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CHAPTER 1: INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS

The place of human rights in the twenty-first century is both celebrated and contested. The first few years of the new century have posed formidable challenges to international law, in general, and international human rights in particular. These challenges flow not only from the international political and institutional recalibration that has followed the events of September 11, 2001, but follow from the new international relationships created by the ending of the Cold War and the rise of new regional and global powers, both politically and economically. At the same time, the status of international human rights norms have solidified and their reach has extended, including the establishment of new institutions such as the International Criminal Court.

Although many observers regard the formation of the United Nations in 1945 and the promulgation of the Universal Declaration of Human Rights in 1948 as the beginning of the modern struggle to protect human rights, one can trace the origins of human rights back to early philosophical, religious, and legal theories such as "natural law," each describing a law higher than the positive law of states (such as legislation). According to those theories, individuals are entitled to certain immutable rights as human beings. Moreover, on close examination it is also clear that variations of these ideals are affirmed in the doctrine and practices of the major monotheistic religious systems.

Human rights precepts and procedures can help to answer such basic questions as: How can you identify or understand an injustice? What can you do about the injustices that you experience in your own life or that others are suffering? Can something be done to prevent, remedy, or at least understand these events?

For more than half a century the world community has codified a series of fundamental precepts that are intended to prevent such grave abuses as arbitrary killing, torture, discrimination, starvation, and forced eviction. Standards have also developed for the provision by governments of positive rights, such as those required to make meaningful the right to some aspects of a fair trial, education, and health care. Gradually over the same period the United Nations, other international organizations, regional institutions, and governments have also developed

sophisticated and accessible procedures for protecting against and providing remedies for human rights abuses.

To comprehend, prevent, and remedy injustice we need to know our rights and how they can be vindicated. Accordingly, after the introduction, part II of this book contains a series of chapters that summarize the applicable international human rights law and identify some of the most important issues that have arisen. Some chapters take a detailed look at contemporary issues, as a means to tease out trends, structures and responses to violations of human rights norms. The book does not attempt a comprehensive and exhaustive treatment of each subject because many subjects would require an entire book on their own, but at a minimum the reader will have a point of departure in understanding many important aspects of human rights law and practice.

A fundamental aspect of this book is its focus on understanding the range of remedies available when rights have been violated. Hence, once a person has identified a relevant principle applicable to a human rights violation established by reference to a treaty or other standard that individual must still determine how to apply that principle to a concrete problem or situation. Part III will cover procedures for implementation at the international, regional, and national level. Human rights is a domain of international law and you will need to have a basic understanding of international law and how international law may apply in a particular case.

A. BRIEF HISTORICAL INTRODUCTION

This section places human rights in historical context by looking at the development of human rights law prior to World War I. It then looks at advancements in protection following World War I and the advent of the League of Nations and the International Labor Organization. Third, it traces positive augmentation of the law in the period between the World Wars. Fourth, it identifies the Holocaust and World War II as the events which prompted the modern movement to protect human rights – principally through the United Nations. Fifth, it shows how human rights have become a subject of international legislation through the United Nations Charter and multilateral treaties. The interface between the legal developments at the United Nations operating in concert with regional human rights protection has been critical to advancing meaningful protection for human rights on a global scale. Finally, it briefly examines the creation of the International Criminal Court – a development intended to further accountability for human rights violations that take place during times of conflict and times of peace.

1. Early Developments

Concepts of human rights can be traced to antiquity -- e.g., the Ten Commandments, the Code of Hammurabi’s approach to law as a means of

preventing the strong from oppressing the weak, and the Rights of Athenian Citizens. Early efforts often came in response to atrocities of war and the problems created by the displacement of persons whether within the state or across borders. Religious, moral, and philosophical origins can be identified not only in biblical and classical history but also in important elements of Buddhism, Confucianism, Hinduism, Judaism, Shinto, and other faiths. Rights concepts began to appear in national documents such as the Magna Carta of 1215. Also in the 13th century, St. Thomas Aquinas used the theory of natural rights to argue that state sovereignty should not be respected when a government is mistreating its subjects. Following the revolution of 1688 in England, Parliament enacted the Declaration of the Rights of Man (1689) to protect citizens from violations by the monarchy. As we will outline below, the historical narrative about the way in which human rights norms emerged in many societies tells a deeper story about the core global-local relationship that defines the success or failure of human rights enforcement.

Starting with the Reformation and the religious wars of the sixteenth and seventeenth centuries, peace treaties began to include clauses aimed at protecting religious minorities. A state's mistreatment of minorities also could provoke intervention by another state. Through the use of its own military, a state might punish or replace an abusive government. Intrusion on sovereignty was believed permissible when a government's treatment of its own subjects "shocked the conscience of humankind."

With the rise of nation states in the seventeenth century, however, classical international law gave enormous weight to the importance of state sovereignty, at the expense to some degree, of emerging supranational human rights norms. Beginning in 1648, with the Treaty of Westphalia, states occasionally agreed to protect some individual rights; but the agreements typically reflected the view that individuals were mere objects of international law whose rights existed as derivative of states' sovereignty.

During the eighteenth and nineteenth centuries the nation-state dominated the development of international law as the sole subjects of international law, but a number of precursors (outlined below) to modern protections of human rights began focusing attention on the role of individuals as, at least, objects of international law. Those precursors began to intrude upon the state-oriented fabric of international law in such previously isolated fields as the protection of aliens, the protection of minorities, human rights guarantees in national constitutions and laws, the abolition of slavery, women's rights, the protection of victims of armed conflict, self-determination, and labor rights.

Developments in the eighteenth and nineteenth centuries reflect incremental steps to recognize individual rights, while simultaneously affirming the importance of sovereignty. They included, for example, diplomatic efforts to protect rights of aliens abroad. Early enforcement of aliens' rights took the form of reprisal: a

citizen with a grievance against a foreigner could seize the foreigner's goods. Reprisals in the 19th century (namely the right to use force against another state aggressor) were gradually replaced by negotiations between governments of aggrieved individuals and of the territory where the wrongs occurred. A state's right to intervene on citizens' behalf rested on two principles -- the rights of aliens to be treated in accordance with "international standards of justice" and to be treated equally with nationals of the country wherein they resided.

Minimum international standards of justice also developed in early efforts to protect religious minorities. Starting with the Reformation and the religious wars of the sixteenth and seventeenth centuries, peace treaties began to include provisions for protecting religious minorities. A state's treatment of its minorities could provoke interventions by other states. In 1827, Great Britain, France, and Russia explained their military intervention against the Ottoman Empire as necessary to stop the abuse of the minority Greek population. Short of war, countries also applied diplomatic pressure to protect minorities in foreign states. For example, six European nations and the United States sent a collective diplomatic note to the government of Romania in 1872 protesting the Romanian mistreatment of Jews.

During the eighteenth and early nineteenth centuries, governments took further measures to recognize some inherent rights of the individual under national laws. This pattern of rights protection developments at the national level underscores a central theme of this book, namely, the necessary and organic relationship between domestic and international law in the protection of human rights. The 1776 American Declaration of Independence proclaimed, "as self evident," the "unalienable rights" of all men to "life, liberty and the pursuit of happiness." Those rights were based on eighteenth century theories of natural law philosophers like Locke and Rousseau, who argued that fundamental rights were beyond state control and that individuals are autonomous in nature. Upon entering society, each individual's autonomy combined to form the people's sovereignty. Rights of self-government, including the right to choose and change the government, became the first inalienable right, but each individual retained a measure of personal autonomy in the form of inviolable rights.

Belief in such rights produced the French Declaration of the Rights of Man and of the Citizen in 1789 and led federated states to insist on adding the Bill of Rights to the U.S. Constitution between 1789 and 1791. A number of nations followed the French and U.S. examples in their constitutions: the Netherlands (1798), Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849), and Prussia (1850). These national developments were central in shaping the international context for nascent international human rights protections.

In addition, nineteenth century efforts to abolish the slave trade and protect workers' rights evidenced a growing international concern for human rights. The slave trade was first condemned by treaty in the Additional Articles to the Paris Peace Treaty of 1814 between France and Britain. By 1823 several British anti-slavery campaigners had established the first nongovernmental organization (NGO) concerned with human rights, the Anti-Slavery Society. In 1885 the General Act of the Berlin Conference on Central Africa affirmed that "trading in slaves is forbidden in conformity with the principles of international law."

The complaints to abolish slavery in the nineteenth century awoke concern for women's rights. In 1840 at an anti-slavery conference in London, two prominent abolitionists -- Elizabeth Cady Stanton and Lucretia Mott -- were forced to remain behind a closed balcony curtain during discussions. They began the international struggle for women's rights which led to the Seneca Falls Convention in 1848 and the formation of the International Women Suffrage Alliance in 1904. The alliance focused on issues such as trafficking of women, voting rights, the education and literacy of women, as well as labor laws that were sensitive to the needs of women.

In 1859 the ICRC's founder, Henri Dunant, witnessed the aftermath of the battle of Solférino and observed the suffering of the wounded soldiers left on the field. As a result of this experience he helped convene the 1863 Geneva Conference which founded the International Committee of the Red Cross (ICRC). The ICRC was instrumental in preparing initial drafts of what became the first multilateral treaty protecting victims of armed conflict -- the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. It aimed to protect military hospitals and provided for equal medical treatment for combatants on both sides of a conflict. The fifteen Hague Conventions of 1899 and 1907 emphasized limits on methods and means of warfare. For example, they banned poisonous gases and other weapons calculated to induce unnecessary suffering.

2. World War I and the League of Nations

Further concern for human rights developed after World War I. In 1918, President Wilson presented Congress with his "Fourteen Points," a program designed to end war and create a world dedicated to justice and to fair dealing. He called, inter alia, for rights to self-determination through newly drawn national borders and statehood for nationalities seeking autonomy. The Senate, however, repudiated the program, Secretary of State Lansing criticized the principle of national self-determination, and other countries withheld support.

Nonetheless, during peace talks Wilson's influence was undeniable. The war ended after the Paris Peace Conference in 1919 produced the Versailles Treaty. The treaty created the League of Nations and the International Labour Organization. Neither

explicitly mentioned human rights, but the following excerpt notes pertinent concerns:

President Wilson had proposed at the Paris Peace Conference to include in the Covenant an obligation of all League members to respect religious freedom and to refrain from discrimination on the basis of religion (draft Article 21). The British delegate Lord Robert Cecil considered this not strong enough and proposed to give the Council of the League a right of intervention against states that would disturb world peace by a policy of religious intolerance. For President Wilson this proposal went too far. In the course of the discussion the Japanese delegate Baron Makino proposed to add to draft Article 21 an obligation of all member states to refrain from discrimination on the basis of race or nationality against foreigners who would be nationals of League members. The Japanese proposal obtained majority support at the commission level but was rejected by the United Kingdom and the United States. In this situation the American delegation also withdrew its own proposal concerning religious freedom. As a result, no obligations regarding human rights were incorporated in the Covenant of the League.

Jan Herman Burgers, The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century, 14 HUM. RTS. Q. 447, 449 (1992) (footnotes omitted).

Even though human rights were not explicitly mentioned, they were not ignored by the League of Nations. The League fostered treaties that constituted the first comprehensive development of what is now viewed as a group rights scheme in international law. “Self-determination” became a basic component of agreements that the League administered in countries and regions including Austria, Bulgaria, Czechoslovakia, Greece, Hungary, Poland, Rumania, Turkey, and Yugoslavia. Known as minorities treaties, they purported to guarantee protection of life and liberty for all inhabitants of the countries or regions party to the treaties, as well as nationals’ equality before the law and in the enjoyment of civil and political rights. The League also required Albania, Estonia, Finland, Latvia, and Lithuania to pledge protection of minority rights before becoming members. These treaties are significant, not only for their codification of important norms such as non-discrimination, freedom of religion, and language rights, but for establishing the legitimacy in international relations of other states taking an interest in the treatment of the nationals of the obligated states, albeit as a result of their group membership rather than their individual status.

League protection extended only to nationals of countries and regions that were party to the treaties. In 1922 the Assembly of the League expressed hope that countries and regions not party to the treaties would extend the same protection to their nationals. Thrice, however, the Assembly rejected proposals to draft a new treaty applicable to all members prescribing each member’s obligations towards minorities.

The League also created a mandate system to protect freedom of conscience and religion in former colonial territories of Germany and Turkey. Governments controlling non-self-governing mandated-territory promised to promote the material and moral well-being, as well as the social progress, of inhabitants. The goal was to prepare some colonies for independent statehood. They would be ready for autonomy when they could guarantee protection of religious, linguistic, and ethnic minorities, as well as rights of aliens and freedom of conscience. The territories included Palestine and Transjordan administered by Britain, Syria and Lebanon administered by France, the Cameroons and Togoland administered by Britain and France, and Rwanda administered by Belgium. The mandate system subsequently evolved into the U.N. trusteeship system. The perceived failure of a group rights approach as embodied in the League had a significant effect on the articulation of group rights under the post Second World War codifications, as well as on the heightened status of individual rights in these schemes. (See the U.N. Charter's Chapter XII.)

3. The Inter-War Years

Scholarly internationalists were responsible for much of the human rights development prior to and during the inter-war years. Alejandro Alvarez of Chile, for example, was among the first to advocate international rights for individuals. Co-founder of the American Institute of International Law, he submitted a 1917 draft declaration on future international law that included a section on individual rights.

Another noted scholar, Russian jurist Andre Nicolayevitch Mandelstam, emigrated to Paris after the Bolsheviks came to power. In 1921 he persuaded the International Law Institute to establish a commission to study protection of minorities and human rights generally. He served as rapporteur and, in 1929, persuaded the commission to adopt a Declaration of the International Rights of Man. It included a preamble and six articles. The first three articles defined a state's duty to recognize the equal rights of each person within its territory to life, liberty, property, and religious freedom. The remaining articles defined states' duties towards their citizens.

In an October 1939 letter to the Times, British novelist H.G. Wells spoke of rights to food and medical care, education, access to information, freedom of discussion, association, and worship. He also discussed rights to work, freedom of movement, and protection from violence, compulsion, and intimidation. Wells and colleagues eventually wrote a document known as the Sankey Declaration. Throughout 1940 and 1941 he promoted the Declaration at meetings and in various publications. In 1940 he published The Rights of Man, or What Are We Fighting For?, which contained the Declaration and his commentary. Reportedly 30,000 copies were circulated in Britain and it was translated into ten languages and offered for world syndication. He received reactions from numerous human rights pioneers,

including Ghandi and Nehru as well as Jan Masaryk, Chaim Weizmann, and Jan Christian Smuts (who in 1945 drafted Articles 55 and 56 of the U.N. Charter).

While scholars and others were promoting human rights, events in Europe undermined their work. Most notorious was the rise of Adolf Hitler. He and the Nazis took control of Germany in 1933 and quickly began implementing their agenda of anti-Semitism and discrimination against homosexuals, gypsies and Christians. In May 1933, the League of Nations heard a complaint from a German who claimed he had been fired from his job because of an April 1933 decree to discharge all Jewish civil servants, to exclude Jewish lawyers from legal practice and Jewish doctors from practice for health insurance funds, and to limit admission of Jewish students to German schools. Germany assured the League that it would protect the life and liberty of its citizen without discrimination, and apparently led the League to close the case. The League reconsidered Germany's anti-Semitic policies at the end of 1933, and Germany responded by withdrawing from the League.

4. World War II and the Beginning of the Modern Human Rights Movement

The modern human rights movement began during World War II. The war represented the destructive extension of state sovereignty concepts that had dominated international relations for three centuries. The Nazis, seeking international preeminence, acted with unprecedented brutality and demonstrated that previous attempts to protect individuals from the ravages of war were hopelessly inadequate. It was entirely clear that the rules relating to the regulation of warfare needed substantial overhaul. The war also demonstrated that unfettered national sovereignty could not continue to exist without untold hardships and, ultimately, the danger of total destruction of human society. It was out of the trauma of World War II and the fifty million killed, many more injured, and such great suffering that the modern human rights movement was born. Human rights became a rallying cry of the allies struggling against the war-time brutality of Nazi Germany, Italy, and Japan.

Germany's tactics were based on speed, surprise, and terror. In the Battle of Britain, the German air force bombarded English population centers and for 61 nights in October and November 1940 sought to destroy British cities. During the heaviest bombing, from July to December 1940, more than 23,000 civilians were killed and 32,000 were injured. The German assault on the Soviet Union was even more brutal. That conflict raged for nearly four years and resulted in Soviet military casualties of 6.5 million. Including civilians, an estimated 20 million Soviets were killed during the attempted German conquest of the Soviet Union. The industrial cities of Germany and Italy were also subject to intensive bombing by Britain and the United States. The most brutal of those attacks was the British fire bombing of Dresden in February 1945 killing more human beings than either of the two U.S. atomic bombs at Hiroshima or Nagasaki.

The most infamous brutality during the war was the Holocaust. The extermination of Jews began in the summer of 1941 when Reichsfuhrer Himmler gave the order for the liquidation of Russian Jews encountered during the invasion of the Soviet Union. In the course of the first year, the German army killed an estimated 90,000 Jews. Massive deportations of Jews to death camps began in 1942. From all over Europe they were brought by train; and, when the trains arrived, Germans unloaded the prisoners -- primarily Jews but also gypsies, homosexuals, and assorted political dissidents -- and stood them in lines for inspection by SS doctors. From trainloads of 1,500 people the doctors generally selected 1,200-1,300 for immediate extermination by firing squads or gas chambers. By the end of the war the Germans in the death camps had exterminated an estimated 6,000,000 Jews and nearly that many non-Jews. Another two million died outside the camps as a result of the German policy of extermination. This total amounted to nearly two-thirds of the population of pre-war European Jewry.

The war in Asia and the Pacific was also brutal. The Japanese occupation of China, for instance, proved to be as vicious as Germany's conquest and control of Eastern Europe. Among the worst atrocities of the Sino-Japanese war was the occupation commonly known as the "Rape of Nanking." When the Japanese conquered the city in 1937, an estimated 500,000 civilians resided there. During the first few months, when acts of brutality were at their highest, the army killed at least 43,000 civilians and soldiers raped countless women. One observer of the Japanese occupation of Nanking estimated that at least 1,000 rapes took place each night. The Japanese army also established camps for forced prostitution in conquered lands such as China, Korea, and the Philippines.

In response to those and other horrors, world leaders spoke out in defense of peace and protection of human rights. On January 6, 1941, President Roosevelt, in his State of the Union address to Congress, outlined his vision of the future based on the "four essential human freedoms":

First is the freedom of speech and expression everywhere in the world. Second is the freedom of every person to worship God in his own way everywhere in the world. Third is the freedom from want, which, translated into world terms, means economic understanding which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world. Fourth is the freedom from fear, which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor-anywhere in the world.

His speech was one of many strong statements as to the crucial importance of human rights in the international community. In addition, on August 14, 1941, Roosevelt and Prime Minister Churchill set forth aims of the allied war effort in a Joint Declaration known as the Atlantic Charter. It stated general principles

regarding the structure of the post-war world. Among those principles, Article 6 stressed the importance of human rights:

After the final destruction of Nazi tyranny they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all men in all the lands may live out their lives in freedom from fear and want.

During 1941 the Atlantic Charter received endorsements from all the European allies, which were followed by the Declaration of the United Nations on January 1, 1942, in which twenty-six nations pledged alliance in the war against the German/Italian/Japanese axis.

After the war, political leaders and scholars continued to look to the protection of human rights as both an end and a means of helping to ensure international peace and security. The victors responded to the War and the Holocaust by forming the United Nations, which had the dual purpose of preserving the peace and protecting human rights. Soon thereafter, intergovernmental organizations in Europe and the Americas also established their standards for the protection and promotion of human rights. There was also a more determined movement towards greater institutional and economic interdependence for states by the creation of such entities as the European Economic Union, the General Agreement on Tariffs and Trade, the International Monetary Fund, and the World Bank

a. Criminal Accountability: From the Middle Ages to the Nuremberg and Tokyo Tribunals, and Control Council Law No. 10

International criminal accountability has a longer pedigree than is generally known. As early as 1474 the first genuinely international trial for the perpetration of atrocities was held against Peter von Hagenbach for crimes committed during the occupation of Breisach. Following the First World War there was a generally favorable climate, particularly in England, to seek criminal accountability for acts associated with the war. Following intense political negotiations between the United States and the United Kingdom the Versailles Treaty formally accused the defeated German Kaiser for a “supreme offence against international morality and the sanctity of treaties.” He was never tried, having fled to the Netherlands to avoid trial. Notably a small number of regular German soldiers were tried at the end of the war in a series of trials known as the Leipzig Trials.

During the Second World War and the immediate post-war period, most human rights advocates focused on the prosecution of perpetrators of war-time abuses. The allied governments had received innumerable reports of German and Japanese atrocities and, in response, they agreed to punish the individuals responsible. The International Military Tribunal, which sat at Nuremberg, was created by the London Agreement of August 8, 1945. The International Military Tribunal for the

Far East was established in Tokyo on January 19, 1946. Both tribunals served the immediate function of punishing the leading war criminals. The Control Council for Germany (composed of Britain, France, the Soviet Union, and the United States) issued Control Council Law No. 10 in 1946 to expand the London Agreement and authorize the trial of thousands of cases not pursued by the International Tribunal at Nuremberg.

b. The Creation of the United Nations: Dumbarton Oaks and San Francisco

In 1944 Britain and the U.S. met with the Soviet Union (and later with China) at Dumbarton Oaks in Washington, D.C. to formulate a "proposal for the establishment of a general international organization." The initial plan proposed by the U.S. State Department included an international bill of rights that member governments of the organization would agree to accept. The proposal envisioned that the organization's structure would include means to help ensure protection of human rights.

By the time U.S. delegates reached Dumbarton Oaks they had decided, however, to include only a general statement on human rights. Even that approach met with resistance from the British and Soviet delegations. Eventually the U.S. persuaded Britain and the Soviet Union to include a brief statement demonstrating support for human rights in a draft U.N. Charter issued by the Conference on October 7, 1944. It mentioned human rights only once, stating that "the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms."

After the Dumbarton Oaks Conference, various NGOs lobbied for a stronger and more specific statement on human rights. A proposal made by several Jewish groups advocated explicit reference in the Charter to protection of human rights. They proposed also that either the Security Council or the Economic and Social Council be empowered to establish human rights guidelines and take action to enforce compliance with the guidelines. A coalition of 22 NGOs, including the National Council of Women, the National Board of the YWCA, the AFL-CIO, and the NAACP, similarly pressed for an active U.N. role to counter human rights abuses. These organizations proposed that each member nation pledge to secure progressively, for its inhabitants, rights including life, liberty, and freedom of religion. In a strong statement on duties of a state with respect to its own citizens, the American Jewish Committee declared:

[N]o plea of sovereignty shall ever again be allowed to permit any nation to deprive those within its borders of fundamental rights on the claim that they are matters of internal concern. It is now a matter of international concern to stamp out infractions of basic human rights.

In spite of the early difficulties, government representatives from North and South America arrived at the U.N. Conference in San Francisco in the Spring of 1945 with apparent intent to fulfill President Roosevelt's vision of the future and to incorporate human rights clauses in the U.N. Charter.

5. The United Nations and Multilateral Protection of Human Rights

The U.N. Charter established human rights as a matter of international concern. The U.N. set forth these rights in the International Bill of Human Rights, and began the process of codifying human rights.

a. Codification

The Charter's preamble states that the "Peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The Charter was promulgated in 1945 to maintain international peace and security; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination; and to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character. According to Article 1 of the Charter, the U.N. seeks "[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms[] for all without distinction as to race, sex, language, or religion." Article 55 of the Charter requires that the United Nations shall promote "conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for . . . human rights . . . without discrimination . . .." In accordance with Article 56, members pledge "joint and separate action . . . for the achievement of the purposes set forth in Article 55."

Article 68 of the U.N. Charter called for the establishment of a Commission on Human Rights. The first task of the Commission was to draft the Universal Declaration of Human Rights and thus to provide an authoritative definition of the broad human rights obligations of the member states under Articles 1, 55, and 56 of the Charter.

In 1948 the U.N. General Assembly adopted the Universal Declaration of Human Rights, articulating the importance of rights which were placed at risk during the decade of the 1940s: the rights to life, liberty, and security of person; freedoms of expression, peaceful assembly, association, religious belief, and movement; and protections from slavery, arbitrary arrest, imprisonment without fair trial, and invasion of privacy. The Universal Declaration also contains provisions for economic, social, and cultural rights. The Declaration's force, however, is

unfortunately limited by very broad exclusions and the omission of monitoring and enforcement provisions.

Following adoption of the Universal Declaration, the U.N. Commission on Human Rights drafted the International Bill of Human Rights, which contains the Covenant on Economic, Social and Cultural Rights; the Covenant on Civil and Political Rights; and an Optional Protocol to the Civil and Political Covenant. The three instruments were adopted by the General Assembly in 1966 and entered into force in 1976. The International Bill of Human Rights comprises the most authoritative and comprehensive prescription of human rights obligations that governments undertake in joining the U.N.

The two Covenants distinguish between implementation of civil and political rights -- on the one hand -- and economic, social, and cultural rights -- on the other. Civil and political rights, such as freedom of expression and the right to be free from torture or arbitrary arrest, are immediately enforceable. Economic, social, and cultural rights are to be implemented "to the maximum of available resources, with a view to achieving progressively the full realization of the rights . . . by all appropriate means, including particularly the adoption of legislative measures." In other words, governments that ratify the Covenants must immediately cease torturing their citizens, but generally the requirement to feed, clothe, and house them have been less instant in their enforcement. These latter obligations are generally to be accomplished progressively as resources permit. For more on the Covenants, see chapters 4-5, infra.

In addition to the International Bill of Human Rights, the United Nations has drafted, promulgated, and now helps to implement more than eighty human rights treaties, declarations, and other instruments dealing with genocide, racial discrimination, discrimination against women, religious intolerance, the rights of disabled persons, the right to development, the rights of the child, and the rights of migrants. Human rights law has thus become the most codified domain of international law.

One early focus of the United Nations emphasized self-determination through the elimination of colonial domination of the developing world. The constitutions of most nations that have become established since the formation of the U.N. include reference to the rights that are protected by the Universal Declaration of Human Rights and the remainder of the International Bill of Human Rights.

b. Development of Human Rights Law within the U.N. Structure; Charter-based human rights bodies

Human rights are implemented by various bodies under the authority of the United Nations Charter, and by seven expert committees created by specialized human rights treaties. These two kinds of U.N. human rights institutions -- Charter-based

bodies and expert treaty-based committees -- are illustrated by the chart in the frontispiece of this book. Most of the Charter-based bodies are comprised of government representatives and will be discussed first.

Under the authority of the U.N. Charter, human rights activities are principally undertaken by the Security Council, General Assembly, Economic and Social Council, Human Rights Council, Sub-Commission on the Promotion and Protection of Human Rights, the Commission on the Status of Women, and the Commission on Crime Prevention and Criminal Justice.

The Security Council is the principal organ of the U.N., on which the Charter confers primary responsibility for the maintenance of international peace and security. The Council is composed of fifteen members, including five permanent members (China, France, Russia, the United Kingdom, and the United States) and ten non-permanent members elected for two-year terms by the General Assembly. Under Chapter VII of the Charter, the Security Council makes recommendations or decides what measures should be taken to maintain or restore international peace and security. Council measures may include humanitarian aid, economic sanctions, and military intervention. With the end of the Cold War, the Security Council's role has become more visible as the permanent members have more frequently agreed on action. There continues to be much debate over the composition of the Security Council and whether its membership constitutes a fair reflection of the current demographic and power alignment of states. Proposals for reform have emerged but to date there is no political consensus to move them forward.

The Security Council's activism becomes apparent when contrasting the number of actions taken during and after the Cold War. During the Cold War, the Security Council considered on five occasions whether human rights violations qualified as threats to the peace so as to justify measures under Chapter VII. Furthermore, during the forty-two year period from 1948 to 1987, the Security Council established only 13 peacekeeping operations. There were almost three times as many during the ten-year period between 1988 and 1998, when the Security Council sent 36 peacekeeping missions. In addition, based principally upon Security Council decisions, on-site U.N. activities with a significant human rights dimension have taken place in more than twenty countries since 1989, including Angola, Bosnia-Herzegovina, Burundi, Cambodia, Congo, East Timor, El Salvador, Guatemala, Haiti, Iraq, Kosovo, Mozambique, Namibia, Nicaragua, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, Western Sahara, and the former Yugoslavia. The role of the Security Council as international legislator has been augmented by the role it has taken following the events of September 11, 2001, as evidenced by the anti-terrorism mandate given to states under UN Security Council Resolution 1373. The role of the Security Council is discussed more fully in chapter 6, infra.

In 1993, the Security Council further contributed to the development of human rights law when it authorized an international tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. See Security Council resolution 827 of 25 May 1993. The tribunal has publicly indicted 161 individuals. On March 10, 1998, the Chief Prosecutor stated that the tribunal's jurisdiction covers violations of international law that occurred in Kosovo, for example, during the events of 1999 which led to the NATO bombing of Belgrade and Kosovo. In addition, following widespread killings in Rwanda during April 1994, the Security Council established a second tribunal using the same basic approach as in the former Yugoslavia. This tribunal has focused on bringing perpetrators of the Rwandan genocide to justice. The Yugoslav Tribunal is located in The Hague, Netherlands, and the Rwanda Tribunal was established in Tanzania. The tribunals and proposals for establishing a permanent international criminal court are discussed in greater detail in chapter 8, infra. The Security Council has also created a Compensation Commission to assist victims of the Iraqi invasion of Kuwait, which is discussed in chapter 12, infra.

Based upon the precedents of the Nuremberg and Tokyo Tribunals, the many trials in Germany held pursuant to Control Council Law No. 10 after World War II, and the establishment of ad hoc war crimes tribunals for the former Yugoslavia and Rwanda, a permanent International Criminal Court (ICC) was authorized by a Statute of July 17, 1998, which came into force July 1, 2002 when it was ratified by 60 nations. As of May 2006, 100 governments have ratified the Statute of the International Criminal Court. The Statute would permit the prosecution of war crimes, genocide, other crimes against humanity, and eventually aggression once a provision is adopted defining the term. The ICC has complementary jurisdiction over individuals whom governments have failed to prosecute in their national courts or when governments lack the capacity to prosecute nationally. The International Criminal Court sits in the Hague, Netherlands, with 18 judges who are elected for nine year terms (one third each year) by the States parties.

The International Court of Justice (ICJ), having replaced the Permanent Court of International Justice, is the judicial organ of the United Nations. The court sits at the Peace Palace in The Hague, Netherlands, with 15 judges who are elected to nine year terms (one-third every three years) by the General Assembly and the Security Council. The Charter of the United Nations provides for both contentious (adversary) and advisory jurisdiction. Adversary jurisdiction extends only to matters that States Parties have referred to it and in instances where treaties and conventions provide for adjudication by the ICJ. Article 38(1) of the ICJ Statute specifies the sources of law which the court is to apply in rendering its decisions: international conventions, international custom, and general principles of law. Decisions of the ICJ are only binding between the immediate parties and only in respect to that particular case. In other words, stare decisis does not apply. The decisions, however, are widely relied upon as statements of international law.

During the period after World War I the Permanent Court of International Justice rendered several advisory opinions under the Minority Treaties developed pursuant to the Treaty of Versailles that were relevant to human rights. For example, in the 1923 the Court concluded in an advisory opinion that the Government of Poland had in a Minorities Treaty undertaken "to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion." The Court determined that the eviction of German settlers from Poland would violate the government's obligations under the Minorities Treaty -- particularly the property rights of the German minority in Poland. In two advisory opinions relating to the City of Danzig, the PCIJ applied the principle of Nullem crimen sin lege (no crime without law) to find a violation of fundamental rights a decree that a person may be punished in "accordance with the fundamental idea of a law and in accordance with sound popular feeling." Similarly, in another advisory opinion the Court held in Jurisdiction of the Courts of Danzig that individuals -- in this case, Danzig railway officials -- have the capacity to assert their rights under international law -- against the Policy Railway Administration under the relevant treaty.

Soon after its establishment, the International Court of Justice rendered its first advisory opinion with regard to a human rights issue in holding that a reservation to the Convention on Genocide could not be sustained unless its was consistent with the object and purpose of the treaty. The Court noted "the [human rights] principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." In an advisory opinion of 1970, the ICJ found that South Africa's continued presence in Namibia was a violation of international law because the Government of South Africa had "pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions . . . based on grounds of race . . . which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter . . .." The International Court of Justice in its 1980 judgment in the Case Concerning United States Diplomatic and Consular Staff in Tehran said, "[w]rongfully to deprive human beings of their freedom and to subject them to physical constrain in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the Untied Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." In 1986 the ICJ found the United States responsible for violating customary international law by failing to give notice of its mining of Nicaraguan ports. In the same case the Court found U.S. publication and dissemination of a manual on "Psychological Operations in Guerilla Warfare," which advised the contras to "neutralize" certain judges, police officers, and State Security officials, to be "contrary to the publication of the prohibition in Article 3 of the Geneva Conventions, with respect to . . . executions without . . . judicial guarantees . . .."

In 1998, the International Court of Justice unanimously indicated provisional measures so as to ensure that a Paraguayan prisoner Angel Francisco Breard would not be "executed pending the final decision in regard to the claim that Breard had not been notified of his right to contact his consular representatives promptly after he was arrested for murder in these proceedings. The United States Government and the Supreme Court ignored that request and Breard was executed. Again in 1999, the ICJ decided to accept Germany's application for provisional measures to request the United States to "take all measures at its disposal" to ensure that two German nationals are not executed in Arizona, while the Court considers the implications of the failure of Arizona authorities to comply with the consular notification requirements of the Vienna Convention on Consular Relations. The ICJ has reinforced the privileges and immunities of a U.N. human rights official who was prevented by his government from attending the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities and in another case held that the U.N. Commission on Human Rights Special Rapporteur on the Independence of Judges and Lawyers was entitled to immunity from legal process in a defamation action for words spoken by him during an interview about a situation in his own country. The ICJ did not give extensive consideration to human rights concerns in its advisory opinion on the threat or use of nuclear weapons. In this decision, the decision concerning the internationalized armed conflict in the Democratic Republic of the Congo, and the decision concerning the building of a barrier between the Palestinian Territories and Israel, however, the Court gave considered views on the relationship between human rights law and international humanitarian law norms. The Court is presently considering a case by Bosnia and Croatia against Serbia for violation of the Genocide Convention.

The General Assembly is the most authoritative source of international declarations and conventions. Human rights issues are generally discussed in the Assembly's Third Committee. The General Assembly is also the most representative decision-making organ of the U.N., where all members of the U.N. are entitled to vote. It is also important to note that norm-setting resolutions of the General Assembly have "soft" law status -- particularly if adopted by consensus. Furthermore, the General Assembly elects the ten nonpermanent members of the Security Council, elects the members of the Economic and Social Council (ECOSOC), regularly reviews ECOSOC recommendations, similarly elects members of the Human Rights Council and reviews its decisions, and receives reports from several of the human rights treaty bodies.

The General Assembly usually meets from September through December and considers resolutions on several hundred matters. The General Assembly addresses human rights issues in several ways. For example, it has passed resolutions proclaiming the United Nations Year for Tolerance, proclaiming the U.N. Decade for Human Rights Education and the U.N. Decade Against Racism, creating the post of the High Commissioner for Human Rights, and adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to

Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders). Additionally, the General Assembly has focused on issues such as the rights of the child, the right to self-determination, racism, and religious intolerance. Further, the General Assembly has examined human rights situations in such countries as Afghanistan, Bosnia and Herzegovina, Cambodia, Cuba, Haiti, Iraq, Islamic Republic of Iran, Kosovo, Myanmar, Nigeria, Rwanda, and Sudan.

Despite a longstanding tension between Charter Article 2(7)'s prohibition against invading states' domestic jurisdiction and human rights protections in Charter Articles 1, 55, and 56, the General Assembly has increasingly drawn attention to the situation of human rights in specific countries. That tension was broken in the mid-1970s when the General Assembly and the Commission on Human Rights developed a consensus that a Working Group must be established to investigate human rights violations in Chile. Following that period, almost all governments have accepted the propositions that human rights constitute a matter of international concern, and that U.N. investigations and hortatory resolutions do not, in any case, invade a country's domestic jurisdiction. Domestic jurisdiction arguments under Article 2(7) are occasionally raised by specific governments accused of violations, but are not met with wide-spread approval. In fact, offending governments often undermine their arguments by supporting condemnatory resolutions with regard to other offending countries. Since the mid-1970s the General Assembly and other U.N. organs have more regularly expressed concern and taken other actions with regard to country situations, including Afghanistan, Cambodia, Cuba, El Salvador, Estonia and Latvia, Haiti, Iraq, the Islamic Republic of Iran, Kosovo, Myanmar (Burma), Rwanda, Somalia, the Sudan, and the former Yugoslavia.

The Economic and Social Council (ECOSOC) is an intergovernmental body, which operates under the authority of the General Assembly. It consists of 54 members, elected for three-year terms by the General Assembly. The Council usually meets for a six-week long session each year; its meetings alternate between Geneva and New York. ECOSOC receives and ordinarily approves recommendations from the Commission on Crime Prevention and Criminal Justice and the Commission on the Status of Women. The Council is also responsible for monitoring compliance with the Covenant on Economic, Social and Cultural Rights through the Committee on Economic, Social and Cultural Rights. Further, it has issued such human rights standards as the Standard Minimum Rules for the Treatment of Prisoners and the Principles on the Effective Prevention of Extra-Legal, Arbitrary and Summary Executions. For more on ECOSOC procedures, see chapter 6, infra.

The United Nations Human Rights Council was established by General Assembly resolution 60/251 in March 2006, and replaces the somewhat discredited Commission on Human Rights. The resolution was adopted by 170 in favor and

four against. The United States abstained. The Commission had been composed of 53 member states elected by the Economic and Social Council for three-year terms and met annually in Geneva for six weeks each spring. The Council held its first meeting in Geneva in June 2006. The new body was promoted on the basis that it would meet more regularly, that its membership would be elected on the basis of their human rights performance, their human rights would be subject to peer review, and they could be removed from the Council by a two-thirds vote of the General Assembly. The new Council will have 47 members elected by the General Assembly. It is expected that the Council will continue to support the three principal approaches to serious and widespread violations of human rights namely: the establishment of country rapporteurs and working groups under the authority of ECOSOC resolution 1235, consideration of country situations under the confidential procedure of ECOSOC resolution 1503, and review through thematic procedures relating to forced disappearances, summary or arbitrary executions, torture, religious intolerance, mercenaries, arbitrary detention, internally displaced persons, violence against women, etc. Those procedures are explored in chapter 6, infra.

The Sub-Commission on the Promotion and Protection Human Rights (from 1946-1999 known as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities) was unusual because it was composed of 26 persons elected by the Commission, for four-year terms, in their individual capacities rather than as governmental representatives. With the advent of the Human Rights Council in March 2006, the Sub-Commission will be elected by and report to the Council rather than to the Commission on Human Rights. The Sub-Commission often has been the source of resolutions and ideas that are considered and adopted by higher U.N. bodies. With the assistance of the U.N. Office of the High Commissioner for Human Rights, members of the Sub-Commission also prepare studies on path-breaking human rights problems. In addition, representatives of NGOs actively participated in the Sub-Commission's sessions.

The Commission on the Status of Women was established by the Economic and Social Council in 1946. When the Commission was first established, it was created as a sub-commission. It only took one year, however, to realize its importance, and establish the full commission. The Commission is composed of representatives from 45 United Nations member states, elected by the Council for four-year terms. Its functions are to prepare recommendations and reports to the Council on promoting women's rights in political, economic, civil, social, and educational fields. The Commission may also make recommendations to the Council on problems in the field of women's rights that require immediate attention. The Commission has a procedure for receiving confidential communications on human rights violations, but that procedure has not been well-publicized, is not often invoked, and has not been particularly efficacious. The Commission's objects are to implement the principle that men and women shall have equal rights, to develop proposals that give effect to its recommendations, and to adopt its own resolutions

and decisions. The Commission is located in New York. The Inter-American Commission of Women and the Commission on the Status of Arab Women submit reports to each session of the Commission on the Status of Women.

The U.N.'s crime prevention and criminal justice program was, until 1992, administered by the Committee on Crime Prevention and Control, a subsidiary organ of ECOSOC. The Committee, composed of twenty-seven experts, planned the quinquennial Congresses on the Prevention of Crime and the Treatment of Offenders, submitted proposals, and implemented the Congresses' recommendations. The Committee's primary roles were to foster the exchange of information concerning criminal justice and to generate standards against which state performance may be judged. The Committee was very successful in drafting important human rights standards such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Basic Principles on the Role of Lawyers, and Guidelines on the Role of Prosecutors.

In 1992 ECOSOC, pursuant to a request by the General Assembly, disbanded the Committee and replaced it with the Commission on Crime Prevention and Criminal Justice. The Commission is composed of forty government representatives rather than the independent experts that served on the Committee. The Commission's functions are similar to those of the Committee, with the additional responsibility of mobilizing U.N. member states' support for the crime prevention and criminal justice program. The Commission, as a governmental rather than an expert body, has been less productive of norm setting.

The Peacebuilding Commission was established in December 2005. The Commission's Organizational Committee will consist of 31 government members elected to two year terms. Of the 31 members seven will be from the Security Council and seven from the Economic and Social Council selected in a manner determined by the respective Councils. Five members will be chosen from among the top ten assessed contributors to the U.N. that were not previously selected. Five members will be chosen from among the governments that contributed the most military and police personnel for U.N. activities that were not previously selected. The final seven members will be selected by the General Assembly giving due consideration to those countries that have experienced post-conflict recovery. When the Organizational Committee addresses a specific conflict situation it may add members from the countries involved, surrounding nations, nations contributing to any ongoing peacekeeping effort, any regional institutions involved, and the senior U.N. official in the field. The Commission is to propose an integrated strategy for rebuilding and maintaining peace. The Commission is also expected to aid in procuring financial resources and promoting coordination among various organizations inside and outside the U.N.

There are many other U.N. organs whose expertise touches on the protection of human rights. In 1993, for example, the General Assembly voted to create the post

of United Nations High Commissioner for Human Rights. The Office of the High Commissioner for Human Rights, operating under the authority of the Secretary-General, has principal responsibility for U.N. human rights activities, including: overseeing most U.N. human rights bodies, promoting universal ratification and implementation of international standards, and maintaining U.N. human rights field operations.

Other U.N. organs that work to protect human rights include the International Labour Organization (ILO), the oldest intergovernmental organization, which has promulgated 195 recommendations and 185 conventions through May 2006, including several treaties relating to human rights (e.g., on freedom of association, forced labor, and indigenous rights). The ILO's Committee on Freedom of Association adjudicates complaints by trade unions that their rights have been infringed, and its Committee of Experts reviews periodic states reports under the ILO standard-setting treaties. The ILO also contributes to the deliberations of the treaty bodies, such as the Human Rights Committee. The U.N. Educational, Scientific and Cultural Organization (UNESCO) has promulgated a few treaties related to human rights (e.g., as to discrimination in education). UNESCO has also established a Committee on Conventions and Recommendations, which examines allegations of human rights violations against artists, authors, scientists, and teachers. The U.N. High Commissioner for Refugees (UNHCR) protects refugees and asylum seekers and pursues durable solutions for them, including repatriation, resettlement, and local settlement. The UNHCR has also become a major provider of humanitarian assistance to displaced persons, including refugees, persons forced to cross national frontiers by armed conflict, and internally displaced persons. The Food and Agriculture Organization (FAO), the United Nations Children's Fund (UNICEF), and the World Health Organization (WHO) also have programs and policies relating to human rights within their respective fields of action. Even international financial institutions such as the International Monetary Fund and the World Bank make decisions with substantial human rights consequences; the World Bank has developed policies on some of its activities which may have human rights consequences, e.g., involuntary resettlement and indigenous people. The human rights implications of trade regulation by bodies such as the World Trade Organization have been the subject of heated debate.

c. Development of human rights law through seven U.N. treaty-based human rights committees

Increasingly, the seven monitoring bodies established under specific human rights treaties are playing a significant role. These expert bodies include the Human Rights Committee, which considers states reports under the International Covenant on Civil and Political Rights and adjudicates individual cases under the First Optional Protocol to the Civil and Political Covenant. The Human Rights Committee also issues General Comments, which are the considered views of the Committee Members on the nature and substance of state obligations in respect to

particular articles of the Covenant. These Comments are very important in setting out general understandings of the nature and content of state obligations under the Covenant. The six other treaty bodies oversee the implementation of multilateral conventions in their respective domains: the Committee on the Elimination of All Forms of Racial Discrimination; the Committee on the Elimination of Discrimination Against Women; the Committee Against Torture; the Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights, and the Committee on the Protection of the Rights of All Migrant Workers and Members of the Their Families. Some of these bodies have, or are developing individual complaint mechanisms (see e.g. the CEDAW Committee, and the Economic, Social and Cultural Rights Committee) These expert bodies are discussed in this chapter at C.1.b., infra, and in chapters 4-5, infra.

B. WHY DO STATES AGREE TO AND OFTEN OBEY INTERNATIONAL HUMAN RIGHTS?

A number of international relations theorists attempt to explain the creation of and degrees of compliance with international human rights norms. In particular many lawyers and non-lawyers are interested in the question of asking why nations abide by those norms? While there are many theories and numerous variations within theories, this section will focus on four major explanations as to why states ratify and enforce human rights treaties and accept other human rights norms. The four principal theories are "realism," "institutionalism," "," and "liberalism." Fully explaining each of these theories would require its own book and consequently, this section is merely designed to give a brief introduction to these complex issues.

As discussed below, while each theory may offer insights into behavior in some settings, each will also fall short of providing a satisfactory explanation for all behavior. When looking at various human rights treaties and conduct presented throughout this book one can look back to these theories in an effort to understand the relevant norms and activities.

1. Realism

Strict realists make six basic assumptions about the world. First, states are the primary and most powerful actors in the international sphere. Second, the world is anarchic. Since there is no power over states and no state may command another, there is no order in international relations. Third, states seek to maximize their security or power. Fourth, realists perceive the world to have limited resources that are unevenly distributed; states desire to maximize power and security. Fifth, states behave rationally in their pursuits of security or power. Sixth, there is utility in the use of force.

It is important to note that there is a major division within the realist school regarding how states measure the maximization of power. Under classic realist

theory states seek to make absolute gains in their power. Under this view a realist state does not care whether other states gain in the same transaction as long as the state that is acting makes a gain in power. Neo-realists argue that states seek relative gains. In this view states will want to know whether they will benefit more than other parties based on the existing power structure. To illustrate the difference, consider a hypothetical world in which there are only two states A and B. State A is twice as powerful as state B. State B proposes a treaty that would give each state an equal benefit. Classic realists would argue that state A should accept because state A will make an absolute gain. Neo-realists would argue that state A should not accept unless state A gets at least twice the benefit of B because state A is currently twice as powerful and would not rationally want to allow that gap to close.

Based on these assumptions realists tend to view the world as a series of prisoners' dilemmas. The classic prisoners' dilemma involves two suspects arrested for a crime. The suspects agree in advance not to say anything. The police interrogate them separately and offer each leniency in return for a confession. If neither suspect cooperates, they will only face a light sentence for a lesser included offense. If both suspects confess, they will both go to prison for the full crime though they will get some leniency for their cooperation. If only one suspect confesses that suspect will be let off while the other will get the maximum sentence for the full crime. The best overall outcome for both suspects is when both choose not to confess. For each individual the best outcome is to confess while the other sticks to their agreement not to say anything. If either suspect believes the other will cheat by confessing, it is in their best interest to also cheat and confess. Unless the two suspects are incredibly committed to their agreement this prisoners' dilemma should tend to end in both suspects confessing to protect themselves against the worst possible outcome and possibly obtain the best outcome. The basic ideas from the prisoner's dilemma can be translated into the international relations sphere. For example, states will follow the Third Geneva Convention (which protects POWs and wounded soldiers) as long as they believe other states will also comply. Yet if one state suspects, or knows, that another state is violating the Third Geneva Convention, the other state would be motivated to break the treaty.

While realism may explain certain choices made by states in the international sphere and thereby illuminate conduct (particularly economic and military conduct), it has difficulty explaining the acceptance by states of international human rights in such a self-centered and power focused world as understood by the realist theory. The problems are twofold. First, realists must find some benefit for states in agreeing to and complying with international human rights norms and standards. Second, even if such a benefit could be found, realists would need to show why there would not be a strong incentive to cheat under the prisoner's dilemma.

While some treaties may have a benefit for the state that accepts human rights obligations, such as the Geneva Conventions which would protect the state's military, the majority of international human rights treaties impose a cost on compliant states and are not reciprocal in the same way a trade or arms control treaty would be. Under a classic realist view, the state could not rationally agree to a treaty that will cost it power. A neo-realist could argue that if the costs imposed on the other side were greater than the costs imposed on itself in proportion to preexisting power relations, the state could rationally agree. By contrast, neo-realism would still argue that the other side would not rationally accept such an international agreement.

Even if some benefit (perhaps as to reputation) could be identified, realists have difficulty in explaining why more states do not decide to cheat in the prisoner's dilemma. Given the costs of full compliance a state should be expected to cheat to the fullest extent possible. Yet many states continue to ratify human rights treaties and make efforts toward compliance with their obligations under international human rights agreements. Hence, realist international relations theory offers useful if incomplete insights into the reasons why states observe their human rights treaty obligations. The realist theory does, however, help explain why international human rights monitoring is often quite weak.

2. Institutionalism

Institutionalists start from a similar set of assumptions as do realists. States still seek to maximize power or security. Unlike realists, however, institutionalists focus on the gains that they obtain by cooperating with other nations in the context of inter-governmental relationships created by membership in international organizations. Human rights instruments and organizations are viewed as offering benefits to states. Under this view of the world, there is more to be gained by cooperation than any risk associated with that cooperation. In some situations, however, the states engaging in such organizations may be negatively affected by the responsibilities they have undertaken, for example, when they are criticized for violating internationally established principles.

The institutionalist view of the world can be analogized to two people who each need to fold a large pile of bed sheets. If they cooperate on the project by both working to fold sheets, they will be able to fold the sheets in less time, with less effort, with less risk of soiling the newly clean bed sheets, and will probably do a better job than if each of them works separately to fold their own sheets. The risk to one person that the other may have had a smaller pile of sheets at the start is outweighed by the overall gain produced by cooperating.

In the human rights context it is hard to find the pile of sheets to serve as the mutual goal. Agreeing to abide by a set of human rights principles with respect to your residents if another state agrees to abide by the same rules with respect to

their residents may not appear to present an opportunity for cooperative gain. Both states are essentially agreeing to lessen their power if another state does likewise. At the same time the states may ignore these regulations and gain from membership in the organization promoting human rights.

3. Constructivism

Constructivism, also known as the normative theory, argues that states come to accept norms and ideas through a process of socialization and internalization. While realism and institutionalism seem to take the goal of power as a given and only look to the methods of achieving that end, constructivism questions the underlying goal of seeking power or, minimally strives to explain why states pursue certain goals to obtain social acceptance within the community of nations.

A good example of constructivism may be identified in the acceptance of women's suffrage. If realism truly explained behavior, why would the powerful group, that is men prior to the acceptance of female suffrage, agree to give up some of that political power to women? Constructivism would argue that the equality of women, at least with respect to voting, became socialized and internalized by the dominant group that allowed for the adoption of women's suffrage. The idea of equality enshrined in the male dominated society could not be reconciled with discrimination against women and women's suffrage had to be accepted.

Constructivism's main shortcoming is its inability to operate as a predictive theory. At some point, a majority or a large and growing minority will come to share a particular belief and it may be possible to identify a tipping point at which one can see a coming norm. Prior to the tipping point, however, it is hard to know which view held by a minority will make a run toward the tipping point. So while experience shows that certain rights are internalized within the community of nations, it is difficult to know why that happened in the past or what new rights will be accepted in the future.

Constructivism may also suffer from a lack of sincerity on the part of the state actors. It has been argued that states only talk the talk of human rights because it is the expected norm in the community of nations, not because of any real commitment to achieving human rights. The inadequacies of the constructivist approach are seen in the limitations that arise in respect of enforcement of their agreed human rights obligations by states.

4. Liberalism

Liberalism moves its focus from states to individual actors within a state. Liberalism operates under three basic assumptions. First, individuals and private groups are the primary actors in the international sphere. These actors are rational, risk adverse, and have varying interests. Further, these actors are constrained by a

scarcity of resources and conflicting values. Second, states represent some subset of the society. Depending on whose interests are represented states will behave differently in international society. Third, state behavior is determined by the configuration of interdependent state preferences.

Rather than assuming that all states share the same underlying purpose, liberalism says that many different individuals have diverse goals. Some number of these individuals (and consequently their interests) are represented by states. Such representation will vary from a majority of individuals in a democracy, to perhaps one individual, or a small group, under a strong dictatorship. State interests are controlled by the subset of the individuals in the state who have power. Once these state goals are set, states will then act accordingly in the international context yet within the limitations imposed by the competing interests of the control groups in other states.

Under the liberal approach to international relations, countries with repressive political arrangements would not be expected to ratify human rights treaties. In practice, however, many such governments do ratify human rights treaties. If the executive power only represents the interests of illiberal elites, the country would not be interested in treaties and particularly not human rights treaties. Liberal theory advocates would argue, however, that such elites may want to raise their international esteem and thus consent to the treaty at least formally, though there are evident gaps between the commitments made and the enforcement on the ground. Illiberal regimes may not intend to comply with their international obligations, but the liberalism theory helps to explain the role of NGOs as advocates at the national and international level working for the full implementation of the accepted human rights norms.

Realists tend to focus on self-interest, institutionalists on cooperation, constructivists on the impact of norms/ideals, and liberal theorists on the influence of individual actors and groups. None of these theories alone seems able adequately to explain the creation of, compliance with, or violation of human rights norms. Despite these shortcomings each theory offers some insight into the motivations of states and other relevant actors.

Notes and Questions

1. For Further Reading See:

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C. HUMAN RIGHTS IN INTERNATIONAL LAW

Having placed international human rights in its historical and theoretical context, there remains the task of introducing human rights as an aspect of international law.

1. The U.N. and International Human Rights Law

Treaties constitute a primary source of international human rights law. The United Nations Charter is both the most prominent treaty and contains seminal human rights provisions. Charter Article 103 establishes the primacy of the U.N. Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

a. Human Rights under the U.N. Charter

The Charter identifies the promotion and encouragement of respect for human rights as among the principal objectives of the United Nations:

Article 1: The Purposes of the United Nations are: . . .
To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion . . ..

Articles 55 and 56 of the Charter establish the primary human rights obligations of all 191 U.N. member states:

Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and

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

Article 56: All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

b. International Bill of Human Rights

The United Nations General Assembly defined the human rights obligations of member states in the International Bill of Human Rights, which is comprised of:

* Universal Declaration of Human Rights
* International Covenant on Economic, Social and Cultural Rights * International Covenant on Civil and Political Rights
* First Optional Protocol to the International Covenant on Civil and Political Rights

The Universal Declaration of Human Rights (Universal Declaration or UDHR) is not a treaty, and is discussed infra at C.1.d. The Universal Declaration has a preeminent status in the law and is generally agreed to constitute customary international law. The Covenant on Civil and Political Rights establishes an international minimum standard of conduct for all participating governments, ensuring the rights of self-determination; legal redress; equality; life; liberty; freedom of movement; fair, public, and speedy trial of criminal charges; privacy; freedom of expression, thought, conscience, and religion; peaceful assembly; freedom of association (including trade union rights); family; and participation in public affairs; but through the mechanism of non-derogable rights forbids; "cruel, inhuman or degrading treatment or punishment"; slavery; arbitrary arrest; double jeopardy; and imprisonment for debt. Non-derogable rights are rights which in no circumstances can be limited or compromised.

By ratifying the Covenant on Economic, Social and Cultural Rights, a government agrees to take steps for the progressive realization of the following rights to the full extent of its available resources: the right to gain a living by work; to have safe and healthy working conditions; to enjoy trade union rights; to receive social security; to have protection for the family; to possess adequate housing and clothing; to be free from hunger; to receive health care; to obtain free public education; and to participate in cultural life, creative activity, and scientific research. There has been an increased emphasis on the capacity of states meaningfully to enforce economic, social and cultural rights and significant strides have been made in measuring state compliance to these norms.

c. Other U.N. Treaties

The U.N. has further codified and more specifically defined international human rights law in a number of treaties relating to various subjects initially identified by the International Bill of Human Rights. Treaties create legal obligations for those nations that are party to them and can codify existing customary international law, but are generally not binding on the international community as a whole. But cf. U.N. Charter Art. 2(6). Treaties may, however, create general international law when such agreements are intended for adherence by states generally, are in fact widely accepted, and restate general principles of law. See Restatement (Third) of the Foreign Relations Law of the United States § 102(3) (1987 & Supp. 1988) [hereinafter Restatement].

Once drafted by the United Nations, treaties are adopted by the General Assembly and are then opened for ratification or other forms of acceptance by governments, often including those governments not involved in the drafting process. For example, the United States participated in drafting and adopting the International Covenant on Civil and Political Rights from 1948 until 1966, but the U.S. did not ratify it until1992, and then only with several significant reservations as to its application. The U.S. also participated in drafting and adopting, but has only signed and has not yet ratified the International Covenant on Economic, Social and Cultural Rights.

Aside from the Charter and the International Bill of Human Rights, the most significant U.N. treaties that have received enough ratifications or accessions to enter into force include (in order of their date of entry into force):

* Convention on the Prevention and Punishment of the Crime of Genocide
* Convention relating to the Status of Refugees
* Protocol relating to the Status of Refugees
* International Convention on the Elimination of All Forms of Racial Discrimination
* Convention on the Elimination of All Forms of Discrimination Against Women
* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
* Convention on the Rights of the Child
* Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
*Statute of the International Criminal Court

Treaties so drafted are interpreted as international legislation. The most authoritative collection of rules concerning the interpretation of treaties is the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), entered into force January 27, 1980. The principal sources of interpretation include the terms of the treaty, agreements or instruments made in connection with conclusion of the treaty, subsequent agreements between

the parties, subsequent practice in the application of the treaty, relevant rules of international law applicable to relations between the parties, and any special meaning intended by the parties. Article 32 of the Vienna Convention provides that supplementary means of interpretation include preparatory work (travaux préparatoires), which is analogous to legislative history for statutes.

Pursuant to seven of the principal human rights treaties, committees have been established to provide authoritative interpretive guidance. Those seven treaty bodies are the Human Rights Committee (under the Civil and Political Covenant) (HRC); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Committee Against Torture (CAT); the Committee on the Rights of the Child (CRC); and the Committee on the Protection of Migrant Workers and Members of Their Families (CMW). The seven treaty bodies regularly review reports by States parties as to their compliance with the respective treaties and most issue general comments and recommendations that reflect their experience in reviewing the reports and thus provide authoritative interpretations of the treaty provisions. The treaty bodies also issue conclusions as to each State report that provide useful interpretations and suggestions for improvements in compliance. A number of these treaty bodies issues authoritative General Comments, which constitute the considered views of the committees on the scope and interpretation of certain rights or procedures contained in the Treaties. Further, four of the treaty bodies -- the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee Against Torture, and the Committee on the Elimination of Discrimination Against Women -- may receive communications complaining about violations of those treaties and issue decisions interpreting and applying treaty provisions and recommending redress for violations.

d. Related U.N. Instruments

In addition to treaties, the United Nations has promulgated dozens of declarations, codes, rules, guidelines, principles, resolutions, and other instruments that interpret the general human rights obligations of member states under Articles 55 and 56 of the U.N. Charter and may reflect customary international law. The Universal Declaration of Human Rights is the most prominent of those human rights instruments; provides an authoritative, comprehensive, and nearly contemporaneous interpretation of the human rights obligations under the U.N. Charter; and also has provisions which have been recognized as reflective of customary international law. The Universal Declaration has served as a model for many national constitutional provisions on basic rights. The Universal Declaration is also taken as the basis for the work of the Charter-based U.N. human rights bodies. Among the other prominent non-treaty human rights instruments are:

* Standard Minimum Rules for the Treatment of Prisoners
* Declaration on the Rights of Disabled Persons
* Code of Conduct for Law Enforcement Officials
* Declaration on the Right to Development
* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
* Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions
* Declaration on the Protection of All Persons from Enforced Disappearances
* Declaration on the Protection of All Persons Belonging to National or Ethnic, Religious or Linguistic Minorities
* Declaration on the Elimination of Violence Against Women
* Vienna Declaration and Platform of Action
* Beijing Declaration and Platform of Action

These various legal enactments also have the capacity to be transformed into treaty law provisions when sufficient state and non-governmental support is garnered.

2. Other Worldwide Treaties and Instruments

The United Nations is not the only global organization that has issued or facilitated the issuance of worldwide human rights standards. Others include U.N. specialized agencies (such as the International Labour Organization (ILO) and the U.N. Educational, Scientific, and Cultural Organization (UNESCO)), as well as the International Committee of the Red Cross.

As the oldest intergovernmental organization, the International Labour Organization (ILO) has promulgated 195 recommendations and 185 conventions, including several treaties relating to human rights. For example, the ILO has promulgated the following treaties:

* Convention concerning Forced or Compulsory Labour (ILO No.29)
* Convention concerning Freedom of Association and Protection of the Right to Organise
(ILO No. 87)
* Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively (ILO No. 98)
* Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO No. 100)
* Abolition of Forced Labour Convention (ILO No. 105)
* Discrimination (Employment and Occupation) Convention (ILO No. 111)
* Convention concerning the Promotion of Collective Bargaining (ILO No. 154)
* Forced Labour Convention (ILO No. 155)
* Convention concerning Indigenous and Tribal Peoples in Independent Countries

(ILO No. 169)
* Worst Forms of Child Labour Convention (ILO No. 182)

Those treaties are principally interpreted by the ILO's Committee on Freedom of Association, which adjudicates complaints by trade unions that their rights have been infringed, and the ILO Committee of Experts, which reviews periodic states reports under the ILO standard-setting treaties.

The U.N. Educational, Scientific and Cultural Organization (UNESCO) has promulgated several treaties related to human rights, for example, the Convention against Discrimination in Education, 429 U.N.T.S. 93, entered into force May 22, 1962.

The laws regulating armed conflict between parties has a long historical pedigree. A basic idea reflected in multiple religious and philosophical beliefs is that some common denominator of behavior is applicable even in the extremis of war. Hence, in 1863 Columbia University Professor Frances Lieber codified the applicable norms and these were applied by Abraham Lincoln to the Union army during the American civil war.

Since the mid-19th century, the International Committee of the Red Cross has convened governmental conferences to draft treaties protecting soldiers and sailors wounded in armed conflict, prisoners of war, and civilians in times of war. The ICRC has also persistently reminded states to observe applicable customary international law. These treaties and customs constitute the core of international humanitarian law which is designed to limit human rights violations during periods of international and non-international armed conflict. In the context of armed conflicts, international humanitarian law provides a stronger and far more detailed basis for the protection of human rights and humanitarian norms than the International Bill of Human Rights and other U.N. human rights instruments. The relationship between human rights law and humanitarian norms in times of armed conflict is a complex one. It is now generally agreed, and most forcefully articulated by the International Court of Justice in both the Nuclear Weapons case and the recent decision examining the legality of the separation wall being built by Israel through the West Bank and East Jerusalem, that human rights norms are not suspended by armed conflict. Rather they continue to apply in parallel, albeit appropriately modified by the strict application of the relevant aspects of international humanitarian law norms.

The principal multilateral treaties that legislate international humanitarian law -- the four Geneva Conventions of 1949 -- have been ratified by more governments than other human rights treaties aside from the U.N. Charter and the Convention on the Rights of the Child. The four Geneva Conventions are:

* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
* Geneva Convention Relative to the Treatment of Prisoners of War;
* Geneva Convention Relative to the Protection of Civilian Person in Time of War.

Geneva Protocol I of 1977 extends and makes more specific the protections of the 1949 Geneva Conventions to international armed conflict, specifically those which occur in the context of colonial occupation, alien domination, and racist regimes. Geneva Protocol II of 1977 is a far less comprehensive treaty provision which applies to certain non-international armed conflicts reaching a certain (and undefined) threshold of intensity.

* Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I);
* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

Many provisions of the four Geneva Conventions, the two Protocols, and the Hague Conventions of 1899 and 1907 are broadly accepted as customary international humanitarian law applicable to all countries. There exists significant debate about the extent to which humanitarian law applies specifically to emergency situations; international human rights law permits significant derogations during these same periods.

It is generally agreed that inconsistencies and gaps exist between the protections afforded by various human rights and humanitarian law instruments, as well as by national and local laws. There is no doubt that these gaps in protection can leave the individual vulnerable by exposing a lack of accountability for violations experienced or demonstrating a lacuna in legal coverage. Humanitarian law is premised largely on the existence of a particular type of conflict, from which certain protections then flow for the individual, whether combatant or civilian. The level of protection varies dependent on the type of conflict experienced (usually linked to whether the conflict is international or non-international). A clear challenge to humanitarian norms in the twentieth century is to close these gaps and ensure equal and full protection for all individuals regardless what the legal status of the conflict in question may be. Humanitarian law is considered more fully in chapters 7, 8, and 13, infra.

3. Customary International Law

International custom is a source of international law where it is evidence of a general practice accepted as law. Only widespread, rather than unanimous, acquiescence is needed, which may occur in a short period of time. Ian Brownlie,

Principles of Public International law 6-7 (3d ed. 1979); Restatement § 102, comment b (1987) ("there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.") Often there is disagreement as to precisely when a rule has ripened into a norm, but consensus that a norm in fact has evolved does emerge. For example, the U.S. Court of Appeals in Filartiga v. Peña-Irala, 630 F.2d 876 (2d. Cir. 1980), determined that the right to be free from torture had become customary international law. There has been, however, an increasingly lively debate ignited by the administration of George W. Bush as to whether instant custom can be created by states faced with situations of crisis, when they wish to circumvent or revise existing international rules.

Governmental practice in negotiating and approving international instruments has been accorded an increasingly important role in the development of customary law. In the human rights field widespread acceptance of treaties, declarations, resolutions, and other instruments has become a key source of evidence of state practice as well as opinio juris (the accompanying sense of legal obligation) in creating binding law. Article 38(1)(c) of the Statute of the International Court of Justice, which directs the Court to apply "the general principles of law recognized by civilized nations," may refer not just to the provisions of national law but to states' acceptance of legal principles in international instruments.

A customary norm binds all governments, including those which have not recognized the norm, so long as they have not expressly and persistently objected to its development. Restatement § 102, comment d; Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14 (Judgment of June 27); North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 41-44 (1969).

The Restatement lists several prohibitions as giving rise to customary international law: (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; or (g) consistent patterns of gross violations of internationally recognized human rights.

A jus cogens norm is a peremptory rule of international law that prevails over any conflicting international rule or agreement. It permits no derogation, and can be modified only by a subsequent international law norm of the same character.

The concept of jus cogens is of relatively recent origin, although it is incorporated in the Vienna Convention on the Law of Treaties. Its content is disputed, and thus far, only the U.N. Charter's principles prohibiting the use of force are generally agreed to be jus cogens. The International Court of Justice appeared to find that a peremptory norm of international law establishes the inviolability of envoys and

embassies in its judgment concerning Iranian treatment of the U.S. diplomatic and consular staff in Tehran. Commentators have suggested that prohibitions against genocide, slavery, racial discrimination, and other gross human rights violations also have acquired jus cogens status.

4. Regional Organizations and Law-Making

During the period in which U.N. mechanisms for implementing human rights were being created regional human rights' structures were also being agreed in Europe and the Americas. European states, in particular, fresh from the horrors of the Second World War gave particular priority to the creation of human rights enforcement mechanisms that would meaningfully protect ordinary individuals in times of war and peace. The African human rights system was slower to consolidate but at this juncture it is now moving to similar status and enforcement capacity as its regional counterparts. The rights protected by these structures are similar to those of the International Bill of Human Rights, but each of the structures has developed unique approaches to seeking assurance that the rights are put into practice.

The Organization for Security and Cooperation in Europe, which arose from the 1975 Helsinki Accords and follow-up efforts, now has 53 members from the U.S. and Canada on the West to Russia and Kazakhstan in the East. It has created the office of High Commissioner for Minorities and has begun to employ a staff in Prague and Warsaw to encourage democracy and deal with ethnic strife and other serious human rights problems in Central Europe. Relatively little has been done, however, to establish a regional human rights system in Asia. Regional systems are discussed generally in chapters 11 and 12, infra.

a. European System

The European system is the most developed of the regional human rights structures. In 1950 the Council of Europe promulgated the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953. Following the entry into force of Protocol No. 11 on November 1, 1998, and a transitional period for pending cases, the European Convention is implemented by a single permanent body, the European Court of Human Rights. (Formerly, two part-time bodies, the European Commission of Human Rights and the European Court of Human Rights, had enforcement roles). Review of the effectiveness of the Court's structure remains ongoing, and further structural reform is likely. States parties to the Convention may refer alleged violations by other States parties to the Court, though the primary enforcement mechanism is activated through the applications brought by individuals. The Council of Europe has promulgated 14 protocols to expand the protections offered under the European Convention, by adding or redefining rights or by restructuring the implementation system. The European system has compiled impressive jurisprudence and has

achieved a high degree of compliance with its decisions. Importantly the European Convention has been incorporated into the legal systems of all ratifying states in some form, thereby augmenting the enforcement capacity of the treaty.

In addition to the European Convention, there are several other European human rights treaties, including the European Social Charter, the Additional Protocol to the European Social Charter, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. There also are several relevant European institutions with a human rights role, including the European Committee for the Prevention of Torture.

Another parallel institution with growing treaty and institutional competencies in human rights protections is the European Union. Historically, the European Union articulated its commitments to human rights and fundamental freedoms most strongly though social rights protections, and through the jurisprudence of the European Court of Justice based in Brussels. The European Union's Charter on Fundamental Rights is a document containing human rights provisions "solemnly proclaimed" by the European Parliament, the Council of the European Union, and the European Commission in December 2000. The Charter does not have the status of community law but clearly draws together all the human rights norms contained in the treaties of the European Union. The proposed European Constitution contains a version of the Charter. The Constitution proposes that the European Union should accede to the European Convention on Human Rights, thereby enabling the European Court of Justice to render decisions based on the Convention. The Council of Europe has a broader membership than the European Union (EU) (40 states as compared to 15, including many from Central and Eastern Europe). For more on the European system, see chapter 12, infra.

b. Inter-American System

The Inter-American system for protecting human rights has two principal legal sources: the American Declaration of the Rights and Duties of Man, an instrument adopted by the Organization of American States (OAS) along with its Charter in 1948, and the American Convention on Human Rights, adopted by the OAS in 1969, which came into force in 1978. The OAS created the Inter-American Commission on Human Rights in 1959, but until 1970 the Commission derived its existence only from OAS General Assembly resolutions of uncertain legal force. In 1970, revisions in the OAS Charter transformed the Inter-American Commission into one of the principal organs of the OAS. The Inter-American Commission and the Inter-American Court of Human Rights are the bodies charged with the implementation of the American Convention.

The Commission's main functions are to promote respect for and to defend human rights. In fulfilling its functions, the Inter-American Commission on Human Rights

has done impressive fact-finding work on grave country situations. It has issued many individual decisions, but has had difficulty in achieving compliance.

The Commission initiates country studies if it receives a large number of complaints charging a particular government with serious and widespread human rights violations. The Commission prepared its first country reports on Cuba, Haiti, and the Dominican Republic in the 1960s. Although the governments of Cuba and Haiti refused to admit the Commission into their countries, the Dominican Republic allowed the Commission to visit and thus became the subject of the Commission's first on-site investigation. Since then, the Commission has conducted on-site investigations in a number of other OAS countries, including Argentina, Bolivia, Chile, Colombia, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Suriname, and Uruguay.

The Commission can also receive individual petitions alleging human rights violations by OAS member states, whether or not the state in question has ratified the American Convention. The Commission determines admissibility, engages in fact-finding, attempts to arrange friendly settlements and, if necessary, decides whether a violation of the American Convention or the American Declaration has been committed. The Commission may also refer cases involving State parties to the American Convention to the Inter-American Court of Human Rights. A State party to the Convention must specifically recognize the Court's competence to hear contentious cases in order to be subject to the Court's jurisdiction. The Court also exercises a broadly defined advisory jurisdiction, and has issued significant advisory opinions concerning the meaning of the American Convention and other human rights instruments. In addition to the OAS Charter, the American Declaration, and the American Convention, the OAS has promulgated several other treaties and protocols relating to economic, social and cultural rights; the death penalty, disappearances, torture, and violence against women. For more on the Inter-American system, see chapter 11, infra.

c. African Union

The African Union (AU) is the successor organization to the Organization for African Unity (OAU). The OAU was originally formed to rid the African continent of the last vestiges of colonialism, but also took steps to promote human rights. The Charter of the OAU, adopted in 1963, reaffirms adherence to the principles of the U.N. Charter and the Universal Declaration of Human Rights. In 1981 the OAU adopted its principal human rights treaty, the African Charter on Human and Peoples' Rights. The African Charter entered into force in 1986 and has currently been ratified by all 53 members of the AU. In 2002 the AU was formed. Among other goals the AU aims "to encourage internal cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human rights [and] to promote and protect human and peoples' rights in accordance with the

African Charter on Human and People's Rights and other relevant human rights instruments."

The African Commission on Human and Peoples' Rights has eleven members who serve in their individual capacity. Under Article 45 of the AU Charter the Commission's mandate includes taking measures to promote human rights such as researching specific situations, on-site missions, organizing seminars and conferences, giving recommendations to states, setting out human rights principles, and cooperating with other international organizations. It monitors states' compliance through review of reports that are required every two years. It can also receive communications from states, individuals, and NGOs. Unfortunately, the process of state reporting has not been effective in part because states have been very tardy in submitting reports to the Commission after ratifying the Charter.

The Protocol to the African Charter for the establishment of the African Court on Human and Peoples' Rights came into force on January 25, 2004. The Protocol calls for a Court of eleven judges who are nationals of member States of the AU. The African Court is expected to hear cases brought by AU member States and African intergovernmental organizations, and receive requests from nongovernmental organizations. Individuals can bring a case only with the agreement of the relevant government or through the African Commission for Human and Peoples' Rights.

5. International Criminal Law

The idea of having an international criminal jurisdiction to try perpetrators of war crimes first arose in the aftermath of the First World War. In 1919, proposals were made by the "Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties" for an international tribunal to be established in order to try the architects of the war for crimes. Similarly, provision was made in the Treaty of Versailles for the punishment of leading figures deemed to be responsible for the war, including prosecution of Kaiser Wilhelm II for the "supreme offence against international morality and the sanctity of treaties." Although the Versailles Treaty also allowed for the prosecution of German military personnel in either an international court of the court of the Allies, only 12 were ever indicted and brought to trial, and the trials were before a German court.

In 1920 the "Advisory Committee of Jurists" was established to prepare a proposal for the Permanent Court of International Justice. The Committee recommended that the Court to should also be competent to try crimes "constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations. This proposal was, however, rejected as premature by the Assembly of the League of Nations, mainly due to the high premium placed on national sovereignty at the time.

The idea of an international criminal court was then largely forgotten, save for the attempts by the International Law Association and the Inter-Parliamentary Union to produce draft codes in the 1920s. The subject did not come back into prominence until the end of the Second World War and the establishment of the Military Tribunals at Nuremberg and Tokyo.

In November 1947 the General Assembly of the United Nations requested the International Law Commission (ILC) to formulate the principles recognized in the London Charter in order to prepare a draft code of offenses against the peace and security of mankind. Simultaneously a draft Statute for an international criminal court was being prepared by the Commission, the first report on which was presented in 1950, with a proposal being presented in 1954.

A special committee of the General Assembly was also formed in 1951 in order to consider the idea of a permanent international criminal court. The report of this committee was presented in 1952, but political circumstances dictated that it had little chance of success. Resistance came mainly from the major powers and was attributed to the divisions of the Cold War and the effect they had on the functioning of the U.N. Formulation of the definition of aggression had been entrusted to the Special Committee on the Question of Defining Aggression, which was formed and reformed four times between 1952 and 1974. The 1974 Code was substantially revised in 1991 and sent to member states for comment. A non-governmental committee of experts also produced a draft statute in 1990.

The work of the ILC on the Draft Code did not necessarily involve an international dimension until 1989, when Trinidad & Tobago requested that the U.N. consider establishing an international court to deal with drug trafficking. The draft Statute was finished in 1994, with the final Code of Crimes Against the Peace and Security of Mankind being adopted at the 1996 session.

While the drafting and re-drafting of the Code and Statute were continuing, the Security Council had found itself faced with large scale breaches of the laws of war and crimes against humanity happening both in the territories of the former Yugoslavia and in Rwanda. Under the authority of its Chapter VII powers, the Security Council established ad hoc international criminal tribunals to bring to justice those persons who were responsible for the worst atrocities. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established pursuant to Security Council resolution 827 of 25 May 1993, while the International Criminal Tribunal for Rwanda (ICTR) was established a year later, pursuant to Security Council resolution 955 of 8 November 1994.

The experience of the Tribunals did, however, give added impetus to calls for a permanent international criminal court. In addition to increasing the moral legitimacy of international prosecutions, the Tribunals demonstrated how criminal law could be used in practice to deal with war crimes and crimes against humanity.

As with Nuremberg, the legacy of the Tribunals has been in the development of the norms of international law which has facilitated the creation of a permanent international criminal court, despite criticisms leveled against the institutions themselves.

In 1994, using the draft report of the ILC as a basis, the General Assembly convened an ad hoc Commission on the Establishment of an International Criminal Court, and in 1995 the Preparatory Commission (PrepCom) of the ICC was established. The PrepCom report was presented to the 51st Session of the General Assembly in October 1996, and to the Diplomatic Conference convened in Rome in June 1998.

Most contentious issues had been resolved prior to the Conference, including the question of complementarity, whereby the PrepCom had agreed that the ICC would not have automatic primacy over national courts. It was at the Rome Conference that the distinction between the Statute and the Code was erased, resulting in a comprehensive list of crimes to come within the jurisdiction of the court being included in the text of the statute.

The Statute required 60 ratifications before it would enter into force. This number was reached on 11 April 2002, with the Statute entering into force on 1 July 2002. The Assembly of States Parties convened for the first session in September 2002 and formally adopted the elements of crimes and the rules of procedure and evidence. The judges were elected in February 2003.

6. Domestic Implementation of Human Rights

From the perspective of impact on the individual, the most important means of implementing international law is through national legislation, courts, and administrative agencies. In the United States, the best example of a statute that incorporates international human rights law is the Refugee Act of 1980, codified in the Immigration and Nationality Act § 101(a)(42), the definition of "refugee" from the Convention and Protocol relating to Refugees. In interpreting § 101(a)(42), the Supreme Court in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), referred not only to its origins in the Refugee Convention and Protocol, but also to the authoritative interpretation of those treaty provisions in the Office of the U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook in turn uses the Universal Declaration and the two Human Rights Covenants as interpretive tools for defining "refugee," both in regard to the meaning of "persecution" and also as to the five grounds for asylum or refugee status. Hence, U.S. law has incorporated a significant body of international law into national law. See chapters 13-15, infra. Similarly, Section 502B of the Foreign Assistance Act, adopted as a standard for limiting U.S. military aid the definition of a gross and

consistent violation of human rights from Economic and Social Council resolution 1503. See chapters 6, 10, infra.

Even if there is no statute or regulation that specifically incorporates international human rights law into domestic law, courts in many countries have directly incorporated international law in their national legal structures. This approach is particularly used by European states with respect to the European Convention on Human Rights. This direct incorporation approach, known as the monist approach, accepts international law, including treaty obligations, as an integral part of domestic law. Where treaties and custom rank in the hierarchy of legal norms in monist states varies, however (for example, in some states treaties are superior to contrary provisions of the national constitution, while in others ordinary legislation adopted after ratification of the treaty will have supremacy). Other countries have adopted the dualist approach, under which treaties, and sometimes customary law, must be implemented by national legislation. The United Kingdom generally follows the dualist approach, in part to accommodate its constitutional principle of parliamentary supremacy with the unilateral authority of the executive to enter into treaties. The U.K. following considerable delay, adopted implementing legislation for the European Convention on Human Rights, though the Human Rights Act 1998.

The United States has accepted certain aspects of both the monist and dualist approaches to international law and, therefore, to international human rights law. Under the U.S. Constitution "treaties made or which shall be made under the authority of the United States" constitute "the supreme law of the land" and "the judges in every State shall be bound thereby, anything in the Constitution or law of any State to the contrary notwithstanding." U.S. Supreme Court decisions, particularly during the early 19th century, considered international customary law and some treaties as integral parts of national law. In Foster v. Neilson, the Supreme Court distinguished between treaties which are self-executing and those which are not:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule of the Court.

Over the years, courts have used, and commentators have advocated, various standards for determining the extent to which a treaty ought to be considered self-executing. For example, in the much cited opinion of Foster v. Neilson, Chief Justice Marshall looked principally at the language of a bilateral treaty in determining it was not sufficiently definite and compulsory to be self-executing.

Only four years later, however, Marshall reversed his conclusion as to the same bilateral treaty, based upon a review of the history of negotiations indicating that the parties apparently intended the treaty to be self-executing.

In regard to multilateral treaties, including almost all international human rights treaties, it is doubtful whether the intent of the parties manifested, either at drafting or in ratification, should serve as the appropriate standard of evaluation. Professor Stefan Riesenfeld has suggested, instead, that a multilateral treaty ought to be deemed self-executing if it "(a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision." Exactly what domestic legal effect is intended may also figure in the determination. For example, a treaty that does not create a private civil right of action might be raised defensively in a criminal proceeding instituted by national officials.

Most, but not all of the human rights treaties ratified by the United States have been accompanied by a declaration stating that it considers the substantive provisions of those treaties not to be self-executing. In introducing such declarations, however, the Legal Adviser of the State Department explained to the Senate that the declarations applied only to efforts by courts to imply a private cause of action from treaty provisions. Otherwise, it is the obligation of the courts to determine the applicability of treaty provisions in U.S. law.

In addition to legislation specifically incorporating international law into domestic law (as has been done with the Refugee Protocol) and through the direct application of treaties in domestic law as self-executing, certain legislation may establish jurisdiction in national courts for the implementation of norms of international and customary law. Examples of that approach can be found in Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1995), and other cases brought under the Alien Tort Claims Act, 28 U.S.C. § 1350. In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Supreme Court identified prohibitions on torture, piracy, and slave trading as examples of universal and obligatory norms of international law and concluded that judicial recognition of a private cause of action for their violation was warranted under 28 U.S.C. § 1350. International law norms and the advocacy of international civil society can also exert a powerful influence of judges in domestic contexts, framing the way in which they view a domestic issue with human rights dimensions. Examples of this approach include Roper v. Simmons, 543 U.S. 551 (2005), in which the U.S. Supreme Court interpreted the Eighth Amendment's prohibition of cruel and unusual punishment to forbid the executions of juvenile. The Court referred to various treaties against the execution of juvenile offenders in support of its interpretations of the Eighth Amendment.

International law also exerts a powerful influence on the content of domestic law through an interpretive principle of long standing: that domestic legislation should never be interpreted to bring the U.S. into violation of its international obligations unless no other construction of the legislation is possible. Similarly, U.S. courts would be reluctant to interpret U.S. constitutional protections for such rights as religious freedom and due process in a way less protective of human rights than are guaranteed around the world through international human rights law.

Accordingly, the most important means of implementing and thus developing international human rights law is through its application in national and local law. International human rights law can be applied in four ways: (1) by the enactment of legislation specifically incorporating international law into domestic law; (2) through the direct application of treaties in domestic law as self-executing; (3) through the interpretation and application of existing legislative or constitutional provisions; and (4) through the recognition of customary international law as part of national law. These matters are explored more fully in chapters 13-15, infra.

C. CONCLUSION

The years since World War II have brought nearly unanimous recognition of individual rights as an appropriate subject of international concern. The U.N. responded by adopting the International Bill of Human Rights, by promulgating scores of other multilateral human rights instruments, and by developing procedures for human rights implementation and enforcement.

In addition to the human rights machinery of the U.N., regional organizations have promulgated human rights treaties, incorporating many of the norms found in U.N. instruments, and have developed regional mechanisms to enforce the treaties. Non-governmental organizations dedicated to protecting human rights have increased in number and sophistication. These organizations have contributed to the drafting of human rights standards, have assisted intergovernmental organizations with their investigations, and have intervened directly to protect the victims of human rights abuses.

Earlier in this century, the term "human rights" was defined as those rights guaranteed by the International Bill of Rights (comprised of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights with its two Optional Protocols). Over the years, however, international and regional human rights instruments have made more explicit the rights set forth in the International Bill of Rights. "Human rights" are now defined with far more detail and specificity. International human rights law is, therefore, more protective of vulnerable individuals and groups, including children, racial minorities, indigenous groups, refugees, displaced persons, and women. In addition, in some cases, human rights instruments have expanded the definition by elaborating new rights.

International humanitarian law is composed of two streams of applicable legal norms. The first (often called Hague Law) regulates the rights and duties of combatants in situations of armed conflict. The second can be defined as the international law of human rights that is applicable in situations of international armed conflict, and, to a more limited extent, to internal armed conflict, that protects civilians, or those made vulnerable by violence and conflict. International humanitarian law has a substantial intersection with human rights law, and there is a lively and ongoing debate about the parallel application of these two sets of norms in situations of armed conflict. Growing from customary international law and treaties adopted at the Hague Peace Conferences of 1899 and 1907, international humanitarian law has its principal sources in the four Geneva Conventions of 1949 and the two Protocols additional to these Conventions. The definition of war crimes, the laws and customs of war, and crimes against humanity (which are frequently committed during armed conflict) has been clarified by the statutes and jurisprudence of ad hoc and permanent international criminal tribunals and by prosecutions of perpetrators both at the international and national levels. Notably as a result of the drafting of the International Criminal Court Statute there is no longer a need for a crime against humanity to be committed in the context of an armed conflict to ensure prosecution and enforcement.

While most human rights are perceived as rights vis à vis the government, human rights norms may also apply to non-state actors (such as armed opposition groups, businesses, and individuals who perpetrate domestic violence) committing human rights abuses. The campaign to abolish slavery, one of the oldest efforts to protect human rights, was an attempt to regulate the harmful conduct of private actors through international agreement. By Common Article 3 of the 1949 Geneva Conventions and their 1977 Protocols, international humanitarian law can apply to armed opposition groups where the State Party to the conflict in question recognizes this status. Further, a series of treaties exist relating to hijackers, kidnapers of diplomats, and others similarly situated. International human rights norms may also address, though a mechanism known as horizontal application, the responsibility of governments to restrain individuals from committing human rights abuses in the areas of domestic violence, female genital mutilation, etc. The failure of governments to control such conduct may give rise to government responsibility as well as an entitlement to international refugee protection.

In the contemporary context it is also important to note that a number of multilateral treaties concerning the regulation of terrorism have a human rights aspect. The major terrorism suppression treaties are multilateral treaties which range from agreements sweeping in scope to those with much more specific aims. Some of the earliest agreements include the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention 1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention 1970), the International Convention on the Taking of Hostages

(Hostages Convention 1979), and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973). More recent treaties include the United Nations Convention for the Suppression of Terrorist Bombings (1998) and the United Nations Convention for the Suppression of the Financing of Terrorism (1999). The impact of the war on terrorism on the protection of human rights' norms will be further explored in chapter 12.

In sum, currently the term "human rights" should be viewed as incorporating the rights traditionally defined by the International Bill of Rights and subsequent, more particularized norms at the universal and regional levels, customary international law as well as the rights guaranteed by international humanitarian law and refugee law.

The worldwide recognition of human rights law should lead to more widespread acceptance of human rights and, in turn, to increased protection of rights. The remainder of this book deals with the various ways international human rights law is implemented by governments (courts, administrative agencies, and legislatures), intergovernmental organizations, non-governmental organizations, and individuals.

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