

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of [gross/serious violations] should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23

19. *Restitution* should, whenever possible, restore the victim to the original situation before the [gross/serious violations] occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from [gross/serious violations], such as:

- (a) Physical or mental harm;
- (b) Lost opportunities ...;
- (c) Material damages ...;
- (d) Moral damage;
- (e) Costs

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim ... [and others];
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed ...;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- ...

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- ...
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws

X. *Access to relevant information concerning violations and reparation mechanisms*

24. ... [V]ictims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the [gross or serious violations] and to learn the truth in regard to these violations.

...

* * *

Note that the Reparations Guidelines combine a focus on human rights law and international humanitarian law, thus overcoming proposals for the adoption of two separate instruments. The situation of non-state actors, such as corporations, is dealt with obliquely in principle 15.

Both the Reparations Guidelines and the Principles on Impunity reflect the principles contained in the International Law Commission's draft Articles on Responsibility of States for Internationally Wrongful Acts (see Ch. 2, above), which were also adopted in 2001. These two 'soft law' instruments have heavily influenced the approach adopted within the field of transitional justice in the twenty-first century. It has been suggested that transitional justice developed as a response to twentieth century 'atrocities crimes' (defined by reference to the Rome Statute), but this is a retrospective application of a term that was not in use at the time and is much too narrow to describe the broad range of circumstances in which efforts were made to seek remedies that went well beyond condemnations and prosecutions in response to major violations.

Before examining the application of these various principles to historical and current situations involving claims for reparations, we consider three important sets of issues: the 'peace versus justice' debate, the granting of amnesty to offenders, and the role of truth commissions. Then follows a brief review of the current state of the art in transitional justice.⁷⁷¹

⁷⁷¹ See generally: Security Council Report, *Research Report: Transitional Justice: What Role for the UN Security Council* (2022).

One important set of questions involve how institutional efforts to remedy mass human rights violations should address concerns that such interventions will promote war or social conflict. Efforts to address past wrongdoing, for example, may threaten to unravel a fragile peace agreement or the transition from an authoritarian past. Concerns about such consequences often relate to the prospect of criminal trials. These concerns, however, can also apply to a range of other measures. For instance, a truth commission, under certain circumstances, could be more likely to rupture social relations and foster notions of collective guilt rather than encourage reconciliation. Lustration policies – precluding former perpetrators and their supporters from participating in a successor government – might obstruct social integration and political stability. Civil suits against particular individuals or organizations, such as companies formerly involved in apartheid South Africa, might undermine government efforts to encourage those and other actors to rebuild the country.

The important question may not be whether to adopt particular institutional devices, but that of timing. When is it appropriate, or most feasible, to deal with the past through these justice and accountability mechanisms? A central question may also be about who decides. That is, what institution or set of actors should have the authority to decide whether to pursue various strategies? Are local actors best situated to make those decisions, international actors, judicial or political bodies? Does it matter if local actors generally prefer amnesties? What if local actors prefer prosecution, especially for retributive or symbolic reasons, despite a more pragmatic judgement of international exports and institutions? Should the structure of international and domestic legal institutions include a presumption favouring (or disfavouring) certain justice and accountability mechanisms? What factors should overcome that presumption?

Finally, how should decision-makers weigh justice and peace in the instant case versus the precedent set and consequences for dealing with situations of mass violations in the future? For example, trials in the instant case may be important to promoting norms and expectations of punishment in other countries or in the same country's political future. Alternatively, trials might encourage repressive leaders or combatants in the future to conclude that amnesties are not reliable and that conceding political power is not in their best interest.

1. The 'Peace Versus Justice' Debate

At the international level, this debate has manifested itself most prominently in arguments about whether prosecuting the leader of one of the parties to an ongoing conflict will incentivize that person to prolong the hostilities and thus delay peace. At the national level, as we shall see below, the debate has focused on whether such individuals should be granted an amnesty either before or after prosecution in the name of healing societal wounds more quickly.⁷⁷²

The experience of the ICTY and the ICC provide some insights from experience. Analysis by Jacqueline McAllister, in 'The Peace versus Justice Debate Revisited', in Carsten Stahn et al. (eds.) *Legacies of the International Criminal Tribunal for the Former Yugoslavia* (2020) 523, at 537, reached the following conclusions about the impact of ICTY prosecutions on peace efforts:

First, the ICTY did in fact facilitate peace efforts. Second, [it] did so by providing US mediators with leverage for ensuring that only key leaders participated in talks Third, ... [it] also facilitated US mediation efforts by agreeing to monitor and vet entity-level indictments [This] helped to deescalate a major post- Dayton crisis by effectively reassuring former belligerents that they would not be subject to victor's justice.

⁷⁷² In general, *amnesties* foreclose prosecutions for stated crimes (often by reference to crimes or conduct that took place before a stated date), whereas *pardons* release convicted human rights offenders from serving their sentences (or the remainders thereof if they are prisoners at the time of pardon). Nonetheless, usage often views these terms as interchangeable, so that persons not yet tried are 'pardoned' and prisoners serving sentences are granted an 'amnesty'.

...

... [Why might the ICTY] have facilitated, versus undermined, peace efforts. In order for ICTs to increase the costs of noncompliance with ICL, and thereby generate leverage for mediators, they need to be able to conduct legal proceedings. ... ICT officials must negotiate with a range of parties to effectively conduct investigations, secure apprehensions, and hold trials. ... Prosecutorial support for ICTs has steadily increased ever since the ICTY's establishment. Indeed, the Tribunal's own successes in eventually apprehending an array of high-level suspects—including Slobodan Milošević—are indicative of this trend Kathryn Sikkink points to such developments as evidence of a 'justice cascade', or 'a fundamental shift [in] legitimacy of the norm of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm'. Thus, it is now harder—especially for the top combatant leaders who are at the centre of the ICC's efforts—to dodge criminal prosecution.

However, recent research suggests that greater prosecutorial support, combined with the ICC's focus on high-level suspects, can actually make the process of negotiating peace far more difficult. For instance, Alyssa Prorok finds that both factors have made it more difficult for top leaders facing possible prosecution to attend talks for fear they might be arrested and transferred to The Hague. In addition, because amnesty is off the table, it is more challenging to negotiate a settlement. The situation was quite different for the ICTY during the Yugoslav wars. The Tribunal had an immensely challenging time securing prosecutorial support, especially early on. ... [T]he OTP did not end up targeting many top leaders until after peace negotiations had concluded. This suggests that regional leaders potentially had much less to fear than their contemporary counterparts in other civil conflicts, assuming they did not run afoul of the ICTY's then-main enforcement partner: the US. Thus, the ICTY perhaps facilitated, versus undermined, peace efforts both because it was cautious in indicting top leaders and because lead mediators effectively exercised discretion over suspect arrests and transfers. ...

The impact of ICC involvement can also cut both ways, according to Alyssa Prorok, 'The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination', 71 *Int'l Org.* (2017) 213, at 239:

Empirical tests ... support [the] argument [that] ICC involvement significantly reduces the likelihood of conflict termination when the risk of domestic punishment is low. Its impact diminishes, becoming insignificant, as the domestic punishment risk increases. ...

... [T]he court's broader influence is complex and multifaceted: ICC ratification improves prospects for peace in warring states, while active involvement by the court has the opposite impact. The ICC, therefore, is not universally benign or entirely harmful

... [W]hile the ICC's primary mandate is the pursuit of justice, the results indicate that its broader effects on the process of conflict termination must be taken into account by policy-makers and the court itself. In particular, the fact that ICC involvement can prolong conflict has important implications for how the court pursues investigations in ongoing conflict situations in the future. It may be in the best interest of peace, for example, for the ICC to investigate and pursue arrests and trials only after a settlement has been reached. This is particularly true because the court's most detrimental impact comes when conditions for successful settlement improve domestically (that is, as the

domestic punishment risk diminishes), suggesting that the court is doing harm in the very settings where successful settlement may otherwise have been possible.

...

An issue that is related to the peace versus justice debate is whether impunity should be considered the greatest threat to respect for human rights, and should thus be the pre-eminent concern of the international community. For some commentators, criminal prosecution might not be the sole path to eliminate impunity, but it is the most important. Thus, Kate Cronin-Furman, in *Hypocrisy and Human Rights: Resisting Accountability for Mass Atrocities* (2022) 117, argues ‘that the repeated failures to protect or avenge the victims of mass atrocities’ are a deplorable feature of the international system and one that must be countered by determined efforts to gather and process evidence of mass atrocities so that accountability can eventually be exacted from perpetrators. Her view is that victim communities seek, ‘more than anything else ... the designation of their persecutors as human rights abusers’.

Other researchers have reached different conclusions. Payam Akhavan et al., in ‘What Justice for the Yazidi Genocide?: Voices from Below’, 42 *Hum. Rts. Q.* (2020) 1, describe the results of a survey of the preferences expressed by survivors of the sustained assaults by the Islamic State of Iraq and the Levant (ISIL) on Iraq’s Yazidi minority, characterized by many sources as a genocide. The interviewers sought to elicit an understanding of what ‘justice’ might mean for the survivors. One question concerned the interviewees’ preference for retributive justice, such as prosecutions before the ICC or another such tribunal, or restorative justice involving a more wide-ranging set of measures:

What emerged is an understanding of justice principally focused on local issues, immediate concerns, agency, and prospects of a better future—features more readily achievable through local restorative justice rather than global punitive justice. This included a predilection for financial assistance, truth-telling and public recognition, and a need for healing and reconciliation among local communities and, more intimately, neighbors.

The authors concluded that scholars and advocates need to do more to listen to the voices from below and not assume that they define ‘justice’ as the pursuit of prosecutions: ‘The early and continuing prioritization of the ICC, and the near-singular focus of energy and resources on this objective, has undermined the pursuit of more restorative forms of justice.’ The initiatives by the Prosecutor in relation to both Ukraine and Palestine, considered in the preceding chapter, have potentially put the peace versus justice debate in a whole new light. Consider the observations in relation to Ukraine by Carsten Stahn, in ‘The ICC in Its Third Decade: Setting the Scene’, in Carsten Stahn and Rafael Braga da Silva (eds.), *The International Criminal Court in Its Third Decade: Reflecting on Law and Practices* (2024) 3, 19-20:

The warrants create a certain point of no return. They signal that there can be no sustainable peace without leadership responsibility. Politically, they may be interpreted as an effort to promote regime change in Russia. This ... may create a ‘lock in’ and prolong hostilities or intensify conflict. It communicates to the Russian government ‘that its options are to win or to lose power and face prosecution’. Under such circumstance, the continuation of the war may become ‘existential’.

Russian officials may be reluctant to engage in peace negotiations, while facing the threat of prosecution in their aftermath. Once issued by a Chamber, warrants cannot simply be withdrawn by Prosecution. The power of the Security Council to defer investigations and prosecutions under Art. 16 of the ICC Statute is only temporary. The OTP has adopted a narrow reading of the interests of justice clause, which implies that considerations of peace and security do not *per se* bar accountability. Dealing with the ICC warrants may thus require creative strategies, or even a re-calibration of existing ‘no peace without justice’ formulas. ...

The Ukraine warrants ... [have] contributed to the stigmatization of crimes, restricted potential travel options, and highlighted the global relevance of the Court in the ongoing conflict. They have prompted new discussions on cooperation between the ICC and the US. However, they also carry risks. They reveal political divisions among states parties. They make the ICC vulnerable to lawfare. In case of lack of compliance, the Court will be perceived as a toothless tiger. Those who are critical of the Court's strong focus in Ukraine, and risks of double standards, will likely use the Ukraine as a precedent to assess the decisiveness and effectiveness of response in other ongoing or future ICC situations.

2. Amnesties

A 2009 study by Diane Orentlicher for the UN Office of the High Commissioner for Human Rights entitled *Rule-of-law tools for post-conflict States: Amnesties* (UN Doc. HR/PUB/09/1 (2009)) defines amnesties as legal measures that have the effect of:

- (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
- (b) Retroactively nullifying legal liability previously established.

The debate over the acceptability of amnesties in situations involving serious human rights violations involves balancing various elements. These include legal obligations to prosecute, the central importance of ensuring accountability, and an assessment of the impact of an amnesty on other legitimate goals. In 2013, a group of experts adopted the Belfast Guidelines on Amnesty and Accountability, designed to guide decisions made 'in the midst or in the wake of conflict or repression.' The Guidelines acknowledged that amnesties might, at different stages, be used for:

- (viii) encouraging combatants to surrender and disarm
- (ix) persuading authoritarian rulers to hand over power
- (x) building trust between warring factions
- (xi) facilitating peace agreements
- (xii) releasing political prisoners
- (xiii) encouraging exiles to return
- (xiv) providing an incentive to offenders to participate in truth recovery or reconciliation programmes.

The Guidelines distinguish 'illegitimate amnesties' which 'are generally unconditional and have the effect of preventing investigations and ensuring impunity for persons responsible for serious crimes', from 'legitimate amnesties', which are 'primarily designed to create institutional and security conditions for the sustainable protection of human rights, and require individual offenders to engage with measures to ensure truth, accountability and reparations.'

In seeking to link the concepts of amnesty and accountability, the Guidelines suggest that 'amnesties can be designed to complement or operate sequentially with judicial and non-judicial accountability processes' to:

- a) deliver some form of truth and accountability for cases which are not selected for prosecution

- b) focus limited prosecutorial resources on those cases which are deemed to be of a higher priority or where the perpetrator has failed to fulfil the conditions of the amnesty
- c) contribute to a broader range of conflict transformation goals than an exclusive focus on prosecutions
- d) deliver greater consistency with a state's international obligations than broad amnesties that prevent all prosecutions.

Monika Nalepa, in *After Authoritarianism: Transitional Justice and Democratic Stability* (2022) 1 draws attention to the precedent set by Spain, and suggests that a utilitarian calculus might play some role in framing policy responses:

After [Generalissimo] Francisco Franco died, the elites who succeeded him resolved on behalf of the Spanish people to let bygones be bygones. Formally, in 1977, they passed an Amnesty Law; informally, they agreed to a “Pact of Forgetting.” The rationale offered for this deliberate decision was to [choose] democracy over justice. Although the Francoist regime had committed numerous atrocities during the civil war of 1936–1939 as well as after the Nationalists’ victory, Spanish elites decided to “seal the archives” of the Guardia Civil and the Policía Armada (Franco’s secret police) and not attempt any reckoning with the past. Even private conversation concerning the civil war and the authoritarian regime that succeeded it was rendered taboo. This “Pact of Forgetting” was shared widely by all sides of the political spectrum, including the communists against whom Franco’s Nationalists had fought in the civil war. ...

The informal pact became so entrenched that when, in 2007, a socialist government tried to revisit the past by proposing the mildest of transparency measures, victim rehabilitation, it was met with staunch criticism. The Spanish example stood in contrast with its geographic and temporal neighbors, Greece and Portugal, both of which thoroughly purged their former authoritarian leadership and its agencies. ...

Incidentally, neither Greece nor Portugal fared as well recovering from their authoritarian pasts as Spain. ... Scholars of comparative democratization ... overwhelmingly agreed that Spain consolidated because of letting bygones be bygones rather than despite it. ...

It is then hardly surprising that when twenty years later, a wave of democratization spread across Eastern Europe, Spain’s approach to reckoning with the authoritarian past was used as a model for (not) dealing with the legacies of communism. In Poland, this approach was summarized with the term “gruba kreska” (“thick line”). Although originally intended to represent the idea of a clean slate for the new noncommunist cabinet, which would only be held accountable for policies implemented after assuming office, it quickly came to represent the idea of forgiving the communists for all human rights violations committed during their 45-year-long tenure in Poland.

...

Conclusion: Beyond Ritual Sacrifices

... In democracies recovering from authoritarian rule or civil war, politicians trying at all costs to prevent their skeletons from coming out of the closet fail at being effective representatives and betray the interests of their voters. In an effort to bury the truth about skeletons in the closet they succumb to blackmail. The advice to “let bygones be bygones,” “forgive and forget,” or “let sleeping dogs lie”

especially when applied to crimes committed secretly under the authoritarian regime may be deadly for a new polity. At the same time, new democracies' temptation to punish known members and collaborators of the former regime is a form of "ritual sacrifice." Although it signals to some voters a clean break with the former regime, it has little beyond symbolic significance and may be equally crippling as the decisions to let sleeping dogs lie. There is a caveat, however, to the advice of forgoing purges of known collaborators of the authoritarian regime. When the interests of those working for the *ancien régime* depart so much from those of the new democratic politicians that their expertise is worth surrendering, purges should be used. The bottom line is then, that purges should be applied sparingly, while transparency should be used widely.

* * *

In relation to Spain, some changes were introduced in the 2007 Historic Memory Law, but these were limited in scope and a range of UN mechanisms called for a very different approach. In 2009, the UN Human Rights Committee (UN Doc. CCPR/C/ESP/CO/5, para. 9) recommended that Spain should:

- (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate.

In 2014, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition (UN Doc. A/HRC/27/56/Add.1) refuted many of the government's arguments against such measures. The 2022 Democratic Memory Law represented a considerable but far from comprehensive change of heart:

The new law creates the public prosecutor's office for human rights and democratic memory, to investigate past violations and to promote the search for the whereabouts of the disappeared. In addition, it broadens the definition of 'victim' and gives due recognition to children, who were abducted and adopted without parental consent, to their parents and siblings. It also stipulates that it is the responsibility of the state to carry out exhumations and the search for persons who disappeared during the Civil War and the Franco dictatorship.⁷⁷³

The law also: makes the state responsible for recovering the remains of victims buried in unmarked graves; establishes a national DNA database; requires schools to teach about the civil war and the dictatorship; and pardons people convicted of political crimes during the Franco era. It does not lift the amnesty that prevents prosecutions of state officials who committed crimes during the relevant period, and does not provide financial compensation for victims.

In September 2023, the United Kingdom Parliament adopted the *Northern Ireland Troubles (Legacy and Reconciliation) Act 2023*. In December 2023, the Government of Ireland announced that it would bring an inter-state case under the ECHR challenging the Act's immunity provisions 'which shut down existing avenues to truth and justice for historic cases, including inquests, police investigations, Police Ombudsman investigations, and civil actions.' It added that reviews by the proposed Independent Commission for Reconciliation and Information Recovery 'are not an adequate substitute for police investigations, carried out independently, adequately, and with sufficient participation of next of kin.'

The examples mentioned above are mostly concerned with historical situations, but the granting of amnesties is also often raised in the context of negotiating peace deals. In 1999, in the context of negotiating the Lomé Accords to end the Sierra Leone civil war, the UN announced a policy of not

⁷⁷³ C. Fernandez-Torne and P. Ouziel, 'Democratising and decolonising Spain: the limits of the new law on memory', *Justice Info* (5 December 2022).

agreeing to amnesty for war crimes, crimes against humanity, or genocide. Geoff Dancy surveyed all amnesties enacted in civil war contexts since 1946. In ‘Deals with the Devil? Conflict Amnesties, Civil War, and Sustainable Peace’, 72 *Int’l. Org.* (2018) 387, at 416, he concludes that:

... [O]ffers of legal amnesty can be used to halt intrastate conflicts, ... subject to three ancillary rules. The first rule is that amnesties work better if they are enacted in the negotiation phase. ... If and when armed combatants get to the negotiation phase, amnesties may serve as a more useful tool. They are still a signal but of costly commitments to peace. The trick is designing them in a way that is balanced, granting some concessions without making the deal too costly for the government in the future.

... The second finding is that amnesties with explicit immunities for serious violations are not associated with a lower risk of conflict recurrence. This challenges the conventional wisdom among peacemakers that forgiving human rights abuses may be a necessary element of war-ending bargains. In the last sixty years, that is simply not the case. [Immunities for serious violations] are a roll of the dice. On one hand, they may encourage peace discussions with recalcitrant groups but, on the other hand, they weaken the government’s position. Immunities for terrible acts create a negative reputation for the governments that offer them. Governments will be punished, by civilian audiences and by rebels, for making deals that are too accommodating. Rebels will see no reason not to fight against such conciliatory leaders in the future. Civilians will pressure those leaders to renege on the deal and go back to war. Negotiators need to be clear with rebel and state leaders that human rights violations—especially if they are extreme—will have to be investigated. That is now part of the political landscape following conflicts. Ignoring the problem of human rights atrocities is no longer realistic and it was never very effective anyway.

The third finding is that amnesties are also more effective when they are embedded within larger processes of peace. ... [W]hen they are passed following lengthy and iterated processes of negotiation—often as part of larger postconflict deals to release political prisoners, forgive former soldiers of crimes against the state, or to help demobilize the opposition— they are sometimes successful.

... [A]mnesties that bring together various veto players, spoilers, and combatant groups, while being careful not to provide impunity for atrocity, help countries stay at peace following civil war.

Amnesty Laws in the Regional Courts

Both the Inter-American and the European regional courts have ruled on amnesty laws, but a uniform approach is yet to emerge. Jorge Contesse, in ‘Resisting the Inter-American Human Rights System’, 44 *Yale J. Int’l L.* (2019) 179, at 188, describes the approach of that court:

In ... *Barrios Altos v. Peru*, [2011 Inter-Am. Ct. H.R. (ser. C) No. 75, P 39] the Inter-American Court found that Peru had international responsibility for the violation of the right to life, the right to humane treatment, the right to a fair trial, and judicial protection of fifteen individuals killed by a death squad that operated under the autocratic regime of former Peruvian president Alberto Fujimori. The Court declared that amnesty laws “violate non-derogable rights recognized by international human rights law,” [and] that such laws “lack legal effect.”

Barrios Altos had a major impact on domestic judges. District courts issued rulings ordering the reopening of criminal investigations in cases where courts had applied the amnesty laws. And the Peruvian Constitutional Court embraced the Inter-American Court's jurisprudence in its entirety ...

...
In 2005, the Argentinean Supreme Court overruled a 1987 decision and declared unconstitutional several of the country's amnesty laws. ... [The Court found that] the *Barrios Altos* case addressed all questions about State obligations under international anti-impunity doctrines ... [and rendered] Argentina's amnesty laws null and void. ...

In Europe, a Grand Chamber of the European Court of Human Rights (ECtHR), in *Marguš v. Croatia* (App. No. 4455/10, judgment of 27 May 2014) considered the case of a Croatian Army commander who was convicted of war crimes in 2007, following an earlier decision in 1997 to grant him amnesty pursuant to the 1996 General Amnesty Act covering all criminal offenses committed in connection with the war in Croatia in the preceding six years:

137. The Court notes the interveners' argument that ... the granting of amnesties as a tool in ending prolonged conflicts may lead to positive outcomes.

138. The Court also notes the jurisprudence of the Inter-American Court of Human Rights, notably the ... cases of *Barrios Altos*, *Gomes Lund et al.*, *Gelman* and *The Massacres of El Mozote and Nearby Places*, where that court ... found that no amnesties were acceptable in connection with grave breaches of fundamental human rights since any such amnesty would seriously undermine the States' duty to investigate and punish the perpetrators of such acts. It emphasised that such amnesties contravene irrevocable rights recognised by international human rights law.

(γ) *The Court's conclusion*

139. In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the [Croatian] County Court's reasoning referred to the applicant's merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.

Having reviewed subsequent ECtHR case law, Juan-Pablo Pérez-León-Acevedo, in 'The European Court of Human Rights *vis-à-vis* amnesties and pardons', 26 *Int'l J. Hum. Rts.* (2022) 1107, notes that the Court has still not provided a comprehensive statement of its response to amnesties. Nevertheless, he suggests four factors are central to its approach. The first is:

[t]he national process through which amnesties/pardons have been adopted, applied, and/or validated ... This ... includes which organ granted these measures and through which normative instrument, whether these measures apply to serious abuses in national proceedings, and whether subsequent actions adopted ... negatively affected or changed originally admissible amnesties/pardons.

... [The second is the] margin of ... appreciation has generally been the factor that has most expanded the degree of ECtHR's deference ...

... [Third], poor levels of state compliance with international obligations on human rights ... require the ECtHR to constrain its deference to states. This occurs particularly (but not exclusively) when state officers committed atrocities ...

[Fourth], the impact [on] legitimate goals of peace, reconciliation, or democratic transition ... may increase the degree of ECtHR's deference ... to states as opposed to exemption measures seeking impunity, which constrain such deference ... provided that: the state demonstrates that these measures are genuinely adopted to achieve the said legitimate aim(s) rather than impunity; and/or when these measures are accompanied with other transitional justice mechanisms such as reparations.

In other words, the Court has neither adopted an absolute prohibition on amnesties for certain serious crimes, nor closed the door on doing so. Miles Jackson, in 'Amnesties in Strasbourg', 38 *Oxf. J. Leg. Stud.* (2018) 451, argues that if, when the time comes, it opts for the first approach, it will problematically discount 'the difficult and complex choices facing political decision makers in peace negotiations, and ... the value of amnesties in securing other legitimate ends':

First, ... to treat the duty to prosecute as absolute excludes from consideration other relevant interests. This exclusion prioritises the ends served by criminal trials in the face of genuinely conflicting moral and political demands. Secondly, [it would] inhibit the way that the margin of appreciation ought to operate in amnesty cases. ... Thirdly, [it would inhibit] the scope of deference that courts ought to provide to political decision makers on a question such as this. ... Fourthly, to treat the duty to prosecute as absolute renders it non-derogable under article 15(2) ECHR. This ... [upsets] the delicate structure of article 15(2) ... and closes a valuable means of political flexibility built into the Convention.

QUESTION

What are the most compelling arguments in favour of an absolute prohibition on amnesties for individuals accused of crimes such as murder, torture, or crimes against humanity?

3. Truth Commissions

Truth commissions are perhaps the best-known component of transitional justice. They have been defined as:

... temporary, officially sanctioned bodies with mandates to investigate specific periods of past state abuses. They signal an official determination, genuine or not, to establish the truth about past abuses and to avoid their recurrence. Subject to the creativity of their designers, TCs are able to: provide official acknowledgment of abuses and rewrite history; focus on institutional and structural factors that permitted such abuses; make recommendations for legal and institutional reforms; provide information that is useful for subsequent prosecutions and vetting of abusive public officials; and create a basis for victim reparations and memorialization.⁷⁷⁴

The groundwork for the creation of well over fifty such commissions between 1984 and today was laid by the gradual recognition of a 'right to the truth' in international law. General Assembly Resolution 3220 (XXIX) (1974) recognized that 'the desire to know the fate of loved ones in armed conflicts is a basic human need'. Building on this recognition, Article 32 of the 1977 First Additional Protocol to the Geneva Conventions provided for 'the right of families to know the fate of their relatives'. The reference to a 'right' was a subject of considerable debate in the drafting process.

⁷⁷⁴ G. Dancy and O. T. Thoms, 'Do Truth Commissions Really Improve Democracy?', 55 *Comp. Pol. Stud.* (2022) 555. See also the pioneering text by R. Teitel entitled *Transitional Justice* (2000).

Within institutions dedicated to human rights law, the right to the truth first found expression in the context of missing and disappeared persons. The Inter-American Commission on Human Rights and Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances (in its first report: UN Doc. E/CN.4/1435 (1981)) and the Human Rights Committee developed a doctrine recognizing the right of families to know the fate of their close relatives. The right was codified in Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. And, in 2010, the Working Group adopted a General Comment on the Right to the Truth, characterizing it as ‘both a collective and an individual right’ (UN Doc. A/HRC/16/48 (2011), 14).

Recognition of the right to the truth has expanded well beyond disappearances,⁷⁷⁵ as reflected in the Principles on impunity and the Guidelines on reparations. In 2009, the Human Rights Council adopted Resolution 9/11 affirming the right to the truth:

Stressing the importance for the international community to endeavour to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred.

The organs of the Inter-American system also played a central role in developing the concept, which has also been taken up by the other regional system, as noted in the Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff (UN Doc. A/HRC/24/42 (2013)):

19. At the regional level, the Inter-American Commission ... [and Court] were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society. Regarding the collective nature of this right, the Commission observed [in 1986] that “every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”. In [2013], the Court framed the right to truth in the form of a positive State obligation, stressing that “the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations”. The African Commission on Human and Peoples’ Rights has recognized the right to truth as an aspect of the right to an effective remedy for a violation of the African Charter on Human and Peoples’ Rights. In connection with gross human rights violations committed in the context of countering terrorism, the European Court of Human Rights acknowledged the right to truth not only for victims and their families but for the general public as well.

20. The right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorized. With this legal framework in mind, in the aftermath of repression or conflict, the right to truth should be understood to require States to establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth, which is seen as a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation.

⁷⁷⁵ L. Bilsky, ‘The Right to Truth in International Criminal Law’, in K. J. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020) 473.

Over the past two decades, truth-telling has also come to play an important role in a diverse array of contexts. For example, Beth Sundstrom and Cara Delay, in *Catching Fire: Women's Health Activism in Ireland and the Global Movement for Reproductive Justice* (2023) at 14, cite the case of truth-telling among the victims of enforced sterilizations in Peru which served as 'a nonviolent method of historical justice that protected victims' right to the truth as a form of resistance and created the possibility of reparation.' They argue that gender-sensitive truth-telling goes hand-in-hand with reproductive justice, and give an example of civil society-led truth-telling 'which emphasized accountability by listening to women's voices, avoiding reifying or essentializing women's experiences, and affirming local women's meaning making.'

a. Argentina

Most accounts of the emergence of truth commissions begin with post-World War II Germany and efforts to supplement denazification with institutional reforms designed to prevent the recurrence of Nazism, to pay reparations to victims, and to recognize and memorialize what happened. Similar efforts were pursued after the fall of the Berlin Wall and the reunification of Germany. But in more recent history, two commissions have assumed iconic status: those in Argentina and South Africa. In Argentina, a major economic crisis and a crushing military defeat in the Falklands/Malvinas war, led to the election of a democratic government headed by President Raúl Alfonsín. He established the National Commission on the Disappearance of Persons (CONADEP), presided over by the famous writer, Ernesto Sabato.⁷⁷⁶ Its report, *Nunca Más* (Never Again) was published in 1984:

ERNESTO SABATO, PROLOGUE TO NUNCA MÁS (1984)

... [In Argentina] the armed forces responded to the terrorists' crimes with a terrorism far worse than the one they were combating, and after 24 March 1976 they could count on the power and impunity of an absolute state, which they misused to abduct, torture and kill thousands of human beings.

Our Commission was set up not to sit in judgment, because that is the task of the constitutionally appointed judges, but to investigate the fate of the people who disappeared during those ill-omened years of our nation's life. However, after collecting several thousand statements and testimonies, verifying or establishing the existence of hundreds of secret detention centres, and compiling over 50,000 pages of documentation, we are convinced that the recent military dictatorship brought about the greatest and most savage tragedy in the history of Argentina. ... Through the technique of disappearance and its consequences, all the ethical principles which the great religions and the noblest philosophies have evolved through centuries of suffering and calamity have been trampled underfoot, barbarously ignored.

...

... [Human rights were not] violated in a haphazard fashion, but systematically ... with identical kidnappings and tortures taking place throughout the country. How can this be viewed as anything but a planned campaign of terror conceived by the military high command? How could all this have been committed by a few depraved individuals acting on their own initiative, when there was an authoritarian military regime, with all the powers and control of information that this implies? How can one speak of individual excesses? The information we collected confirms that this diabolical technology was employed by people who may well have been sadists, but who were carrying out orders.

...

The abductions were precisely organized operations, sometimes occurring at the victim's place of work, sometimes in the street in broad daylight. They involved the open deployment of military personnel, who were given a free hand by the local police stations. When a victim was sought out in his or her home at night, armed units would surround the block and force their way in, terrorizing

⁷⁷⁶ See generally, V. Vegh Weis, 'Exploring the World's First Successful Truth Commission: Argentina's CONADEP and the Role of Victims in Truth-Seeking', 15 *J. Hum. Rts. Prac.* (2023) 100.

parents and children, who were often gagged and forced to watch. They would seize the persons they had come for, beat them mercilessly, hood them, then drag them off to their cars or trucks, while the rest of the unit almost invariably ransacked the house or looted everything that could be carried. The victims were then taken to a chamber over whose doorway might well have been inscribed the words Dante read on the gates of Hell: 'Abandon hope, all ye who enter here',

Thus, in the name of national security, thousands upon thousands of human beings, usually young adults or even adolescents, fell into the sinister, ghostly category of the *desaparecidos* ...

Seized by force against their will, the victims no longer existed as citizens. Who exactly was responsible for their abduction? Why had they been abducted? Where were they? There were no precise answers to these questions: the authorities had no record of them; they were not being held in jail; justice was unaware of their existence. Silence was the only reply to all the habeas corpus writs, an ominous silence that engulfed them. No kidnapper was ever arrested, not a single detention centre was ever located, there was never news of those responsible being punished for any of the crimes. ...

A feeling of complete vulnerability spread throughout Argentine society, coupled with the fear that anyone, however innocent, might become a victim of the never-ending witch-hunt. Some people reacted with alarm. Others tended, consciously or unconsciously, to justify the horror. 'There must be some reason for it,' they would whisper ...

All sectors fell into the net: trade union leaders fighting for better wages; youngsters in student unions, journalists who did not support the regime; psychologists and sociologists simply for belonging to suspicious professions; young pacifists, nuns and priests who had taken the teachings of Christ to shanty areas; the friends of these people, too, and the friends of friends, plus others whose names were given out of motives of personal vengeance, or by the kidnapped under torture. The vast majority of them were innocent not only of any acts of terrorism, but even of belonging to the fighting units of the guerrilla organizations: these latter chose to fight it out, and either died in shootouts or committed suicide before they could be captured. Few of them were alive by the time they were in the hands of the repressive forces.

From the moment of their abduction, the victims lost all rights. Deprived of all communication with the outside world, held in unknown places, subjected to barbaric tortures, kept ignorant of their immediate or ultimate fate, they risked being either thrown into a river or the sea; weighed down with blocks of cement, or burned to ashes. ...

...
In the course of our investigations we have been insulted and threatened by the very people who committed these crimes. Far from expressing any repentance, they continue to repeat the old excuses that they were engaged in a dirty war, or that they were saving the country and its Western, Christian values, when in reality they were responsible for dragging these values inside the bloody walls of the dungeons of repression. They accuse us of hindering national reconciliation, of stirring up hatred and resentment, of not allowing the past to be forgotten. This is not the case. We have not acted out of any feeling of vindictiveness or vengeance. All we are asking for is truth and justice If this does not happen, then the transcendent mission which the judicial power fulfills in all civilized communities will prove completely valueless. Truth and justice, it should be remembered, will allow the innocent members of the armed forces to live with honour; otherwise they risk being besmirched by an unjust, all embracing condemnation. Truth and justice will permit the armed forces as a whole to see themselves once more as the true descendants of those armies which fought so heroically despite their lack of means to bring freedom to half a continent.

We have been accused, finally, of partiality in denouncing only one side of the bloody events which have shaken our nation in recent years, and of remaining silent about the terrorism which occurred prior to March 1976, or even, in a tortuous way, of presenting an apology for it. On the contrary, our Commission has always repudiated that terror Also, Argentinians have had the opportunity of seeing an abundance of television programmes, of reading countless newspaper and magazine articles,

as well as a full-length book published by the military government, in which those acts of terrorism were listed, described, and condemned, in minute detail.

Great catastrophes are always instructive. The tragedy which began with the military dictatorship in March 1976, the most terrible our nation has ever suffered, will undoubtedly serve to help us understand that it is only democracy which can save a people from horror on this scale, only democracy which can keep and safeguard the sacred, essential rights of man. Only with democracy will we be certain that NEVER AGAIN will events such as these, which have made Argentina so sadly infamous throughout the world, be repeated in our nation.

**RONALD DWORKIN, REPORT FROM HELL
NEW YORK REVIEW OF BOOKS (17 JULY 1986)**

...

Two further crucial decisions were necessary ... First, who should be prosecuted? Alfonsín, ... [had] ordered the arrest and trial of the military men at the top: the nine commanders who formed the three ruling juntas from 1976 to 1982. But should the government also prosecute the staff and junior officers who supervised the abductions and detention centers and the torture, or the thousands of ordinary soldiers who participated in these crimes? Argentine law provided a defense for military subordinates who were merely following orders. But how should this defense be interpreted? Should it protect soldiers who followed orders that were, in fact, illegitimate? Should it protect those who, following orders, committed obvious atrocities?

Second, in which courts should those who were prosecuted be tried? It was at least arguable that ... the law required that military men be tried only in military courts ... It would violate the spirit of due process the government was anxious to reinforce to change that jurisdictional rule retrospectively and try military men in civilian courts. But the military court—the Supreme Council of the Armed Forces—was unlikely to condemn the military structure as a whole, as it would have to do if it accepted the claims of *Nunca Mas*.

The government was subject to intense political pressures on both sides of these two issues. The human rights community, and particularly the Mothers of the Plaza, were outraged at the possibility that the army could be left to judge itself, or that those who had actually butchered and tortured their fellow citizens might escape condemnation altogether. But Argentina needed to bury its past as well as to condemn it, and many citizens felt that years of trials would undermine the fresh sense of community Alfonsín's victory had produced. And any general program of prosecution, reaching far down the command structure, might anger the military and make it regard the new government as its enemy, which would be unwise in a nation where military coups had become almost a ritual.

The new government formally declared its intentions in a comprehensive statute, Law 23.049 of February 14, 1984 ...: all prosecutions of the military ... were to be tried in the first instance by the Supreme Council of the Armed Forces ... But [its decisions] were subject to automatic review by the civilian Federal Chamber of Appeal, which could consider new evidence if it thought this necessary. ...

The law also resolved the issue of criminal responsibility. It provided, in Article 11, that in the absence of any evidence to the contrary, any member of the military who acted "without decision-making capacity" would be presumed justifiably to have regarded all the orders he received as legitimate orders, except that this presumption would not hold if the acts he committed were "atrocious" or "aberrant." ... It was widely understood that abduction, for example, was not atrocious, so that the junior officers who formed the abduction squads would not be guilty under these standards, but that torture, rape, murder, and robbery were atrocities ...

Law 23.049 was attacked by the human rights groups as much too lenient; they saw it as a capitulation to the military for political reasons.

[In the end, the Supreme Council] refused to participate in the trial of the nine commanders, which was transferred to the civilian court]

* * *

Nunca Más became a bestseller in Argentina and was translated into five other languages, selling over half a million copies. It was also used as a model for other Latin American truth commissions between 1985 and 2003. Emilio Crenzel, in ‘Genesis, Uses, and Significations of the Nunca Más Report in Argentina, 42 *Lat. Am. Persp.* (2015) 20 notes that Nunca Más:

recognized the disappeared as subjects of law without revealing their political activism, posited the exclusive responsibility of the dictatorship in the disappearances, and upheld democracy as the guarantee for preventing the horror from ever happening again, thus obscuring the responsibility of political and civil society before and after the coup. ... [It thus] publicly challenged with unprecedented strength the dictatorship’s denial of the crime. ... [It secured] a massive readership.

... Nunca Más became the template for constructing a new memory of [the] past. It became the dominant way of thinking about, remembering, and representing the past. [But, over time, the human rights community challenged the Alfonsín government] ... over who was the rightful interpreter of its contents [A]fter the impunity laws were passed and the pardons were granted ... the human rights organizations regarded the Nunca Más report as a means for denouncing the crime of forced disappearance and as a sign of the waning willingness of the state and political leaders to seek justice.

From 1995 on, Nunca Más entered a new cycle of mass dissemination as multiple actors sought ways of conveying the past to younger generations. ... [I]t was no longer seen as a means for attaining punitive goals and became a vehicle of memory, opening the way for a debate over possible political and historical interpretations. ... These accounts introduced new meanings, some even openly challenging the original report’s view, by presenting state violence as existing prior to the coup, explaining the disappearances as a result of material goals or of political and religious values that the report posited as being violated by this crime, and abandoning the view of democracy as the political regime that guaranteed the “never again” imperative.

Nonetheless, these interventions reproduced some of the interpretative approaches of the report, eluded the historical examination of the past, overlooked any possible connections between political and civil society and the horrors perpetrated, and ignored the political activism of the disappeared. ... [Argentine society has had difficulty] in incorporating this past into a historical account that includes politics as a feature of its protagonists and a cause for ruptures. The uses of Nunca Más illustrate the public’s acceptance of the report as a canonical text, while its resignifications evidence that it too was shaped by the political times of collective memory. ...

b. South Africa

The establishment of the South African Truth and Reconciliation Commission was part of the negotiated settlement in 1994 to bring an end to apartheid. For various reasons, it captured the public imagination and has been highly influential, although assessments of its contributions vary, as noted by the UN Special Rapporteur in 2017:

... It is the only truth commission to include an amnesty-for-truth model (a highly conditioned amnesty by design). It integrated a promise of reparations (alas, not completely satisfied), and, importantly, provided a public platform for victims, not the least through highly successful public hearings. Ultimately, the expectation that the amnesty process would generate significant information was not met. Similarly, the idea that those whose amnesty applications had been denied would be liable for prosecution (7,112 applications filed but only 849 amnesties granted) has been emptied of force because of the reluctance to initiate prosecutions. Nonetheless, the model has been extraordinarily influential. Kenya, Liberia and Sierra Leone have adopted elements of this approach.⁷⁷⁷

Other commentators have been even more critical:

... [The TRC] was widely applauded by international scholars and human rights non-governmental organizations, and it did perform a number of functions admirably. The Commission's public and televised hearings brought the voices of ordinary Africans into the mainstream public space in a way that was unprecedented in South Africa's history. After the TRC hearings, it was apparent to all that apartheid was a vicious system of institutionalized racism that destroyed millions of human lives, through violence and through structural neglect.

... [But] the final TRC Report released in 1998 was a shambolic document comprised of 3,500 jumbled, barely edited pages with no coherent chronology and no index. It contained basic and embarrassing mistakes of fact

Perhaps more significant was the TRC's evasion of the larger historical questions about the nature of the apartheid system and its relationship to violence. The TRC report need not have settled these complex issues, but it ought to have broached them, since a central stated rationale for truth commissions is that they can address the historical questions that criminal courts must eschew in their focus on individual criminal responsibility. In the end, the South African TRC did not leave behind a well-constructed report that offered new insights into apartheid-era violence. In fact, the criminal prosecution of apartheid security policemen such as [Colonel] Eugene De Kock arguably produced more new and substantial information on the day-to-day functioning, if not the entire chain of command of the apartheid state security apparatus. In this respect, there is a very wide disjuncture between how international scholars and practitioners and South Africans of various political dispositions perceive the Commission's legacy.

The South African case casts doubt upon the often-stated view that truth commissions inevitably represent a marked improvement upon domestic criminal trials with respect to the histories they write. Instead, some commissions and courts produce meager and impoverished accounts, whereas others write complex and detailed histories of the origins of conflict. ...⁷⁷⁸

c. East Timor and Indonesia

Two very different experiences in this region are recounted by different scholars. The first relates to East Timor:

⁷⁷⁷ P. de Greiff, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice, UN Doc. A/HRC/36/50/Add.1 (7 August 2017), para. 14.

⁷⁷⁸ R. Ashby Wilson and V. Petrović, 'Transitional Justice Histories: Narrating Mass Atrocities', in J. Meierhenrich, A. Hinton and L. Douglas (eds.), *The Oxford Handbook on Transitional Justice* (2023).

... After 1999, when the United Nations assumed administration of East Timor following massive violence around the referendum on self-determination, a Serious Crimes Process and a Commission for Reception, Truth and Reconciliation were established. The former was comprised of two hybrid criminal justice mechanisms that focused on perpetrators of the most serious abuses. The Commission complemented this approach by dealing with the aftermath of violence in communities, focusing on mid- or lower-level perpetrators of crimes, through a programme to encourage the “reception” of former militias back home. Another novelty was the joint truth-seeking effort with Indonesia, the Commission on Truth and Friendship. Initially criticized by observers who expected nothing short of a whitewash, that Commission’s final report supported many of the politically sensitive findings of the Commission for Reception, Truth and Reconciliation in East Timor regarding crimes against humanity committed by Indonesian forces.⁷⁷⁹

The second relates to events in Indonesia:

In October 1965, ... [the] Indonesian military, with the assistance of co-opted religious and nationalist youth militias, rounded up members and affiliates of the mass-supported Indonesian Communist Party (PKI). Between October 1965 and March 1966, up to 1 million unarmed civilians were murdered due to their alleged political beliefs, with a further estimated 1.5 million held in political detention camps for years afterward.

...

[Between 2008 and 2012, Indonesia’s National Human Rights Commission (Komnas HAM) launched an official inquiry into these events. If the Commission was able to provide ‘sufficient preliminary evidence’ that gross violations could reasonably be expected to have occurred, a full investigation and possible prosecutions should then be undertaken by the Attorney-General.]

... [The Commission] report, which provided substantial evidence of numerous crimes against humanity perpetrated by state agents and their proxies in 1965–1966, was a landmark achievement in many ways. It refuted the military’s own version of events, and instead laid the blame squarely on the Indonesian Army leadership for its role in coordinating and carrying out the murders, exterminations, torture, sexual violence, and the many other forms of widespread violence perpetrated systematically against Communists in the aftermath of the October 1, 1965 coup. Nothing has come of the [report] ...⁷⁸⁰

d. Colombia

Colombia was in a state of civil war between 1958 (or 1964, according to some accounts) and 2016. After a ‘final peace agreement’ in 2016, a Truth Commission began work in 2018. In July 2022 it published an 896-page summary of findings and recommendations, along with the first two chapters of what will eventually be a ten-chapter report. It estimated that some 450,000 people were killed, nearly twice the number previously believed. Millions of people were displaced. The report drew on more than 14,000 individual and collective interviews, as well as a cache of previously classified Central Intelligence Agency and other U.S. Government reports which disclosed many forms of involvement by U.S. officials and corporate actors.

On 24 November 2016, the Colombian Government and FARC-EP (Revolutionary Armed Forces of Colombia – Army of the People) signed the ‘Final Agreement to End the Armed Conflict and Build a

⁷⁷⁹ P. de Greiff, above, para. 21.

⁷⁸⁰ J. Melvin and A. Pohlman, ‘Crimes against Humanity in Indonesia (1965–1966)’, in B. Holá et al. (eds.), *The Oxford Handbook of Atrocity Crimes* (2022) 829.

Stable and Lasting Peace’. Among other things, the agreement created the ‘Holistic System for Truth, Justice, Reparation and Non- Recurrence (SIVJR). Juana Acosta-López and Cindy Espitia-Murcia, in ‘The Transitional Justice Model in Colombia *vis-à-vis* the Inter- American Human Rights System’, in Alejandro Linares-Cantillo et al. (eds.), *Constitutionalism: Old Dilemmas, New Insights* (2021) 331, explain the role of the three principal organs established by the agreement:

1. *The Truth, Coexistence and Non- Recurrence Commission*. This is a temporary extra- judicial organ tasked with four main functions, namely: (i) to clarify the human rights and international humanitarian law (‘IHL’) violations and breaches committed in the course of the NIAC [non-international armed conflict]; (ii) to provide the society with ample explanation on the complexity of the Colombian conflict; (iii) to promote the recognition of the victims and the acknowledgement of the individual and collective responsibilities of those who participated in the conflict; (iv) to promote reconciliation and coexistence in the territories as a guarantee of non- recurrence.

...

2. *Special Unit for the Search of Persons deemed as Missing in the Context and due to the Conflict*. This is a high-level special unit of a humanitarian and extra- judicial nature, whose goal is to direct, coordinate, and contribute to the implementation of humanitarian actions for the searching and identification of all the people deemed as missing due to the NIAC who are still alive. In the cases of those deceased, whenever possible, the Special Unit should work for the location and dignified delivery of their remains.

3. *Special Jurisdiction for Peace*. This organ is composed of a number of judicial panels for justice. In its twenty- year term it is tasked with judging those who bear most responsibility for crimes that constitute serious violations of international human rights law and grave breaches of IHL that were committed during the sixty-year NIAC. ... [Its main function] is to secure, by reasonable means within its reach, truth, justice, reparation, and guarantees of non- recurrence for the victims. ...

An excerpt from the recommendations in the Truth Commission’s 2022 report follows. Note that this is an unofficial electronically-generated translation.

**COMMISSION FOR THE CLARIFICATION OF TRUTH, COEXISTENCE AND NON-REPETITION,
THERE IS A FUTURE IF THERE IS TRUTH: FINAL REPORT, FINDINGS AND
RECOMMENDATIONS
(2022) 624**

Introduction

... The signing of the Peace Agreement ... opened a new opportunity to undertake as a society the transformations that are necessary However, [today] ... we are facing a scenario of increased violence in some areas of the country. ...

The ... violence and armed confrontation in some territories has resulted in an increase in displacements, confinements, recruitments, landmine incidents and assassinations of social leaders, human rights defenders and people in the process of reincorporation. Added to this is the blockage of dialogues with the ELN and the absence of a security strategy appropriate to the context and focused on the protection of people. Taken together, all of the above implies a risk of reliving a cycle of violence that was thought to have been overcome

...

... [E]ight themes were prioritized ... in the recommendations:

1) peace building as a national project, 2) victims, 3) political regime and participation, 4) drug trafficking, 5) impunity, 6) security, 7) territorial peace, 8) culture for peace and education. ...

...

Summary of recommendations

...

- ... [P]eace as a long-term priority must become a national project that places respect for life and dignity at the center, that guarantees rights to all equally, that recognizes and respects diversity, a peace that is built from the territory and with the communities, and in which dialogue is the main tool for dealing with differences and resolving conflicts. A peace that allows for reconciliation and the reconstruction of citizens' trust in institutions and among themselves
- Recognize the victims of the armed conflict in their pain, dignity and resistance; recognize the injustice of what they have experienced and the collective trauma that we share as a society. This should lead us to commit ourselves to comprehensive and transformative reparations for the more than nine million victims of the internal armed conflict

...

- To advance in a critical examination of our past in order to build on it a future in peace. For this reason, we need a policy of memory and truth for the construction of peace and non-repetition that commits the State and society as a whole and contributes to the strengthening of democratic values. Furthermore, it must recognize, support and promote the memory initiatives of civil society and its organizations as essential for the construction of a plural and democratic memory; and ensure that the responsible institutions have the necessary independence and autonomy to carry out a policy and decisive action for a living and plural memory that implies a break with the past of stigmatization, justification or denial.
- Rethink the problem of drug trafficking and find the political, economic, ethical and legal ways out of it in in-depth debates, both at the national and international levels, that will allow progress in the regulation of the drug market and overcome prohibitionism. This is based on the recognition of the penetration of drug trafficking at all levels of culture, politics and economy, and that the war against drugs and for illegalized drugs is one of the main and most relevant factors that have facilitated the persistence of conflict and violence In the immediate term, it is urgent to adopt a human rights and public health approach in the policy against cultivation and consumption and to rationalize the use of criminal action against the weakest links in the chain, which will allow, among other things, overcoming structural problems of poverty, exclusion and stigmatization. And to implement a proposal for the rigorous regulation of the market and consumption under state and international control in a process in which Colombia can and should play an inspirational and leading role.
- Strengthen and develop investigative mechanisms that allow the State and society to know in depth the system of relationships, alliances and interests involved in drug trafficking and networks of violence. ...
- Recover the value of justice to vindicate legality, promote peaceful coexistence, contribute to the satisfaction of victims' rights and rebuild trust in the State. In this sense, given the persistence of violence caused by armed groups and the impact of impunity, it is necessary to improve the State's capacity to guarantee the impartiality and independence of the investigative and judicial entities, as well as the control bodies that must be a guarantee and commitment to the necessary strengthening of democracy

...

- Establish a new vision of security for peace building, as a public good centered on people, that allows us to overcome the logics of the armed conflict in which we have lived, change the way the State understands and is present in the territories and rebuild trust based on dialogues between citizens and institutions, particularly the public force, as a fundamental element for territorial peace and institutional strengthening. In this context, the transformation of the security sector, and in particular the role of the security forces in

ensuring the prevention of crime and the requirements of the law in the protection of the lives and tranquility of people, starting with those who are most exposed due to poverty and exclusion, becomes relevant Finally, the recovery of trust also implies that the sector's institutions face the legacy of human rights violations and breaches of IHL in which their members have been responsible, and guarantee the non-repetition of these events.

- To deepen democracy for peace through the definitive exclusion of weapons from politics
- Building peace requires new tools and a break with the past, a positive shock, and not a fragmented vision of the way forward. ... A ministry or an entity that promotes State policies for reconciliation and peace-building is one of the tools that the Commission proposes. ...
- To guarantee conditions of well-being and dignified life for the communities in the territories ... requires a comprehensive, long-term effort that commits not only the State, but society as a whole, based on a participatory, equitable, sustainable and multicultural land-use planning process. To this end, land redistribution, prevention and reversal of dispossession, access to public goods and services, including security and justice, and productive opportunities (financial capital, tertiary roads, access to markets) must be guaranteed for rural inhabitants, which means food security and sovereignty for the country, care for ecosystems, water and land as fundamental elements for the common good and good national living from the local communities.
- ... There cannot be full peace without differential treatment of historically excluded groups - ethnic peoples, peasant population, women, children, adolescents and youth, LGBTIQ+ persons, persons with disabilities or functional diversity, and the elderly- and if specific efforts are not made to transform the factors that caused the armed conflict to have a particularly aggravated impact on them. ...

* * *

To the extent that generalizations can be valid across a wide range of truth commissions over many decades, Adam Kochanski, in 'Mandating Truth: Patterns and Trends in Truth Commission Design', 21 *Hum. Rts. Rev.* (2020) 113, identified three emerging trends based on a review of 44 truth commissions that operated between 1974 and 2015. The first was a move towards more complex mandates. He notes that while the 1990 Chad TC had the singular goal of documenting the abuses committed under Hissène Habré, the 2008 Kenyan Truth, Justice, and Reconciliation Commission had 18 different goals. He notes, however, that the broader focus 'has coincided with a turn away from the early expectation that truth commissions will support human rights prosecutions', but adds that there has been no accompanying 'move toward robust procedural powers for investigation and reporting'. The second trend is a diminished emphasis on seeking prosecutions, for which he offers two possible explanations. The first is that 'a functional division of labour has emerged' between the work of TCs and trials conducted by the courts. The second, and more problematic, explanation 'is that a logic of reduced costs is motivating TC establishment. In other words, TCs are being selected because they offer a substitute for trials – abusive regimes view them as a less harmful policy option that can deflect calls for accountability.' He cites bodies set up in Sri Lanka and Côte d'Ivoire as illustrations of initiatives largely designed to defuse or even silence accountability demands.

The third trend identified by Kochanski is a failure to give TCs strong investigative and reporting powers. He suggests that this might be taken as 'an early indicator of instrumental use given some of the most questionable TCs fall into the range of limited powers (e.g. Algeria, Lebanon, Serbia and Montenegro, Sri Lanka, and so forth).'

4. The Future of Transitional Justice

While the materials above have focused primarily on issues such as amnesties and truth commissions, there are a great many other dimensions to transitional justice, including reparations which are dealt with below (p. 000). In addition, mention should be made of the increasing use of techniques associated with transitional justice to address the violations of rights to which indigenous peoples in many countries have been subjected (see UN Docs. A/76/180 (2021) and A/HRC/51/50 (2022)). Sámi reconciliation commissions have been set up in Norway (2018), Finland (2019) and Sweden (2020), and in 2021, Victoria, the second most populous state in Australia, established the Yoorrook Justice Commission to ‘develop a shared understanding among all Victorians of the impact of colonisation, as well as the diversity, strength and resilience of First Peoples’ cultures; and to make recommendations for healing, system reform and practical changes to laws, policy and education, as well as to matters to be included in future treaties.’⁷⁸¹ In a different context, transitional justice approaches have also been used to address sexual and other abuses in religious settings.⁷⁸²

Looking at the field as a whole, David Tolbert and Marcela Prieto Rudolph, ‘Transitional Justice in the 21st Century: History, Effectiveness, and Challenges’, in Barbora Holá et al. (eds.), *The Oxford Handbook of Atrocity Crimes* (2022) 581, note the extent to which deep disagreements remain as to its nature and future directions:

There is an air of paradox in the goals associated with transitional justice. There are conflicts between substantive and procedural justice, and between reconciliation and nation-building. There is the challenge of achieving criminal accountability when violations have been committed by thousands of perpetrators and achieving reconciliation while simultaneously “opening up old wounds,” and promoting a transformative agenda that at the same time is meant not to imperil the transition. Although tensions may arise in practice, there is nothing in the goals that makes them incompatible ...

... [T]here is no consensus on any conception of transitional justice. Some think transitional justice is just a form of ordinary justice, while others emphasize the particularities of pre-transitional states. Teitel has focused on the particularities of transitional justice and its relation between law and political transformation, while De Greiff has argued that transitional justice is a “principled application of justice in distinct circumstances.” More recently, Colleen Murphy has provided a theoretical account of transitional justice and its demands, which contests the idea of transitional justice as a mere compromise between different familiar kinds of justice and underlines transitional justice’s special nature. Others emphasize restorative justice, which aims for reconciliation by seeking to re-establish the relationships between victims and perpetrators and involving the wider community. Initially thought of as applicable only to lesser violations, some now argue it should extend to the most serious crimes. Finally, there is the most recent transitional justice canon, which has been called the “fourth generation of transitional justice scholarship”: transitional justice as transformative justice. ...

Thus, there is no consensus on any conception of transitional justice nor on the relationships among transitional justice’s goals. This makes the second question—on which there is not much consensus either—even more challenging: Does transitional justice deliver on what its advocates promise? ...

In the following readings, Dustin Sharp and Frank Haldemann offer important reflections on the ways in which the field should evolve in the years ahead.

⁷⁸¹ <https://yoorrookjusticecommission.org.au/overview/>.

⁷⁸² J. Gallen, *Transitional Justice and the Historical Abuses of Church and State* (2023).

**DUSTIN SHARP, RETHINKING TRANSITIONAL JUSTICE FOR THE TWENTY-FIRST CENTURY:
BEYOND THE END OF HISTORY
(2018) 155**

[In concluding his book, Sharp argues that transitional justice policy in the twenty-first century should be (re)oriented around the following five broad themes:]

Transitional justice should embrace more extended concepts of peace, justice, and violence

“Peace” tends to be conceived of as a narrow (neo)liberal peace. “Justice” is typically understood in terms of legal and atrocity justice for a narrow if not egregious band of civil and political rights violations. And the “violence” that is to be condemned (and, hopefully, prevented) is understood as comprising physical violence, for the most part excluding violence of the economic, cultural, and structural kind. These are all, of course, social and political constructions, and there is a sense in which they are mutually reinforcing. That is, narrow constructions of justice and violence lead to a comparatively thin idea of peace, and vice versa.

... Without doubt, justice in its fullest and most expansive sense must necessarily remain a broader concept than transitional justice. However, to the extent that questions of economic violence and distributive justice help to drive conflict, instability, and human rights abuses, their positioning at the periphery of transitional justice concern may ultimately be self-defeating. Thus, whatever the dividing line between abuses that will be addressed or go unaddressed by transitional justice mechanisms, it makes little sense as a matter of policy to draw a simplistic one that reifies historic dichotomies of civil and political versus economic and social rights.

...

Much will depend on context, but whether issues of economic violence are addressed is a question largely bound up with practical and methodological challenges, not fundamental or structural impossibilities. More cautious approaches might, for example, focus on those patterns of economic violence with the greatest negative impact on economic and social rights, or perhaps focus on a small group of those “bearing the greatest responsibility” for economic crimes. Another filtering device to render the inquiry more manageable might be temporal – limiting the investigation to a period of the last ten years, for example. In this, the embrace of economic violence would be little different than historical approaches to violations of civil and political rights, which have tended to be relatively limited and selective.

The question is therefore increasingly less whether facets of economic violence should be addressed than how they should be addressed in view of available resources and the roots and drivers of the conflict. ...

Transitional justice should embrace the idea of “liberal localism”

... Transitional justice has tended to privilege largely Western approaches to and understandings of what it means to “do justice.” This has at frequent intervals sparked resistance and backlash, and diminished a sense of badly needed legitimacy and local support for many transitional justice initiatives. The sense that transitional justice is in essence a “Western” enterprise pushed, funded, and supported by the Global North is not entirely accurate, but contains an uncomfortable degree of truth that is ultimately corrosive to the very local ownership and support essential to long-term success. Yet the choice going forward is not a simple one between dogmatic localism and strongly assertive if not imperious global justice. Rather, the dilemmas of “the local” reveal competing liberal principles and commitments that need to be balanced. In and of itself, there is nothing particularly illiberal, for example, in giving greater weight to local autonomy, participation, and decision making when it comes to deciding what justice is supposed to mean and what the appropriate mechanisms for delivering that justice should be. If taken seriously, principles of pluralism and concepts like the “margin of

appreciation” worked out in historically liberal societies would also go a long way toward generating locally driven transitional justice practice reflective of greater contextual openness and adaptability. ...

Transitional justice should strike a better balance between retributive, restorative, and distributive justice
...

Considered most expansively, “justice” could be understood as a broad social project and a condition in society. To “do justice” with such a conception in mind would likely involve a wide spectrum of efforts involving components of retributive, restorative, and distributive justice. Yet this holistic view of justice stands in contrast to a narrower human rights legalism often associated with transitional justice that has tended to see justice as a relationship to the state, has tended to see “accountability” for mass atrocities as synonymous with individual criminal accountability rather than a broader collective or institutional model, and which has imagined justice to be something that can, to some extent, be engineered and delivered through legal mechanisms and reforms. If this is the conception of justice animating the field, we can then ask whether “transitional justice” is not just a simple byword for “law,” “legal justice,” or “retributive justice.” Thus, a necessary step in achieving a more holistic view of justice would be to question the bias of many in the field toward topdown retributivism as the “gold standard” response to mass atrocity. This assumption is particularly hardwired into lawyers for whom courtroom justice is often seen as the only form of “hard” or “real” justice that one should accept, with anything else being a second-best or compromise solution. ...

Transitional justice should embrace peacebuilding, the emancipatory kind, supported by a broader range of liberalisms

Transitional justice has in several short decades become the “globally dominant lens” through which we now grapple with legacies of violence and mass atrocity. That lens has not been an apolitical, acultural, or nonideological one, being most accurately viewed as a fairly narrow, mostly Western, (neo)liberal prism with all the reductive concepts of peace, justice, and violence that go with it. Seen through these optics, transitional justice is the harbinger and handmaiden of atrocity justice and liberal democracy. ... [T]hese liberal optics ... have contributed, at least in part, to some of the blind spots and frictions associated with transitional justice initiatives today, helping to push certain questions and modalities of justice into the foreground, while relegating others to the background of transitional justice concern:

Set in the Foreground	Set in the Background
the global, the Western	the local, the non-Western “other”
the modern, the secular	the traditional, the religious
the legal	the political
civil and political rights	economic and social rights
physical violence	economic and structural violence
the state, the individual	the community, the group
formal, institutional, “top-down” change	informal, cultural, social, “bottom-up” change

A key question is what happens to the chart above if we come to conceptualize transitional justice not simply as a vector for the promotion of atrocity justice and liberal democracy, but as a broader component of peacebuilding. ...

... [E]mbracing a paradigm of emancipatory peacebuilding, buttressed by constructs from critical peacebuilding theory, would serve to support a number of the policy changes advocated above. For example, an embrace of positive peace would help to generate a default policy assumption that one should evaluate the need [to address] both physical and economic violence, and consider the cocktail of retributive, restorative, and distributive most suited to the context. As another example, embracing a vision of peacebuilding informed by concepts of popular peace, the everyday and hybridity would

help to generate a default policy assumption that justice initiatives should in most instances begin from the “bottom up,” being planned and driven by local constituencies and cosmovision. ...

...

Transitional justice should embrace a sense of radical humility

...

... Historically, dominant transitional justice practice has been characterized by a sort of overconfidence in its abilities, predicated on the assumption that we know what concepts like “doing justice” and “accountability” actually mean, both in and beyond the West; and that mainstream understandings of such concepts are an unmitigated good for transitional societies and beyond. Dominant practice has also often reflected a lack of humility about the extent to which these concepts can be actualized by outsiders without robust local support.

... And if after deep inquiry more flexible and extended concepts of justice, violence, and peace are indeed to be embraced as a policy matter, they must be accompanied by a sense of “radical humility” that accepts the need for their continued interrogation and contestation. ...

**FRANK HALDEMAN, TRANSITIONAL JUSTICE FOR FOXES:
CONFLICT, PLURALISM AND THE POLITICS OF COMPROMISE
(2023) 201**

Nine Theses on Transitional Justice ...

Isaiah Berlin [made famous the] distinction between the hedgehog and the fox – a metaphor for two radically distinct ways of thinking His heart was with foxes, with those eclectic, pluralist thinkers who, unlike hedgehogs, see ‘many things’ rather than ‘one big thing’, and who are sceptical about reducing everything to one single framework or system in terms of which all questions can be solved. [The author seeks to think ‘like a fox’ about transitional justice, and summarizes the findings of his book in nine theses]:

1. *It’s time to learn to unlearn the normal model.* Our way of thinking about and doing transitional justice has been for too long straitjacketed by ... ‘the normal model’ [which] reduces transitional justice to an anti-impunity framework, structured around neatly defined and supposedly complementary legal obligations and rights. It is time to relearn the language of dilemmas, uncertainties, conflicts and failure that the normal model suppresses. ... [This requires posing questions such as:] How do transitions come about? What conflicts arise? Which values, and which interests collide? How can conflicts be accommodated, and how can enduring change occur? Which compromises are acceptable, and which are not? What is a credible alternative to the present state of affairs? What new social contract is needed to build a better future? ...

2. *Rather than wishing value conflict away, the question is how to constructively live with it.* The normal model problematically assumes that transitional justice forms a harmonious whole. The reality of transitional justice is far messier, however. The goods usually associated with transitional justice (truth, justice, peace, the rule of law, democracy, etc.) tend to conflict, and often irreconcilably, and when they do, there is no single correct formula for resolving the conflict. Value conflict, then, is structural rather than incidental to the project of transitional justice. ...

3. *There are no neat solutions, only hard choices.* ... There is no overarching standard, no neat formula, by which such conflicts can be wholly dissolved or resolved. Nothing can make the tensions entirely disappear. Every choice, however well considered, entails regrettable loss. ...

4. *We can be realistic without being hopeless.* ... [We] must engage head-on with the issue of how real change is possible here and now. This ... means being wary of both bright-eyed optimism and simplistic moralising. ...

5. *Context is almost everything.* The practice of transitional justice is inescapably context dependent. ... [I]t is quintessentially a matter of making delicate judgements about what can be done, or even be tried, in some particular circumstances by concrete agents with limited resources and powers. ... Principles and values ... do have a central role to play ... [but] normative generalising is a rather poor guide to practice. It is no substitute for the work of situated judgement.

6. *It's a winding route along an ever-evolving itinerary.* ... [T]ransitional justice ... involves ... hard choices about how to allocate scarce resources and settle deep conflicts among competing values and interests. These choices are inherently political. ...

7. *Compromise always leaves a sour aftertaste, but we can hardly do without it.* ... [Often] compromise is the only viable alternative to continuing war and oppression, and hence a precondition of the very possibility of transitional justice. Compromise in itself is neither 'bad' nor 'good', however. It must be asked in each case whether a particular compromise can stand up to critical scrutiny at a particular point in time. ...

8. *We need to remove our Western blinders.* Even as it pays lip service to 'the local', the normal model leaves virtually no room for practices and approaches other than those from the West. Decolonising transitional justice would mean engaging with 'other' standpoints It would call ... for a critical dialogue between different practices and forms of knowledge, premised on the belief that no framework can be seen as *the* answer to transitional justice's problems. ...

9. *The task is both impossible and necessary.* Any response to radical evil is inescapably incomplete and inadequate. Nothing can ever undo what was done, recover what was lost. The slate cannot be wiped clean. ... If 'something is to be done', we cannot do without ideals of what a better society should look like. Envisioning a credible alternative to the status quo is the very precondition for doing something. Transitional justice can be hopeful without being shallowly optimistic. It is bound up with the hope that social conditions are improvable through genuine human struggle. ...

QUESTIONS

1. What is the significance of the position, expressed by various international human rights bodies, that the right to the truth is: (i) separate from the right to information; and (ii) an individual as well as a collective right?
2. It has been suggested that we are now seeing the fourth generation of approaches to transitional justice, which focuses on bringing transformative justice. Compare the principal characteristics of the approach reflected in *Nunca Más* in 1984 with that in the Colombian Truth Commission report almost forty years later. Is the latter too wide-ranging? If so, what issues would you have left out?

B. REPARATIONS

Reparations are an integral part of the right to an effective remedy, and of transitional justice. But they are also assuming a broader role in terms of redress for historical injustices, such as slavery and colonialism,⁷⁸³ which are the main focus of the following materials. Before examining those issues, however, it is useful to consider some of the philosophical dimensions of reparations claims. Consider

⁷⁸³ On 'the duty to provide reparations to peoples, deprived of their means of subsistence, self-determination and development', see Separate Opinion of Judge Cançado Trindade in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, 156, at 232.

first the analysis of different ethical theories of reparations by Eric Posner and Adrian Vermeule, in 'Reparations for Slavery and Other Historical Injustices', 103 *Colum. L. Rev.* (2003) 689:

... A theory of reparations explains why the government should require one group of people to pay another group of people even though the latter group, the victims or their descendants or relations, do not have a prior legal right against the first group. Reparations claims thus involve three relationships: (1) the relationship between the original wrongdoer and the original victim; (2) the relationship between the original wrongdoer and the possible payer of reparations; and (3) the relationship between the original victim and the possible claimant or beneficiary of reparations. The claimant must show that each relationship is of the proper type.

The nature of the relationship depends on two separate moral questions. The first concerns the grounds of the moral obligation that gives rise to the reparations claim. Many reparations schemes are based on a claim that one group of people wrongfully harmed another group of people and therefore owe compensation to the extent of the harm. Others are based on a claim that one group of people was unjustly enriched by another group of people and therefore must make restitution of the benefit obtained. The harm and restitution theories have distinctive implications for the generosity and form of reparations and for the validity of the claims of nonwrongdoers and nonvictims.

The second question concerns the nature of the entity that can bear moral obligations. We consider three positions. Under ethical individualism, only individuals can have moral obligations and rights. Under "soft" ethical individualism, a corporate body can also have moral obligations and rights even arising out of circumstances where the individuals who compose the corporation do not. Thus, an individual who belongs to the corporation could be made to pay on account of a wrongful act committed by the corporation even though the individual was not to blame for the act. Under ethical collectivism, a more loosely defined group such as a nation can have moral obligations and rights. Here, even individuals who, though members of the group, did not voluntarily enter the group or accept the benefits of membership (as in the case of soft ethical individualism) can be made to pay for the wrongful acts of the group. As we will discuss, reparations claims become easier to make as individualistic premises are relaxed, but they also become vaguer and less compelling.

Jeremy Waldron, in 'Redressing Historic Injustice', 52 *U. Toronto L. J.* (2002) 135 addresses issues relating to reparations, especially for indigenous peoples. His thesis has been summarized in the following terms:

[Waldron's] 'thesis of the supersession of historic injustice' or the 'supersession thesis' ... is as follows: If a historical injustice occurs leading to an unjust situation S1 at time T1, morally relevant changes in circumstances can occur between T1 and T2, such that at T2, justice does not require – and may prohibit – returning to the prior situation. So, suppose settlers unjustly seized Indigenous lands in 1840. Just after this, the dispossession remains an ongoing injustice and should be reversed. However, changes in circumstances like population increases and environmental conditions may mean that historical entitlements (judged from a moral perspective) can no longer be justified relative to contemporary needs for lands and resources. The distribution of resources that was unjustly established through the seizure in 1840 may become a just (or not unjust) distribution of resources in 2022. Waldron says that if it is no longer a

continuing injustice that Indigenous peoples are deprived of those resources, then the injustice has been ‘superseded’. ...⁷⁸⁴

Now, consider Waldron’s own analysis:

It does not follow from what has been said we should attach no importance to historic injustice of the sort that disfigured the colonial history of countries like New Zealand. The arguments made in Parts IV-VIII are directed at a particular way of thinking about that injustice and a particular way of approaching its remediation. I have criticized the approach that aims, as it were, to wind the tape back to the injustice and try to make the world as though the injustice had never happened: I have argued that the counterfactuals that that involves are impossible to figure out (if not incoherent), and I have argued, too, that such an approach tries to do justice to the wrong entities (viz. modern-day successors to the groups that were important at the time the injustice took place) and to vindicate the wrong rights (rights that obtained by virtue of circumstances quite different from those of the modern world). The reparationist enterprise fails to take proper account of the fact that the people, entities, and circumstances in relation to which justice must now be done have changed radically from the peoples, entities, and circumstances in relation to which violations were historically committed. Some of those changes are a result of the historic injustice. But, as I argued in the early sections of the article, that does not mean they can be ignored or reversed. We must come to terms with each other here and now, irrespective of how we were [sic] all got here.

Behind the thesis of supersession lies a determination to focus upon present and prospective costs - the suffering and the deprivation over which we still have some control. The idea is that any conception of justice that is to be made practically relevant for the way we act now must be a scheme that takes into account modern circumstances and their impact on the conditions under which people presently live their lives. Arguments for reparation take as conclusive claims of entitlement oriented towards circumstances that are radically different from those we actually face: claims of entitlement based on the habitation of a territory by a small fraction of its present population, and claims of entitlement based on a determination to ignore the present dispersal of persons and peoples on the face of the earth, simply because the historic mechanisms of such dispersal were savagely implicated in injustice. And yet, here we all are. The present circumstances are the ones that are real: it is in the real world that people starve or are hurt or degraded if the demands of justice in relation to their circumstances are not met. Justice, we say, is a matter of the greatest importance. But the importance to be accorded to it is relative to what may actually happen if justice is not done, not to what might have happened if injustice in the past had been avoided.

I want to end by emphasizing two other points that qualify or clarify my thesis of the supersession of historic injustice. First, what I have said applies only if an honest attempt is being made to arrange things justly for the future. If no such attempt is being made, there is nothing to overwhelm or supersede the enterprise of reparation. My thesis is not intended as a defence of complacency or inactivity, and to the extent that opponents of reparation are complacent about the injustice of the status quo, their resistance is rightly condemned. Repairing historic injustice is, as we have seen, a difficult business, and, as a matter of fact, it is almost always undertaken by people of good will. The only thing that can trump that enterprise is an honest and committed resolve to do

⁷⁸⁴ L. Meyer and T. Waligore, ‘Superseding historical injustice? New critical assessments’, 25 *Crit. Rev. Int’l. Soc. & Pol. Phil.* (2022) 319.

justice for the future, a resolve to address present circumstances in a way that respects the claims and needs of everyone.

Second, my thesis is not that such resolve has priority over all rectificatory actions. I claim only that it has priority over reparation that might carry us in a direction contrary to that indicated by a prospective theory of justice. Often, and understandably, claims based on reparation and claims based on forward-looking principles will coincide, for, as we saw in Part III, past injustice is not without its present effects. It is a fact that many of the descendants of those who were defrauded and expropriated live demoralized lives of relative poverty - relative, that is, to the descendants of those who defrauded them. If the relief of poverty and the more equal distribution of resources is the aim of a prospective theory of justice, it is likely that the effect of rectifying past wrongs will carry us some distance in this direction. All the same, it is worth stressing that it is the impulse to justice now that should lead the way in this process, not the reparation of something whose wrongness is understood primarily in relation to conditions that no longer obtain.⁷⁸⁵

THOMAS PIKETTY, A BRIEF HISTORY OF EQUALITY (2022) 68

...

The Question of Reparations

... The case of Haiti was particularly extreme in that the slave population grew very rapidly Around 1700, the total population of the island was about 30,000 inhabitants, of which barely half were slaves. ... At the end of the 1780s, the colony had more than 470,000 slaves (90 percent of the population), 28,000 Whites (5 percent), and 25,000 métis and free Blacks (5 percent).

... The system was in a phase of accelerated expansion when the French Revolution broke out. In 1789-1790, free Blacks claimed the right to vote and to participate in assemblies. This seemed to them logical, given the resounding proclamations regarding equal rights that were being made in Paris, but they were refused that right. The slave uprising began in August 1791 Despite military reinforcements sent from France, the insurgents rapidly gained ground and took control of the plantations, whereupon the planters fled the country. The new commissioners sent from Paris decreed the emancipation of slaves in August 1793, a decision that was extended to all the colonies by the Convention of February 1794 There was hardly any time to implement this decision. In 1802, the property owners persuaded Napoleon to reestablish slavery in all the slaveholding islands except Haiti, which declared its independence in 1804, after having once again driven out the French troops sent to take back their property. ...

Should the French State Reimburse the Debt Paid by Haiti?

The case of Haiti is emblematic, not only because it was the first abolition of slavery in the modern age after a victorious slave revolt, and the first independence from a European power won by a Black population, but also because this episode ended with a gigantic public debt that undermined Haiti's development over the following two centuries. Although in 1825 France finally agreed to accept the country's independence and to put an end to its threats to send troops to invade the island, that was only because Charles X had obtained from the Haitian government a commitment to repay to France a debt of 150 million gold francs to indemnify the slaveholders for the loss of their property. The Port-au-Prince government did not really have a choice, given France's clear military superiority, the embargo imposed by the French fleet, and the genuine risk that the island would be occupied. This veritable tribute represented more than 300 percent of Haiti's national income in 1825 – more than three years of production – a huge sum that it was materially impossible to repay in a short time. In

⁷⁸⁵ An entire symposium on this thesis was published in 2022. See J. Waldron, 'Supersession: A reply', 25 *Crit. Rev. Int'l. Soc. & Pol. Phil.* (2022) 443.

this case, the treaty stipulated a rapid payment of the whole amount to [a bank], with the Haitian government being responsible for refinancing itself and paying interest to French private banks in order to spread out the repayment. The Haitian debt was the object of multiple, chaotic negotiations, but it was largely repaid (capital and interest), with an average payment of about 5 percent of the Haitian national income per annum between 1840 and 1915 With the support of the French government, the banks finally decided to cede the rest of their receivables to the United States, which occupied Haiti from 1915 to 1934 to reestablish order and safeguard its own financial interests.

The 1825 debt, transferred from one creditor to another, was officially extinguished and definitively repaid by the beginning of the 1950s. For more than a century, from 1825 to 1950, the price that France tried to make Haiti pay for its freedom had one main consequence: the island's development was overdetermined by the question of the indemnity, which was sometimes violently denounced and sometimes accepted with resignation, according to the ebb and flow of endless political cycles.

Suppose the French state finally decides to reimburse the debt paid by Haiti, as the Haitian state has been asking it to do for decades. What should the amount of this reparation be? There is no single answer to this question, and it deserves to be the subject of a democratic debate. But it cannot be evaded. A simple, transparent solution might consist in setting the amount at 300 percent of the Haitian national income in 2020, or about 30 billion euros [which would represent the equivalent of a little more than 1 percent of France's current public debt].

...

[The British approach]

...

... [T]he law of abolition passed by the British Parliament in 1833 put in place full compensation for property owners. Relatively sophisticated scales were drawn up on the basis of the slaves' age, gender, and productivity, so that the compensation might be as fair and as exact as possible. In this way, some 20 million pounds sterling, or about 5 percent of the United Kingdom's national income at the time, was paid to 4,000 slaveholders. Today, if a government decided to devote to such a policy the same proportion of the British national income, it would have to pay approximately 120 billion euros, or about 39 million euros, on average, for each of the 4,000 property owners. ... All this was financed by a corresponding increase in the public debt, which was itself repaid by all British taxpayers

* * *

The history recounted by Piketty was subsequently supplemented by a remarkable in-depth, long-term, archival study undertaken by the New York Times: Catherine Porter et al., 'The Ransom: The Root of Haiti's Misery: Reparations to Enslavers', *The New York Times* (20 May 2022).⁷⁸⁶ Some excerpts follow:

Though Haiti's government made the last payments connected to its former slaveholders in 1888, the debt was far from settled: To finish paying it off, Haiti borrowed from other foreign lenders who, in league with a few self-serving Haitian officials indifferent to their people's suffering, laid claim to a significant share of the nation's income for decades to come.

Depleted after decades of paying France, Haiti took out even more loans after that. By 1911, \$2.53 out of every \$3 Haiti took in from coffee taxes, its most important source of revenue, went to paying debts held by French investors That left precious little to run a country, much less build one.

In some years of the United States occupation, which began in 1915, more of Haiti's budget went to paying the salaries and expenses of the American officials who controlled its finances than to providing health care to the entire nation of around two million people.

⁷⁸⁶ See also L. Obregón, 'Empire, Racial Capitalism and International Law', 31 *Leiden J. Int'l L.* (2018) 597.

Even after the Americans relinquished fiscal control in the late 1940s, Haitian farmers were living on a diet that was “often close to the starvation level” As few as one in six children went to school.

During slavery, Haiti brimmed with such wealth that its largest and most important city, Cap-Français, was known as the “Paris of the Antilles,” bursting with bookstores, cafes, gardens, elegant public squares and bubbling fountains. ... The harbor, choked with garbage today, was perennially full of ocean-worthy sailing ships.

In 1991, Jean-Bertrand Aristide, a former priest, became Haiti’s first democratically elected President. He was ousted in a military coup seven months later, but was re-elected in 2001. In 2003 he launched a campaign to secure reparations from France and calculated that Haiti was owed \$21,685,135,571.48. *The New York Times* commented that although French diplomats mocked the figure for its size and precision, ‘estimates vetted by economists and historians ... [show] his calculations may have been close to the mark – and possibly even modest.’ Bertrand was subsequently compelled to leave the country before the end of his term in office, on the grounds that there was otherwise a risk of civil war. But the French Ambassador to Haiti at that time ‘told *The Times* ... that France and the United States had effectively orchestrated “a coup” against Mr. Aristide by forcing him into exile.’ The newspaper added that:

Since his departure, none of his successors have pressed the issue. In 2003, the French government dismissed his claim of restitution. Twelve years later, [French President François] Hollande acknowledged that France did indeed owe Haiti a debt – before his staff quickly said it was not a monetary one.

Litigation

Litigation has been important in upholding reparations in some contexts but not others. Antony Anghie, in ‘Rethinking International Law: A TWAAIL Retrospective’, 34 *Eur. J. Int’l L.* (2023) 7, at 87, draws a sharp contrast between the rejection of Global South reparations demands and the enthusiastic enforcement of the ‘Western law of reparations’ (based on notions of state responsibility, p. 000 above), which has required formerly colonized countries to pay vast amounts of compensation for wrongs suffered at their hands by corporate investors. International law has premised both approaches on property rights. In the colonialism context, rights to the property of colonized peoples were quickly transferred to the colonizers. But a very different approach has prevailed in response to the expropriation of investors’ property:

... A law of reparations shaped to compensate corporations is now accepted as logical, coherent, inevitable and, indeed, indispensable to furthering growth and development. This body of law both embodies and extends the neo-liberal vision of the world that is now so dominant. By contrast, efforts to provide reparations for slavery or colonial exploitation are criticized as aberrant and destructive, threatening entire social and economic structures with endless claims and no end in sight. ...

The contrast is reflected in a Separate Opinion by Judge Abdulqawi Yusuf, in the International Court of Justice case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): Reparations* (9 February 2022), para. 37:

37. In its 2005 Judgment,⁷⁸⁷ the Court ... [recognized] injuries caused not only to the DRC but also to “persons on its territory”[. This] should have found application in the reparations phase through the award of different types of

⁷⁸⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 257, para. 259

reparations depending on the nature and scope of the injury and on the addressees of the reparation. This is not unfortunately the case. The Judgment seems to be stuck in a time warp as it reflects the State-centred approach to reparation reminiscent of the law of diplomatic protection, while acknowledging gross violations of human rights and humanitarian law the victims of which should be entitled to compensation or other forms of reparation independently of their State. Recent developments in human rights and international humanitarian law have led to a widespread recognition that, with regard to claims arising from an injury suffered by an individual or a community, reparation should accrue to the injured individual or community.

At the national level, very few court cases claiming reparations have so far succeeded. The following British case, based on a tort claim, and benefiting from unusually abundant documentary proof, illustrates both the challenges and the limited opportunities.

***NDIKU MUTUA, PAULO NZILI, WAMBUGU NYINGI, JANE MUTHONI MARA & SUSAN
NGONDI V. THE FOREIGN AND COMMONWEALTH OFFICE***
HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, [2011] EWHC 1913 (QB) (21 JULY 2011)
[INITIAL HEARING TO DETERMINE THE VIABILITY OF THE CLAIMANTS' CASE]

MR. JUSTICE MCCOMBE

(A) Introduction

1. This is an action for damages for personal injuries brought by five claimants in respect of alleged torts of assault and battery and negligence, for which it is said the defendant is liable as representing Her Majesty's government in the United Kingdom. The injuries in respect of which the claims are made are said to have been deliberately inflicted on the claimants while they were in detention in Kenya, in varying periods between 1954 and 1959, by officers and soldiers of the Kenya police force, the Home Guard and/or the Kenya Regiment. The particulars of the injuries alleged to have been inflicted speak of physical mistreatment of the most serious kind, including torture, rape, castration and severe beatings. ... [I]f the allegations are true ... the treatment of these claimants was utterly appalling.

...

13. The claim is presented under five heads. ... (1) ... the former liability of the Colonial Administration in Kenya simply devolved or was transferred, by operation of the common law, upon the UK Government at the time of independence in 1963. ... (2) ... the UK Government is directly liable to the claimants, as a joint tortfeasor, with the Colonial Administration and the individual perpetrators of the tortious assaults, for having encouraged, procured, acquiesced in, or otherwise having been complicit in, the creation and maintenance of the "system" under which the claimants were mistreated. Such liability is said to arise out of the role of the military/security forces under the command of the British Commander-in-Chief. ... (3) ... the UK Government is similarly jointly liable, through the former Colonial Office, for the acts complained of, because of its role in the creation of the same system under which detainees were knowingly exposed to ill-treatment. ... (4) ... the UK Government is liable to the claimants ... as the result of an instruction, approval or authorisation of particular treatment of claimants given on 16 July 1957. ... (5) ... the UK Government is liable in negligence for breach of a common law duty of care in failing to put a stop to what it knew was the systemic use of torture and other violence upon detainees in the camps when it had a clear ability to do so.

...

148. At this stage of the proceedings it seems to me that there is a substantial body of evidence suggesting that both governments well knew that those in charge of the camps and/or those under their command were "not fit and proper persons" to be given custody of prisoners. ... At trial the evidence may point the other way, but such a conclusion cannot be ruled out at present.

...

[The court considered the government's claim that a duty of care should not be imposed 'in areas where public policy issues, in the sense of political judgments, arise' (para. 151), but concluded that this was an exceptional case and 'of such a nature that judicial policy might positively demand the existence of a duty of care' (para. 153).

154. In my judgment, it may well be thought strange, or perhaps even "dishonourable", that a legal system which will not in any circumstances admit into its proceedings evidence obtained by torture should yet refuse to entertain a claim against the Government in its own jurisdiction for that government's allegedly negligent failure to prevent torture which it had the means to prevent, on the basis of a supposed absence of a duty of care. ...

[The court concluded that the claims, as amended, could go forward.]

**HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, [2012] EWHC 2678 (QB) (5
OCTOBER 2012)
[HEARING ON WHETHER THE CASE WAS BARRED BY THE LIMITATION ACT]**

MR. JUSTICE MCCOMBE

1. [In the preceding judgment] I directed that the case be set down "for hearing of limitation as a preliminary issue". The pleaded issues on limitation are as follows.

2. ... [T]he defendant pleads that each claim by the claimants is barred by virtue of the expiry of the three year time limit provided for under section 11(4) of the Limitation Act 1980 [In response] the claimants state ...:

“(i) ... [I]t is admitted that the action is outwith the time limit provided by s.11 of [the 1980 Act];

(ii) Notwithstanding the passage of time a fair trial remains possible and there are compelling reasons why the Court should exercise its discretion under s.33 and permit the claims to proceed”.

6. [Section 33(1) of the Act provides that 'If it appears to the court that it would be equitable to allow an action to proceed', it may exercise its discretion to do so, having regard to:]

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

...

(c) the conduct of the defendant after the cause of action arose, ...;

...

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

...

(D) The factual issues arising

...

28. ... [I]t seems to me that the following factual issues would arise at trial ...:

i) When were the injuries inflicted on each claimant and where did the relevant ill-treatment occur? What was the official status of the perpetrators? Were they soldiers, African home guards, prison officers or other officials? What was the legal status of those individual perpetrators, vis-a-vis the Colonial Government, the British Army (and its Commanders-in-Chief) and the Colonial Office in London respectively and does that status matter?

...

iii) Did General Erskine [Commander in Chief, East Africa Command] (and each of his successors) have full command and the means of control over the entire “security forces” in Kenya? ...

iv) Did the British Army commanders have either de jure or de facto control of officials and others serving in the detention facilities and villages ...;

v) What role did the War Council in Kenya/the British Army play in the “screening”, interrogation and detention system?

vi) Was there a system of torture and/or other ill-treatment of detainees ...;

vii) ... what was the true nature of the relationship between the Colonial Office in London and the Colonial Administration in Nairobi? ...

...

ix) What (if anything) did the Colonial Office know about abuses to detainees occurring in detention facilities and elsewhere and when did it have such knowledge?

x) Was there any cover up of any such abuses and, if so, by whom? ...

...

xii) Causation and Quantum of damages

29. In respect of all these matters, the claimants contend that a fair trial is possible on the basis of the substantial documentary base that survives and the oral evidence of surviving witnesses in Kenya and the UK. The defendant says, “No, a fair trial is not possible”

(E) Background facts relating to the Section 33 factors

...

31. Each of the surviving claimants is now elderly. Mr Nyingi is aged 84, Mr Nzili is 85 and Mrs Mara is about 73. Mrs Ngondi was 71 when she died. They each come from remote rural areas of Kenya and have worked in elementary farming communities. They have little education, even in their own languages; none has any significant knowledge or understanding of English. They have no experience, prior to this matter, of legal or other professional advice. They have minimal financial means. The possibility of any legal claim arising out of their now admitted ill-treatment was only brought to their attention by the Kenya Human Rights Commission (“KHRC”) in [2006 and 2008]. ...

32. As a matter of historical scholarship, two new works about the Kenya Emergency were published in 2005. Those works were *Imperial Reckoning: the Untold Story of Britain’s Gulag in Kenya* by Professor Caroline Elkins of Harvard University and *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* by Professor David Anderson of Oxford University. Both these works, based on extensive research both in Kenya and the UK, reached the conclusion that there was regular and systematic abuse of detainees in screening centres and detention camps. ... Published historical work on these subjects prior to 2005 had been much more limited and the documentary basis of the present claims had not been unearthed. ...

...

(F) The two main rival contentions: Documents and Witnesses

...

[In the earlier phase of the case, it was recounted that the UK Government had been unable to locate 300 boxes of documents relating to the Emergency, that had been removed from Kenya before

independence in 1963. But as the trial was underway, those in charge of government records at a facility called Hanslope Park announced that the boxes had been found.]

48. ... In the intervening 12 months a great deal of further work has been conducted on that collection by both sides. The historians robustly maintain ... that the new disclosure has only served to confirm the impressions and conclusions that they had expressed

...

51. At a trial the court would have to conduct its own analysis of the documents However, on the present evidence, ... [I conclude] that the available documentary base is very substantial indeed and capable of giving a very full picture

...

109. Looking at those claimants' evidence, I think that it will be quite possible to determine sufficiently clearly where and when they suffered their injuries and the official status of those responsible for inflicting them. It will also be possible, on the documents arranged and collated chronologically, together with the other evidence, to determine whether or not the injuries occurred because of a breach of duty on the part of the United Kingdom government.

...

[The court noted that although not necessary to the conclusion of the case, it would consider the argument that in cases involving torture and statute of limitations issues, 'the Court may be assisted by considering the approach of international tribunals when adjudicating on claims arising out of torture' (para. 155). The claim was that 'By logical extension [from criminal cases,] the disapproval of time bars for torture cases extends to civil actions'. The Court found, however, that customary international law did not support the existence of such a rule in relation to civil, as opposed to criminal, cases (para. 157). In concluding the judgment, the Court upheld the request that it should exercise its discretion under the Act to allow the case to proceed.]

**WILLIAM HAGUE (SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS),
MAU MAU CLAIMS (SETTLEMENT)
UNITED KINGDOM PARLIAMENTARY DEBATES, HOUSE OF COMMONS (6 JUNE 2013) COL.
1692**

[An emergency was declared between 1952 and 1963 as a result of the armed struggle between the Kenya Land and Freedom Army (known as the Mau Mau), and the British authorities. Widespread violence was committed by both sides, and most of the victims were Kenyan. Many thousands of Mau Mau members were killed, while the Mau Mau themselves were responsible for the deaths of over 2,000 people, including 200 casualties among the British regiments and police. [British statistics estimated that 11,000 Mau Mau were killed, Anderson's estimate is 25,000 and Elkins' estimate has been many times that number.]

Emergency regulations were introduced; political organisations were banned; prohibited areas were created; and provisions for detention without trial were enacted. The colonial authorities made unprecedented use of capital punishment and sanctioned harsh prison, so-called "rehabilitation", regimes. Many of those detained were never tried, and the links of many with the Mau Mau were never proven. ...

We recognise that British personnel were called upon to serve in difficult and dangerous circumstances. Many members of the colonial service contributed to establishing the institutions that underpin Kenya today, and we acknowledge their contribution. However, I would like to make it clear now and for the first time on behalf of Her Majesty's Government that we understand the pain and grievance felt by those who were involved in the events of the emergency in Kenya. The British Government recognise that Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British Government sincerely regret that these abuses took

place and that they marred Kenya's progress towards independence. Torture and ill treatment are abhorrent violations of human dignity, which we unreservedly condemn.

...

In 2012 [the High Court ruled that the cases excerpted above could proceed.] The Court of Appeal was due to hear our appeal against that decision last month. However, I can announce today that the Government have now reached an agreement with Leigh Day, the solicitors acting on behalf of the claimants, in full and final settlement of their clients' claims.

The agreement includes payment of a settlement sum in respect of 5,228 claimants, as well as [costs] of £19.9 million. The Government will also support the construction of a memorial in Nairobi to the victims of torture and ill-treatment during the colonial era. ...

This settlement provides recognition of the suffering and injustice that took place in Kenya. ...

We continue to deny liability on behalf of the Government and British taxpayers today for the actions of the colonial administration in respect of the claims, and indeed the courts have made no finding of liability against the Government in this case. We do not believe that claims relating to events that occurred overseas outside direct British jurisdiction more than 50 years ago can be resolved satisfactorily through the courts without the testimony of key witnesses, which is no longer available.

...

... [W]e do not believe that this settlement establishes a precedent in relation to any other former British colonial administration.

... We do not want our current and future relations with Kenya to be overshadowed by the past. Today, we are bound together by commercial, security and personal links Bilateral trade between the UK and Kenya amounts to £1 billion each year, and around 200,000 Britons visit Kenya annually.

...

* * *

Much has been written about this case.⁷⁸⁸ But the key question is why other cases have not followed on the same path. Caroline Elkins, in 'History on Trial: Mau Mau Reparations and the High Court of Justice', in *Time for Reparations*, above, at 117, suggests three reasons: (i) cases cannot be filed in British courts for abuses that occurred before 1948; (ii) claimants in such cases must be alive and able to appear in court; and (iii) equally damning historical records have not yet become available in relation to other situations.

On 31 May 2021, six UN Special Procedures mandate-holders (those dealing with transitional justice, right to housing, rights of indigenous peoples, rights of internally displaced persons, racism, and torture) sent a 'communication' to the UK Government (UN Doc. AL GBR 5/2021) alleging that:

During the pre-colonial and colonial period in Kenya, the Kipsigis and Talai indigenous peoples of Kericho County, as was the case with other communities and indigenous peoples in Kenya, were subjected to gross violations of human rights, such as unlawful killing, sexual violence, torture, inhuman and degrading treatment, arbitrary detention, arbitrary displacement and violations of the rights to privacy, family life and property. The violations also included the expropriation of extensive land belonging to the Kipsigis and Talai peoples of Kericho County, which was considered to be particularly fertile and suited to agriculture. Over 500,000 persons belonging to the Kipsigis and Talai peoples are estimated to have been affected by these events.

⁷⁸⁸ M. Parry, 'Uncovering the brutal truth about the British empire', *The Guardian*, 18 August 2016; and J. Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment', 3 *Crit. Analysis of L.* (2016) 261.

The letter notes however that the Government has already indicated that it had ‘no intention to enter any process’ to resolve these claims. Unfortunately, the communication contains no legal analysis engaging with the facts or with precedents, but simply an annex entitled ‘Reference to international human rights law’ which lists a large array of standards and reports of general relevance.

International Initiatives

From time to time, various groups have sought to underscore the importance of the reparations issue. The ‘Abuja Proclamation’, adopted by the First Pan-African Conference on Reparations held in Abuja, Nigeria, on 27-29 April 1993:

Calls upon the international community to recognize that there is a unique and unprecedented moral debt owed to the African peoples which has yet to be paid - the debt of compensation to the Africans as the most humiliated and exploited people of the last four centuries of modern history.

...

Further urges the OAU [the Organization of African Unity] to call for full monetary payment of repayments through capital transfer and debt cancellation.

Convinced that the claim for reparations is well grounded in International Law.

Urges on the OAU to establish a legal Committee on the issue of Reparations.

...

In Resolution 543 (LXXIII) of 12 December 2022, the African Commission on Human and People’s Rights called upon African Union states to ‘establish a committee to consult, seek the truth, and conceptualise reparations from Africa’s perspective, describe the harm occasioned by the tragedies of the past, establish a case for reparations (or Africa’s claim), and pursue justice for the trade and trafficking in enslaved Africans, colonialism and colonial crimes, and racial segregation and contribute to non-recurrence and reconciliation of the past’.

In the UN context, the 2001 Durban Conference was an important watershed:

... [T]he slave-trading nations ... have expressed their abject regret for historical wrongs committed, [but] they have insisted on separating issues of responsibility from reparations and rejected the imposition of ex post facto liability. Although [pre-conference] expert reports endorsed reparations, the 2001 World Conference Against Racism only “acknowledge[d] that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade” [UN Doc. A/CONF.189/12 (2001), para. 13]. This formulation has consistently been interpreted to mean that slavery was not in fact such a crime at the time it happened. Instead, the Conference recognized a “moral obligation . . . to halt and reverse the lasting consequences of those practices” and invited governments “to honour the memory of the victims of these tragedies.”⁷⁸⁹

In 2021, the UN High Commissioner for Human Rights (UN Doc. A/HRC/47/53 (2021)) reported that:

62. Existing initiatives indicate that there is an increasing willingness and emerging practice to acknowledge the need to repair the continuing impacts of enslavement, the transatlantic trade in enslaved Africans and colonialism. Building on these initiatives, States should initiate comprehensive processes to

⁷⁸⁹ P. Alston, ‘Does the Past Matter? On the Origins of Human Rights’, 126 *Harv. L. Rev.* (2013) 2043, at 2050. For a refutation of the argument that slavery ‘was legal at the time’, see E. T. Achiume, below; and K. Schwarz, *Reparations for Slavery in International Law* (2022).

halt, reverse and repair the lasting consequences and ongoing manifestations of these legacies in their specific national context. These processes should be designed to seek the truth, define the harm, pursue justice and reparations and contribute to non-recurrence and reconciliation.

...

64. Measures taken to address the past should seek to transform the future. Structures and systems that were designed and shaped by enslavement, colonialism and successive racially discriminatory policies and systems must be transformed. Reparations should not only be equated with financial compensation.⁷⁹⁰

The most elaborated international proposal to date is from Caribbean Commission:⁷⁹¹

CARICOM, TEN POINT PLAN FOR REPARATORY JUSTICE (2014)

In 2013 Caribbean Heads of Governments established the Caricom Reparations Commission (CRC) with a mandate to prepare the case for reparatory justice for the region's indigenous and African descendant communities who are the victims of Crimes against Humanity (CAH) in the forms of genocide, slavery, slave trading, and racial apartheid.

THE CRC ASSERTS THAT EUROPEAN GOVERNMENTS:

Were owners and traders of enslaved Africans instructed genocidal actions upon indigenous communities

Created the legal, financial and fiscal policies necessary for the enslavement of Africans

Defined and enforced African enslavement and native genocide as in their 'national interests'

Refused compensation to the enslaved with the ending of their enslavement

Compensated slave owners at emancipation for the loss of legal property rights in enslaved Africans

Imposed a further one hundred years of racial apartheid upon the emancipated

Imposed for another one hundred years policies designed to perpetuate suffering upon the emancipated and survivors of genocide

And have refused to acknowledge such crimes or to compensate victims and their descendants

Caricom Ten Point Action Plan

1. Full Formal Apology

The descendants of the indigenous peoples subjected to genocide, the loss of several cultures, and the erasure of numerous languages require a full and formal apology. ...

⁷⁹⁰ See also, Report of the Secretary-General on reparatory justice for people of African descent, UN Doc. A/78/317 (2023))

⁷⁹¹ See R. Biholar, 'Reparations for Chattel Slavery: A Call from the "Periphery" to Decolonise International (Human Rights) Law', 40 *Nordic J. Hum. Rts.* (2022) 64.

A full apology accepts responsibility, commits to non-repetition, and pledges to repair the harm caused. Governments from countries responsible for the destruction have refused to offer apologies and have instead issued Statements of Regret. These statements do not acknowledge that crimes have been committed and continue to represent a refusal to take responsibility.

2. Indigenous Peoples Development Programmes

As a result of European conquest and colonisation, the indigenous peoples within the Member States of CARICOM have been subjected to forced migration within countries and across the region; to brutal work conditions, and genocide. Indigenous peoples were brutalized and killed as a result of official instructions to the European military commanders who came to the region. Those who were not immediately killed had their ancestral lands seized and a community of 3 million people in 1700 was decimated to less than 30 thousand in 2000. This also led to the destruction of their languages and unique cultural heritage. Their descendants remain traumatized, landless, and are one of the most marginalized groups in the region as a result of the deliberate and racist discrimination on the part of the European colonizers.

Despite the efforts of the newly developing CARICOM Member States which have inherited the situation, the rebuilding of these communities cannot be done without responsible European States taking on the responsibility of correcting the damage and where possible, restoring the communities that still exist.

3. Funding for Repatriation to Africa

The descendants of African peoples stolen from their homes, lands, people, and cultures have a legal right of return; It is the responsibility of those States that are responsible for the forced movement and enslavement of their ancestors to establish a resettlement programme for those who wish to return. ...

4. The Establishment of Cultural Institutions and the Return of Cultural Heritage

...

The restoration of historical memory through community institutions such as museums and research centres will allow citizens to understand these crimes against humanity as well as other colonial harm and to memorialize their ancestors' contributions

...

5. Assistance in Remediating the Public Health Crisis

...

6. Education Programmes

...

7. The Enhancement of Historical and Cultural Knowledge Exchanges

...

8. Psychological Rehabilitation as a Result of the Transmission of Trauma

9. The Right to Development through the Use of Technology

For 400 years the trade and production policies of Europe could be summed up in the British slogan: "not a nail is to be made in the colonies". This was a deliberate decision to retard the technology available for development within CARICOM Member States.

...

10. Debt Cancellation and Monetary Compensation

CARICOM governments that emerged from slavery and colonialism have inherited the massive crisis of community poverty and an inability to deal with the development of their countries because of the burdens of the legacy of colonialism.

...

... Since correcting the burden of colonialism has fallen on these new States, they are unable to deal with the challenges of development without taking on onerous levels of debt. This debt cycle properly belongs to the governments from the responsible European countries who have made no sustained attempt to deal with debilitating colonial legacies.

Support for the payment of domestic debt, the cancellation of international debt, and direct monetary payments where appropriate, are necessary reparatory actions to correct the harm caused by colonialism.

* * *

In contrast, consider the following perspectives on proposals for international reparations:

Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (2004), xx:

[In responding to the question '[w]as the British Empire a good or bad thing', Ferguson acknowledges that its 'involvement in the Atlantic slave trade and slavery itself ... is no longer a question for historical judgement alone; it has become a political, and potentially a legal, issue.']

... [F]or much ... of its history, the British Empire acted as an agency for imposing free markets, the rule of law, investor protection and relatively incorrupt government on roughly a quarter of the world. [It encouraged the] 'imperialism of free trade'. Prima facie, therefore, there seems a plausible case that the Empire enhanced global welfare – in other words, was a Good Thing.

Many charges can of course be levelled against the British Empire I do not claim, as John Stuart Mill did, that British rule in India was 'not only the purest in intention but one of the most beneficent in act ever known to mankind'; nor, as Lord Curzon did, that 'the British Empire is under Providence the greatest instrument for good that the world has seen' The Empire was never so altruistic. In the eighteenth century the British were indeed as zealous in the acquisition and exploitation of slaves as they were subsequently zealous in trying to stamp slavery out

Yet the fact remains that no organization in history has done more to promote the free movement of goods, capital and labour than the British Empire And no organization has done more to impose Western norms of law, order and governance around the world. ...

Nigel Biggar, *Between Kin and Cosmopolis: An Ethic of the Nation* (2014), 90:

One obvious apparent problem with empire is that it comprises the imposition of rule by one people upon another, and so involves oppression and exploitation. The imposition of rule, however, is not inherently unjust: all government involves the threat and exercise of coercion against the unwilling Nor is the oppression and exploitation of one group by another peculiar to empires: it happens within nation-states, too Sometimes the imposition of imperial rule can have the salutary effect of imposing a unifying, pacific, and law-abiding order on peoples otherwise inclined to war among themselves. The order that an empire brings should not be instantly dismissed as intolerably unjust. It might be. On the other hand, sometimes a measure of injustice should be tolerated for the sake of a decent measure of peace, without which nothing at all can flourish. ...

Albie Sachs, 'Foreword', in Jacqueline Bhabha, Margareta Matache and Caroline Elkins (eds.), *Time for Reparations: A Global Perspective* (2021) xi:

...

In the course of this process of humanizing international law, it would, in my view, be important not to limit the theme of reparations to seeking monetary compensation. ...

...[I]n a libel case in which I sat as a justice of the Constitutional Court in South Africa, a colleague and I strongly criticized the use of money awards as the main mechanism for salvaging the dignity and honor of the traduced person. Our contention, later adopted by the court as a whole, was that apology and suitable restorative justice amends would be far more meaningful than payment of a lump sum that would still leave the parties as enemies.

Money can often be quite the wrong moral currency, the wrong register. It abstracts pain from the human heart and puts it in the marketplace. ...
[R]estorative justice can be far more enduring, far more meaningful than punitive or compensatory justice, though it can contain elements both of punishment and material recompense. ...

E. Tendayi Achiume, 'The Postcolonial Case for Rethinking Borders', in *Dissent*, Summer 2019:

... [I]nternational legal scholars such as Antony Anghie have unpacked the complex ways in which international legal doctrine, and international financial and economic institutions, advance First World nations' interests at the expense of those of the Third World, while stymieing equality-enhancing or reparatory reform. The structural subordination of the Third World as a whole to the First World as a whole should negate the right of any First World country to exclude any Third World person [seeking to enter the First World country], whether or not that specific country colonized the country of nationality of that specific person. The benefits to the First World of neocolonial subordination—and its ethical implications—go far beyond discrete bilateral relations between former colonial powers and the nations they colonized.

Olúfẹmi O. Táíwò, *Reconsidering Reparations* (2022):

[This statement of the author's analysis is taken from his post on the LPE Project blog (21 February 2023), at <https://lpeproject.org/blog/reconsidering-reparations/>].

... [M]y recent book *Reconsidering Reparations* argues for two things. First, reparations for trans-Atlantic slavery and colonialism should be seen as a future-oriented project engaged in building a just social order. Second, if we accept that view, then reparations and the struggle for racial justice should be directly linked to the struggle for climate justice.

...

[The author advocates a] "constructive view" [that] aims to rebuild our social environment itself in the direction of justice: redistributing resources and social advantages to create a just world. ...

Other ways of thinking about reparations focus on retributive or reconciliatory justice. ...

Both of these approaches get much right about the moral dimensions of reparations and the history of injustice that makes reparations relevant and important. But focusing repairs on the wealth of particular marginalized groups or the moral relationships between particular groups of marginalized people risks overlooking the rigid aspects of our political and economic systems that

impoverished and alienated the groups in the first place. Moreover, these approaches are often used to defend one-off, reversible policy actions: the cash transfer, scholarship program, apology, or memorial. The constructive view accepts the importance of redistributing wealth and resources, as well as rebuilding cultural and interpersonal esteem, and supports many of these policies. But it comes with a further requirement: to root these interventions in a political context that will safeguard rather than erode the gains they make towards justice.

Climate crisis arises out of the same history as the global racial empire. ... Given this, we can expect climate change to redistribute social advantages in a way that compounds and locks in the distributional injustices that we have inherited. Left unchecked, the climate crisis threatens to destabilize and overwhelm the past victories won for the cause of racial justice and whatever additional ones we are able to eke out in the near future.

In the face of these links, what should be done? ... Bread-and-butter reparations demands, like direct transfers of money to individuals and families or reconciliation processes, must retain their central importance. But we can link the important need for cash and memorials to other important structural concerns, from addressing the destructive role of prisons and pollutants to building food, water, housing, and energy systems that are managed for and by people rather than for profit. Like the fight against the climate crisis itself, these needed interventions will be won or lost on a planetary scale.

Reparations in the United States⁷⁹²

While reparations for slavery in the United States are currently the focus of a great many initiatives, including commissions established by the states of California, Illinois and New York, and the city of San Francisco, they are also deeply rooted in the history of struggles against slavery, as illustrated by an example from the late eighteenth century. In 1775, after the defeat of the British in Lexington and Concord, the largest slave owner in Massachusetts fled to England. His property was confiscated by the state in 1778 and his remaining slaves freed. One of them, Belinda Sutton (aka Royall), petitioned the General Court (the state legislature) on 14 February 1783:⁷⁹³

The Petition of Belinda an Affrican, humbly shews:

... [B]efore she had Twelve years ... when she, in a sacred grove, with each hand in that of a tender Parent, was paying her devotions to the great Orisa who made all things – an armed band of white men, driving many of her Countrymen in Chains, ran into the hallowed shade! ... She was ravished from the bosom of her Country, from the arms of her friends – while the advanced age of her Parents, rendering them unfit for servitude, cruelly separated her from them forever!

Scenes which her imagination had never conceived of – a floating World ... three hundred Affricans in chains, suffering the most excruciating torments; and some of them rejoicing, that the pangs of death came like a balm to their wounds.

⁷⁹² See generally: V. Ladisch and A. M. Roccatello, 'The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States (ICTJ Briefing)', International Center for Transitional Justice (26 April 2021); A. Nurse, *Reparations and Anti-Black Racism: A Criminological Exploration of the Harms of Slavery and Racialized Injustice* (2022); and W. Darity and A. Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-first Century* (2020).

⁷⁹³ Transcription published by Royall House and Slave Quarters, at <https://royallhouse.org/belinda-suttons-1783-petition-full-text/>.

...

Fifty years her faithful hands have been compelled to ignoble servitude for the benefit of an Isaac Royall, until ... the present war was Commenced – The terror of men armed in the Cause of freedom, compelled her master to fly

The face of your Petitioner, is now marked with the furrows of time, and her frame feebly bending under the oppression of years, while she, by the Laws of the Land, is denied the enjoyment of one morsel of that immense wealth, apart whereof hath been accumulated by her own industry, and the whole augmented by her servitude.

WHEREFORE, casting herself at the feet of your honours, as to a body of men, formed for the extirpation of vassalage, for the reward of Virtue, and the just return of honest industry – she prays, that such allowance may be made her out of the estate of Colonel Royall, as will prevent her and her more infirm daughter from misery in the greatest extreme, and scatter comfort over the short and downward path of their Lives – and she will ever Pray.

Belinda Royall was granted a pension of 15 pounds and 12 shillings, to be paid out of the estate of Isaac Royall. But no precedent was set and the debate continues to unfold in the third decade of the twenty-first century. An important impetus was given to the debate by Ta-Nehisi Coates, in ‘The Case for Reparations’, *The Atlantic* (15 June 2014). He argued that even after the Civil War, Black people:

... were terrorized. In the Deep South, a second slavery ruled. In the North, legislatures, mayors, civic associations, banks, and citizens all colluded to pin black people into ghettos, where they were overcrowded, overcharged, and undereducated. Businesses discriminated against them, awarding them the worst jobs and the worst wages. Police brutalized them in the streets. And the notion that black lives, black bodies, and black wealth were rightful targets remained deeply rooted in the broader society. ...

...

... [W]hite supremacy is not merely the work of hotheaded demagogues, or a matter of false consciousness, but a force so fundamental to America that it is difficult to imagine the country without it.

In Coates’s view, the resulting wealth gap provided the strongest illustration of the fact that Black people had been treated ‘as sub-citizens, sub-Americans, and sub-humans’ and it led him to advocate reparations as a way of closing the resulting ‘chasm’, as ‘the price we must pay to see ourselves squarely.’

Coates’ article drew many critical responses. Consider the following examples. Kevin D. Williamson, wrote in ‘The Case against Reparations: A reply to Ta-Nehisi Coates’, *National Review* (24 May 2014):

... Even if we accept the facts of aggregate advantage and disadvantage with their roots in historical injustice, the aggregate cannot be converted into the collective inasmuch as neither advantage nor disadvantage is universal on either side nor linked to a straightforward chain of causality. Some blacks are born into college-educated, well-off households, and some whites are born to heroin-addicted single mothers, and even the totality of racial crimes throughout American history does not mean that one of these things matters and one does not.

Once that fact is acknowledged, then the case for reparations is only moral primitivism: My interests are inextricably linked to my own kin group and directly rivalrous with yours, i.e., the very racism that this program is in theory

intended to redress. Mr. Coates also, I think, miscalculates what the real-world effects of converting our liberal conception of justice into a system of racial appropriation might mean. There are still, after all, an awful lot of white people, and though many of them might be inclined to make amends under some sort of racial truce following the process Mr. Coates imagines, many of them might simply be inclined to prevail. ... [A] system of exclusive interests in which black and white operate effectively in opposition ... is not only morally repugnant, but likely to undermine the genuine political and economic interests of African Americans. ...

David Frum, 'The Impossibility of Reparations', *The Atlantic* (3 June 2014):

The United States government launched its reparations program to African Americans in autumn of 1969. Originally known as "the Philadelphia plan," the program set quotas for black employment in construction trades. Over the next decades, such quotas would spread from industry to industry, and would expand into higher education and public contracting.

...

The affirmative action experience since 1969 offers some insights into what is likely to happen next: (1) The program will expand to additional groups. (2) The question of who qualifies will become ever more contested and embittered. (3) Side effects will be large and unexpected. (4) The program will work severe inequities. (5) The legitimacy of the project will rapidly fade.

Affirmative action ranks among the least popular things that U.S. governments do. When surveyed, white Americans crushingly reject race preferences, Hispanic Americans object by a margin of 2 to 1, and black Americans are almost evenly divided, with only the slightest plurality in favor.

Now imagine how Americans will feel when what is redistributed by racial calculus is not university admissions or workplace promotions but actual, foldable cash. ...

The most directly relevant litigation on these issues declined to consider claims lodged against leading countries that were alleged to have unjustly profited from slavery:

**IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION
307 F. SUPP. 2D 977 (N.D. ILL. 2004)**

CHARLES NORGLE, DISTRICT JUDGE

...

Beginning in 2002, a number of lawsuits were filed by descendants of slaves seeking reparations from private corporations, which were alleged to have unjustly profited from the institution of slavery. ... This litigation presently consists of nine individual lawsuits, and these individual Plaintiff's [sic] have filed a consolidated complaint.

The Plaintiffs ..., on behalf of themselves and the classes they seek to represent, seek reparations on behalf of all "descendants of formerly enslaved Africans" and all living "formerly enslaved African-Americans." Specifically, Plaintiffs seek an accounting, constructive trust, restitution, disgorgement, compensatory and punitive damages arising out of the named defendants' alleged past and continued wrongful conduct relating to the institution of slavery.

...

The named defendants ... are eighteen present-day companies whose predecessors are alleged to have been unjustly enriched through profits earned either directly or indirectly from the Trans-Atlantic

Slave Trade and slavery between 1619 and 1865, as well as post-Emancipation slavery through the 1960s.

...

V. Conclusion

It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation's history. However, Plaintiffs' claims ... fail based on numerous well-settled legal principles. First, Plaintiffs' claims are beyond the constitutional authority of this court. Without alleging any specific connection between themselves and the named Defendants, Plaintiffs lack essential constitutional standing requirements to bring their claims. Second, prudential limitations prohibit the court from deciding such broad questions of social importance when such claims are brought on behalf of absent third parties, as Plaintiffs attempt here. Third, the long-standing and well-reasoned political question doctrine bars the court from deciding the issue of slavery reparations, an issue that has been historically and constitutionally committed to the Legislative and Executive branches of our government. Fourth, Plaintiffs' claims are untimely. Conceding that many of the torts alleged in the Complaint occurred prior to the formal end of slavery, Plaintiffs fail to show how any of these claims fall within the applicable statutes of limitation. Finally, under the rules of procedure which guide the federal judicial system, Plaintiffs' Complaint fails to state a claim upon which relief can be granted, a serious defect the court cannot overlook regardless how egregious the circumstances giving rise to the claims.

In summary, Plaintiffs' attempt to bring these claims more than a century after the end of the Civil War and the formal abolition of slavery fails; this determination is consistent with the position taken by numerous courts which have considered the issue over the last century. Ultimately, the legal obstacles prohibiting judicial resolution of such claims cannot be circumvented by the courts. ... Some may view this ruling as a condonation of ancient wrongs. That view is wrong. To suggest that the lions have won again and that the court is impervious to the human suffering at the core of this case would be absurd. The reasonable prudent person will read this opinion with care. We strive, case by case, within an imperfect system of law, through human endeavors, towards the unattainable perfect justice we seek.

* * *

In conclusion, we note some local initiatives within the United States and then an analysis by the UN Special Rapporteur on racism that rebuts some of the principal objections often made to reparations. The local initiatives are recounted in a report by the UN High Commissioner for Human Rights (UN Doc. A/HRC/47/53 (2021) para. 57):

In the United States, for example, litigation was instigated against the city of Tulsa, Oklahoma, regarding the 1921 massacre; the Maryland Lynching Truth and Reconciliation Commission has been established; memorialization initiatives have been undertaken in Montgomery, Alabama; reparations will seek to "address the historical wealth and opportunity gaps that African American/Black residents of Evanston experienced"; and, at the federal level, a bill (HR40) has been introduced to establish a commission to study and develop reparation proposals for African-Americans. Mappings, apologies and reparations initiatives have been launched at the state and local levels by universities and religious groups, among others, regarding their historical relationship to enslavement. The private sector has also begun issuing formal apologies and undertaking certain commitments towards reparations.

E. TENDAYI ACHIUME, REPORT OF THE SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RACIAL INTOLERANCE
UN DOC. A/74/321 (2019)

...

Political and legal resistance to reparations

45. Serious political opposition to reparations for colonialism and slavery remains among the countries that benefited the most from both. ... [I]n Durban in 2001, certain former colonial powers remained staunchly resistant to formal apologies for slavery and colonialism, and to any acknowledgment of the pressing need for reparations. [T]he Regional [preparatory] Conference of the Americas ... adopted the following strong statement acknowledging that:

the enslavement and other forms of servitude of Africans and their descendants and of the indigenous peoples of the Americas, as well as the slave trade, were morally reprehensible, in some cases constituted crimes under domestic law and, if they occurred today, would constitute crimes under international law. [And that] these practices have resulted in substantial and lasting economic, political and cultural damage to these peoples and that justice now requires that substantial national and international efforts be made to repair such damage. ...

46. Canada and the United States opposed the inclusion of this important paragraph in the report of the Regional Conference. ... The report of the European Conference did not even mention peoples of African or Asian descent.

47. Political opposition to the subject of reparations in some countries is so deep that even attempts to study the issue have been consistently blocked at the legislative level. For example, between 1989 and 2023, Congress has failed to act on a draft bill, H.R. 40, entitled “Commission to Study and Develop Reparation Proposals for African-Americans Act”.

48. Conventional analysis of international law, including by former colonial nations, identifies a number of legal hurdles to the pursuit of claims for reparations for slavery and colonialism. Among the most salient legal hurdles identified is the intertemporal principle in international law, codified in article 13 of the articles on responsibility of States for internationally wrongful acts. The intertemporal principle stresses that a State is responsible for violations of international law only if, at the time of the violation or its continuing effects, the State was bound by the legal provisions it transgressed. Numerous States have appealed to the non-retroactive application of international law to deny that they have a legal obligation to provide reparations. For example, ... Germany has argued that its obligations [to the Ovaherero and Nama peoples of Namibia] are “historical” and “moral”.

49. First, the intertemporal principle is subject to exception, including when (a) an act is ongoing ... or (b) the wrongful act’s direct ongoing consequences extend into a time when the act and its consequences are considered internationally wrongful. That means that racial discrimination rooted in or caused by colonialism and slavery that occurred after each had been outlawed cannot be subject to the intertemporal bar. Second, the intertemporal principle does not apply to present-day racially discriminatory effects of slavery and colonialism, which States are obligated to remediate, including through reparations. The intertemporal principle cannot be said, per se, to bar all claims for reparations for racial discrimination rooted in the events and structures of slavery and colonialism. ...

50. ... [T]he intertemporal principle has a long history of service to both slavery and colonialism. ... [I]nternational law itself played an important role in consolidating the structures of racial discrimination and subordination throughout the colonial period, including through customary international law, which was co-constitutive with colonialism. Part of the problem, then, is that international law has not fully been “decolonized” and remains replete with doctrines that prevent the reparation and remediation of the inequality and injustice entrenched in the colonial era. When Member States and even international lawyers insist on the application of the intertemporal principle as a bar to pursuing reparation and remediation of racial injustice and inequality, they are, in effect,

insisting on the application of neocolonial law. Legal efforts are more appropriately directed at developing international doctrine that can ensure the equal treatment and recognition of all human beings irrespective of race, and that is, in part, what is at stake in debates on reparations for slavery and colonialism.

51. Other legal concerns involve the difficulties in potential matters of responsibility and causality, especially with regard to the time that has passed since the transatlantic slave trade and colonialism. The concern is that determining the individuals responsible for horrific acts, the identities of the victims, the descendants of the victims and how much is owed poses insurmountable legal difficulties. The legal complexity that would be and is involved in pursuit of individually and even class-based legal claims for reparations are genuine. However, such difficulties cannot be the basis for nullifying the existence of underlying legal obligations. ...

...

53. Several States have refused to issue a formal apology for their roles in slavery and colonialism, instead issuing expressions of remorse or regret. States appear to be driven by concern that formal apologies could be construed as an admission of legal responsibility, generating lengthy legal claims and financial compensation. Such concerns not only put the [UN Guidelines on reparations] on hold, but also drove the dilution of the strong calls for apologies and reparations articulated ... during the lead-up to [Durban]. ...

54. Development aid and national reform can certainly form part of the suite of reparatory measures for slavery and colonialism. However, if pursued in a manner that completely denies the connection between contemporary problems and their historical origins, such initiatives cannot do the necessary work of repairing structures of racial inequality and discrimination rooted in historic injustice. Such ahistorical and uncontextualized development aid similarly fails to fulfil specific international human rights obligations relating to the contemporary manifestations of historic racial discrimination and injustice. ...

QUESTIONS

1. Does Waldron's 'supersession thesis' suggest any conclusions that might be relevant in the debate over reparations for slavery or colonialism? Compare Cunneen's approach focusing on the need to assert indigenous sovereignty which 'demands a reimagining of how we conceptualize sovereignty and a rethinking of the institutional and governance arrangements required to give it effect'.⁷⁹⁴
2. Are the causal links suggested in the analyses of the 'reverse reparations' paid by Haiti to France sufficiently clear as to make it a relatively straightforward case in favour of an obligation to pay reparations?
3. At its peak, the British Empire governed a quarter of the world's population and between one-quarter and one-fifth of its land surface.⁷⁹⁵ Does this suggest that the United Kingdom bears a special responsibility in terms of the payment of reparations, or that the magnitude of the issues raised is simply too great to warrant consideration?
4. In assessing the case for reparations for slavery and its aftermath in the United States, what weight should be given to predictions of a massive backlash from the white population?

⁷⁹⁴ C. Cunneen, 'Settler Colonial States and Transitional Justice', in J. Meierhenrich et al (eds.), *The Oxford Handbook of Transitional Justice* (2023) 000.

⁷⁹⁵ D. Judd, *Empire: The British Imperial Experience, 1756 to the Present* (1996) 2.

Chapter 18. Critical Perspectives

The preceding chapters of this book have underscored many of the major challenges faced by the international human rights regime (IHRR). Before surveying responses to those challenges, it is helpful to acknowledge that, when we talk about ‘human rights’ or even about the ‘regime’ or the ‘movement’, we are generally not focusing on the totality of the multi-faceted system, but we do not then specify exactly what it is we are talking about. We might be referring to conceptions based on broad philosophical or religious ideas, to local culturally-derived values, to a system that falls under the rubric of human rights in national law, to the specific normative framework embodied in something we call international human rights law, to the interpretations of rights adopted by leading courts and other bodies, or to the institutional framework that has been established at the international or regional levels. This lack of specificity has been a major problem when it comes to some of the sweeping overall assessments published over the past couple of decades, which have too often focused on human rights *tout court* and found ‘them’ inadequate, ineffectual, problematic, counter-productive, or even destructive.

At the international level, refuge is frequently taken in the term ‘implementation’, in the sense of giving effect to the agreed norms, but this term is often invoked at such a level of determined generality as to tell us rather little about what is actually happening. For scholars, it might be more productive to consider whether the focus should be on: *vernacularization* in the sense of translating norms at one level into a language in which they can be understood at another; ‘awareness-raising and *sensitization*’ to use the term adopted by the Inter-American Court of Human Rights; *mobilization* by social movements; *legalization*, juridification, norm domestication, or constitutionalization as the lawyers get their hands on the concept; or *institutionalization*, as governments or inter-governmental actors seek to establish arrangements by which to give effect to the obligations and responsibilities of different actors. Of course, these processes, far from being independent of one another, are often very closely linked. But for analytical purposes, it is helpful to keep such distinctions in mind.

Almost a decade ago, César Rodríguez-Garavito, in ‘The Future of Human Rights’, 20 *Sur* (2014) 499, noted the extent of the uncertainty facing the IHRR as a result of: ‘(i) the rise of a multipolar world with new emerging powers, (ii) the emergence of new actors and legal and political strategies, (iii) the challenges and opportunities presented by information and communication technologies, as well as (iv) the threat posed by extreme environmental degradation. He highlighted some specific problems, in particular ‘the hierarchical nature of traditional human rights discourse and movement, asymmetry between North and South organisations, over-legalisation of human rights language, and the lack of concrete assessments of human rights outcomes.’ He argued that human rights practitioners could either respond in a defensive manner by acting as gatekeepers, or could engage in ‘reflexive reconstruction that reimagines practices and boundaries to generate productive symbiosis among diverse human rights actors...’⁷⁹⁶

Today, the challenges and the questions to which they give rise are even more urgent. Consider the following overview:

NEHAL BHUTA ET AL., INTRODUCTION
IBID. (EDS.), THE STRUGGLE FOR HUMAN RIGHTS (2021) 1

[We live] in an era of faltering democratic institutions and practices, dramatically destructive climate events, collapsing economic growth, renewed attention to systemic racism and police brutality, global pandemics, and some of the most unequal distribution of income and wealth recorded in over a hundred years. These profound crises occur against the background of the collapse of long-standing assumptions that had structured politics and international relations. Even as the previous epoch-making political-economic settlement (whether we call it Keynesianism, Embedded Liberalism, Welfarism, or something else) comes dangerously unwound, it has come under renewed criticism for reproducing the legacies of colonialism, imperialism, and slavery, and for embedding the normative

⁷⁹⁶ See also L. Fletcher, ‘Power and the International Human Rights Imaginary: A Critique of Practice’, 14 *J. Hum. Rts. Prac.* (2022) 749.

status of a concrete type of social persona: white, male, able-bodied, heterosexual. Can contemporary human rights laws and practices meet these and the many other challenges we face? Should the seventy-year project of legalizing human rights internationally be pushed further, paused, or rethought? ...

One productive starting point is that, even as the relationship of human rights to social and political change is everywhere shifting and contested, human rights remain the closest thing to a global lingua franca for representing, framing, labelling, and demanding redress for injustice and social suffering. ... [O]rganizations and groups—non-profits, social movements, and loose collectives—embrace the language of human rights in all regions of the globe, and have successfully used human rights to advance justice and accountability. The shared language of rights can be used to express and legitimate values, concerns, and needs, and can be an important organizing tool. Global movements—such as those led by indigenous peoples, peasants, workers, women, and people with disabilities—have organized to claim human rights and demand that their rights be recognized in law. The attention that can be garnered by claims of human rights violations can and has been used to label economic, political, and institutional structures as fundamentally unjust and inadequate. Formal human rights institutions can be used to spotlight abuse, focus attention on issues, serve as platforms for advocacy, and pressure governments to reform. They provide space for advocates to unite across borders, raise the profile of national struggles, and articulate their demands in new ways.

...

* * *

A course book such as this is designed to stimulate the reader's thoughts and reflections rather than to provide answers to the most challenging questions that arise. Accordingly, it cannot pretend to provide an overall evaluation of the regime as a whole. But it would be remiss not to provide some sampling of the flood of assessments or critiques that have emerged over the past two decades.

Probably the most compelling analyses of the effectiveness of human rights have been written in the context of detailed studies focused on particular rights, groups, institutions, or countries. Conversely, the harshest critiques have often been of a general and all-embracing nature, such as Stephen Hopgood's, *The Endtimes of Human Rights* (2013), or Eric Posner's *The Twilight of Human Rights Law* (2014). We have considered above various claims that human rights are irredeemably Western in origin, content and implementation, and will not revisit those arguments here. But other commentators portray the almost complete failure of the IHRR, and sometimes point to unintended consequences that have left the victims of injustice even worse off. This is sometimes attributed to misplaced strategies, unduly narrow interpretations, or unacceptable omissions. However, other critiques suggest that the regime has either knowingly or inadvertently displaced, discouraged, or suppressed alternative approaches that might have been more effective.

One of the most detailed empirical studies, focused on the domestic impact of human rights treaties, is Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009):

... [F]ormal commitments to treaties can have noticeably positive consequences. Depending on the domestic context into which they are inserted, treaties can affect domestic politics in ways that tend to exert important influences over how governments behave toward their own citizens. Treaties are the clearest statements available about the content of globally sanctioned decent rights practices. Certainly, it is possible for governments to differ over what a particular treaty requires – this is so with domestic laws as well – but it is less plausible to argue that the right to be free from torture, for example, is not something people have a right to demand and into which the international community has no right to inquire; less plausible to contend that children should be drafted to carry AK-47s; and less plausible to justify educating boys over girls on the basis of limited resources when governments have explicitly and voluntarily agreed to the contrary. Treaties serve notice that governments are

accountable – domestically and externally – for refraining from the abuses proscribed by their own mutual agreements. Treaties signal a seriousness of intent that is difficult to replicate in other ways. They reflect politics but they also shape political behavior, setting the stage for new political alliances, empowering new political actors, and heightening public scrutiny. When treaties alter politics in these ways, they have the potential to change government behaviors and public policies. It is precisely because of their potential power to constrain that treaty commitments are contentious in domestic and international politics (at 4).

...

International law is not a panacea for all ills. It will not eliminate ruthless dictators, end racial or gender discrimination for all time, or raise all humans to an acceptable standard of living. These international legal commitments are not magic bullets. They have helped but not cured the rights deficit The principles espoused in [human rights treaties] have garnered broad official acceptance worldwide. There are disagreements among states over the exact meaning of some of their provisions but also widespread acknowledgment of their authoritative character. These treaties have inspired some of the most significant constitutional changes within countries in the past three decades. They have touched off domestic debates, provoked demands, and raised the expectations of ordinary citizens. They have been used at crucial moments and critical junctures by litigants and judges to shape domestic law, institutions, and practices for the future. In many cases, people are much better off because of international human rights law than they would have been in its absence (at 350).

SETTING THE SCENE

Before considering a range of critical snapshots, it is helpful to supplement earlier materials in this book by providing some relevant context in terms of the legal, historical and sociological debates in this area. Robert Howse and Ruti Teitel provide an insightful reminder that a narrow or legalistic understanding of compliance cannot capture the reality of the situation. Ryan Goodman and Derek Jinks examine some of the socialization techniques present in the IHRR, and Philip Alston warns of the pitfalls of selective historical accounts.

ROBERT HOWSE AND RUTI TEITEL, BEYOND COMPLIANCE: RETHINKING WHY INTERNATIONAL LAW REALLY MATTERS 1 GLOBAL POLICY (2010) 127

...

... [T]he conceptual, and more recently empirical, study of compliance has become a central preoccupation, and perhaps the fastest growing subfield, in international legal scholarship

... Looking at the aspirations of international law through the lens of rule compliance leads to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality, and especially a tendency to oversimplify if not distort the relation of international law to politics.

...

One reason that compliance is often seen as a central problem for international legal scholarship is the challenge (by realists and some but not all positivists) that law is only really law when accompanied by authoritative interpretation and enforcement (see Morgenthau, 1948). A focus on compliance, or more adequately perhaps obedience (see Henkin, 1968), aims to deflect such a claim by asserting that there is a range of considerations including reputational effects/long-term self-interest that lead to

compliance with international law, regardless of the absence of authoritative interpretation and enforcement in most instances.

Such a response at once proves too much and too little. ...

... It is worth noting however that one of the most sophisticated positivist accounts of law, that of H. L. A. Hart, rejects the notion that legal obligation implies effective coercive sanctions, specifically informed by a consideration of international law. According to Hart:

To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats. This theory, as we have seen, identifies 'having an obligation' or 'being bound' with 'likely to suffer the sanction or punishment threatened for disobedience'. Yet, as we have argued, this identification distorts the role played in all legal thought and discourse of the ideas of obligation and duty (Hart, 1961, pp. 217–218).

...

The following are some of the possible effects of international law that are not captured by the notion of behavioral 'compliance' with a 'rule' of law...

International law (norms and/or institutions such as courts and tribunals) may shift in whole or in part decision-making, interpretative and/or legitimating power from one set of elite actors to another (for example from diplomats, foreign policy analysts and military planners to legal professionals such as judges, lawyers and law professors). This effect is autonomous from that of compliance: in some cases, legal professionalization may lead to more compliance, and in some cases less. In others, it could even lead to 'ultracompliance': effects which go beyond what is desired from the perspective of the objectives of the legal regime, and which may even be perverse.

...

International law can affect the way that policy makers view international problems and conflicts (for example in terms of clashes of rights as opposed to balancing of political or economic interests) and their perception of the constituencies to whom they are accountable in addressing such problems and conflicts. ...

...

... [There is] an internal difficulty within the 'compliance' perspective. Goldsmith and Posner, for example, maintain that unlike ratification of human rights treaties, 'democracy, peace and economic development' have been shown to enhance human rights protection; however, this contrast assumes that democracy, peace and economic development occur entirely exogenously of the effects of international human rights law. If ... international human rights law helps to lock in transitions to peaceful democratic conditions, then it may ultimately lead to what is usually conceived of as compliance, but only through a normative effect that is caught in the first instances by focusing on something other than rule compliance.

...

While Eric Posner ... tends to dismiss the influence of the International Court of Justice (ICJ), based on the number of judgments it has emitted and their purportedly distant effects on the controversies decided (Posner, 2004), the jurisprudential *acquis* of the ICJ on such essential questions as state responsibility, countermeasures and treaty interpretation has been repeatedly invoked, in for example, investor–state arbitrations ...

...

Rather obviously legal agents bargain in the shadow of the law. ... States, instead of simply 'complying' with international legal rules may bargain in light of them, and around them. ...

[In the context of] the international legal duty to punish crimes against humanity, ... the increasing likelihood of such prosecutions given the creation of an international criminal court may well affect peace or regime transition bargains between parties to a conflict, for instance making it more difficult or less plausible to use amnesties as a bargaining chip for acceptance of a peaceful, negotiated

transition. On the other hand, with the ICC in the background now, and its ability to enforce international criminal law during an ongoing conflict, more cautious or restrained behavior by some of the participants in the conflict may result, and this could actually make a transitional bargain easier. ... [T]hese effects do not even come into focus if one centers the analysis on effects on ‘compliance’ with the duty to prosecute and/or the duty to cooperate with the ICC for instance.

**RYAN GOODMAN AND DEREK JINKS, SOCIALIZING STATES:
PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW
(2013)**

Chapter 1: Introduction

...
First-generation scholarship in international human rights law, in our view, provides an indispensable but plainly incomplete framework. Prevailing approaches suggest that law changes human rights practices either by materially inducing states (and individuals) or by persuading states (and individuals) of the validity and legitimacy of human rights law. In our view, the former approach fails to grasp the complexity of the social environment within which states act, and the latter fails to account for many ways in which the diffusion of social and legal norms occurs. Indeed, a rich cluster of empirical studies in interdisciplinary scholarship documents particular processes that socialize states in the absence of material inducement or persuasion. These studies conclude that the power of social influence can be harnessed even if: (1) collective action problems and political constraints that inhibit effective material inducements are not overcome and (2) the complete internalization sought through persuasion is not achieved. ...

Our aim is to provide a more complete conceptual framework by identifying a third mechanism by which international law might change state behavior — what we call acculturation. ... We do not suggest that international legal scholarship has completely failed to identify aspects of this process. Rather, we maintain that the mechanism is underemphasized, insufficiently specified, and poorly understood, and that it is often conflated or confused with other constructivist mechanisms such as persuasion. ...

Chapter 2: Three Mechanisms of Social Influence

...
A. Material inducement

The first and most obvious social mechanism is material inducement — whereby states and institutions influence the behavior of other states by increasing the benefits of conformity or the costs of nonconformity through material rewards and punishments.

B. Persuasion

Persuasion is a mechanism of social influence documented principally by psychologists and sociologists — and applied by others to the spread of norms across states. Persuasion theory suggests that the practices of actors are influenced through processes of social “learning” and other forms of information conveyance that occur in exchanges within international organizations and transnational networks. Persuasion “requires argument and deliberation in an effort to change the minds of others.” Persuaded actors “internalize” new norms and rules of appropriate behavior and redefine their interests and identities accordingly. ... The touchstone of the overall process is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice. ...

...

C. Acculturation

Another important mechanism of social influence, in our view, is acculturation. ... Whereas persuasion emphasizes the content of a norm, acculturation emphasizes the relationship of the actor to a reference group or wider cultural environment. ... Accordingly, acculturation encompasses processes such as mimicry and status maximization. The general mechanism induces behavioral changes through pressures to conform. Individual behavior (and community-level behavioral regularity) is in part a

function of social structure — the relations between individual actors and some reference group. Actors are impelled to adopt the behavioral practices and attitudes of similar actors in their surrounding social environment.

... Actors, in an important sense, are influenced by their environment; indeed, this generalized influence is one important way that “culture” is transmitted and reproduced. Although culture is typically understood as “learned behavior,” much of what actors absorb from their social environment is not simply “informational social influence.” Social influence is a rich process — one that also includes “normative social influence” whereby actors are impelled to adopt appropriate attitudes and behaviors. An actor need not be unaware of these influences — these processes can be subconscious or fully apparent. ...

... Despite the obvious similarities, acculturation differs from persuasion in important respects. First, persuasion requires acceptance of the validity or legitimacy of a belief, practice, or norm — acculturation requires only that an actor perceive that an important reference group harbors the belief, engages in the practice, or subscribes to the norm. Accordingly, persuasion involves complete internalization. Acculturation can involve complete or incomplete internalization. Second, persuasion requires active assessment of the merits of a belief. Acculturation processes, in contrast, frequently (though not invariably) operate tacitly; it is often the very act of conforming that garners social approval and alleviates cognitive discomfort. Persuasion involves assessment of the content of the message (even if only indirectly); acculturation involves assessment of the social relation (the degree of identification) between the target audience and some group (and of the importance of the issue to the group). Acculturation occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure. Acculturation depends less on the properties of the rule than on the properties of the relationship of the actor to the community. Because the acculturation process does not involve actually agreeing with the merits of a group’s position, it may (but does not necessarily) result in outward conformity with a social convention without private acceptance or corresponding changes in private practices.

**PHILIP ALSTON, DOES THE PAST MATTER?
ON THE ORIGINS OF HUMAN RIGHTS
126 HARV. L. REV. (2013) 2043, 2076**

[In *The Last Utopia: Human Rights in History* (2010), at 8-9, Samuel Moyn famously claimed that ‘it was ... only in the 1970s that a genuine social movement around human rights made its appearance’. He adds that ‘[f]ew things that are powerful today turn out on inspection to be longstanding and inevitable. And the human rights movement is certainly not one of them. [This] ... means that human rights are not so much an inheritance to preserve as an invention to remake – or even leave behind ...’.]

By detaching today’s international human rights regime from its deep roots and dismissing the relevance of the many historical as well as intellectual struggles to define a shared understanding of the subject, [historical revisionists led by Moyn] are able to present us with a clean sheet from which to begin their own speculations as to both the nature and the origins of the human rights movement. ... [One result is that] there is a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy.

B. The Road Ahead

Any meaningful history of human rights must disaggregate and address separately the different analytical dimensions of the overall enterprise. The enterprise of “human rights” consists of too many distinct facets to be reduced to one or two variables. The history and power of ideas, the force of grassroots social and political movements, the impact of legal and constitutional traditions, and the influence of institutions at both the domestic and international levels constitute indispensable elements that need to be factored into any effort to understand the origins, nature, and potential significance of the present regime. Several lessons emerge from [recent historiography].

1. *The Intrinsic Polycentricity of the Human Rights Enterprise.* — Each of the different historiographical approaches has something important to offer, but we should be very wary of any single account that purports to have found the answer to the puzzle and to have invalidated alternative interpretations. The human rights enterprise is intrinsically complex and multifaceted. Its origins are to be found in different and multiple sites, and they cannot usefully be traced back to any single source or through examining the evolution of a single theme, process, or institution.

2. *Linear Claims as a Suspect Class.* — Histories that rely on strong claims of continuity over a long period of time are inherently questionable. Thus, for example, the history of antislavery alone ... has been a remarkably circuitous, uncertain, and often tragic one, even in the limited period from 1807 to the present. Claims of a direct lineage over a century or two will generally imply elements of consistency and perhaps even inevitability that do not resonate with the actual path that history has traced, and this is certainly true of the struggle to abolish slavery. ...

... [In the history of human rights] there are crucial continuities as well as discontinuities, and neither should be overlooked or underestimated.

3. *The Need for an Analytical Framework.* — Given the polycentric nature of the overall enterprise ... “human rights” might be thought of as: (a) an idea, including careful consideration of the extent to which vocabularies are interchangeable over time; (b) an elaborated discourse, going beyond basic ideas, but not requiring institutional manifestations; (c) a social movement, including a definition of such a movement and specification of why it is significant; (d) a practice, or an institution, that resembles in at least some respects the elements that we might consider important today; (e) a legal regime, either at the national or international level, or both; or (f) a system that is capable of effectively promoting respect for the rights of individuals and groups. Each of these categories would constitute a plausible focus for analysis, and each is likely to be linked to the other, thus forming elements in the historical genealogy of the system. An isolated focus on one or another will inevitably produce different accounts of the origins, antecedents, precursors, and so on The choice of focus will also produce different causal accounts.

4. *The Power of Ideas.* — At the end of the day, the most compelling reason for the importance of genealogy is to be found in the history of ideas. But human rights does not consist of a single idea. Much of the recent literature seeks to single out one particular element that is then said to have transformed an otherwise amorphous mass of claims and assertions into a suddenly coherent body of “human rights” that had not previously existed. To the extent that [Jenny Martinez, in *The Slave Trade and the Origins of International Human Rights Law* (2012)] seeks to mark out the origins of a regime that consists of the elements that would be most prized by a twenty-first-century international lawyer — treaties, courts, and enforcement — her case is strong. Nor is she oblivious to the broader political and societal contexts in which this regime emerged. But the weakness of the bolder claim that she makes is that she fails to trace the historical evolution of either the basic normative claims of the antislavery movement or the techniques that were pioneered at the time. Even if the case can be made that today’s norms and institutions look much like those of yesteryear, any compelling genealogical claim needs to be demonstrated rather than surmised.

For Moyn, the key transformative step is that the claim made by an individual is directed to the international community, rather than to the state of which the individual is a citizen. But this step is just one among many in the long and winding voyage of the concept of human rights, the evolution of which continues. There is no single element, no single idea that enables us to declare that the notion of human rights has reached a definitive threshold that not only marks it off from all that has gone before but also makes it qualitatively and fundamentally different. We are looking at a continuum, albeit not a linear one. ...

5. *The Role of Power.* — Power, in both its positive and negative iterations, must be an integral part of any history of human rights. But power comes in many shapes and forms ranging from military force to the soft power of ideas. ...

THE PAST AND FUTURE OF HUMAN RIGHTS: SNAPSHOTS

In reading the materials below, keep in mind questions such as the following:

- When we speak of the IHRR, what exactly do we have in mind? Is it necessary to disaggregate the different component parts of the regime (concepts, norms, laws, institutions, social movements, etc.) to arrive at nuanced and meaningful judgments, or is the ‘system’ sufficiently coherent as to be susceptible to a single overall assessment? How do the authors below conceive of the ‘regime’, ‘movement’, or ‘system’ that they are addressing?
- Given the magnitude, extent, and persistence of the violations that we see worldwide, does it follow that the IHRR has failed? That it is entirely inadequate?
- How much of the authoritarian and populist backlashes against human rights can be attributed to the shortcomings of the regime, or alternatively to its successes?
- How could the IHRR be reformed? Or should it be abandoned/scrapped and replaced with something very different? If so, what form might that take? What alternatives have the critics of the existing system suggested?
- Reflecting back on the many issues and sub-regimes explored in this book, which of the assessments below seems to best capture your own perception?
- To what extent has the overall IHRR been unduly path dependent, or been captured or distorted by one or more political or economic ideologies? How rigid or flexible has it proven to be? How well has it adapted in response to new challenges?
- Are the successes of the regime really significant, or are they largely pyrrhic or marginal?

ABDULLAHI AHMED AN-NAIM, DECOLONIZING HUMAN RIGHTS (2021) XII

In the absence of verifiable means of evaluating the level or degree of actual protection of human rights, factors such as the ratification of treaties, adoption of laws, and descriptive self-reporting by states or highly selective and arbitrary reporting by international human rights organizations (NGOs) are taken as “evidence” of negative or positive human rights performance by the state. The priorities of so-called donor governments and northern-based NGOs are taken as the sole reliable means of promoting human rights in postcolonial states in Africa and Asia.

Since human rights are by definition universal claims asserted and realized by self-determining human beings, our ability to define and implement these norms is integral to our humanity. The present state-centric international law system and its institutions can provide only limited and contingent protection of human rights norms. Shifting the human rights paradigm from state-centric bureaucratic formalism to people-centered social and political movements will still need states or other forms of large-scale political formations that are subject to total transparency and effective accountability.

... [What is needed is] the mutual linking of being human and human rights, whereby perceptions of what the human is define the scope, content, and methods of the protection of human rights, and the quality of being human is enabled and realized through the protection of those rights. By “human rights,” I mean moral and political entitlements that are due to all human beings equally by virtue of their humanity, without any distinction on such grounds as race, sex, religion, or national origin. ... I prefer to present these rights as moral and political – instead of legal – entitlement because the legal dimension is futile without sufficient moral foundation and the political will to implement it.

[Asked by the *UNESCO Courier* in 2019 how respect for human rights can be ensured, An Naim replied that:

... human rights should be defined by the people who accept and live by them on the ground, and not imposed by former colonial powers on their former colonies or by delegates of post-colonial states, and international bureaucrats.

Second, human rights norms must be implemented through realistic contextual steps that are suited to the needs and resources of relevant communities, and not by enacting high-sounding legislation to be presented at sanitized meetings of international organizations, and diplomatic or academic conferences.

Third, strategies of implementation must be deeply contextual, and under the control of the human subjects of these rights everywhere.]

**UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS
(3RD ED., 2008) IX⁷⁹⁷**

... [W]hile human rights languages provide a striking arena for questioning the barbarity of power and domination, these at the same moment do not exhaust the range of normative politics. Other evaluative ways also exist that are often in conflict with the ethical languages of human rights. ... [There is a] need for constant vigilance against an assumption that human rights norms and standards, and even values and sentiments, instantly justify themselves in terms of the attainment of human/social welfare as distinct from the states of human well-being, or as serving the tasks of just social orderings, nationally, regionally, or globally. The languages of justice remain relatively autonomous of the languages of human rights

... This book explores three distinct but related domains of making, remaking, and unmaking of non-material human rights culture (sentiments, symbols, and values) as well as the material culture of human rights (the infrastructures of power and authority which promote and sustain the articulation of human rights norms and standards).

... Endeavours at making and remaking contemporary human rights norms and standards ... remain more crucial than may be ever fully glimpsed or garnered via the endless (and already sterile) debate about the 'universality' and 'relativity' of human rights.

... [T]he various declarations of human rights since the [UDHR] spawning human rights treaties and related instruments and constitutional enunciations, all in constant interplay, make space for the struggles for the attainment of human rights; these at the same moment also preserve some ultimate or terminal forms and zones of sovereign governmental discretion; in sum, the overall production of human rights free zones of domination and governance. The production constraints thus posed are scarcely amazing. The astonishing feature of the polymorphous production of contemporary human rights norms and standards, at all levels ... is its normative exuberance and excess. The crucial question then is this: How may we read or render legible as well as intelligible these forms of what I name here as the 'carnivalistic' production of human rights exuberances/excesses? Do these speak to us about some new messianic futures of human rights, or even to some future histories of the humankind? Or does all this primarily, and after all, constitute the cunning of instrumental political reason?

[Baxi draws a strong distinction between the 'politics *of* human rights' and 'politics *for* human rights'.]

... It remains rather easy to describe the politics for human rights in the languages of 'transformative', or even as 'redemptive' politics. ... [But in] this genre, the 'transformative'/'redemptive' politics of the State/sovereignty-oriented production of dominant and dominating truths stands constantly exposed as an expedient order of cruel and wounding falsehoods.

The 'best' practices of politics for human rights invoke and use the 'transformative'/'redemptive' imagery differently indeed. In these genera, communities in resistance and suffering (the worst-off) peoples offer the labours of popular and societal resistance to the various forms of the politics of domination and governance. Human rights and social movement activist practices become possible

⁷⁹⁷ Baxi's work has been described by W. Twining, *General Jurisprudence* (2009), at 430, as 'diffuse, polemical, and difficult to summarise.' Nonetheless, he offers an excellent overview of it, using Baxi's own words. See also W. Twining (ed.), *Human Rights, Southern Voices: Francis Deng, Abdullahi an-Na'im, Yash Ghai and Upendra Baxi* (2009).

and legible on a register that marshals the power of utterance of the political truths of the suffering peoples and communities in resistance. While the politics of dominance thrives upon the practices of nationalization of truth and the unending nurturance of governmental monopoly over definitions of ‘the’ public interest or the common good, civil society formations (or more accurately put the ensemble of diverse practices of social and human rights activism) contest this monopoly of a singular and totalizing narrative of official authorial voice. Resistance—the myriad forms of articulation of counter-hegemonic power—thus makes the best narrative sense for the uncertain promise of human rights futures.

I say ‘uncertain promise’, if only because there exist no easy alternatives to the problematic of representation, that is the activist art and craft of speaking *with*, rather than *for* the suffering or the worst-off peoples. Speaking for (acts/feats of ‘political’ representation) remains the standard way of dominance/governance; speaking *with* suffering peoples constitutes the ‘substance’ of politics for human rights. Not all human rights NGOs thus labour to speak *with* the suffering peoples, despite their professed aims and the problem of representation thus becomes acute with some contemporary tendencies towards the conversion of human rights *movements* into human rights *markets*. Many practices of human rights activism fail indeed to restore to suffering peoples, and indeed even claim for themselves the most precious of all human rights—the constantly claimed *human right to interpret human rights*. Nonetheless, I here offer overall some grounds for a belief that in the main various styles of engagement with the politics for human rights aspire at being, and remaining, historically worthy of this designation.

**SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY
(2010) 212⁷⁹⁸**

When the history of human rights is told beyond myths of deep origins, it illustrates the persistence of the nation-state as the aspirational forum for humanity until recently. The state was the incubator for rights claims, both in the rise of the absolutist state, with its well-disciplined interior order and colonialist exterior expansion, then in the creation of the modern nation, in which citizenship and rights, identification and contestation, were always bound up with each other. The relevance of the nation-state was amplified, rather than qualified, in the World War II alliance politics that led to the marginalization in the United Nations of the human rights that some wartime rhetoric had featured. It was geographically dispersed in the anticolonialist imagination, in which the new human rights were understood as a subversive instrument against imperial rule in the name of liberation and the construction of new states around the world. The perceived crisis of the postcolonial world, however, made the globalization of the nation-state unattractive as the sole formula for the achievement of modern freedom. Accordingly, rights finally lost their long connection with revolution.

...

The international human rights movement became so significant, then, neither because it offered a rights-based doctrine alone nor because it forged a truly global vision for the first time. Rather, it was the crisis of other utopias that allowed the very neutrality that had made “human rights” wholly peripheral to the aftermath of World War II—when taking sides in a contest of programmatic visions seemed so pressing—to become the condition of their success. ...

But the very neutrality that allowed for human rights to survive in the 1970s, and prosper as other utopias died, also left them with a heavy burden later. For even if their breakthrough depended on their antipolitics, human rights were soon affected by two transformative changes. First, the moment that favored pure moral visions passed, not least in American party and electoral politics, as Jimmy Carter’s brief presidential career illustrates so vividly. Second, and more important, partisans of the human rights idea were forced to confront the need for political agenda and programmatic vision—the very things whose absence allowed for their utopia to emerge so spectacularly and discontinuously in the first place. If human rights were born in antipolitics, they could not remain wholly noncommittal toward programmatic endeavors, especially as time passed.

⁷⁹⁸ For a review, see S. Benhabib, ‘Moving beyond False Binaries: On Samuel Moyn’s *The Last Utopia*’, 22 *Qui Parle* (2013) 82.

...

Born of the yearning to transcend politics, human rights have become the core language of a new politics of humanity that has sapped the energy from old ideological contests of left and right. With the advancement of human rights as their standard, a huge number of schemes of transformation, regulation, and “governance” contend with one another across the world. But if in the thirty years since their explosion in the 1970s human rights have followed a path from morality to politics, their advocates have not always forth-rightly acknowledged that fact. Born in the assertion of the “power of the powerless,” human rights inevitably became bound up with the power of the powerful. If “human rights” stand for an exploding variety of rival political schemes, however, they still trade on the moral transcendence of politics that their original breakthrough involved. And so it may not be too late to wonder whether the concept of human rights, and the movement around it, should restrict themselves to offering minimal constraints on responsible politics, not a new form of maximal politics of their own. If human rights call to mind a few core values that demand protection, they cannot be all things to all people. Put another way, the last utopia cannot be a moral one. And so whether human rights deserve to define the utopianism of the future is still very far from being decided.

SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD
(2018) 216⁷⁹⁹

The real trouble about human rights, when historically correlated with market fundamentalism, is not that they promote it but that they are unambitious in theory and ineffectual in practice in the face of market fundamentalism’s success. Neoliberalism has changed the world, while the human rights movement has posed no threat to it. The tragedy of human rights is that they have occupied the global imagination but have so far contributed little of note, merely nipping at the heels of the neoliberal giant whose path goes unaltered and unresisted. And the critical reason that human rights have been a powerless companion of market fundamentalism is that they simply have nothing to say about material inequality. The chief worry about human rights is not that they destroy the very distributive protections they set out to afford, let alone that they abet “disaster capitalism.” In too many places, those protections never existed. And global capitalism is hardly the only or even the main source of state abuses. ...

... Precisely because the human rights revolution has focused so intently on state abuses and has, at its most ambitious, dedicated itself to establishing a guarantee of sufficient provision, it has failed to respond to—or even recognize—neoliberalism’s obliteration of any constraints on inequality. Human rights have been the signature morality of a neoliberal age because they merely call for it to be more humane. ...

...

Could a different form of human rights law or movements correct for their coexistence with a crisis of material inequality? There is reason to doubt that they can do so by changing radically—for example by transforming into socialist movements. There is no contradicting the moral significance and possibly even historical success of human rights when it comes to combating political repression and restraining excessive violence or indeed, although more controversially, in campaigns for economic and social rights. But whenever inequality has been limited, it was never on the sort of individualistic and often antistatist basis that human rights share with their market fundamentalist *Doppelgänger*. And when it comes to mobilizing support for economic fairness, the chief tools of the human rights movement—playing informational politics to stigmatize the repressions of states or the disasters of war—are simply not fit for use. It is in part because the human rights movement is not up to the challenge that it has been condemned to offer no meaningful alternative, and certainly no serious threat, to market fundamentalism. ... The truth is that local and global economic justice requires redesigning markets or at least redistributing from the rich to the rest, something that naming and shaming are never likely to achieve, even when supplemented by novel forms of legal activism.

⁷⁹⁹ For a review, see G. de Búrca, [Review of *Not Enough*, by Samuel Moyn], 16 *Int’l J. Con. L.* (2018) 1347.

**JOSEPH R. SLAUGHTER, HIJACKING HUMAN RIGHTS:
NEOLIBERALISM, THE NEW HISTORIOGRAPHY, AND THE END OF THE THIRD WORLD
40 HUM. RTS Q. (2018) 735, 743**

Most of the new historiography comes out of a strain of intellectual history that largely disregards or dismisses ideas that did not occur to or circulate among European and American academic thinkers; more curiously, it does not seem to count history itself as an idea, as something that is mobilized (in the form of historiographic stories that are told and re-told about the origins, identities, and destinies of human rights) on behalf of some interests and not others. Despite dismissing the traditional Western progress narratives of human rights as so much mythmaking, the new historiographers rarely try to account for the political and social power of myth (or historiography, in its academic form)—that is, the particular historical, political, and other “sociofunctionalist” effects that “mythopoeic narratives” themselves produce in the world. To put it most polemically, the new historiography takes neither the Third World (its people and nations) nor the power of historiography (that is, itself) seriously as agents of history in their own right, as agents that affect the character and understanding of human rights and international history. To my mind, then, this new historiography is salutary only insofar as it troubles the potted history of human rights, opens (or re-opens) new windows of opportunity, and amplifies the chorus of skeptics (many from the Global South), who have long maintained, with Malawian historian Zeleza, that “human rights are not organic to or a natural result of a fictive western tradition going back to ancient Greece, a teleological narrative of retrospective appropriation that is fundamentally ahistorical and intellectually flawed.” For the most part, however, it fails to engage with those historians, and insofar as the revisionist history displaces and obscures those vital critiques, resubordinating non-Western histories, theories, and accounts of human rights to the new historiographical hegemon, it becomes as much a monolithic part of the problem as any other oversimplified history of the European pedigree of human rights—part of the historical hijacking of human rights described below.

**ZACHARY MANFREDI, RADICALIZING HUMAN RIGHTS
THE BOSTON REVIEW (21 JUNE 2022)**

Although [the] legacy of left skepticism about human rights retains valuable lessons for advocates, our political moment also provides opportunities for the reconceptualization and radicalization of human rights programs. Contemporary appeals to human rights arguably have the most to offer by developing a more egalitarian dimension to the politics of human rights. The traditional liberal conception of human rights as individual entitlements limits the capacity of the state to regulate private power and mobilizes state authority on behalf of private property and capital accumulation. By contrast, progressive appeals to human rights can link this language to a normative vision for a more just social order and the provision of public welfare. Developing an egalitarian vision requires moving beyond a guarantee of sufficient minimums and instead emphasizing how radical social and economic inequality stifle the realization of a more robust and radical human rights project.

...

... [C]ritics have long observed that a narrow focus on “rights talk” and formal equality can obscure and even ratify substantive inequalities. ...

Two contemporary trends in the left criticism of human rights are particularly notable. [Manfredi discusses the work of Samuel Moyn and of anthropologist Talal Asad.] ... Critics worry that the legal protections offered by a theory of human rights predicated on a consumerist subject will focus primarily on creation of “free markets” and justify policies that intensify social and economic stratification. Left critics of human rights also observe that different rights regimes encourage and produce particular self-conception among rights holders: if a human right to private property or wealth accumulation is enshrined in law, it helps establish a framework for how people evaluate their life projects.

Recent work by Jessica Whyte and Quinn Slobodian advances this argument and showcases how neoliberal reformers often relied on the language of human rights as part of their own political

programs. In *Globalists: The End of Empire and Birth of Neoliberalism* (2018), Slobodian shows how Geneva School neoliberals who were instrumental in the development of postwar international institutions—such as Ludwig von Mises, Friedrich Hayek, and Wilhelm Röpke—framed human rights as “xenos rights,” that is, rights of security for foreign capital and protections of private property against state expropriation. In addition, Whyte’s 2019 book *The Morals of Market: Human Rights and the Rise of Neoliberalism* shows how “neoliberals developed their own account of human rights as moral and legal supports for a liberal market order.” As Whyte documents, neoliberals relied on human rights to advance a consumerist vision of the welfare state subject to means-testing and compatible with international human rights instruments. They appealed to human rights as reason to oppose postcolonial projects of economic redistribution and industry nationalization, including notably opposition to the New International Economic Order. And they turned to human rights as justification for radical programs of reform in Chile and elsewhere that focused on privatization, deregulation of financial markets, and destruction of labor unions.

...

We should not deny the purchase of these critiques, but ... the growing contemporary focus on the social and economic dimensions of human rights already helps recast them in ways that depart from neoliberal formulations. ...

...

... [I]n some respects, the substantive content of rights claims championed by recent progressive political actors differ dramatically from the rights preferred by neoliberal reformers. Human rights to education, housing, protection from racial discrimination, gender equality, union membership, sustenance, and water all emerged over the course of the twentieth century, and new rights instruments and declarations were often developed in response to the demands of left social movements. ... [N]umerous radical thinkers have relied on the language of human rights. In this sense, the progressive turn to a more robust vision of social and economic rights language might be seen as an attempt to resuscitate a more radical tradition of human rights advocacy as an alternative to mainstream liberal and neoliberal formations. This work requires recognizing the plasticity of law and its potential to develop in new directions. This does not mean we should fall prey to what international law scholar Susan Marks has called “false contingency” regarding rights—that is, the assumption that human rights are infinitely malleable and repurposable for left politics. But in the twenty-first century context of extreme economic inequality, claims that there are human rights to food, water, non-discrimination, housing, and labor protections may prove more protean and radical than previously imagined.

...

... [C]ritiques of human rights call our attention to the importance of developing a more radically egalitarian vision of human rights advocacy. Egalitarianism, in this sense, should not be construed as merely a matter of formal equality before the law: the insistence, say, that all members of a polity have “equal rights” in the sense of equal claim to a minimal set of rights claims. Rather, a genuinely egalitarian politics of human rights should underscore the ways that radical social, economic, and political inequality necessarily enable widespread violations of human rights. This is not only because, practically speaking, the concentration of private wealth makes it difficult to achieve even the minimum guarantees of basic economic and social rights. Extreme inequalities in wealth also create disparities in political power and fundamentally undermine democratic control over economic governance. Radical inequality thus undermines human rights because it stifles even the basic right to equal say in the democratic political process that ought to determine what social and economic orders reign.

...

Recent progressive takes on tax policy are particularly interesting examples of how one might develop such an egalitarian account of human rights. As a matter of political rhetoric, progressive politicians have framed their tax proposals specifically as a reaction to both insufficient minimums and to radical economic inequality. Moreover, in a substantial sense these programs have an inherently egalitarian dimension: reducing the holdings of the wealthiest (while either not decreasing or increasing the wealth of those with fewer resources) reduces economic inequality. Framing progressive taxation as a human rights issue then implies an affinity between realizing human rights and securing a more egalitarian social order.

PAUL O'CONNELL, ON THE HUMAN RIGHTS QUESTION
40 HUM. RTS. Q. (2018) 962

Critiques of human rights abound. This is by no means a recent development, but the very ubiquity of the language of human rights in our age, means that a plethora of critiques of human rights have proliferated over the last forty years. While it is true that such critiques arise from various points along the ideological and political spectrum—at times making strange bedfellows of critical theorists and reactionary politicians—what we might, broadly, term “the left” has provided particularly fertile ground for critical accounts of human rights. Notwithstanding these critiques, and a recent spate of declarations about the demise of human rights, social movements around the world continue to frame their struggles and demands, at least partly, through the language of human rights. This can be seen in struggles for housing in Spain and South Africa, land in Brazil, racial equality in the US, or water in Ireland, to name but a few. This presents us with an interesting disjuncture. Throughout the world, millions of people are attempting to confront the misery and injustices heaped upon them by the contemporary global order through, in part, mobilizing the language of human rights to advance and defend their interests. At the same time, many of the putative critics of this extant global order disdain, by implication, such efforts through a sometimes bald, sometimes sophisticated, critique and dismissal of human rights.

This disjuncture—between critical theory and critical practice—raises a number of crucial questions about the relationship between ideas and social movements, law and struggles to bring about social change, and, for present purposes, about the role of human rights in emancipatory politics. It raises, at a critical historical juncture, the fundamental question of how individuals and groups committed to fundamental social change should engage with human rights. The argument developed here, put briefly, is that while many of the critiques of human rights raise important concerns, they fail to meaningfully address the central question of the relationship between human rights and social struggles. In contrast to such critiques, it will be argued here that human rights can and should be deployed in emancipatory political projects today, but that reaching such a conclusion requires us to go beyond narrow, formalistic, and overly juridical concepts of what human rights are, and stress the centrality of social and political struggle in the formulation and defense of human rights.

...

In the contemporary era of austerity and commodification, communities struggling for water, housing, health care, and food find that their immediate struggle also requires thinking about broader, structural issues. The assertion of a human right, in these contexts, becomes, of necessity, a rejection of the logic of the market, of the basic impulse of the capitalist system.

SALLY ENGLE MERRY, THE STATE OF HUMAN RIGHTS CONSCIOUSNESS: NOT YET
ENDTIMES

NEHAL BHUTA ET AL. (EDS.), THE STRUGGLE FOR HUMAN RIGHTS (2021) 62

[A]re human rights really on the verge of disappearing? It is certainly the case that many human rights institutions have become more bureaucratic and stodgier; and that human rights organizations in many parts of the world are under threat. Yet the appeal of human rights has always resided in the ideal of justice, fairness, and equality that they represent. These remain appealing ideas globally, even if the institutions designed to promote and enforce human rights are in themselves increasingly unable to do so. ...

...

Human rights ... refer to a set of ideals about how governments should treat their citizens and about how all humans should be treated. These ideals, moreover, have the imprimatur of a global consensus. Although there has been a great deal of sophisticated and valuable scholarship about whether human rights are ‘effective’, measured ‘effectiveness’ is not the only way to evaluate the importance of human rights. After all, we do not judge the value of national laws because they are effective, but because they articulate goals that we would like to make effective. Most—national and international—laws in fact

have an impact in the absence of sanctions, operating instead on the basis of voluntary compliance with a set of rules and ideas that people (or collectives) come to accept. But they are also routinely violated. ...

...

Recognizing the continuing importance and strength of human rights requires looking for them in different places. These places are not simply the HRC or the regular meetings of the [treaty bodies] but also the offices of small NGOs and the streets of poor neighbourhoods. Understanding human rights in practice requires looking at the way the ideas they promote have become part of everyday life for many people around the world. ...

The resilience of some broad conception of human rights in communities around the world rests in part on the universal concern with justice, although it is defined in many ways. Every society has conceptions of justice, although the specific norms and procedures used to produce it are quite variable. Many of these conceptions are grounded in religion while others are based on community standards or state enactments. Human rights differ, however, in that they offer a relatively secular conception of justice rooted not in a particular state but in the consensus of a large majority of states. Thus, they are legitimated by a transnational consensus that gives them a kind of power beyond that of state law. It is far from the only transnational conception of justice, of course. Many religions are transnational and carry these ideas, such as liberation theology, while political ideologies such as Marxism and democracy and the rule of law provide alternative ideas of justice.

This does not mean that there are not problems with human rights as a global model for justice. It offers an over-individualized idea of justice that does not always address the structural causes of inequality. It establishes a platform below which no person or society should fall, but it does not explicitly tackle inequality. Although it covers social and economic rights as well as civil and political ones, the former are often not as well supported and implemented. Human rights as a global justice ideology have not resolved the difficult question of the incompatibility of universal applicability and respect for local cultural practices. States that feel threatened by human rights activism are increasingly shutting down human rights organizations. Yet, human rights ideas remain a major force in global consciousness.

WENDY BROWN, 'THE MOST WE CAN HOPE FOR . . .': HUMAN RIGHTS AND THE POLITICS OF FATALISM

103 S. ATLANTIC Q. (2004) 451

Is the prevention or mitigation of suffering promised by human rights the most that can be hoped for at this point in history? Is this where we are, namely, at a historical juncture in which all more ambitious justice projects seem remote if not utopian by comparison with the task of limiting abuses of individuals? Is the prospect of a more substantive democratization of power so dim that the relief and reduction of human suffering is really all that progressives can hope for? If so, then human rights politics probably deserves the support of everyone who cares about such suffering. But if there are still other historical possibilities, if progressives have not yet arrived at this degree of fatalism, then we would do well to take the measure of whether and how the centrality of human rights discourse might render those other political possibilities more faint.

**RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS
(2018) 1**

This book explores the imaginary possibilities of freedom in the aftermath of the critique of human rights. Addressing this issue in relation to gender and alterity, I specifically focus on how, in light of such critique, freedom is to be envisaged once the emancipatory claims of human rights have proven disingenuous, false or simply unrealizable. In the global context, freedom remains defined as a liberal, external pursuit, involving the accumulation of further rights by a rational, finite and individual subject. The critical legal project, including postcolonial and feminist interventions, has successfully dismantled

the façade of this claim, exposing the regulatory and governance structures of human rights. The central endeavour of this book is to consciously explore the imaginary possibilities that have emerged in the aftermath of critique by centring and examining articulations of freedom available in non-liberal, alternative epistemologies. I address alternative registers that present radical insights on freedom as based on discrete understandings of the subject which are distinct from/remain beyond the reach of liberal individualism, and posit notions of self-scrutiny, reflection, discernment and the turn inwards as central features.

The focus on non-liberal (as opposed to illiberal) articulations of freedom pushes against the liberal positioning of human rights as indispensable central instruments in struggles for freedom, and further questions their capacity to realize this goal. The discussion not only exposes the parochial, provincialized identity of human rights as liberal, overwhelmingly Western and Eurocentric, but also displays the destructive capacities nestled in the liberal claim to ideological supremacy – one that ultimately seeks to retain its dominance over all others through its coercive formulations of how to be, and be free, in the world. The notion that divergent understandings of freedom have always existed outside of the liberal and neoliberal imaginaries and related market terms is either barely considered by those who shape, support and implement the rights regime, or considered inherently alien and therefore irrelevant to the recursive ideological currents within the fishbowl. ... [F]reedom should be actively delinked from the human rights project as formulated and imposed by the liberal imaginary, and should instead be explored within a range of dynamic and existing alternative philosophical spaces. By exploring whether, and how, non-liberal vocabularies of freedom can address and alleviate the current disillusionment with human rights' capacity to deliver on their emancipatory promise, the book marks a conscious and productive shift in the direction of visualizing the concept of freedom from outside the liberal fishbowl, and exploring considerations of freedom that have always existed beyond the fishbowl.

My analysis is not framed within an either/or binary – that is, between support for the human rights project and a specific intervention (which can have disastrous and unintended consequences), and a refusal to intervene that closes its eyes to the repression and violence experienced by sexual and religious minorities and women (for the most part, it is generally alleged, in rogue, non-Western states). Instead, my starting premise accepts the idea of human rights as a project that is already affected by – and overtly and covertly implicated in – structures of power, laying bare the fallacy of human rights as linked to an external, optimistic pursuit of freedom. ... [E]ven the minimalist claims of human rights advocates – that rights can alleviate human suffering and do not have wider effects – are invariably advancing maximalist projects, such as the need for thriving markets or the embedding of a particular notion of the female subject as unveiled, sexualized and autonomous. ... The trail of disorder, chaos and, at times, unanticipated but irrefutably harmful outcomes produced in and through human rights advocacy ... underscores the urgent need to identify new ways of pursuing freedom. ...

RADHA D'SOUZA, SOCIAL MOVEMENTS, LAW AND LIBERAL IMAGINATIONS
(2018) 6-7

...

Right claims conceal what is entailed in our relationship to land and nature. Indeed, right claims facilitate the transformation of places into properties and homeland into home-market. Yet, even the more radical movements on land such as indigenous peoples' movements that are opposed to the very notion of land, forests and water as property frequently end up supporting the idea of 'human' rights to land.

[In 2009, a speaker] for the radical Mapuche movement in Chile ... relied on the UN Declaration on the Rights of Indigenous People [UNDRIP] as the legal justification for the creation of an autonomous, self-governed Mapuche region. Why do indigenous peoples whose land claims arise from being synonymous with Time's claim to places find the need to invoke an international statute enacted in remote places like the UN headquarters in Geneva as recently as 2005 to make their claims sound 'reasonable'? Social movements sometimes argue that right claims are nothing more than conceptual vehicles that validate ethical and moral claims. The need for legal justifications to validate their land

claims invite us to consider why ethical claims are articulated as legal claims in the first place. Further, are right claims strictly ethical claims with no ramifications for law and politics? Right claims as ethical justifications do not lead us to questions why the [UNDRIP] was adopted, who the actors driving the adoption were, and the timing of it coming as it did in the wake of sweeping neoliberal reforms of international order.

...

... Right claims as ethical and moral claims divert attention from the context, the actors and the mechanisms at work The powerful indigenous critique of individual property rights in nature ends up reifying the dualism of property and 'human' rights on which liberal rights are founded.

... [T]he rights discourse today is a cacophony of discordant voices. Each actor in coalitions to promote this or that right ... has a different understanding of rights, of its history, its philosophical presuppositions, and above all expectations. Each actor canvassing for this or that right is located within a distinct type of institutional setting and carries a particular ideological orientation to rights. Arguments about rights in international coalitions and campaigns take the form of 'my version of rights is better than yours ...'. This argument is analogous to the argument 'my god is better than yours', an argument that ultimately relies on faith, a belief that cannot lead a rational engagement about god, yours and mine. ...

SYLVIA TAMALE, DECOLONIZATION AND AFRO-FEMINISM (2020) 207

[The] regime of international human rights protections has indeed proved inadequate to liberate marginalized groups, let alone African women, from the multiple oppressions they suffer. Many commentators have highlighted the limitations of liberally-conceived human rights in securing gender-related liberties to women and sexual minorities. ... Neither International NGOs ... nor local NGOs are likely to deliver freedom beyond some limited survival. This is because their ideological orientation is largely based in Western liberal individualistic understandings of rights rather than in underscoring the critical vitality of group rights. All of them operate within the universalistic and essentialist norms that undergird the international human rights framework and the concept of gender, respectively. Inevitably, the decolonial project would reject the racism that underlies the ideas of universalism and essentialism.

JACK SNYDER, HUMAN RIGHTS FOR PRAGMATISTS: SOCIAL POWER IN MODERN TIMES⁸⁰⁰ (2022) 239

...

... A top priority on the global human rights agenda should be to lead the way in advocating for reform of the globalized forums of free speech to empower professional journalists and regulate monopoly tech platforms. ...

Finally, the human rights movement needs to be far more circumspect and consequentialist in choosing to intervene in the entrenched cultural practices of societies that are not yet liberal and modern. ...

... To organize and mobilize a potent mass movement for the rights cause, three strategic adjustments offer promising avenues.

First, the power of religious zeal and networks should be tapped more assiduously. ...

Second, human rights activism needs to focus much more on core rights values that speak to the interests of the majority groups in a society: to the majority ethnic, racial, and religious groups; to the broad middle class and dominant occupational groups; and to local civic leaders in mainstream

⁸⁰⁰ See also J. Snyder, 'Human Rights Pragmatism: Problems of Structure and Agency', 139 *Pol. Sci. Q.* (2024) 21.

communities. Instead of addressing mainly the powerless and downtrodden, activists need to emphasize issues in which everyone is in the same boat of exploitation by abusive elites and extractive factions. Emphasize inclusive civic rights such as equality before the law, due process, respect for the right to property and the fruits of one's labor, curtailment of monopoly power in markets and employers' coercion of labor, access to health care and pensions, and systematic checks on arbitrary abuse of official power in dealing with citizens. Activists are of course already in favor of these things. What needs to be different is that activism that highlights discrimination against weak or stigmatized groups should always be framed as a message that links abuse of the minority to similar abuse of the majority. ...

Third, to get a big, powerful coalition, activists need to mobilize around big, hot-button grievances that unite everybody. One such issue is corruption, which is a top-priority issue for human rights activism because it links to every other kind of human rights abuse: abuse of office, due process, discrimination, torture, atrocities, and every kind of economic, social, and cultural right. ...

... [T]he rhetoric of rights needs to avoid shaming, especially outsiders' explicit or even implicit shaming of widespread, entrenched cultural practices, which only plays into the hands of backlash against rights. Instead, rights persuasion will work better if the conversation is two-way, if vernacular normative ideas of the community are taken into account, and if local notables are fully engaged as intermediaries in packaging global and local concepts in a form that works in local politics. Nonetheless, activists need to find ways to vernacularize rights talk that does not proceed down the slippery slope toward "normalizing deviance": for example, torturing or lynching criminals to protect the "human rights" of the community; "persuading" refugees to agree to go back to an unsafe homeland by making their refuge even worse.

GRÁINNE DE BÚRCA, INTRODUCTION REFRAMING HUMAN RIGHTS IN A TURBULENT ERA (2021) 1

... [A] growing array of populist and illiberal authoritarian leaders across the world, supported by the continued rise of the far-right ..., have overtly contested, distorted, and dismissed the idea of human rights. Domestically they enact and encourage increasingly repressive policies and practices against vulnerable parts of their population and against human rights defenders as well as capturing and controlling independent institutions, and internationally they seek to undermine and weaken human rights institutions and processes. And while many human rights scholars have opted for a business-as-usual approach in the face of rising illiberalism, some of the loudest intellectual voices from both progressive and conservative quarters have expressed deep disenchantment with the human rights enterprise. Prominent scholars and public intellectuals have variously dismissed the language, ideals, practices, and achievements of human rights law and advocacy as flawed, inadequate, hegemonic, confining, overreaching, apolitical, peripheral, or pointless. Human rights approaches have been accused of being tools of Western imperialism, an elitist and bureaucratic legal paradigm, a limiting expert discourse which crowds out emancipatory political alternatives, which limits its ambitions and hides its own 'governmentality', an intellectually 'autistic' culture, an anti-politics, and a companion to neoliberalism.

Yet at the same time that scholars, particularly in the global north, have been outdoing one another with ever more scathing and dismissive critiques, human rights movements, protests, and practices have been abounding and spreading. There may be turbulence in the form of growing political repression and illiberalism, ... but there has also been turbulence in recent years in the form of widespread social justice protests and grassroots mobilizations. ... The discourse of human rights continues to be used by many progressive social, environmental, indigenous, labour, and other movements and campaigns for justice

What is it that explains these two opposite sets of developments? Is the apparently continued vitality of the human rights movement and the conviction of the many actors worldwide who invoke human rights in their quest for social, economic, environmental, and other forms of justice, little more than

the remains of a movement approaching its final stages ...? Or do the pessimistic and often scathing diagnoses of the human rights sceptics fail to give due credit to the drivers of human rights movements, to the conditions under which and the reasons why they continue to emerge, grow, and flourish?

[T]he human rights movement remains an inherently attractive and appealing one, due to the universally asserted values on which it is based, its continued vitality as one among various languages and tools for challenging injustice, and the adaptability and creative potential of human rights ideas, law, and advocacy to generate legitimacy and help to promote positive change and reform even under turbulent and rapidly changing national and global conditions. ... [I]n contrast to accounts that present the human rights movement as elitist, apolitical, top-down, or bureaucratic, the experimentalist account of international human rights law and advocacy ... understands human rights instead as the product of ongoing interaction and contestation between an array of actors, institutions, and norms: between the claims and demands of people affected and concerned, the international norms and institutions which elaborate and monitor their implementation, and the domestic institutions and actors which reinforce and support those claims.

The potency and legitimacy of the human rights project rest on three main foundations. First, it is based on a deeply-rooted and attractive moral discourse that integrates at least three core values: human dignity, human welfare, and human freedom. Second, these values and their more detailed elaboration in various international legal instruments have gained widespread (even if thin and uneven) agreement among states worldwide. Third, the human rights project is a dynamic one which is activated, shaped, and given its meaning and impact through the ongoing mobilization of affected populations, groups, and individuals, and through their iterative engagement with an array of domestic and international institutions and processes over time.

**CÉSAR RODRÍGUEZ-GARAVITO, HUMAN RIGHTS 2030: EXISTENTIAL CHALLENGES AND A
NEW PARADIGM FOR THE HUMAN RIGHTS FIELD
NEHAL BHUTA ET AL. (EDS.), THE STRUGGLE FOR HUMAN RIGHTS (2021) 328**

... [W]hile human rights are not in a state of crisis, they are undergoing a moment of transition that raises systemic challenges for the movement. Some challenges come from outside the field, such as technological disruption, populist authoritarianism, the climate crisis, rising inequality, and the end of the Euro-American order. Some others are intrinsic to the architecture and the modus operandi of the traditional paradigm of human rights advocacy, such as strategic stagnation, fragmentation, and competition, insufficient long-term vision, unmanaged complexity, and narrow membership and audiences.

I have argued that, although those challenges create an existential risk for the movement—they are indeed the meteorite in the firmament—, they do not necessarily spell the end of the human rights project. To avoid the collision, however, business as usual will not do. The traditional paradigm of human rights is plainly inadequate to deal with the simultaneity, the speed, and the depth of those challenges.

In order to contribute to a new paradigm of human rights for the next decade, I proposed ways out of the current impasse that draw on lessons from other fields, from journalism to public health to human-centred design, as well as from disciplines that human rights actors have yet to incorporate into their toolkit, from social psychology to geology to social innovation. My aim has been to flesh out an intermediate approach between despair and defensiveness, one that vindicates the rich history and continued value of the human rights project, while searching for and experimenting with new ideas and initiatives capable of disrupting the field's dysfunctionalities and finding solutions to its urgent problems.

To that end, I have suggested that we view the human rights field as an ecosystem, rather than as a hierarchy. In an increasingly complex and interdependent world, human rights strategies need to be

informed by biology as much as by law and politics. They need to be more focused on symbiosis and much less on policing the current boundaries of human rights.

I proposed three types of disruptive interventions that could build up a human rights ecosystem: a more collaborative mode of operation, greater sense of time (both long term and short term), and heightened attention to narratives, emotions, and frames capable of connecting with larger constituencies and other social justice movements.

Constructing a human rights ecosystem is easier said than done. For international NGOs, this implies a difficult challenge: transitioning from the vertical and highly autonomous *modus operandi* that has allowed them to make key contributions, to a more horizontal model that would allow them to work with networks of diverse actors. For domestic organizations, this entails pursuing strategies that allow such organizations to connect to one another and using new leverage points created by increased geopolitical multipolarity, as well as opening up to non-legal professionals, social movements, and online activists. For all actors in the field, this shift implies embracing an experimental approach based on a greater willingness to try new strategies, expand the repertoire of tactics, cultivate new organizational forms and funding models, and develop capabilities for and openness to learning and adjusting to rapidly changing circumstance