Sir Nigel Rodley had agreed to contribute to this volume before his untimely death in 2017. With the kind permission of Dr Rodley, his contribution to the previous edition has been reproduced as a tribute to him. Sir Nigel was a founder of the contemporary system of international human rights law, whose wisdom and guidance is greatly missed in a world which much needs it. The chapter has been lightly edited to reflect recent factual developments, but the ideas and views expressed remain his own.

Summary

The human rights idea developed as a non-clerical counterweight to the increasing power of the emerging modern State, establishing limits to the imposition of State power over individuals. Despite nineteenth-century concern with slavery, especially the slave trade, human rights did not become a full-fledged issue of international
concern until the advent of the UN Charter, which made the advancement of human rights a purpose of the UN. The Charter paved the way for the adoption of the International Bill of Human Rights which framed human rights as an issue of general international law, as well as giving treaty form to specific obligations and providing machinery for monitoring compliance with the treaties’ provisions. The main categories of human rights—civil and political/ economic and social—are addressed by international law. The former, classic, human rights are mainly about the freedom and autonomy of the individual within the larger society, whereas economic and social rights typically require State action to guarantee them. However, to an extent, civil and political rights require action by the State to protect people from the actions of others in society (including corporations). The bearers of human rights remain individuals and the duty to safeguard them remains with the State. Human rights are accepted, at least as a matter of law, to represent universal obligations; they are not the privilege of inhabitants of States with a ‘Western’ culture. Civil and political rights include both intellectual freedom (conscience, expression, association, assembly) and physical freedom (liberty and security of person, movement, prohibition of slavery). Human dignity, an underlying principle in the International Bill of Human Rights, is the main value protecting physical integrity and life. From the 1960s a substantial network of treaty-based and UN-Charter-based machinery developed to lend international protection for internationally recognized human rights.

I. Introduction

The original notion of human rights referred to those rights that the individual might assert against the organized power of the State (Freeman, 2011, pp 15–36). It is a notion that grew in the West in the seventeenth and eighteenth centuries, at a time when feudalism was being replaced by mercantilism and religion had begun to lose its position as a counterweight to royal power that was giving way to the emergent, industrializing State. Indeed, it was the State that claimed a monopoly of the use of physical force with a view to protecting people from each other (Weber, 1919). It was the Leviathan that would tame the dangerous, predatory jungle. But it too required taming and from Locke to Rousseau and Thomas Paine, from Magna Carta and the English Bill of Rights to the Virginia Bill of Rights and the Déclaration des droits de l’homme et du citoyen, the idea of an individual human domaine réservé was born and consecrated. The human gift of conscience was now not only of equal worth and respect as the duty to obey the sovereign, but also, in some limited but basic respect, superior to that duty, whether the sovereign be hereditary or institutional/constitutional. The social contract, by which each individual ceded some of his or her naturally endowed autonomy to ensure the meeting of shared needs, did not
require the total surrender of that autonomy. Human rights marked the boundary of the cession. The individual retained sovereignty too.

At this point we are dealing with a philosophical construct. For it to be materialized, it had to be translated into law and would sometimes assume constitutional form. It took time, but nowadays hardly a constitution exists that does not recognize human rights. The international human rights project was mainly a post-World War II development, but so was the coming into existence of a majority of the world’s States (principally through the process of decolonization). As a result, many constitutional bills of rights owe much to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights (see the next section). It is the legal rather than the philosophical manifestation of human rights that is the focus of this chapter.

A brief section on the historical origins of international human rights law is followed by a discussion of the basis of obligation in the field. Then there is a consideration of various modes of human rights classification that have been put forward and in which ‘core’ economic and social rights are identified. A summary treatment of the almost outdated political discourse as to whether human rights are truly universal or culturally specific precedes a more extensive elaboration of the major substantive principles of civil and political rights and the values underlying them. The main universal machinery for monitoring or implementing human rights, both treaty-based and UN-Charter-based, as well as regional machinery, is then reviewed.

II. Historical origins of international human rights law (IHRL)

It is not surprising that human rights entered the domain of international law only relatively late and slowly.

International law was and remains a system of law designed to make inter-State coexistence as smooth as possible: its function is to provide the norms and means to attenuate transnational friction. Like any legal system, its overall goal has been the avoidance and resolution of conflict, the pursuit of peace. During most of its life, international law was predicated on a notion of the sovereign independence of States that excluded any consideration of the ‘internal affairs’ of States, which were seen as matters of domestic jurisdiction. After all, international law was the normative expression of international relations, just as much as national law can be said to be the normative expression of any national political dispensation. According to perhaps the most influential school, international relations are about the pursuit of the national interest (the maximization of power) in economic, trade, territorial, political, military areas, with international law as a means of securing a non-violent balance of the aggregate of national interests. Indeed, factoring human rights into the mix of material interests that are the traditional content of
international relations would, it has been asserted, make matters of principle (human rights) merely another commodity to be traded in the market of national interests.\(^{11}\)

Human rights are inherently intra-State matters and that means that in the international context they are capable of becoming additional sources of friction between States, rather than balm, thus multiplying the challenge to the international legal system. They seemed to be a cuckoo in the nest of the doves of peace, even if the hawks of war had little affinity for them either. To vary the metaphor, human rights may well have been felt by diplomats and international civil servants to be grit thrown into the oil designed to lubricate the cogs of the machinery of international discourse.

Nevertheless, as early as the nineteenth century, one human rights issue, slavery, entered the domain of international law. Starting with Britain in 1807, the major European slave-owning and slave-trading nations abandoned the practice and then worked to strangle other States’ slave-trading practices.\(^{12}\) By the time of the 1926 Slavery Convention, chattel slavery and its associated trade were largely historical relics,\(^ {13}\) but until the early twentieth century, action was focused more on the international trade in slaves than on the practice of slavery. Escaping slaves might find freedom in States that did not recognize or no longer recognized the status of slaves, but the slavery-free were not insisting that international law required that the status of slavery be abolished in those jurisdictions that retained it.

The advent of the League of Nations after the First World War brought further developments. Recognizing that the denial of national minority aspirations had been a factor (p. 777) leading to the war—the assassination by Serb nationalists of the Archduke Franz Ferdinand of Austria is generally considered the spark that set fire to the European tinder box—the League presided over the creation of a series of treaties concerned with minorities, aimed at avoiding a repetition of the problem. Of course, it was not all minorities that would be protected, only those in the Balkans and eastern Europe, so this was a limited human rights incursion into international law.\(^ {14}\)

Also limited was the inclusion of human rights clauses into the mandates given by the League to some colonial powers to administer the former colonies of the defeated powers, notably the Germans. This was no general project of incorporating human rights into the administration of colonies as a whole, still less one aimed at decolonization, but it must have been perceived as a signal that those subjected to colonialism deserved to have their human rights respected.\(^ {15}\)

The most significant post-World War I development in the field of human rights was the creation in 1919 of the International Labour Organization (ILO). Here was established an organization designed to promote and protect a certain category of rights—freedom of association—at least as
regards the rights of trade unionists. This development too was a
response to political events, notably the 1917 Russian Revolution, which
led to the withdrawal of Russia from the global conflict of World War I.
The ILO was effectively an enlightened response aimed at showing
workers that their interests could be met by something less radical than
communist revolution. With its imaginative tri-partite structure (States,
trade union organizations, and employers’ organizations) and its serious
machinery for addressing allegations of violations of workers’ unionists’
rights, particularly the Committee on Freedom of Association, it was a
real example of the possibility of the international protection of human
rights (Sweepton, 2013, ch 20).

A. Charter of the UN

The foundations of modern international human rights law are to be
found in the Charter of the United Nations. One of the goals of the UN
laid down in its Article 1 is the achievement of ‘international cooperation
in ... promoting and encouraging respect for human rights and
fundamental freedoms for all without distinction as to race, sex, language
or religion’. It was far from inevitable that human rights would figure
prominently, if at all, in what was to become the nearest thing to a world
constitution. It took intense lobbying by what we now call civil society,
especially American non-governmental organizations (NGOs). The
argument that prevailed was that a paradigm-changing lesson had to be
learned from the Second World War (Lauren, 2011, chs 5 and 6). Nazi
Germany’s genocide of Jews and Roma and other crimes against
humanity, and its territorial aggressiveness, were seen as part of the
same phenomenon. A ruthless, lawless regime that could commit carnage
in parts of its own population and brutally repress any opposition to it
was seen to be part and parcel of a project of violent deployment of force
internationally. The frontier between the previous hermetically sealed
realms of the inter-State and the intra-State was now seen to be porous.
Once in the Charter, human rights had, in one leap, become a matter of
international concern and, thus, of international legal relevance.

III. The basis of obligation in international
human rights law

The UN Charter language of ‘cooperation’ for ‘promoting and
encouraging respect’ for human rights was not exactly a demand for the
immediate observance of human rights. However, later provisions came
closer to this. Thus, Article 55 of the Charter requires that, ‘[w]ith a view
to the creation of conditions of stability and well-being which are
necessary for peaceful and friendly relations among nations,’ the UN
‘shall promote ... universal respect for and observance of, human rights
for all without distinction as to race, sex, language or religion.’ Here we
at least had the goal of securing respect for, and observance of, human
rights on a universal basis. This still fell short of imposing direct human
rights obligations on States, but Article 56 did address this point: ‘[a]ll
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.’ So, States had to work not only jointly but each on their own to achieve promotion of respect for, and observance of, human rights.

In the early decades of the UN, there was disagreement as to whether this language should be read as an exhortation or a direct obligation (Schwelb, 1972). By 1971, the answer for the International Court of Justice (ICJ) was that the provisions involved a directly binding obligation and that South Africa had, by applying its apartheid system in South-West Africa under the mandate it was given by the League of Nations, violated these provisions. It might still have been possible to interpret this decision as being restricted to the obligation to respect human rights ‘without distinction as to race’ and so on (Humphrey, 1979, p 36), but if so, the ICJ certainly put paid to that notion in the later Teheran Hostages case, where it affirmed:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.

The reference to the Universal Declaration of Human Rights (UDHR) is important for two reasons: first, the UN Charter itself provided no elaboration of what was meant by the term ‘human rights and fundamental freedoms’; second, the UDHR was, as will be seen, contained in a resolution of the General Assembly and so not per se binding.

A. The international bill of human rights

The first task of the UN Commission on Human Rights, established pursuant to Article 68 of the Charter, was the drafting of an International Bill of Human Rights that would consist, first, of a declaration of human rights principles (this would become the UDHR), followed by obligations consecrated in treaty form. The purpose of the treaties would be both to give clear legal force and more precision to the UDHR and to provide machinery for monitoring the implementation of the substantive provisions. The latter will be returned to in Section VII.

To the extent that the eventual treaties were perceived to be needed, not only for the creation of monitoring procedures but also for legal specificity, did that mean that the UDHR was devoid of force? The matter was controversial from the beginning. There were those who held that it had no legal force. Under Article 14 of the Charter, the General Assembly had only the power to make recommendations; it was not intended to be a world legislature. Moreover, by its very terms, the UDHR purported to be
no more than a ‘common standard of achievement for all peoples and all nations’.

On the other side, whatever the legal status of the UDHR as such, it contained the catalogue of human rights and fundamental freedoms that were referred to by UN Charter articles on human rights, especially Articles 1, 55, and 56. So, to the extent that these provisions contained binding obligations, it was to the UDHR that one would have to look to discover their content (de Schutter, 2012, p 39).

The arguments began to be finalized by the time of the 1968 UN International Conference on Human Rights which adopted the Proclamation of Teheran. According to paragraph 2 of that Proclamation, the UDHR ‘states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of members of the human family and constitutes an obligation for members of the international community’. A quarter of a century later, a World Conference on Human Rights would declare: ‘Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments.’ From that point on one rarely heard a challenge to the idea that States had human rights obligations other than by virtue of human rights treaties. By the time of the UN Millennium Declaration in 2000, the General Assembly was able to resolve to ‘respect fully and uphold the Universal Declaration of Human Rights’ and in 2005 the World Summit Conference could proclaim:

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\text{We recommit ourselves to protect and promote human rights, the rule of law and democracy, and recognize that they are interlinked and mutually reinforcing and that they constitute together universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations system to promote human rights and fundamental freedoms.}^{23}
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B. General international law

Because of the quasi-constitutional nature of the UN Charter, it would be misleading to conceive of the human rights obligations it contains as merely themselves treaty obligations. The better approach is to understand them in the same way as the State obligations on the use of force, that is to say, as norms of general or universal international law (Charney, 1993). They are norms of customary international law, generally binding on all States and often rooted in all three major sources of international law, customary international law, treaty law, and general principles of law (see Roberts and Sivakumaran, Ch 4 of this book).

Some of the rules have firmly become rules of \emph{jus cogens} (Bianchi, 2008). After the prohibition of genocide the most evident would be the prohibition of torture that is non-derogable in universal and regional human rights treaties and has been recognized as a rule of \emph{jus cogens} by the ICJ, a body generally cautious about attributing that status
Logic would suggest that the Charter-based exclusion of (implicitly adverse) distinctions based on race, sex, language, or religion would enjoy \textit{jus cogens} status. The prohibition of racial discrimination would certainly seem to fall into the category,\textsuperscript{26} although there is less manifest authority for the proposition as regards discrimination on grounds of language or religion, if only because they have not received the same amount of attention. This cannot be said as regards discrimination on grounds of sex, which, like racial discrimination, has been addressed in widely ratified treaties. So far, the ICJ has not been called upon to express its view.

Not too much should be made of the distinction between a norm of general international law and one of \textit{jus cogens}. The origins of the distinction lie in that between traditional customary international law and \textit{jus cogens}. The point about ordinary rules of international law is that they may not be binding on ‘persistent objectors’, or may be departed from by means of regional custom, or by treaty. It is the latter dimension that \textit{jus cogens} addresses directly: treaties may not depart from rules of \textit{jus cogens}.\textsuperscript{27} In reality, the possibilities of evading or modifying rules of customary international law discussed earlier arise out of the synallagmatic nature of most of the traditional customary international law rules.\textsuperscript{28} International human rights law is by nature non-synallagmatic; its rules are, by definition, \textit{erga omnes}.\textsuperscript{29} It is instructive in this respect to note the great range of UN Human Rights Council ‘special procedures’ which have come to deal with most of the rights contained in the UDHR, in the expectation that all States are bound to respect them. In fact, as will appear later, the area of potential dispute nowadays lies not in whether States are bound to respect most if not all, of the rights contained in the UDHR, but in differences about the scope and nature of those rights. That is to say, there may be some room for interpretation of the obligation implied in the right in question.

C. \textbf{Treaty law}

The advantage of treaties as a source of international legal obligation over other sources is that there is generally no dispute as to the existence of a legal obligation. In principle, the only question to be answered is not whether there is a rule, but only whether the facts in question do or do not conform to the stated rule. After all, the State party to a treaty will be expected to have freely undertaken its obligations as a solemn act of sovereign power. And, as with other fields of international law, treaties in the field of human rights have been widely resorted to.

\textsuperscript{30} The speedy adoption in 1948 of the Genocide Convention was a necessary response to the holocaust of Jews and Roma. It took until 1966 for the International Bill of Human Rights to be completed, by adding to the UDHR (also 1948) the International Covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR), together with the (first) Optional Protocol to the ICCPR. In fact, the
process of adopting the Covenants was so protracted that a subject-specific treaty was adopted a year earlier, namely the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Other subject-specific treaties followed and there are now nine ‘core’ UN human rights treaties.31

Meanwhile, regional treaties came into existence, sometimes preceding the UN treaties, sometimes following them. The most influential and longstanding general ones are the European and American Conventions on Human Rights and the African Charter on Human and Peoples’ Rights. There are also regional subject-specific ones, such as the Inter-American Convention to Prevent and Punish Torture32 and the African Charter on the Rights and Welfare of the Child.

IV. Categories of rights

If the original notion of human rights connoted the limits of governmental power over the individual, and so concerned the rights of the individual against the State, there have been further claims to the title of human rights. A common set of categorizations of such claims, in addition to individual human rights as traditionally understood and commonly denominated civil and political rights (considered later in this chapter), is collective and group rights.33

Collective rights would be those that are needed by, or that pertain to, segments of the population, particularly the most vulnerable, and demand government action. The term ‘economic and social rights’ is typically used to encompass such rights, which consist essentially of expectation of the fulfilment of claims on governments (or society as a whole) to meet basic human needs, such as health, food, shelter, and education. What distinguishes them conceptually is that the centre of gravity of the idea of civil and political rights is individual freedom from government, while that of economic and social rights (p. 782) is the claim for action by governments. What they have in common is that those subject to governmental authority are the rights-bearers and governments are the duty-bearers.

‘Group rights’ are a wholly different species. They are said to inhere not in the individual but in populations. They seem to cover such issues as self-determination, development, a clean and healthy environment, and peace.34 The asserted rights in question may not even be within the power of the State to respect. Rather, at least implicitly, their centre of gravity involves the claims by the State vis-à-vis the international community or even the rights of States against their own populations and the individual constituting the latter.35 Space does not allow for an analysis of the legal existence or content of any of these asserted rights. It is evident that there is nothing in the structure of international law that would prevent such groups having rights, even if at present the amount of discussion and writing about them seems in inverse proportion to any agreed content. The point is that to call them ‘human rights’ is a
misnomer that totally denatures a term that should be limited to denoting the rights of individual human beings in relation to the State.

However, one of them must be addressed, if only because of its juridical pedigree, before we move on, and that is the right of all peoples to self-determination—for is not the right specified as the first article of both the ICESCR and the ICCPR? At first sight that of itself would appear to lay to rest any objection to its existence as a human right. In fact, as is often the case, first sight is misleading, requiring a second look. It is evident from the structure and organization of the Covenants that the right to self-determination is apart from other rights. Each Covenant is divided into five parts. Part I has Article 1 on the right to self-determination standing alone. Part II provides general jurisdictional and obligational articles. Only Part III sets out specific human rights. Part IV deals with monitoring procedures and Part V has the Final Clauses. This structure, separating the right to self-determination from the rights-articulating part by a non-rights-articulating part, compels the conclusion that the right to self-determination is contextual to other rights rather than a self-standing Covenant-protected right. It is neither a civil nor political, nor economic nor social human right.

Similarly, it cannot be ignored that States have adopted a Declaration on the Right to Development that specifically refers to its subject as ‘an inalienable human right’. The provisions of this instrument, most of which use the hortatory ‘should’, are so devoid of specificity or precision as to make their meaning, if any, elusive. The other asserted ‘group rights’ are even more vacuous, making them still more doubtful candidates for the title of ‘rights’, much less ‘human rights’. What follows will therefore focus on civil and political rights, and on economic and social rights, more or less as reflected respectively in the ICCPR and the ICESCR.

(p. 783) A. Civil and political/economic and social

According to the 1993 Vienna Declaration and Programme of Action, all human rights are ‘indivisible and independent and interrelated’. This does not mean that they are indistinguishable. Certainly, the (necessarily exaggerated) paradigm indicated earlier—that civil and political equals freedom from government action, while economic and social equals demand for such action—can be misleading. For example, the ‘freedom from’ idea is often thought of as requiring abstention or negative action, while the ‘demand for’ idea is seen as involving positive action. In reality, much in the civil and political rights domain also requires positive action, for example, a decent system of administration of justice, including a humane penitentiary system, or an effective, clean law enforcement apparatus. Similarly, access to economic and social goods can sometimes be facilitated by State inaction, for instance, by not standing in the way of humanitarian assistance.
However, the similarities should not mask the reality of dissimilarities. The financial cost of a system of decent government capable of respecting the rule of law is surely infrastructural to the whole rights project and so, arguably, prior to the costs of guaranteeing any particular right. Deduct these costs from the ‘price’ of ensuring civil and political rights and not so much remains. And much of what does remain is in the realm of the so-called horizontal obligations of States (considered in Section IV B), whereas the major costs of meeting people’s needs are so central to the economic and social rights project that States have shied away from assuming the same type of legal obligation.

Thus, whereas Article 2 ICCPR pledges States ‘to respect and to ensure’ the rights recognized by the Covenant, the comparable Article 2 ICESCR requires them only ‘to take steps, individually and through international assistance and cooperation ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized’ by the Covenant. Even discounting the muddying of the nature of the duty-bearer (international cooperation is not within the gift of the State party in question), an obligation on a State to ‘take steps’, within ‘available’ resources to achieve rights ‘progressively’ cannot be equated with the peremptory notions of ‘respect and ensure’.

The Committee on Economic, Social and Cultural Rights (see later) has noted that the obligation of non-discrimination is of immediate effect, even though the same obligation would anyway apply to a State party to the ICCPR (Article 26). The same Committee has insisted that there is ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ of the Covenant. So, where ‘a significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education’, the State in question ‘is prima facie failing to discharge its obligations under the Covenant’. 

Ten years later, the Committee, in a General Comment on the Right to Health, affirmed the following core obligations:

- **(a)** To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- **(b)** To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- **(c)** To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- **(d)** To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
To ensure equitable distribution of all health facilities, goods and services.\textsuperscript{42}

It also required States to ‘adopt and implement a national public health strategy and plan of action’.\textsuperscript{43} This peremptory language tracks that of Article 4 of the ICCPR, which makes certain rights in that Covenant non-derogable. There is no comparable language in the ICESCR itself.

Much attention has been given to whether or not economic and social rights are justiciable, in the sense that they are the sorts of subject matter that are suitable for judicial rather than policy decision by legislatures and executives. There is a certain artificiality to the discussion insofar as any polity may grant any functions to its courts. Certainly, at the international level, it will be interesting to follow the work of the Committee on Economic, Social and Cultural Rights under the 2008 Optional Protocol that grants the right of individual petition to it for violations of obligations under the Covenant. The challenge for the Committee will be to identify specific violations on the basis of such unclear obligational requirements.

**B. Vertical and horizontal obligations**

A sub-species of positive obligations is in the domain of ‘horizontal’ obligations of States. If the paradigmatic human rights construct envisages a vertical relationship—the State vis-à-vis the individuals subject to the States’ jurisdiction—there is nevertheless a ‘horizontal’ dimension, in the sense that there is also an expectation that the State will protect individuals from other individuals (or groups or legal entities). This is not the same as saying that individuals can violate the human rights of other individuals. As the Human Rights Committee has affirmed, ICCPR obligations are binding on States and ‘do not, as such, have direct horizontal effect as a matter of international law’.\textsuperscript{44} But, the Committee goes on to state that:

\begin{quote}
the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application by private persons or entities.\textsuperscript{45}
\end{quote}

First, this passage recognizes that, even in the area of civil and political rights, States have positive obligations of protection. This goes beyond the provision of a clean, rule-of-law-respecting system of governance (see earlier). Thus, for example, the right to life and the prohibition of torture require the State to investigate allegations of violations of those provisions and bring perpetrators to justice (especially State officials who have inflicted or acquiesced in the harm in question).\textsuperscript{46} Similarly, States may be in violation of their \textsuperscript{(p. 785)} obligations to ensure such rights as a
result of ‘permitting or failing to take appropriate measures or to exercise
due diligence to prevent, punish, investigate or redress the harm caused
by such acts by private persons or entities’. The attraction of this
approach is that it allows holding the State accountable when it seeks to
use private persons or entities to inflict the harm (or to claim that private
persons or entities are responsible for inflicting the harm); while it may
not be possible to attribute direct responsibility to the State, it will
remain possible to attribute indirect responsibility for failure to discharge
its positive obligations.

The obligation to use ‘due diligence’ to protect against harms is not
restricted to those areas where there may be conceded State
responsibility (for acts that must otherwise have served governmental
interests). The Human Rights Committee frequently reminds
governments, for example, of their obligation to use due diligence to
prevent domestic violence. Here the harm will rarely, if at all, have been
inflicted in pursuit of a governmental interest, but that does not mean
that there is no foundation of responsibility on any State to protect people
from threats to life or limb at the hands of others.

Equally, these positive obligations are not open-ended to the point of
losing the vertical paradigm dimension in favour of the horizontal
dimension to prevent any harm inflicted by one person on another. This is
what is meant by the phrase ‘in so far as [the rights in question] are
amenable to application by private persons or entities’. An evident
example of a right that is so amenable is that offered by the Human
Rights Committee itself: ‘In fields affecting basic aspects of ordinary life,
such as work or housing, individuals are to be protected from
discrimination within the meaning of Article 26.’

C. Rights-holders and duty-bearers

As has been seen, the only conceptually consistent and generally
accepted rights-holders are individuals. States or comparable
collectivities may have rights under international law, but not human
rights. However, there is an extensive discourse, to the point of polemic,
as to whether other entities may be human rights duty-bearers, that is,
bound to respect human rights, failing which they would be considered
human rights violators (Clapham, 2006; Rodley, 2013).

For instance, there is little resistance to the notion that
intergovernmental organizations (IGOs) are capable of violating human
rights. Conceptually, it should be self-evident that, if a State acting alone
can commit a human rights violation, then a group of States pooling their
powers and acting in the same way should be similarly capable of
violating human rights. Indeed, the opposite would be subversive of the
whole project: States would merely have to act collaboratively to relieve
themselves of their human rights obligations. That IGOs were capable of
having rights and obligations under international law has been
acknowledged since the 1949 Reparations Case. Here the ICJ held that an
IGO, the UN, must protect its own personnel and must accordingly have the power to bring a claim against States for harm done by them to such personnel.\textsuperscript{49} As the UN has found itself increasingly involved not only in peacekeeping, but also in peace-enforcement and peacebuilding operations, the UN slowly came to accept that it too would have obligations of a general international humanitarian law and general international human rights law nature.\textsuperscript{50}

The precedent of the inter-State organization having duties and responsibilities hardly serves to justify the claim that (other) non-State actors (NSAs) can and do have human rights obligations. Yet claims are made in respect of various NSAs, including armed opposition groups, organized crime gangs, transnational business enterprises, and even individuals. One cannot look to human rights treaties to clarify the situation, since these only bind the States that become party to them. This drives us to look to customary or general international law for guidance. Here too we have a dearth of authority. It would be plausible to apply the criterion that human rights treaty bodies invoke to establish State responsibility: is the State in effective control?\textsuperscript{51} \textit{Pari passu}, we could ask the same question in respect of the other candidates for potential human rights violation status.

So, it would be consistent at least with the principles of international humanitarian law to consider armed opposition groups (typically called terrorists by the governments in question) as capable of having international human rights law obligations. If such a group has the attributes of a party to an armed conflict, which would normally involve, if not territorial control (as in international armed conflict),\textsuperscript{52} at least similar exclusive de facto control of parts of a population, then it would not do violence to the international human rights law project to consider the group as being required also to respect at least those human rights for which that level of control permits it to incur responsibility. In the absence of such status, then the acts of the group are no more than any government would consider them to be, namely, criminal acts, which the government would be expected to seek to repress. To dignify their perpetrators as anything more than criminal seems to serve no purpose. For international human rights law to pipe up ‘me too’ with the State in question will hardly serve to ameliorate the harms inflicted or offer any redress. Of course, this is without prejudice to the (limited) role of international criminal law as regards crimes against humanity. However, to the extent that the group whose members may have committed crimes against humanity fails to meet the criteria of a party to an armed conflict, it must still have sufficient organizational density and structure to be in a position to meet the threshold test for crimes against humanity, that is, that there be an attack against a civilian population, that the acts be committed on a widespread or systematic basis, and that they be committed pursuant to an organizational policy.\textsuperscript{53} Close as this may come to being a party to an armed conflict within the meaning of international humanitarian law (IHL), it is not clear what the ‘value
added’ would be of calling the groups human rights violators. Certainly, there is little legal authority for the proposition.\textsuperscript{54}

All these arguments apply \textit{a fortiori} as regards ordinary criminal gangs and yet more so for individuals. The most cited latter manifestation would be domestic violence. According to a feminist critique, the traditional human rights paradigm relates to the public sphere and is therefore male-oriented. Apparently this fails to take account of the reality of the millions of women round the world who are kept in the private sphere and out of the public sphere. It is hard to give credence to a critique that would appear to legitimate a situation that inherently violates the rights and power of women to act autonomously and in the public sphere, on terms of equality with men. To the extent that they are denied that right and the State has not exercised due diligence to address that deprivation, this is a matter of State responsibility (see earlier) and should, of course, be vigorously addressed as such.

As to the suggestion that business enterprises, transnational or otherwise, may be considered as bodies having direct human rights responsibilities under international law, it is certainly true that these are sometimes perceived as having more power than governments, at least insofar as the availability or otherwise of their investments and business activity can have major consequences for a State’s economy. However, except perhaps in the area of personnel policy or security measures, their activities pose limited \textit{direct} challenge to human rights. Rather it is the territorial State that is most likely to be the direct violator. Indeed, few States would deny that it is \textit{their} responsibility to protect people from harms committed by business enterprises and thus should exercise the appropriate due diligence to that end. It is certainly the case that the international legal evidence is consistent with that approach.

Thus, in 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights submitted to the Commission on Human Rights (see later) a draft text entitled ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’.\textsuperscript{55} The Norms purported to vest in the corporations and enterprises ‘the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international … law’.\textsuperscript{56} Even though the Norms acknowledged the ‘primary responsibility’ of States to ensure that the corporations and enterprises respect human rights,\textsuperscript{57} the Norms’ acceptance of the principle that international law would target such enterprises directly led to their being abandoned.

Eight years later, the UN Human Rights Council (successor to the Commission, see later) was able to adopt by consensus a new text of ‘Guiding Principles on Business and Human Rights’, drafted by Professor John Ruggie,\textsuperscript{58} and the Council even established a Working Group to promote the Principles.\textsuperscript{59} There is no mystery as to what led to the changed reception. The Ruggie Principles, as they are known, focus heavily on the responsibility of \textit{States} to ensure that business enterprises
respect human rights. To the extent that the Principles address businesses directly, it is mainly to encourage them to respect human rights by avoiding activities with potentially adverse human rights impacts. The introductory commentary to the Principles expressly eschews their creating ‘new international law obligations’. Hopefully, the Principles will be a catalyst to encourage further State activity to hold their corporations, whether acting domestically or abroad, to a human rights-respecting posture and to permit civil society and shareholders to put the political spotlight on non-rights-respecting enterprises.

V. Human rights: universal or culturally specific

For some decades a view was propounded that human rights was a Western notion that was being foisted on the rest of the world. For example, ‘Asian values’ would be invoked by some States of that region in opposition to the idea of a universal concept of human rights. While the problem still inspires academic discussion (Freeman, 2013), it has little of relevance to say from the perspective of international human rights law. As we have seen, human rights and fundamental freedoms are thoroughly grounded in the UN Charter and most States of all regions of the world have freely become parties to most of the core international human rights treaties (see earlier), including the ICCPR and the ICESCR. At some time or another, they will all vote for (or join a consensus on) resolutions taking up human rights issues in other countries.

In fact, as early as 1993, the Vienna Declaration and Program of Action was untypically direct on the issue, declaring in its first paragraph: ‘The universal nature of these rights and freedoms is beyond question.’

The same document, while insisting on the duty of States to promote and protect human rights, did nevertheless signal delphically that ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’ (para 5). This should not be seen as clawing back the general orientation of universality; rather it is indicating that, as with any international norms, the method of securing compliance with them is a matter for any State’s internal legal system. It may also be a signal that there may be some limited margin for the interpretation of the content of rights (see later).

The relativist argument is also specious. It ignores the fact that one very Western construct, the modern State, is gratefully adopted by some non-Western societies, however alien to their indigenous cultures. Since respect for human rights has become a feature of the modern State—a means of limiting the overweening power of the State—it is not convincing to claim a right to exercise the powers of statehood without accepting the constraints needed to ensure that the State represents, rather than subjugates, those within its jurisdiction.
Meanwhile, a robust debunking of culturally relative approaches to human rights was given as early as 1978 by the late Senator José Diokno of the Philippines: speaking of a cultural justification for Asian authoritarianism, he pointed out that this meant that ‘the Asian conception of freedom differs from that in the West; that, in short, Asians are not fit for democracy’; this he dismissed as ‘racist nonsense’. Indeed, insofar as States are the effective power-holders responsible for human rights violations, it is axiomatic that it is only at the State level that human rights can be guaranteed.

What international law does not dictate is how this guarantee is to be achieved and, as with all international law rules, that is a matter for the State. For instance, in principle, monist States will permit international law obligations generally, or international human rights obligations in particular, to be directly justiciable in their courts, whereas in principle, dualist States will not allow their courts to adjudicate international law or IHRL issues, unless they have in some way, typically by legislative act, been incorporated into national law. For example, the courts of the (more or less) dualist UK could not directly apply the provisions of the European Convention of Human Rights until the Human Rights Act 1998 directly incorporated it into UK law. By contrast, the courts of generally monist Netherlands had been doing just that (de Wet, 2008, ch 5).

In reality, the two paradigms tend to be caricatural. The courts of States considering themselves dualist may well be willing at least to seek to interpret national law in a manner consistent with international law. Meanwhile, monist States are rarely totally monist: they may be restricted to adjudicating treaty law rather than customary international law or they may treat a treaty provision as ordinary legislation that can be varied by subsequent legislation. The courts themselves may clip their own wings by adopting doctrines such as the non-self-executing treaty, by which they decide that the particular treaty or treaty obligation is not one that was intended to be justiciable without legislation. In any event, lawyers and or judges may just be unfamiliar or uncomfortable with international (human rights) law and so avoid invoking or applying it. These are only some of the points on a continuum between the monist and dualist paradigms.

In practice, human rights treaty bodies will not typically expect the provisions of their treaties to be expressly incorporated into national law. However, as the Human Rights Committee has put it, ‘Covenant guarantees may receive enhanced protection in those States where the court is automatically or through specific incorporation part of the domestic legal order.’ Whatever the level of incorporation, the judiciary may, like the other branches of government, be capable of placing a State in violation of its international human rights law obligations.
It is not in the nature of international law to articulate the conceptual premises on which its elements are based. This is also true of international human rights law, and whereas we can look to notions of national law and social contract theory for the origins of human rights thinking in the West, the international level offers no such explanatory sources. The one idea that recurs in the preambles of the UDHR and the two Covenants that constitute the International Bill of Human Rights is that of human dignity. Thus, the first preambular paragraphs of the UDHR and the Covenants, echoing similar language from the UN Charter, announce that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. The Covenants then proclaim that ‘these rights derive from the inherent dignity of the human person’. In the UDHR, the first article continues the invocation: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’. The notion of ‘reason’ perhaps resonates with that of reason that underlies natural law whether theist or non-theist in doctrine. Clearly, in addition to human dignity, other deep principles are freedom, equality, justice, and brotherhood. Yet others are identifiable, although not spelled out, notably fairness and impartiality (of which equality is a dimension), participation, and accountability. Between them they can be considered to embrace most, if not all, internationally recognized human rights. Some rights will be more associated with one principle than another. Evidently a key value underlying the core economic and social rights is that of brotherhood, but as will be seen to be the case with civil and political rights, most could fall within more than one of these deep values.

What follows in this section is limited to civil and political rights, as the key economic and social rights have already been identified. It is also the case that virtually all the jurisprudence at the universal level at this stage concerns civil and political rights. As noted, the work of the Committee on Economic, Social and Cultural Rights under its Optional Protocol could affect the picture.

A. Freedom

The notion of freedom has two broad connotations: intellectual freedom and physical freedom. Under the former fall most of the so-called fundamental freedoms that are the hallmark of a free civil society: freedom of opinion and expression; of thought, conscience, and religion; of association; and right of peaceful assembly. It is hard to imagine a society in which all these freedoms are broadly respected that could be characterized as repressive.

There may, of course, be some limitations on such freedoms, especially where the rights of the individual and those of the group are not clearly compatible: indeed, giving the lie to the communitarian taunt that these traditional liberal freedoms connote a privileging of the individual over
the legitimate needs of a society are the so-called ‘claw-back’ clauses that permit restrictions necessary to preserve such group values as national security, public order, and the (p. 791) rights of others. Of course, any such restrictions must be the minimum necessary to achieve the declared goal and must not be such as to render the rights nugatory. Expression invoking incitement to racial hatred may well require to be restricted, but evidently there is no justification for restricting the distribution of copies of the UDHR on Human Rights Day!

It is also not uncommon to speak of ‘balancing’, in the sense of balancing the right of an individual with the group value or balancing the apparent demands of one right with another. This implies an element of subjectivity that would allow anyone to make what would effectively be a ‘judgement call’. A better conception is that of identifying the correct scope of each right internally and vis-à-vis other rights. The notion is captured vividly by the famous aphorism: ‘the right to swing my fist ends where the other man’s nose begins’. It is not always possible to highlight so clearly the frontier between the rights and other recognized (group) values or between the rights themselves, but tests of necessity and proportionality that are integrated to the analytical process are a guide to the delimitation of the proper scope of the particular right in the context of the particular facts.

The primordial instance of a right engaging physical freedom is, axiomatically, the right to liberty and security of person and its obverse, the prohibition of arbitrary detention. While not raising the same kinds of conceptual issues as the intellectual fundamental freedoms, there are areas of potential uncertainty in the notion of what is arbitrary. That a detention be provided for by law is not sufficient to dispose of the matter. For the Human Rights Committee, ‘arbitrariness’ connotes ‘elements of inappropriateness, injustice and lack of predictability’. Issues also arise in relation to ‘security of person’ which, for the European Court of Human Rights, is inseparable from deprivation of liberty, whereas the Human Rights Committee considers it to cover threats, such as death threats. Such threats come close to engaging freedom of movement. This latter freedom is evidently another physical freedom right and one that raises especially difficult issues when it comes to the rights of aliens lawfully within a State’s territory: it touches a raw nerve under a traditional principle under international law that permits States the sovereign right to determine which aliens may be within their territory.

A final freedom right is found in the prohibition of slavery and while chattel slavery may thankfully be of merely historical interest, other ‘contemporary forms of slavery’ persist, such as that associated with human trafficking, and may require strenuous action by States to protect its victims.
B. Fairness and impartiality: equal treatment and non-discrimination

It is hard to think of anything that so offends one’s sense of justice than to be treated differently from others for reasons extraneous to the issue at stake and on the basis of attributes that are, or are felt to be, beyond choice. Hence, the UN Charter’s constant mention of ‘without distinction as to race, sex, language or religion’. The first three criteria are evidently beyond all choice while the same may not be true in quite the same way for religion, since freedom of religion involves a right to ‘adopt’ a religion, evidently implying choice. Nevertheless, the inclusion of religion here was inevitable in that it was the inseparable link between race and religion that was the basis for the Jewish holocaust perpetrated by Nazi Germany. This genocide, as we have seen, was pivotal to the inclusion of human rights in the UN Charter. A further factor must have been that it is in the nature of religion or similar profoundly held beliefs as to the nature and purpose of humanity that the holder feels him or herself to be impotent simply to abandon such beliefs.

By the time of the adoption of the UDHR, other prohibited criteria of discrimination were added: ‘colour, as well as political or other opinion, national or social origin, property, birth or other status’. Again, most of these attributes are not a matter of individual choice, just ones that the individual was simply ‘landed with’. This is also the case for property at birth, but not necessarily in later life when the acquisition or loss of property may be very much a matter of choice. As to political or other opinion, there is more personal freedom of choice, at least in respect of the decision to express one’s political or similar opinions. The point is captured in the very freedom itself: under Article 19 ICCPR, there is a right to hold opinions without interference; it is only the expression of them that may, as noted, be restricted on certain grounds. What then of the notion of ‘other status’? Assuming the *ejusdem generis* rule applies, the question arises as to what amounts to ‘the same kind’. The underlying idea seems to be that of attributes that are biologically or psychologically beyond choice. Thus, sexual orientation has come to be recognized as falling within the prohibited categories of discrimination. In one major respect, the ICCPR goes beyond the UN Charter and UDHR, in the sense that it has a free-standing non-discrimination article. The earlier texts required the rights protected to be enjoyed without discrimination, but Article 26 of the ICCPR requires equality under the law generally and non-discrimination on the listed grounds in respect of all legal rights. The Human Rights Committee, as other treaty bodies, accepts that offensive discrimination may be indirect as well as direct, but that some distinctions may be made as long as they are reasonable and objective.

The same principles of fairness, impartiality, and equality also underlie the protection of the rights of (members of) ethnic, linguistic, or religious minorities found in Article 27 ICCPR. It is not clear to what extent this
provision goes beyond the provisions on non-discrimination, direct or indirect (Rodley, 1995).

(p. 793) **C. Human dignity**

While the human dignity value appears to underlie the whole corpus of international human rights law, some rights are especially associated directly with this value. Thus the UN Declarations against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and against Enforced Disappearance both consider their subject matter to be ‘an offence to human dignity’.88 The only international treaty on the right to life, the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, affirms that abolition ‘contributes to the enhancement of human dignity’.89

Indeed, few human rights issues have received as much attention as the prohibitions of torture and ill-treatment and of enforced disappearance, which are prohibited by every general human rights treaty.90

Enforced disappearance, while not specifically addressed in general human rights conventions, violates many of the rights contained in those conventions, most evidently the prohibition of arbitrary arrest and detention/right to liberty and security of person and the prohibition of torture and similar ill-treatment. To at least this extent, that links the latter right directly to the human dignity value, as well as the freedom value. In addition to the just-mentioned Declaration there are now a universal and a regional convention on this abhorrent violation.91 Even though the UN Conventions define the notions of torture and enforced disappearance, there remain outstanding issues of scope, such as whether pain or suffering for ‘torture’ has to be more severe than for ‘inhuman treatment’ or whether enforced disappearance requires, beyond refusal to acknowledge the detention and/or the whereabouts of the person, an additional element involving placing the person outside the protection of law.92

The right to life, while non-derogable, is not absolute in the sense that not all deprivations of life will be considered arbitrary and thus violating the right. Accordingly, deployment of potentially lethal force in international armed conflict permissible under IHL would also be consistent with international human rights law. Similarly, law enforcement officials may use such force to protect life and limb if no other means are available. Once again, as with restrictions on fundamental freedoms, we see notions of necessity and proportionality at work. An especially difficult area is posed by the continuing existence of the death penalty in some national jurisdictions, despite the fact that there are one universal and three regional abolitionist protocols to treaties whose original texts expressly contemplate the death penalty as an exception to the right to life, albeit subject to certain important restrictions.93 Meanwhile, with (so far)
increasing majorities, the UN General Assembly has been urging States to adopt moratoria on the use of the death penalty.\textsuperscript{94}

\textbf{D. Justice and legality}

In broad terms, the justice value connotes fairness and equality, as indicated earlier. It also has the specific connotation in the sense of administration of justice: the legal justice system. If that system acts arbitrarily or without integrity, there can be no secure legal rights. The right to a fair trial or hearing—due process of law—is thus infrastructural. The relevant article of the ICCPR is Article 14, and Human Rights Committee General Comment 32 deals with it at length. One noteworthy element is the increasing scepticism as to the ability of military or special courts to deliver justice either to those who are accused of crime or those who may be the victims of crimes committed by military or security personnel.\textsuperscript{95} Unless one has the means of knowing the content of one’s legal obligations and the consequence of non-compliance, any notion of legality—and so justice—is fatally undermined. The principle of non-retroactivity of crime and punishment (\textit{nullum crimen, nulla poena sine lege}) is found in the non-derogable Article 15 ICCPR.

\textbf{E. Participation}

Intellectual fundamental freedoms represent both a condition and a means of meaningful participation in society. The right to participate in the government of one’s society is evidently a direct manifestation of this value (Article 25 ICCPR). It covers a range of issues, from equality of access to the civil service to the right to choose a State’s political leaders or indeed to stand for election. To the extent that competitive democratic elections have become the system of choice since the end of the Cold War, the Human Rights Committee has felt able to find the requirement that candidates for political office should belong to parties or to specific parties to be an ‘unreasonable restriction on the right to participate in public affairs’.\textsuperscript{96} Like the European Court of Human Rights, it has also found a blanket prohibition on prisoners’ voting to violate the right.\textsuperscript{97}

\textbf{F. Accountability}

Numerous rights that respond to other values also respond to the value of accountability. Obvious examples would be the right to freedom to receive and impart information (a dimension of freedom of opinion and expression) and hold elected representatives accountable by voting for others (see the preceding paragraph). Especially important are the provisions for remedies in case of violation of rights. While the right to compensation is the standard means, it can go much further to include an obligation on the State to investigate criminal violations of human rights and bring perpetrators to justice.\textsuperscript{98}
G. The private sphere

The right to be left undisturbed in one’s home and to a private life is not a typical manifestation of the freedom value, but although precisely not in the public domain, it could be considered a form of freedom to be insulated from social intrusion. It certainly connects up with freedom of expression, on the scope of which it represents a limitation. The protection of the family and childhood are primary positive obligations on the State and are not easily assignable to one of the core values. They may be seen as preconditions to the full flourishing of the human personality, without which the other rights and the values on which they are based cannot be meaningfully enjoyed.

VII. International machinery on human rights

Anyone attending the principal UN political human rights organ, the Human Rights Council, would find it difficult to credit the difference between it and its predecessor, the Commission on Human Rights, in the latter’s early years. Nowadays, States and NGOs routinely make oral interventions (under certain agenda items) on any human rights issue or any country. NGOs also routinely submit written information for circulation as UN documents on the same issues. It was only in the late 1970s and early 1980s that it came to be accepted that the previous pervasive silence on specific human rights cases and situations in member States could be left behind. There is now a substantial network of what are usually called Charter-based human rights procedures.

A. Universal charter-based human rights procedures

1. UN Commission on Human Rights

The Commission established by the Economic and Social Council (ECOSOC) pursuant to Article 68 of the UN Charter understood its early role to be one of standard-setting. Very early in its existence, in 1947, it decided ‘that it has no power to take any action in regard to any complaint concerning human rights’, a stance confirmed by ECOSOC Resolution 75 V (1947). A confidential list of complaints, without details, was to be compiled by the UN Secretariat, with original texts of the complaints being made accessible to members. No public discussion of the complaints took place, nor, even in closed discussion, did members raise alleged human rights violations in other States.

a. Country-specific procedures

A breakthrough came two decades later in 1967, when the Commission and its Sub-Commission were authorized by ECOSOC Resolution 1235 XLII to make ‘a thorough study’ of alleged consistent patterns of human rights violation and investigate gross human rights violations. Examples given were the human rights situation in southern Africa, that is, South Africa, Southwest Africa (now Namibia) and secessionist Southern...
Rhodesia. When in 1968 the Sub-Commission took this mandate seriously, forwarding material from NGOs not only on the southern African situation, but also on the independent sovereign States of Greece (after a 1967 military coup) and Haiti (languishing under the dictatorship of President-for-life Dr François (Papa Doc) Duvalier), the Commission, unwilling to let NGOs dictate its agenda, established a confidential complaints procedure reflected in ECOSOC Resolution 1503 XLVIII (27 May 1970) (‘the 1503 procedure’). This was a confidential procedure, whereby the confidential list of communications would be examined by a working group on communications of five members of the Sub-Commission (‘working group on communications’). The working group could forward to the full Sub-Commission communications ‘which appear to reveal a consistent pattern of gross and reliably attested violations of human rights’. The Sub-Commission could then send on any such situation to the Commission.

The Commission in turn established its own working group (‘working group on situations’), composed of five of its members, to recommend to the Commission what action to take. Such activity occasionally involved a ‘thorough study’ carried out by a special rapporteur appointed by the Commission, sometimes a request to the UN Secretary-General to report to the next annual session of the Commission. Usually, the Commission would merely decide to keep the situation ‘under review’ from year to year. On occasion it would simply decide to drop consideration of the situation, regardless of its seriousness. It never used its power under Resolution 1503 to establish an investigative committee.

However, the ‘1503 procedure’ dictated how ‘communications’ from private sources, including NGOs, should be treated. It did not constrain individual members of the Commission, nor of the Sub-Commission. If they wanted to raise situations of their own motion, they could. Already a working group on southern Africa had been established in 1967. Its mandate was extended briefly to cover the territories occupied by Israel in the June 1967 war—until the General Assembly itself established a working group on that situation. Public consideration of human rights country problems at the UN only moved beyond southern Africa and the Israeli-occupied territories (IOT) in 1975 in response to international concern with a friendless military government in Chile that had brutally seized power in 1973 from a constitutionally elected government.

Slowly after this other countries were taken up in public session, with a special rapporteur usually appointed to examine the situation, provided the State in question was not too influential. There are at the time of writing some 13 country mandates. Despite the appalling record of the military government of Argentina in the latter half of the 1990s, whose barbarities included thousands of enforced disappearances, there was insufficient political will to initiate a study of the situation in that country. This lamentable situation in fact led to a positive development. If the Commission could not examine the situation in Argentina, perhaps it
could consider the phenomenon that most characterized that situation, that is, enforced disappearance (Kramer and Weissbrodt, 1981).

(p. 797) **b. Thematic special procedures**

The outcome was the establishment of the first of the thematic special procedures, the Working Group on Enforced or Involuntary Disappearances (1980). Its initial mandate was merely to study the phenomenon of enforced disappearances and it was created for a year. However, the Working Group’s first report, in 1981, was something of an institutional earthquake. It provided a summary of all the cases it had received and transmitted to the governments impugned, as well as summaries of any replies from them. It also began the practice of making urgent appeals where people had been detained in circumstances indicating that they might be at risk of enforced disappearance. The Working Group did not draw any conclusions regarding State responsibility, considering its role to be humanitarian and non-judgmental, albeit there was nothing requiring such caution in the resolution setting it up. It also began undertaking country visits, the reports of which evidently struggled, none too successfully, to avoid judgment.

The next thematic mechanisms to be created were those of the Special Rapporteurs on extra-judicial, summary and arbitrary executions (1982) and on torture and ill-treatment (1985) (see Rodley, 1986). Their reports followed the style of those of the Working Group. There are now some 44 thematic mandates. Some (mainly in the field of civil and political rights) are more action-oriented, based on individual case work; others (mainly in the field of economic and social rights) are more study-oriented. But there is no hard and fast dividing line, as evidenced by the joint work of a number of civil and political rights mandates with that on the right to health in respect of the situation in the US Naval Station at Guantánamo Bay, Cuba. Only one, the Working Group on Arbitrary Detention, is expressly mandated to make individual case-specific conclusions. However, the other original mandates have long since abandoned any pretense of not arriving at country-specific evaluations.

2. UN Human Rights Council

The ‘double-standards’ implied in the politically grounded selection of countries for public consideration by the Commission had been noted from the early days of focus on the IOT and southern Africa exclusively. The inability to address the situation in Argentina directly has already been noted. Another high-profile example was the impunity of Iraq under the bloody dictatorship of President Saddam Hussein. Even after the gas bombing of 5,000 of its own people in Halabja in 1988, it was not possible to get a majority to vote for public consideration. Indeed, Iraq even managed to get itself dropped from the confidential 1503 procedure. Two
years later, after Iraq invaded Kuwait, the Commission could then appoint a special rapporteur on the human rights situation in Iraq.106

Yet it was not until 2004 that a High-Level Panel on Threats, Challenges and Change, established by Secretary-General Kofi Annan, found that the Commission had become discredited and should eventually be replaced by another body.107 The political selectivity matter was the key issue. One reason for this, it was suggested, was that States with poor human rights records were more inclined to stand and work hard for election to this 53-member State body108 so as to deflect possible attention from themselves. The solution of the High-Level Panel was to have a body, either at Charter level or, at any rate, reporting to the General Assembly, that would be universal in membership. It would thus not be a distorted cross-section of the UN membership and it would have instantly enhanced status by reporting directly to the Assembly rather than to ECOSOC. The Secretary-General, with strong support from the USA, came out in favour of a smaller body elected by the General Assembly, with a two-thirds majority vote (implicitly guaranteeing that States with poor human rights records would not be elected).109 After an extensive negotiation General Assembly Resolution 251/60 was adopted in 2006 and a 47-member Human Rights Council elected by a simple majority of the General Assembly was created; it would report direct to the Assembly, not to ECOSOC.

Even if there is no competition for regional slots, any candidate has to secure a majority of positive votes in the General Assembly rather than obtain the seat by acclamation. Moreover, no State may have more than two successive three-year terms. The Council is also required to institute a system of universal periodic review (UPR) of the human rights of all UN member States. It is easier to call special sessions to deal with urgent situations (one-third of Council members can request, not over a half as before) and, anyway, the Council meets much more frequently than the one annual six-week session of the Commission. Meanwhile, the Council inherits the system of special procedures and a ‘complaints mechanism’ modelled on the ‘1503 procedure’. Of particular significance, there is the UPR.

It is too early to attempt an authoritative evaluation; the Council is a work-in-progress. At first, it looked as though it would be retrogressive. The institution-building package that emerged after its first year was not encouraging.110 While the use of country rapporteurs was continued, they were limited in practice to those that had already been taken up by the Commission; two, Belarus and Cuba, were even dropped as part of the political deal to get the package.111 By 2011, a willingness to take up new situations emerged (Côte d’Ivoire, Syria), with others following (Eritrea, 2012; Mali, 2013). Others that had been dropped earlier reappeared (Iran, 2011; Belarus, 2012), one, Sudan, as early as 2009.112
The earliest special sessions were overwhelmingly focused on the IOT (and Israel’s 2006 incursion into Lebanon). An apparent breakthrough on the situation in Sri Lanka proved illusory when the Council adopted an uncritical resolution proposed by Sri Lanka itself.\(^ {113} \) The Council retrieved itself by adopting resolutions in 2012 and 2013 expressing concern at various grave human rights violations,\(^ {114} \) a concern confirmed late in 2013 by the High Commissioner for Human Rights.\(^ {115} \) A convincing indication of real moving away from political selectivity or ‘double-standards’ would be if the Council were to appoint a special rapporteur on Sri Lanka’s (at the time of writing) continuously deteriorating situation.\(^ {116} \) On the other hand, after the Sri Lanka setback, there were significant special sessions on Côte d’Ivoire (2010), Libya (2011), and Syria (three in 2011 and one in 2012).\(^ {117} \)

Meanwhile, although UPR does not lead to country-specific evaluations by the Council as such,\(^ {118} \) it is generally thought to be playing a role that encourages States to make pledges, such as to ratify unratified human rights treaties or to issue standing invitations to special procedures to visit the country in question. Also, the very process of having to face questions and recommendations, based on the report submitted by the country and reports prepared by the Office of the High Commissioner for Human Rights (OHCHR), on the concerns of special procedures and treaty bodies (see next section), and on those expressed by ‘stakeholders’ (national human rights institutions and NGOs), can be at least a means of nudging the State towards improving its performance to some extent.

**B. Universal treaty bodies**

As already indicated, the presumption in the early days of the UN was that only by treaty adherence could States’ human rights behaviour be submitted to international scrutiny. What follows is a consideration of the ‘system’ of the nine treaty bodies (Committees) established pursuant to the ‘core’ human rights treaties referred to earlier.\(^ {119} \) There are in fact ten treaty bodies, as a second one on torture was created by an Optional Protocol to UNCAT (OPCAT), that is, the Sub-Committee on Prevention of Torture (SPT). Its functions are innovative and will be briefly touched on at the end. The first one, the Committee against Torture (CAT) established under UNCAT, has more usual functions.

The treaty bodies are composed of between 10 and 25 members, with the mean being 18. The members are expected to be experts and are nominated by the States parties to the respective treaty to serve in their individual capacities. They are typically elected to four-year terms and may be re-elected without limit under some treaties, while two mandates are the maximum under other (more recent) ones. The expertise required is that of the subject matter, not necessarily law, although their job is to seek to interpret and apply a legal instrument that normally falls to be interpreted according to the law of treaties, a discipline likely to be more familiar to persons with legal training. In principle it may be easier for
persons who are not government members to act in a genuinely individual capacity. Nevertheless, some treaty body members are government officials, often senior diplomats. In practice, the discourse that takes place reflects far more that of individual expertise than intergovernmental negotiation.

(p. 800) 1. Functions

a. State reports

In respect of all but the Committee on Enforced Disappearances (CED) and evidently the Subcommittee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (SPT), the States parties to a treaty are required to submit periodic reports to the Committees and reviewing these State reports is the one common function across the nine core treaty bodies. The periodicity of reports, when specified, is between two and five years. For the Human Rights Committee, the treaty body of the ICCPR, it is when the Committee specifies, but in practice the Committee uses a range of three to six years depending on the seriousness of the situation. The outlier CED only receives as of right and automatically an initial report, after which it is up to the Committee to decide whether it wants further reports. This doubtless reflects the fact that most States parties will not engage in the practice of enforced disappearance and should not be required to report unnecessarily.

Several of the Committees put written questions before the hearing to the State, in the form of a ‘list of issues’ (LOI), requesting States to respond in writing, so that when the actual oral hearing takes place with a delegation from the State, the process of information clarification is already underway. Some have gone further and offered States wishing to ease what the latter call the ‘reporting burden’ the option of ‘focused reporting’, that is simply responding to a ‘list of issues prior to reporting’ (LOIPR) once the initial reports of the States has been examined. After the written and oral exchange, the Committee will adopt ‘concluding observations’; these are mainly a list of concerns about areas of possible non-compliance with treaty provisions and recommendations to address the concerns. Concluding observations began only in 1992. Some Committees have also established a follow-up procedure consisting of a further round of exchanges, under the guidance of a special rapporteur, on a number of the recommendations. The Committees refer to the overall process as the ‘constructive dialogue’.

Many States become overdue in submitting their reports, some for up to two decades. This has led some Committees to institute a procedure of considering a situation in the absence of a report, applied to the most seriously overdue. Here usually the Committee will announce its intention to initiate the procedure. As is intended, this may often result in the State in question submitting a report. If it does not, the Committee may draft an LOI and, again, the State may respond. In the absence of a response
then the hearing will go ahead, the State being invited to send a delegation, which the State may well do. The least satisfactory (and rarest) outcome will be an actual hearing in the absence of any written contribution from the State or any delegation. A constant problem for the Committees is that they generally have a backlog of reports submitted but yet to be considered, while also faced with overdue reports; if the latter were to be submitted, the backlog would be even greater.124

**b. General comments**

The Committees have developed a practice of issuing ‘general comments’, consisting of guidance to States on the Committees’ understanding of what States’ obligations under the respective treaty may be. These were developed by the Human Rights Committee in the early 1980s, during the Cold War, when there was no agreement to issue country-specific evaluation of the sort found in what are now called ‘concluding observations’. These are seen as authoritative interpretations of the treaties, developed on the basis of extensive experience of reviewing periodic reports and of examining individual cases (see following section). General comments are now typically the result of protracted discussion over several sessions of the Committee in question. The practice of consulting civil society and governments during the process has also emerged over time.

c. **Individual complaints**

It was not by oversight that the only obligation States were willing to assume from the beginning was that of reviewing periodic reports submitted by governments. This process was in effect the lowest common denominator of what States were prepared to accept by way of international supervision of their compliance with their human rights obligations. Nevertheless, from the beginning the idea of a court that would hear individual complaints was advanced by some.125 Yet outside the European and, later, Inter-American regions there was no political will for such a radical idea. What was, however, in the realm of the possible was an optional system of having individual complaints submitted to the Committees. This was first made available by States making declarations under Article 14 ICERD and Article 22 UNCAT or by their ratifying the (First) Optional Protocol to the ICCPR. Later other treaty bodies were given the same power to consider individual complaints, either by an optional declaration under a new treaty or by ratifying an optional protocol, usually adopted later. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was the first of these with its Optional Protocol and now it is or will be possible for all treaty bodies to receive individual complaints. So far, it is the Human Rights Committee that has most practice on such complaints, followed by CAT and then the CEDAW Committee and CERD.
Although the ‘views’ that are the outcome of the Committees’ deliberations on individual complaints are not per se legally binding on the States in question, the (written, confidential) process by which they are adopted is modelled on judicial practice. Both parties are given full opportunity to respond to each other’s pleadings and the Committees’ deliberations are indistinguishable from those of a court. The views are adopted ‘in a judicial spirit’.126 The ‘jurisprudence’ or ‘case law’ emanating from the cases is in the public domain and widely resorted to by international lawyers seeking authoritative interpretation of the treaties. Some Committees have also established a follow-up procedure, whereby the good offices of a special rapporteur are used to seek compliance with the adverse findings of the Committee.

The practice has emerged, similar to that of the ICJ and the European Court of Human Rights, of seeking interim measures to discourage action by the State party that would render the process nugatory. Thus, if ‘irreparable harm’ appears imminent, such as the application of the death penalty or the deportation of someone to a State where they face torture or other prohibited ill-treatment, the State will be requested to refrain from taking the action, pending consideration of the case. Non-compliance with the request will be considered a violation of the instrument providing for the right of individual petition.127

d. Inter-State complaints

A number of treaties provide for inter-State complaints, that is, on a reciprocal basis, the consideration of complaints by one State against another. Uniquely within the UN treaty bodies system, ICERD makes such complaints an automatic possibility (Article 12). The others, like that under Article 41 ICCPR are all optional on a reciprocal basis. The procedure has not once been used and so will not further detain us here.

e. Inquiries

The drafters of UNCAT introduced a novel function for a UN human rights instrument. Provision was made for undertaking inquiries into the alleged systematic practices of torture (Article 20). The innovation was sufficiently controversial that a special provision had to be made for States to be able to opt out of the procedure by means of a reservation at the time of ratification (Article 28). Even without availing themselves of the ‘opt out’, States could refuse to permit the treaty body to have access to their territories when undertaking an inquiry.128 Subsequently, other instruments came to envisage a similar power, starting with the Optional Protocol to CEDAW. The principal practice to date is that by UNCAT, followed by CEDAW. The UNCAT practice has been more limited than was expected at the time of drafting, consisting of only eight published inquiry reports.129

f. Other functions
Committee on Enforced Disappearances

No doubt reflecting the especial gravity of the phenomenon of enforced disappearances, the CED is empowered to refer serious situations—apparent systematic or widespread practices of enforced disappearance—to the attention of the General Assembly (Article 34). It may also request urgent action (not just requests for interim measures) in respect of a feared enforced disappearance (Article 30).

Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

As indicated earlier, OPCAT establishes a wholly novel body. It has no similarity with the other treaty bodies. Modelled broadly on the functions of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) established under the 1987 European Convention of the same name, the SPT has the right without further permission to undertake periodic missions to States parties and visit places of detention. The idea is that institutions subject to visits will be deterred from engaging in the prohibited practices. Unlike the CPT, there is no express power for it to undertake ad hoc visits, though it may be that the dearth of available resources for frequent visits will be more of an obstacle to the achievement of this deterrent function.130

However, the OPCAT also provides for States parties to establish their own national preventive mechanisms (NPM), whose function would be the same as the SPT or, for that matter, the CPT. This dimension may then suggest that the principal contribution of the SPT in practice will be in its ability to support and so enhance the effectiveness of the NPMs.

2. The legal nature of treaty body outputs

In some ways, the human rights treaty drafters sought to steer clear of endowing the treaty bodies with the same power to issue binding decisions or judgments as courts would have. Nevertheless, the output of a body provided for within a treaty and appointed by States parties to the treaties, operating in a judicial spirit, must have the sort of juridical authority that governments could not simply dismiss as merely recommendatory. The point could not have been stated more clearly, in respect of the Human Rights Committee, by the ICJ:

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that
3. Proposals for improvements to the system

The core treaty bodies are thought to represent a reporting burden on States, thus giving a reason for delays in reporting, and, as noted earlier, there are backlogs that would increase with removal of the delays in reporting. There are also elements of duplication across the treaty bodies: many of the subjects of the topic-specific treaties also fall within the scope of the general treaties (the Covenants). There are also possibilities in the latter areas for contradictions in the outputs of the treaty bodies.

Various proposals have been mooted to address these issues: a single, unified treaty body, a consolidated report for submission to all the bodies, and a comprehensive reporting calendar. There is no space here to analyse why, so far, none of these solutions has been able to overcome assorted legal or political obstacles. It remains the case that most improvements are made by the treaty bodies themselves, sometimes individually and sometimes collectively. Thus, the treaty bodies have developed the LOI and LOIPR, as well as the consideration of situations in the absence of a report. It is instructive that the latest proposal from the High Commissioner for Human Rights—the comprehensive reporting calendar (or ‘master calendar’) is predicated on the now optional LOI and LOIPR procedures being made compulsory and operating together with the procedure of a review in the absence of a report.

At the time of writing, it seems that it will remain necessary for the treaty bodies to continue their own initiatives to increase the efficiency of their procedures. The main obstacle to their attempts in this direction is the constant limitation on their resources, aggravated by periodic financial crises.

4. The special procedures and the treaty body system

The treaty bodies were created, it will be recalled, because in the early decades of the UN it was thought that international scrutiny of States’ human rights performance could only be engaged in by means of freely accepted treaty obligations. The development of the special procedures of the Human Rights Council did not impede their development.

Under the circumstances, it is surprising that there is not more overlap and even competition between the two systems. So far, there is more complementarity than competition between them. The special procedures do not engage in reviews of State periodic reports. Even the advent of UPR that could have been at odds with that core function of the treaty
bodies has not turned out that way, since UPR does not lead to corporate conclusions and recommendations like those of the treaty bodies. On the contrary, treaty body concluding observations have proved a fertile source of recommendations by Council members to States undergoing UPR (Rodley, 2012, pp 328–30).

Similarly, except for the Working Group on Arbitrary Detention, special procedures do not routinely come to conclusions about specific individual allegations of human rights violations. Apart from the CED, it is left to the special procedures to undertake urgent appeals. It will be interesting to see how the CED and Working Group on Enforced or Involuntary Disappearances deal with their overlapping powers to make such appeals.

One area of definite potential overlap is that of inquiries into systematic practices. However, while such inquiries, typically involving country visits, are routine for the special procedures, they have not yet attained the same standard practice for even those treaty bodies with the power to pursue such inquiries. In any event, as long as the inquiries do not take place at the same time, it is possible that they can still be complementary, with each inquiry able to build on the previous one (Rodley, 2012, p 339–40).

C. Regional bodies

If the universal system was slow to get off the ground, there was progress at the regional level, no doubt reflecting a sense of shared priorities and a preference to settle issues, as it were, en famille.

The first was the European Convention on Human Rights (ECHR). This is the only human rights instrument that establishes a court to which any individual can call to account the State exercising jurisdiction over him or her, and expect a legally binding decision on the case. This radical development emerged relatively recently. When the ECHR was adopted in 1950, there was not even an automatic right to individual petition: the Convention created a European Commission of Human Rights and a European Court of Human Rights. The Commission could consider inter-State complaints as of right. It could only deal with individual complaints in respect of States that chose to make the requisite declaration. The Court’s jurisdiction was also optional.

Moreover, even when States parties to the ECHR accepted the Court’s jurisdiction, that did not entitle the individual directly to seize the court of a complaint. Any complaint was first considered by the Commission. Once the Commission had issued its report, it could itself refer the case to the Court if the State party concerned had accepted the court’s jurisdiction. Moreover, the State party concerned could also choose to refer the case to the Court, in effect giving the defendant State a right of appeal not enjoyed by the individual applicant, albeit the State of nationality of the applicant, if the applicant were not a national of the accused State, could also refer the case of its national to the Court.
It was only in 1990 that Protocol 9 to the ECHR was adopted to permit individuals from States that chose to accept this Protocol to refer a case to the Court. It took Protocol 11 (1994) that had to be accepted by all States parties to the ECHR before the Commission was dissolved and all individuals from all States parties could apply directly to the Court for a remedy. All members of the Council of Europe are parties to the Convention and adherence to it is now a condition of membership for new candidates to join the Council of Europe. This in turn means that 820 million citizens and others within the jurisdiction of the 47 States now have direct access to a human rights court outside their own countries’ legal systems. This has resulted in the Court’s having a major challenge in dealing with its docket.

The Court, as mentioned, has jurisdiction to hear inter-State complaints in respect of any State party to the ECHR (Article 33). There have been only four of these. It was vested with a new power pursuant to Protocol 11 (1994) by which it could issue advisory opinions at the request of the Committee of Ministers, the body representing all member States of the Council of Europe (Article 47). Neither of the two so far requested has concerned the interpretation of substantive Convention rights.

The next regional system to come into being was the inter-American one, first, directly under the Charter of the Organization of American States (OAS) and later by virtue of the American Convention on Human Rights (ACHR). The latter Convention incorporated the Inter-American Commission on Human Rights that had earlier been established by the political organs of the OAS, and examined cases in respect of alleged violations of the American Declaration on the Rights and Duties of Man. There is an automatic right of individual petition by anyone in the 35 member States of the OAS. In respect of the 23 States parties to the ACHR, the Commission (now a treaty body) applies the provisions of the Convention. The Commission retains its original jurisdiction over the other 12 member States, applying the Declaration.

Unlike the European system where inter-State complaints were always possible in respect of all parties to the ECHR, inter-State complaints to the Inter-American Commission are optional requiring separate acceptance, by both the State against which the complaint is made and the State making the complaint. Also, unlike in the European system, the Commission may also, proprio motu, investigate situations of apparent violations of human rights.

Meanwhile, paralleling the earlier practice of the ECHR, the ACHR established an Inter-American Court of Human Rights. Its jurisdiction is optional and individuals from the 18 States that have accepted the jurisdiction of the Court do not have a right to refer their case directly to the Court. Rather, the Commission must first consider the case and only then may it be referred whether by the Commission itself or the State concerned, to the Court.
The Court may also issue advisory opinions, at the request of a number of entities established by the Charter of the OAS. Individual member States, regardless of whether they are parties to the ACHR, may also request advisory opinions (Article 64). This function was an original part of the Court’s work and, unlike its later arrival under the ECHR, it has been used.

Following its European and inter-American predecessors (the ECHR and ACHR), the African Charter on Human and Peoples’ Rights (ACHPR, 1981) creates an expert body, the African Commission on Human and Peoples’ Rights (ACNHPR), composed of 11 African personalities of the highest reputation. The Commission mainly deals with complaints both of individual and general practices of violations of human rights, on the basis of communications submitted by individuals and NGOs, and like its UN counterparts it reviews periodic reports.

By a 1998 Protocol, the OAU established an African Court of Human and Peoples’ Rights of 11 judges. Twenty-six of the States parties to the Charter have ratified the Protocol. The Commission, the States parties concerned, and African IGOs may refer cases to the Court, after they have been considered by the Commission. A major step is the possibility of NGOs or individuals bringing cases directly to the Court, by-passing the Commission, if the State concerned has accepted its jurisdiction.

To date, five States have accepted this jurisdiction. The Court may also issue advisory opinions, at the request of OAU member States, the OAU or any of its organs, or ‘any African organization recognized by the OAU’ (Article 4). This element of the jurisdiction has not to date been used.

Other regional systems have been created but have not so far sufficiently advanced to indicate the need for detailed consideration. Thus, the revised Arab Charter on Human Rights (2004), which entered into force in 2008 and established a seven-member Arab Human Rights Committee, only provides the Committee with a power to review State reports. This procedure has not to date yielded any public outcome (Rishmawi, 2013, pp 52–3). Expectations are not high for the ASEAN Intergovernmental Commission on Human Rights, composed of State representatives. A recent authoritative review of the system described it as ‘nascent rather than well-established’ (Muntarbhorn, 2013).

VIII. Conclusion

Human rights really entered the corpus of international law only after their promotion became a purpose of the UN Charter. There had been forerunners: the abolition of slavery and, especially the slave trade, in the nineteenth century, and the protection of freedom of association for labour; the rights of minorities in the Balkans; and the rights of residents in League of Nations mandate territories after World War I.
25. International Human Rights Law

The notion of human rights in the crucial, classical sense of being the limits of States’ authority over those subject to their jurisdiction, was a product of the European Enlightenment. If the church had been a counterweight to the feudal State, human rights were the non-clerical counterweight to the emergent, industrializing modern Western State that spread all over the world with the end of the colonial period. It took the cataclysm of World War II, characterized by aggression externally and crimes against humanity (genocide, systematic and widespread gross violations of human rights) internally and externally, for the world to accept that human rights was not something that could be left in the domaine réservé of States.

After some early doubt about whether the UN Charter’s human rights clauses were merely hortatory or peremptory, it gradually became accepted that the latter was true. The Universal Declaration of Human Rights may formally only have had the status of a resolution of the General Assembly, that is, a recommendation, but it came to be accepted as reflecting the actual content of human rights and fundamental freedoms of which the UN Charter spoke. It also took time for the Charter provisions to be accepted as containing obligations to comply with human rights. The early decades of the UN assumed that the UN could not address allegations of human rights violations other than by treaty obligation.

The UDHR from the beginning aimed to address, not only freedom from fear (human rights as traditionally understood), but also freedom from want (requiring State action to secure economic and social needs). So-called group rights (eg to self-determination, development, a healthy environment, and even peace), whatever their status may be under international law, cannot qualify as human rights, as the latter have to be seen to be the rights of the individual in relation to the State, unless the term is to be deprived of all content.

There have been hypocritical and self-serving attempts to separate the modern State from its obverse side—human rights—in the name of asserted local cultural traditions. While the idea may still be heard in political discourse, international human rights law has nailed the issue: human rights are universal.

The nature and content of economic and social rights has been somewhat elusive. Authoritative statements affirm that there are identifiable core obligations: ensuring the right of non-discriminatory access to health facilities, goods, and services; to minimum essential, nutritionally adequate food and freedom from hunger; to basic shelter, housing, and sanitation and potable water; to essential drugs; and to ensure equitable distribution of health facilities, goods, and services.

Even if, paradigmatically, economic and social rights imply (extensive) State action, while civil and political rights imply State abstention, both conceive of human rights such that the rights-holders are individuals and
the duty-bearers are States (or States acting together in IGOs). The idea that corporations, bands of organized criminals, or politically motivated armed opposition groups may also be duty-bearers directly under international law (they remain subject to national law) is incompatible with the basic conception of human rights and unsupported by persuasive authority.

The standard civil and political rights reflect a number of basic values: intellectual freedom (conscience, expression, association, and assembly); physical freedom (liberty and security of person/prohibition of arbitrary arrest and detention; freedom of movement; and prohibition of slavery); fairness (equal treatment, non-discrimination and protection of rights of minority members); human dignity (personal integrity, including prohibition of torture and ill-treatment, and right to life); justice and legality (due process, no retroactive crime or punishment); participation (especially in government); accountability (right to remedy); and the legitimacy of a non-public or private sphere (respect for home and private life).

Slowly a broad network of monitoring, supervisory, and complaints mechanisms developed. The first to be recognized, being juridically unchallengeable, were bodies established by treaty. Later, the main political organ of the UN dealing with human rights—formerly the Commission on Human Rights, later the Human Rights Council—created a web of country-specific and thematic ‘special procedures’. Generally, their activities are complementary, with the main area of overlap between some treaty bodies and most special procedures being the power of country visits. The record of treaty bodies in this respect is too limited to suggest the existence of extensive duplication. The potential for overlap and even competition in the area of periodic review conducted by treaty bodies and the Human Rights Council has not, so far, materialized.

At the regional level, there has been more progress, both with regard to the power to examine individual complaints by expert treaty bodies and to have them adjudicated by human rights courts.

References


25. International Human Rights Law


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date: 14 May 2021
25. International Human Rights Law


25. International Human Rights Law


**Further reading**


25. International Human Rights Law


**Notes:**

1 The text of this introduction is borrowed from Rodley, 2013, ch 29.

2 The Leviathan was Hobbes’ image for that ‘man or assembly of men’ to whom each vulnerable individual member of society would surrender ‘all their power and strength’ for ‘our peace and defence’. See Hobbes, 1651, ch XVII.

3 Eg Locke, 1689.

4 Rousseau, 1762, especially Book I, ch 4 on the limits of sovereign power (that democratically reflects the General Will).

5 Paine, 1791.

6 *(English) Bill of Rights (1689), Virginia Bill of Rights (1776).*

7 *Déclaration des droits de l’homme et du citoyen* (1789).


9 The primacy of conscience is sometimes sourced to Antigone, who had to choose between obedience to her king and her obligation to bury her brother (Weston, 1989, p 13). In fact, even though she chose the latter, Sophocles at any rate does not seem to make clear that this was the

10 The realist school (*Realpolitik*) whose most influential exponent was Hans Morgenthau. See Morgenthau, 1967, chs 1 and 6 and *passim*.

11 See the observations of Ernst Haas concerning the (then) new Carter Administration’s human-rights-focused foreign policy: ‘The United States has embarked on the most naïve and moralistic campaign since Woodrow Wilson’ (Haas, 1977, p 72).

12 Abolition of the Slave Trade Act. In 1811, the trade was made a felony in the British Empire.

13 It has managed to be abolished three times in Mauritania, in 1905, 1981, and 2007: see Corrigan, 2007.


16 Thus echoing the lesson learned in Article 1.

17 *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p 6, para 131: ‘To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.’


19 The only ‘Functional Commission’ of ECOSOC that was specifically to be established under Article 68 was the one on human rights.

20 GA Res 217A III (10 December 1948), proclamatory paragraph.


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25 Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, para 99.


28 If a series of bilateral relationships.


32 There is also the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), (CETS No 126); it is non-normative, confining itself to establishing a Committee for the Prevention of Torture (CPT) which visits places of detention in States parties.
The eminent commentator Karel Vasak once described these three categories as the 'three generations of human rights' (Vasak, 1977). This catchy term did little service to clarity of thought about human rights.

For self-determination and development, see next paragraph; for environment see, eg, African Charter on Human and Peoples’ Rights, Article 23; for peace: Article 24 and Protocol of San Salvador to the American Convention on Human Rights, Article 11.

Thus, Algeria invokes an asserted right to peace to justify avoidance of accountability and perpetuate impunity for its brutal repression in the 1990s of an Islamist revolt involving thousands of enforced disappearances. Eg Human Rights Committee, Guezout et al v Algeria (Communication No 1753/2008), UN Doc CCPR/C/105/D/1753/2008 (2012), para 4.6.

Thus, the Human Rights Committee took account of the article in interpreting Article 25 (right to participate in government); in fact, it found that the exclusion of certain French and other foreign citizens (persons not resident for the previous ten years) from participating in a referendum on self-determination for New Caledonia did not violate Article 25 read together with Article 1: Gillot et al v France (Communication No 932/2000), UN Doc CCPR/C/75/D/932/2000 (2002), para 13.4. This was a case of external self-determination from colonial control, pursuant to the General Assembly Declaration on the Granting of Independence to Colonial Countries and People, GA Res 1514 (XV) (14 December 1960). It is unclear whether or how the right may apply in internal situations.


Ibid, para 10; see generally, Chapman and Russell, 2002.

General Comment No 3, ibid, para 10.

Ibid, para 10.

General Comment No 14 (2000) (the right to the highest attainable standard of health (Article 12 of the ICESCR)), para 43(a)–(e).

Ibid, para 43(f).

Human Rights Committee, General Comment No 31 (n 29), para 8 (emphasis added).

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46 Ibid, para 18.


48 Ibid. Article 26 provides for equality under the law and non-discrimination ‘on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.


50 See UN Secretary-General, Secretary-General’s Bulletin: Observance by UN Forces of International Humanitarian Law, 6 August 1999, UN Doc ST/SGB/1999/13; Remarks of the UN Legal Counsel, Nicolas Michel, to the Security Council meeting on ‘Strengthening International Law: Rule of Law and Maintenance of International Peace and Security’, UN Doc S/PV.5474 (2006), pp 3-5; UN Secretariat, ‘Human Rights Due Diligence Policy on UN Support to non-UN Security Forces’ (HRDDP) (July 2012), which confirms ‘the Organization’s Purposes and Principles in the Charter and its obligations under international law to respect, promote and encourage respect for international humanitarian, human rights and refugee law’ (emphasis added).


52 Article 3 common to the four Geneva Conventions of 12 August 1949 does not specify the attributes of a non-State party to an armed conflict. Additional Protocol II to the Conventions, relating to the protection of victims of armed conflict refers to ‘dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [a state’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’, Article 2(1). Common Article 3 is not generally interpreted to require such a high threshold for an entity to be considered a party to a non-international armed conflict.


54 However, Ben Emmerson QC, the UN Human Rights Council’s Special Rapporteur on the promotion and protection of human rights while countering terrorism, has rejected this approach as ‘legalistic’ though he cites no primary sources to sustain the refutation: UN Doc A/HRC/20/14 (2012), para 13.


56 Ibid, para 1.
57 Ibid.


60 Principles 11–24.

61 [Editor’s Note: Human Rights Council Res 26/9 (26 June 2014) established an open-ended intergovernmental working group, mandated ‘to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights’. The 3rd Session of the Working Group took place in October 2017.]


63 Even under the Act, the Courts cannot strike down legislation that they cannot reconcile with the ECHR; they may only issue a certificate of incompatibility that then would require the amending legislator to repair the incompatibility (s 4).

64 An early UK (Scottish) example not involving human rights is Mortensen v Peters (1906) 14 Scots Law Times 227. It took until the 1990s before the Courts would feel comfortable with ECHR-based arguments for interpretive purposes: see Besson, 2008, p 48; the ICCPR is generally overlooked.

65 This is US practice: Whitney v Robertson 124 US 190 (1888) (Supreme Court).

66 See, eg, Foster and Eelam v Neilson, 2 Pet 253 (1829) (US Supreme Court); also the refusal of the courts of clearly monist Senegal to try exiled Chadian President Hissène Habré in the absence of legislation implementing the universal jurisdiction clauses of the UNCAT: Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, para 18.

67 See, eg, Human Rights Committee, General Comment No 31 (n 29), para 13. Note, however, the practice of the Committee against Torture under UNCAT, which maintains that States are obliged to incorporate into domestic law the crime of torture, containing the elements of torture as defined in UNCAT Article 1: see Committee against Torture General Comment No 2 (Implementation of Article 2 by States parties), UN Doc CAT/C/GC/2 (2008), para 8.

68 General Comment No 31, para 13.

69 See, eg, Rodley, 2008.
70 Preambular para 2.


72 See Friedman, 1960, pp 58–9 (on St Thomas Aquinas) and 64–5 (on Grotius).

73 I have here borrowed from the taxonomy I have previously used in Rodley, 2012, p 106.

74 See ICCPR Article 19(3) (freedom of opinion and expression); Article 18(3) (freedom of thought, conscience and religion); Article 22(2) (freedom of association); and Article 21, second sentence (right of peaceful assembly).


77 Eg Coleman v Australia (Communication No 1157/2003), UN Doc CCPR/C/87/D/1157/2003 (2006). ICCPR Article 19 being violated by ‘disproportionate’ reaction (fine and imprisonment) to public speaking in a shopping mall without a permit: para 7.3. Note the joint concurring opinion of Committee Members Nisuke Ando, Michael O’Flaherty, and Walter Kälin to the permit system allowing the authorities to ‘strike a balance’ between freedom of expression and ‘countervailing’ interests: ibid, Appendix.


79 Commonly attributed to the great nineteenth-century American jurist and judge, Oliver Wendell Holmes Jr.

80 See General Comment No 31 (n 29), paras 33–7.


82 Thus, under ICCPR Article 13, such an alien is provided only with procedural, rather than normative, protections.

83 Article 2.
That is, the rule of interpretation that open clauses after a list should be understood as limiting further examples to those ‘of the same kind’ as those specified in the list.

Nowak correctly points out that a specific decision of the Committee involving the criminalization of homosexual behaviour was found to violate Article 17(1) (private life) together with Article 2(1) (on the basis of the word ‘sex’). The Committee did not explain this deviation from the issue as it was litigated, namely, as an Article 26 issue in relating to ‘other status’; Nowak, 2005, referring to Toonen v Australia (Communication No 488/1992), UN Doc CCPR/C/50/D/488/1992 (1994).

And, indeed, ICCPR, Article 2(1).

See General Comment 18 (1989) (Non-discrimination), paras 10 and 13 respectively.

GA Res 3452 (9 December 1975), Article 2 (torture); GA Res 47/133 (18 December 1992), Article 1 (enforced disappearance).

GA Res 44/128 (15 December 1989), preambular para 1; see also African Charter on Human and Peoples’ Rights, Article 5, and American Convention on Human Rights, Article 5.

ICCPR, Article 7; ECHR, Article 3; ACHR, Article 5; ACHPR, Article 5; Arab CHR, Article 8; see generally Rodley and Pollard, 2009, ch 2.


See Rodley and Pollard, 2009, pp 85–124 (torture) and 332–7 (enforced disappearance).


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96 General Comment No 25 (1996), UN Doc CCPR/C/21/Rev.1/Add.7, para 17.


98 Human Rights Committee, General Comment No 31 (n 29), paras 15 and 18.

99 See ICCPR, Article 17.

100 See ICCPR, Articles 23 and 24.

101 A body of up to 26 individual experts, then known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, later re-named Sub-Commission on the Promotion and Protection of Human Rights, until it was dissolved at the same time as the parent intergovernmental Commission on Human Rights.

102 By ECOSOC Res 728F (30 July 1959), the Secretariat had been authorized to prepare a confidential list of communications (complaints) alleging human rights violations in specific countries, the list being circulated to members of the Sub-Commission and the Commission. This list became the basis for the ‘1503 procedure’.

103 The term ‘special rapporteur’ is a portmanteau term for individual experts charged with a specific function by a UN body and expected to report to the body. Here, we are talking about experts mandated to investigate or fact-find for the body appointing them.

104 Sometimes the term ‘special representative’ (usually, then, to be appointed by the Secretary-General) or ‘independent expert’ would be used. The terminology was no guide to the function.

105 [Editor’s Note: the number of thematic mandates in the text has been updated from the 36 at the time of the previous edition in 2014.] And another one on occupied Kuwait. See Commission on Human Rights Res 1991/74 (6 March 1991), para 5 (Iraq) and 1991/67 (6 March 1991), para 9 (occupied Kuwait).


107 Ibid, para 283.


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111 Human Rights Council Dec 1/102 (30 June 2006); for the background, see Boyle, 2009, pp 28–44.

112 [Editor’s Note: Only one new country rapporteur has since been established, for the Central African Republic in 2013. There are currently 12 such mandates.]


116 Ibid. [Editor’s Note: Such a mechanism has not been established.]

117 [Editor’s note: subsequent Special Sessions have been held concerning: the Central African Republic (2014); IOT (2014); ISIS in Iraq and the Levant (2014); Boko Haram (2015); Syria (2016); South Sudan (2016); and the Rohingya in Rakhine State, Myanmar (2017).]

118 The UPR process outcome consists of recommendations made by other States together with the response of the examined State to each recommendation; there is no corporate conclusion or recommendation made by the Council as a whole.

119 Committee on the Elimination of Racial Discrimination (CERD), Committee on Economic, Social and Cultural Rights (CESCR) (uniquely, established by ECOSOC, the body originally provided for by ICESCR to perform the monitoring function), Human Rights Committee (HRC), Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Committee against Torture (CAT), the Committee on the Rights of the Child (CRC Committee), the Committee on the Protection of All Migrant Workers and Members of Their Families (CMW Committee), the Committee on the Rights of Persons with Disabilities (CRPD Committee), and the Committee on Enforced Disappearances (CED).

120 It is a long-standing practice of most committees, now enshrined in the ‘Guidelines on the Independence and Impartiality of Members of Human Rights Treaty Bodies (“the Addis Ababa Guidelines”), adopted by the Twenty-fourth annual meeting of chairs of the treaty bodies (UN Doc A/67/222 (2012) Annex), for members to refrain from participating in work on their own countries.

121 See Rodley, 2013, pp 621, 627 (LOI) and 629–30 (LOIPR). [Editor’s Note: Following the adoption by the General Assembly of Res 68/268 (9 April 2014) on ‘Strengthening and enhancing the effective functioning of the Un human rights treaty body system’ (paras 1 and 2), all treaty bodies
are encouraged to offer States the possibility of using what is now called the ‘Simplified Reporting Procedure’. This is increasingly being used.]

122 Before that there was no agreement that the bodies could interpret their powers as including the issuance of country-specific evaluations: ibid, 628–9.


124 [Editor’s Note: in response to this problem UN GA Res 68/268 (9 April 2014) substantially increased the amount of meeting time available to treaty bodies to deal with the backlog of reports and, whilst not entirely eliminated, the problem of backlog for many Committees is now significantly reduced. The problem of late or non-reporting, however, remains.]

125 Eg Lauterpacht, 1950, ch 3, discussing the possibility of amending Article 34 of the Statute of the International Court of Justice to permit individuals, rather than just States, to seize the Court.

126 The language of the Human Rights Committee: General Comment No 33 (2008) (The Obligations of States Parties under the Optional Protocol to the [ICCPR]) UN Doc CCPR/C/GC/33, para 11.


128 UN Doc A/51/44 (1996), paras 216–18 (refusal of Egypt—no other refusal of a CAT visit is known to have occurred).

129 [Editor’s Note: the number of Inquiry Reports published by the CAT has increased to ten, with Reports being published concerning Lebanon (2014) and Egypt (2017).]

130 [Editor’s Note: When this was written, the SPT had only been able to undertake an average of three or four visits per year. The SPT is now able to undertake approximately ten visits per year following increased resourcing in the wake of UN GA Res 68/268 (9 April 2014).]


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135 Ibid.

136 [Editor’s Note: UN GA Res 68/268 (9 April 2014) brought about significant changes to the practical operation of the treaty bodies. Meeting time was substantially increased and as a result backlogs have declined. Streamlined and aligned procedures have been encouraged to improve efficiency and effectiveness. Nevertheless, the system is still affected by significant resource constraints and a further review of the system is due to occur in 2020.]

137 Article 25.

138 Article 48.

139 Ibid; the State of the alleged victim’s nationality could also refer the case to the Court.

140 In force 1 November 1998.


142 There were others dealt with by the European Commission, including the landmark *Greek Case* (1969) 12 *Yearbook of the European Commission of Human Rights* 468. [Editor’s Note: The Court has now also determined on the merits a fifth inter-State complaint and three others are currently pending before the Court, marking a notable increase in the use of the inter-State procedure.]

143 The population of the Americas is estimated at 953 million.

144 Article 31.

145 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human Rights, Article 12 (in force 2004). The Court will merge with the proposed African Court of Justice after 15 African Union member States have ratified the 2008 Protocol on the Statute of the African Court of Justice and Human Rights; three had done so at the time of writing. [Editor’s Note: the number of ratifications has now risen to six.]

146 [Editor’s Note: the number of ratifications has now risen to 30.]

147 Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court or Human Rights, Articles 5 and 34(6).
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148 [Editor’s Note: the number accepting the jurisdiction of the Court has now risen to eight.]

149 [Editor’s Note: by the end of 2017 the Court had now issued six Advisory Opinions.]

150 [Editor’s Note: a number of Reports following the consideration of country situations are now available at http://blogs.lse.ac.uk/vaw/regional/arab-league/arab-human-rights-committee/.