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HUMAN RIGHTS:

A COMPARATIVE APPROACH

ΚΑΛΛΙΠΟΣ
ανοικτές ακαδημαϊκές εκδόσεις

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Human Rights: A Comparative Approach

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To the girls and women who inspired us and are the wind beneath our wings…!

To our sisters, mums and grandmothers!!

To the young and future generations!!!

This open access ebook on human rights education is linked with multiple United Nations Sustainable Development Goals (SDGs), including SDG 4: Quality Education, SDG 13: Climate Action, and SDG 16: Peace, Justice, and Strong Institutions.

1. **SDG 4: Quality Education:** The present ebook aligns with SDG 4 as it emphasizes the importance of quality education and the integration of human rights education within educational systems. It promotes lifelong learning opportunities, inclusive education, and the acquisition of knowledge and skills necessary to foster sustainable development, human rights, and social justice.

2. **SDG 13: Climate Action:** This ebook recognizes the intersectionality between human rights and climate change. It highlights the importance of climate action in addressing environmental challenges and their impact on vulnerable communities. By incorporating climate justice principles, it emphasizes the need to protect human rights in the face of climate change.

3. **SDG 16: Peace, Justice, and Strong Institutions:** The ebook contributes to SDG 16 by promoting peace, justice, and strong institutions through human rights education. It emphasizes the importance of understanding and respecting human rights, fostering a culture of peace, and advocating for inclusive and just societies.

By linking our open access ebook on human rights education with these SDGs, we highlight the interconnectedness of education, human rights, climate action, and peace. It reinforces the need for comprehensive approaches to address global challenges and work towards a sustainable and equitable future.

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Abbreviations

AfCRWC	African Charter on the Welfare
AICHR	ASEAN Intergovernmental Commission on Human Rights
ACHR	American Convention on Human Rights
AfCHPR or African Commission	African Commission on Human and People's Rights
AfCtHPR or African Court	African Court on Human and Peoples' Rights
ASEAN	Association of Southeast Asian Nations
ASEAN ASWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
Art.	Article
Arts.	Articles
AU	African Union
BAP	Bali Action Plan
CAT	Committee Against Torture
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CRC Committee	Committee on the Rights of the Child
COP	Conference of the Parties
CRPD	Committee on the Rights of Persons with Disabilities
CED	Committee on Enforced Disappearances
COE	Council of Europe
ECHR	European Convention on Human Rights
ESC	European Social Charter
FRA	European Union Agency for Fundamental Rights
Revised ESC	Revised European Social Charter
EU	European Union
EU CFR	EU Charter of Fundamental Rights

HRC CCPR	Human Rights Committee
HRC	Human Rights Council
ECtHR	European Court of Human Rights
ESCR	European Committee of Social Rights
FCNM	Framework Convention for the Protection of National Minorities
ICC	International Criminal Court
ICJ	International Court of Justice
ILO	International Labour Organisation
LGBT	Lesbian, Gay, Bisexual, Transgender, Intersex
SPT	Subcommittee on the Prevention of Torture
ESC	Economic, Social and Cultural Rights
ESC	European Social Charter
HRE	Human Rights Education
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
GRETA	Group of Experts on Action against Trafficking in Human Beings
ICC	International Criminal Court
I/A Court of HR	Inter-American Court of Human Rights
IAHR or I/A Commission on HR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
HR	Human Rights
NGOs	Non-Governmental Organisations
OAS	Organisation of American States
UN	United Nations
UN CAT	Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment
UDHR	Universal Declaration on Human Rights
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
UN CRC	Convention on the Rights of the Child
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights
ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearances
ICRPD	International Convention on the Rights of Persons with Disabilities
OP-CRPD	Optional Protocol to the International Convention on the Rights of Persons with Disabilities
OAU	Organisation of African Union
UPR	Universal Periodic Review
KP	Kyoto Protocol
UNFCCC	United Nations Framework Convention on Climate Change
UNCED	United Nations Conference on Environment and Development

Preface

The digital publication titled “Human Rights: A Comparative Approach” encompasses a diverse array of human rights topics, thereby offering an expansive examination of the subject matter. This open-source e-book has been meticulously crafted to serve as an invaluable resource for the purpose of human rights education, aligning with the fundamental principle that education itself is a fundamental human right. Drawing upon the extensive experience garnered by the two authors throughout their tenure in academia, including interactions with both undergraduate and postgraduate students, this publication stands as a testament to their commitment to fostering a deeper understanding of human rights. Moreover, the content of this book has been significantly shaped by the discerning insights and concerns expressed by their audience, demonstrating a mutual dedication to effective human rights pedagogy and the ongoing evolution of human rights through the transformative influence of education.

Human rights serve as a mechanism for taming the unrestrained power of the State, which has the capacity for ‘legitimate’ violence (see: ‘monopoly of violence'), since human rights provide a measure that requires that each action of the State is in accordance with the fundamental principles of political theory that underpin the foundation, cultivation, growth, and evolution of human rights, like the rule of law. Therefore, to foster the reader's comprehension of human rights, it is helpful to approach this field from a philosophical standpoint and recognize them as instruments that balance the unrestrained powers of the State with the essential liberties required by individuals within a free society. In this context, human rights impose obligations and constraints on the State to safeguard the rights of individuals, while simultaneously providing a framework for challenging the traditional role of the State. The State's responsibilities to promote, protect, and fulfill human rights are contingent upon various factors, including the ratification process of relevant human rights legal instruments, which can be a protracted political endeavor for certain States. Additionally, States may enter reservations in these human rights instruments, reflecting personal, cultural, religious, or alternative interpretations of specific legal obligations, or they may seek to expand or restrict the territorial application of these instruments based on their own considerations. The application of human rights, however, presents numerous challenges, encompassing aspects such as monitoring, enforcement, State accountability for human rights violations, the availability of reparations for victims, and ultimately, the ability of human rights to translate into tangible actions that restore justice. In reality human rights main goal is to protect the individual’s liberties from the State’s violations.

Why a comparative approach? Why do we use the term "comparative"?

1. The examination of the interplay between the essence of human rights and the actual realization of their enjoyment offers a captivating perspective through which to understand human rights. This dynamic is open to diverse interpretations and can be alternatively framed as the divide between a State's comprehension of human rights and that of an individual. While human rights inherently serve as safeguards for the individual, the conceptualization of human rights by States may markedly deviate from this understanding. From the viewpoint of a State, the relevance of human rights hinges upon their formal recognition within a legal framework, thereby establishing corresponding obligations for that particular State.

2. Human rights encompass a dual nature consisting of both entitlements and responsibilities. Under international law, States assume obligations and duties to *respect*, *protect*, and *fulfill* human rights. The *obligation to respect* necessitates that States abstain from interfering with or curtailing the exercise of human rights. The *obligation to protect* requires States to safeguard individuals and groups against human rights abuses. Furthermore, the *obligation to fulfill* mandates that States actively undertake measures to facilitate the realization of fundamental human rights. At the individual level, while we possess entitlements to our own human rights, it is equally important to demonstrate respect for the human rights of others. In many ways, human rights hold significant relevance in the context of the relationship between individuals and the State, serving as a valuable framework for promoting and safeguarding basic rights and freedoms.

3. The perceived fragmentation of international human rights law is observed through the existence of diverse regional systems for human rights protection. Over the course of the last three decades, human rights courts and quasi-judicial entities at both universal and regional levels have generated substantial jurisprudence on human rights matters. Conducting a comparative analysis of the rights jurisprudence originating from these international human rights bodies, such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (I/A Court of HR), may ultimately indicate that these entities engage in an ongoing dialogue, mutually reinforcing and complementing each other.

4. The rate at which international organizations establish standards regarding human rights varies, as some organizations continue to engage in the ongoing process of codification. As a result, their collection of human rights instruments, comprising both legally binding and non-binding documents, is continuously enriched. This continuous enrichment contributes to a more comprehensive understanding of the normative dimensions of human rights, thereby affording more explicit protection for marginalized and vulnerable groups.

5. The imperative to advance human rights education through a comparative approach, is crucial. In order to effectively cultivate human rights education, it is essential to draw upon the knowledge derived from national and regional judicial decisions and instruments. Human rights education operates on a triptych of principles: (i) the acquisition of knowledge about human rights, (ii) learning in support of human rights, and (iii) education facilitated through the lens of human rights. This form of education is not only a human right in itself but also a shared responsibility at both individual and State levels. The preamble of the Universal Declaration of Human Rights explicitly emphasizes the obligation of every individual and societal institution to promote respect for these rights and freedoms through teaching and education. Despite the passage of seven decades since the inception of the foundational document in human rights law, the Universal Declaration of Human Rights (1948), human rights education remains significantly underserved, despite its indispensable role in the overall endeavor of advancing human rights.

What does this book offer to scholars and students?

This freely accessible open source digital publication seeks to enhance the quality and functionality of electronic interactive multimedia textbooks in higher education. It achieves this by providing a pioneering and innovative textbook on human rights education, presented in a digital format. By doing so, it endeavors to bring about a transformative shift in the methods of studying, learning, and teaching human rights law within the digital realm.

The primary objective of this eBook is to enhance the quality of online publications and digital files associated with e-books. This is accomplished by integrating in-depth knowledge of human rights with digital literacy skills and the utilization of online open resources for the purpose of human rights education. Functioning as an online educational resource in the realm of human rights, its aim is to provide readers with a comprehensive introduction to the subject matter while harnessing the full range of technological tools available for digital writing and online publishing of educational materials. In this regard, the eBook will encompass digital guidelines and tools designed to facilitate distance learning and on-screen study. To enhance the learning experience, the content will be presented in a format that incorporates screen-break notifications and also incorporates various interactive elements such as photographs, videos, podcasts, infographics, and multimedia content. It is important to note that, all multimedia materials will be freely accessible online for educational purposes, either through being royalty-free or through Creative Commons licensing (CC).

- **This eBook serves as an open source digitally accessible publication** that incorporates an extensive range of contemporary technological tools within its content. It introduces various innovative features, such as:

- Interactive digital tools like online human rights quizzes that actively engage readers in the learning process.
- Hyperlinks strategically embedded throughout the text, redirecting readers to external sources and enhancing their overall learning experience.
- The eBook offers a diverse array of content and material, allowing readers to alternate between reading text, watching videos, playing interactive educational games and following a course outline or watch a documentary to gain deeper critical insights to each topic presented.
- The book's chapters are thoughtfully designed to be concise and easily readable online and on screens. Clear instructions and guidelines are provided to enhance the learning experience.
- The eBook is enriched with audio-visual materials that extend beyond written text, employing cinema for human rights education and utilizing documentaries for educational purposes. These supplementary resources are freely available online, exempt from royalty fees. By engaging with this eBook, students will acquire comprehensive knowledge about human rights from various perspectives, including philosophical, legal, international organizations and institutions, and political viewpoints.

Through this comprehensive exploration, students will develop a deep understanding of human rights principles and gain insight into the critical issues that shape informed and knowledgeable human rights scholars, fostering a critical perspective.

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Introduction

When it comes to disseminating knowledge of human rights on a global scale, the United Nations assumes a pivotal position as the principal catalyst in sowing and nurturing the seeds of human rights education at the international level. The United Nations plays a significant role in promoting global awareness of human rights. The World Conference on Human Rights in Vienna in 1993 achieved remarkable success primarily due to three key factors: education, training, and public communication of human rights. Notably, the United Nations General Assembly officially acknowledged the period from January 1, 1995, to December 31, 2004, as the Decade of Human Rights Education, underscoring the importance of this initiative.

Following a decade of extensive research, the World Programme for Human Rights Education was established in 2004. One of the initial objectives of this program was to enhance human rights education within primary and secondary school settings. The World Programme, along with its Plan of Action, encouraged all nations to undertake their own initiatives in this regard. During its second phase, spanning from 2010 to 2014, the Human Rights Council identified human rights education in higher education and the implementation of human rights training programs for educators, public servants, law enforcement personnel, and military members at all levels as key priorities. To facilitate these efforts, in September 2010, the UN High Commissioner for Human Rights presented the Plan of Action for the program's second phase, which received acceptance. Furthermore, the Human Rights Council emphasized the importance of sustaining human rights education in primary and secondary schools among its Member States. It is essential to note that the World Programme operates on a temporary basis, allowing governments and other interested stakeholders to continue collaborating indefinitely.

In December 2011, the UN General Assembly adopted a Declaration on Human Rights Education and Training. As the first dedicated piece of legislation to HRE, the Declaration on Human Rights Education and Training is an invaluable tool for advancing HRE and raising awareness of its relevance. Consequently, individuals possess the entitlement to be informed, actively pursue, and obtain comprehensive knowledge about all human rights and fundamental freedoms. Moreover, they should have unfettered access to human rights education and training. Human rights education and training encompass not only the dissemination of knowledge on human rights but also the active promotion and defense of these rights through advocacy efforts. It is the fundamental responsibility of States, as stated in the Declaration on Human Rights Education and Training, “to promote and provide human rights education and training” (Article 7). The Human Rights Council is responsible for overseeing the Office of the United Nations High Commissioner for Human Rights in Geneva, which is in charge of human rights education within the UN system.

The establishment of contemporary human rights and universal human rights education can be grounded on the principles of human rights education. Enhancing the

comprehension of human rights among individuals, can contribute to a better realization of their other fundamental human needs including access to adequate food, housing, and healthcare. The right to education has been safeguarded through the efforts of international human rights organizations. To ensure equal educational opportunities for all, the principles of Accessibility, Acceptability, Adaptability, and Availability, commonly known as the four “As,” need to be effectively implemented. It is imperative that every student has equitable access to qualified educators and appropriate educational materials, while the educational system should be adaptable to meet diverse individual requirements. The realization of Economic, Social, and Cultural Rights is intricately linked to the right to education and human rights education, and effective State engagement is vital in ensuring the fulfillment of these rights. When imparting knowledge about human rights, governments must uphold guarantees such as the right to life, liberty, and the pursuit of happiness. The right to provide education on human rights has resulted in the broadest possible comprehension of these rights.

In today's interconnected world, the significance of soilidarity and mutual support among individuals becomes evident as unfair treatment has wide-ranging implications that impact the overall quality of life. The consequences of actions originating in Europe transcend geographical boundaries, exerting a global influence. Ethical considerations must be at the core of human rights education since ethics can provide the space for developing a critical perspective of viewing an issue in our complex human rights world that is being influenced by a variety of stakeholders and intentions. For example, the garments we wear often involve the labor of children in Asia, highlighting the exploitation and violation of their rights. Moreover, the political and religious unrest experienced in countries like Iraq, Somalia, and Afghanistan is compounded by the lingering effects of European colonial history, leading to an influx of asylum seekers who seek refuge beyond their borders.

Climate change from a human rights perspective illuminates the importance of climate justice. Climate justice is the new frontier for the human rights field. Clumate change which is predominantly driven by the actions of developed nations, presents another dimension of human rights challenges. The adverse impacts of climate change disproportionately affect vulnerable populations, particularly in the Global South like for example, Africa and Asia, forcing millions of people to migrate due to the degradation of their environments and the loss of livelihoods. This underscores the interconnectedness of human rights issues on a global scale, as the actions of one region can have profound consequences on the lives and well-being of individuals in distant parts of the world.

However, the impact of international human rights violations extends beyond the practical implications on a domestic level. The fundamental principles of ethics espoused by major world religions, emphasize the importance of concern for fellow human beings. These ethical tenets underscore the urgency to address human rights violations as a global issue, rather than one confined to specific geographical locations. By fostering comprehensive education and awareness about human rights, societies can strive to establish a culture where the dignity and rights of all individuals are respected, thereby preventing their abuse and promoting social justice.

Given the intricate nature of human rights challenges, there is a growing consensus that the right to educate students about human rights is a fundamental aspect of empowering future generations. By equipping individuals with a deep understanding of human rights issues, diverse examples of violations and the mechanisms for their protection, education plays a vital role in cultivating informed and responsible global citizens who can actively contribute to the promotion and defense of human rights.

In accordance with Article 26 of the Universal Declaration of Human Rights (UDHR), everyone has the right to an appropriate education. Article 28 of the Convention on the Rights of the Child states that: "Each pupil shall be treated with dignity and respect during school discipline. A child's formal education should emphasize values like respect for human rights and fundamental freedoms, responsibility in a free society, understanding, tolerance, and equality, cultivation of regard for the natural environment".

Human rights, as an embodiment of fundamental human needs, establish a set of essential standards that are universally applicable, ensuring that individuals are treated with decency and bestowed with inherent dignity. These rights are intricately tied to principles of freedom, fairness, equality, respect, and justice, forming the bedrock upon which a just and inclusive society is built. By way of illustration, specific examples of human rights encompass the right to life, the right to express oneself without restrictions, the right to enter into marriage and form a family, the right to enjoy a decent standard of living and the right to access quality education. (The Universal Declaration of Human Rights (UDHR) and a summary of it, are both included for your convenience. Read the Illustrated edition of the Universal Declaration of Human Rights).

The principle of equal and enduring access to human rights is universally applicable to all individuals. Regardless of their geographical location or nationality, everyone is entitled to the same comprehensive set of universal human rights. For instance, the right to participate in governance and free elections is contingent upon the exercise of freedom of speech. These rights are inherently inseparable, interdependent, and cannot be relinquished or transferred to another individual, as they are inherent and indivisible components of human rights.

In order for individuals to effectively exercise and safeguard their human rights, it is imperative that they possess knowledge and awareness of these rights. This recognition is explicitly acknowledged in the preamble of the Universal Declaration of Human Rights (UDHR), while Article 26 emphasizes the importance of accessible education aimed at fostering a deep appreciation for human rights and fundamental freedoms. The ultimate objective of human rights education is to establish a global community grounded in the universal respect for the rights of every individual. Within such a society, people are not only well-informed about their own rights and responsibilities but also vigilant in identifying instances of rights violations affecting others, taking proactive measures to prevent such transgressions. Human rights are woven into the fabric of our culture, akin to language, traditions, arts, and regional identities, becoming an integral aspect of our daily lives.

In light of the prevailing mental health crises and the afresh identified vulnerable populations resulting from the COVID-19 pandemic, it has become evident that human

rights preparedness requires a reassessment and reorientation of certain endeavors. Within the United Nations, experts in the field of human rights have engaged in extensive deliberations regarding the recognition of mental health as a fundamental human right. Numerous lines of evidence underscore the profound mental and societal repercussions brought about by COVID-19. Despite the significant positive impact of cinema, arts, and culture on happiness and mental well-being, these aspects tend to be undervalued. In response to these circumstances, human rights preparedness should leverage the knowledge acquired to mitigate future adverse consequences on human welfare, including the emerging challenges to mental health. A comprehensive understanding of mental health, human rights, and the economic implications of the pandemic necessitates a contextual approach.

Since its inception in 1948, substantial efforts have been devoted to fostering awareness and education regarding human rights. It is essential to acknowledge that human rights education (HRE) can be implemented through various approaches, while the underlying principles remain unchanged. Adaptations may be warranted to accommodate diverse worldviews, educational settings, and the specific interests of organizations and the public sector. By examining the roles played by "individuals and organs of society," a clearer understanding can be gained regarding their involvement in HRE education and service delivery.

At the 1993 World Conference on Human Rights, it was agreed that teaching about human rights was *essential* for fostering harmonious relationships between groups and fostering acceptance of one another's perspectives. During the UN Decade of Human Rights Education (1994-2004), the General Assembly requested that all Member States promote "training, distribution, and information aimed at the creation of a worldwide culture of human rights" (1995-2004). As a result, governments have ramped up their efforts to spread HRE, mostly via state-run educational programs. Because governments care about diplomatic ties, law and order, and society's smooth operation in general, they often see HRE as a way to further these goals.

Human rights education (HRE) is defined by the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (2010) as "education, training, awareness raising, information, practices, and activities which aim, by equipping learners with knowledge, skills and understanding and developing their attitudes and behavior, to empower learners to contribute to the building and defense of a universal culture of human rights in society." Human rights education is a dynamic process that empowers individuals to learn about their own rights and those of others through participatory and interactive learning approaches. It is widely recognized that teaching human rights encompasses three essential aspects.

1. Firstly, acquiring an education in human rights involves gaining knowledge about the nature of human rights, their underlying principles, and the mechanisms for their protection. This includes understanding the various international and regional instruments that safeguard human rights.

2. Secondly, human rights education emphasizes the equal significance of both the method and substance of instruction. The pedagogical approach should align with human rights values, to ensure that the teaching process upholds the principles it seeks to impart.
3. Lastly, the aim of human rights education is to equip students with the knowledge, beliefs, and attitudes necessary to promote and defend human rights in their daily lives and within their communities. This entails empowering individuals to become active agents of change and advocates for human rights, fostering a culture that values and respects the dignity and rights of all.

Considering the implementation of human rights education, it becomes evident that it cannot be simply *taught* in a traditional sense. Rather, it must be acquired through experiential learning and practical engagement. This includes providing students with real-world examples and opportunities to apply their understanding of human rights in meaningful ways. Effective human rights education necessitates an approach that consistently upholds human dignity and reinforces the observance of rights for all individuals.

The authors of this book, being human rights lawyers and academics with a profound dedication to human rights advocacy and education, have devoted their adult lives to fighting for various human rights causes. Their intention in producing this book is to provoke readers to critically question their comprehension of human rights and to inspire them to embark on their own personal journey of engaging ethically with advancing human rights principles.

Part A

Chapter 1 Philosophical Foundations

Abstract

This chapter aims to provide a comprehensive analysis of the historical progression of philosophical ideas that have significantly influenced the formation and understanding of human rights. Central inquiries to be addressed in this exploration include elucidating the essence of human rights, examining the normative justifications underlying their existence, investigating the role of natural law and natural rights in their conceptualization, and critically examining the universality of human rights. The forthcoming discussion will encompass a range of topics, such as delving into the historical and evolutionary trajectory of human rights, investigating their origins, reflecting on ethics, exploring various conceptual frameworks related to human rights, charting their development across different historical periods, and scrutinizing the diverse philosophical theories that have contributed to our understanding of human rights. By delving into these multifaceted dimensions, this chapter endeavors to foster a more nuanced and scholarly understanding of the complex tapestry of human rights and their profound implications for societies worldwide.

Required Prior Knowledge

Human Rights, Law, Philosophy, Critical Legal Studies.

A.1.1 The foundations of human rights

The objective of this section diverges from the mere compilation of an inventory of rights. Rather, its purpose lies in conveying the comprehensive essence of human rights by investigating their *ontological* existence through an *epistemological* lens, inevitably intertwined with Aristotelian perspectives. This exploration involves revisiting the enduring quest of Ethics to actualize its profound potential, dating back to its inception in ancient Greece and the transformative impact of the Socratic method on philosophical discourse. It is useful to mention that there are scholars that argue that it was the 'Stoics that invented human rights'[1]. However, the practical application of ethical principles in the real world has regrettably fallen short, exposing the profound gap between theory and practice. Consequently, in the year 2023, human rights, as descendants of ethical ideals, cannot be regarded as universally existing entities detached from external influences, such as societal, political, or legal systems, to name but a few examples.

[1] BETT, RICHARD, 'DID THE STOICS INVENT HUMAN RIGHTS?', in Rachana Kamtekar (ed.), *Virtue and Happiness: Essays in Honour of Julia Annas*, Oxford Studies in Ancient Philosophy (Oxford, 2012; online edn, Oxford Academic, 24 Jan. 2013), https://doi.org/10.1093/acprof:oso/9780199646043.003.0009, accessed 22 Dec. 2022.

While a list of human rights, as exemplified in the Universal Declaration of Human Rights (UDHR), serves a valuable purpose in legal contexts and legislative endeavors, its utility within the realm of *philosophy* proves more confining than fruitful. This realization uncovers a paradoxical nature of the argument, for it contradicts the very essence of philosophy, which inherently demands thoughtful deliberation and choice. In creating such a list, choices are made regarding which rights to include, inevitably leading to parallel choices to exclude or disregard other rights of significance. The question arises: Who possesses the authority to determine which rights hold prominence in our post-patriarchal societies? Even if two individuals share a foundational understanding of human rights, they may diverge in their opinions regarding the inclusion of specific rights on such a list. Moreover, when considering this issue from a *cultural relativist* perspective, doubts may emerge as to the existence of *universal moral rights* altogether.

In an attempt to encompass the comprehensive spectrum of ancient and contemporary human rights, this four-part overview strives to incorporate various dimensions. Nevertheless, this account acknowledges the likelihood that certain manifestations of human rights may assume additional qualities within our capitalist community of nations. Consequently, this overarching concept does not demand the unification of all aspects of human rights within a singular framework, as argued by Buchanan 2013, who posits that theorizing universal moral rights alongside international legal human rights should be approached separately.

It is crucial to recognize that human rights, by their very nature, denote rights pertaining to humans—a seemingly self-evident point worth emphasizing when contemplating the essence of these rights (see Cruft 2013 for further elaboration).

The majority, if not all, assertions regarding human rights encompass corresponding duties towards those to whom these rights are addressed. The concept of rights revolves around principles of freedom, protection, preferential treatment, and other associated privileges. Human rights obligations frequently encompass the requirements of respect, protection, facilitation, and provision. For the sake of clarity, it is important to acknowledge that human rights can entail both positive and negative obligations, necessitating various actors such as the State, corporations, or individuals to undertake affirmative actions to ensure the enjoyment or, conversely, refrain from actions that impede the realization of a human right.

While the majority of rights impose obligations on both rights-holders and duty-bearers, it is worth noting that, certain legal human rights often describe ideal outcomes and assign obligations for their attainment. Some may argue that these goal-oriented rights lack the authenticity of inherent rights, yet it could be more productive to perceive them as constituting a weaker but still valuable notion of a right. In addition, Feinberg (1973) offers further insights into the concept of *manifesto rights*.

Human rights norms can be viewed through various lenses: (a) as a consensus derived from genuine human moralities, (b) as moral norms supported by compelling arguments, (c) as rights enshrined within national legal frameworks (sometimes referred to as *civil* or *constitutional* rights), or (d) as rights recognized at the international level.

Advocates of human rights often aspire for the fulfillment of all four possibilities in order to establish a robust foundation for the existence and safeguarding of human rights.

Concerns pertaining to human rights include ensuring fair trials, eradicating slavery, ensuring education is available, and preventing genocide. Despite the fact that the human rights championed by many philosophers are fairly basic, they recognize the significance of variety.[2]

Human rights are applicable to all individuals, encompassing every living human being or person. They are universally granted, independent of factors such as race, religion, or nationality. The concept of universality incorporates several notions of self-sufficiency. Human rights persist irrespective of the customs, values, and legal systems of specific cultures or civilizations. However, certain exceptions need to be acknowledged in light of this universal principle. For instance, certain rights, like the right to vote, may only be exercised by adult citizens and permanent residents of a country. Additionally, individuals convicted of serious crimes may temporarily forfeit their right to freedom of movement. Human rights treaties highlight the rights of marginalized groups, including minorities, women, Indigenous peoples, and children.

As emphasized earlier, the value of human rights is foundational. According to the late Judge Maurice Cranston, human rights are of *great importance* and their violation represents a significant affront to justice. However, unless human rights are accorded high priority, they may be overshadowed by other pressing concerns such as national peace and security, individual and national autonomy, and both national and global prosperity. In certain instances, such as matters of national security, human rights may lose their prominence and be deemed less valuable. While the significance of human rights is undeniable, it does not render them immune to debate or controversy. James Griffin aptly suggests that human rights should be seen as “resistant to trade-offs, but not excessively so” (Griffin, 2008). For example, human rights appear to possess varying degrees of priority. In situations where the right to life clashes with another right, such as the right to privacy, the right to life often assumes greater precedence.

[2] Cohen, J., (2004), “Minimalism About Human Rights: The Most We Can Hope For?”, Journal of Political Philosophy, 12: 90–213.

A.1.2 Five questions that have utility in our journey to understand human rights

i. Should human rights be deemed inalienable and universal?

The question of whether human rights should be regarded as inalienable and universal is a complex and debated topic within academic and philosophical discourse. Different perspectives exist on this matter, reflecting diverse philosophical, cultural, and ethical viewpoints.

Supporters of the inalienability and universality of human rights argue that these rights are inherent to all individuals by virtue of their humanity. They contend that human rights are not granted or revoked by any authority, but rather are fundamental and inalienable entitlements that every person possesses. From this standpoint, human rights are seen as universally applicable to all individuals, regardless of their cultural, social, or political context. The universality of human rights underscores the idea that these rights are not contingent upon cultural or societal norms and should be upheld universally as a moral imperative.

On the other hand, critics of the notion of inalienable and universal human rights raise several concerns. They argue that the concept of human rights is culturally and historically contingent, and that different societies may have different conceptions of rights and values. Some critics emphasize the importance of cultural relativism, suggesting that the understanding and prioritization of rights may vary across cultures. They contend that a rigid universal framework might neglect the diversity of human experiences and hinder the respect for cultural autonomy and self-determination.

Ultimately, the question of whether human rights should be considered inalienable and universal is subject to ongoing debate and requires careful examination of philosophical, ethical, and cultural perspectives. Balancing the principles of universality and cultural relativism is a complex task, as it involves navigating between the promotion of common human values and the recognition of cultural diversity and autonomy.

Human rights possess a dual nature, characterized by their universality and inalienability. They are deemed essential for all individuals, irrespective of their location or circumstances. The Universal Declaration of Human Rights, in its Article 1, asserts that “All human beings are born free and equal in dignity and rights”. The term *human rights* refers to the inherent dignity and entitlements that are universally applicable to all individuals by virtue of their humanity. The universal human rights doctrine maintains that these rights should be extended to every person. However, critics, particularly cultural relativists, challenge this perspective, contending that universal human rights can be seen as imperialistic and hegemonic.

While human rights are considered inalienable, it is crucial to acknowledge that their inalienability does not render them inviolable or impervious to compromise. This implies that individuals cannot permanently or voluntarily relinquish their rights, nor can their rights be permanently stripped away due to wrongdoing. However, certain rights may be

temporarily or permanently suspended in cases of just convictions for serious crimes, such as the right to freedom of movement. Those who support both human rights and the imposition of imprisonment as a penalty for grave offenses must grapple with this position. Consequently, it can be argued that while all human rights may not be inherently inalienable, they are exceedingly difficult to forfeit.(See Donnelly 2003).

ii. Should human rights be regarded as fundamental safeguards?

Various philosophers have engaged in discussions surrounding the scope and limitations of human rights, positing that their extent and depth should be relatively limited rather than extensive. For instance, scholars like Joshua Cohen 2004 and Rawls 1999 have argued that human rights should be confined to a few dozen rather than hundreds or thousands. According to this perspective, the primary focus of human rights lies in preventing the worst-case scenarios rather than striving for the best possible outcomes. Shue 1996 suggests that human rights are primarily concerned with establishing minimum standards for acceptable human behavior rather than lofty ideals or ambitious aspirations.

When human rights are conceived as realistic minimum standards, many legal and policy issues at State and local levels can be resolved through popular decision-making processes. This approach allows for the prioritization of human rights, accommodates significant cultural and institutional variations among countries, and provides ample room for democratic decision-making at the national level. However, it should be noted that the concept of an extensive list of human rights is not inherently contradictory, indicating that minimalism is not an inherent characteristic of human rights (critics of the view that human rights are minimal standards can be found in works by Brems 2009 and Raz 2010. Minimalism, in this context, should be understood as a normative guideline within the framework of international human rights. While modest forms of minimalism have gained popularity in recent years, they do not align with the broader discourse surrounding human rights.

Human rights are widely regarded as fundamental safeguards that protect the inherent dignity, freedoms, and well-being of individuals. They serve as a critical framework for upholding and promoting human dignity, equality, and justice in societies around the world.

As fundamental safeguards, human rights provide a set of universally recognized standards that ensure the protection of individuals from abuse, discrimination, and oppression. They establish a baseline for the treatment and rights of all individuals, regardless of their personal characteristics, such as race, gender, religion, or nationality. Human rights act as a shield against arbitrary actions by governments, institutions, or individuals, and aim to prevent violations of individual autonomy, physical integrity, and dignity.

Moreover, human rights serve as mechanisms for social progress and the advancement of society as a whole. By upholding and promoting human rights, societies can strive towards greater inclusivity, fairness, and equality. Human rights contribute to

fostering democratic systems, rule of law, and accountability, enabling individuals to participate in the decision-making processes that affect their lives.

However, it is important to note that the realization of human rights requires ongoing efforts, including legal frameworks, institutional mechanisms, and societal engagement. It is not sufficient to merely recognize human rights in theory; they must be actively protected, promoted, and fulfilled in practice.

In conclusion, human rights are widely regarded as fundamental safeguards that provide a framework for protecting and promoting the dignity, freedoms, and well-being of individuals. They serve as the foundation for a just and inclusive society, offering protection against abuse and discrimination, and fostering social progress and accountability.

iii. Do we want to characterize human rights as identical to or "mirroring" moral rights?

The 1948 Universal Declaration of Human Rights, adopted by the United Nations, emphasized the paramount importance of upholding human rights as a supreme moral principle. Human rights, in their broadest sense, encompass universal moral principles that apply to all individuals, irrespective of formal recognition by any governing body.

The question of whether there exists universal consensus on the notion that all human beings possess inherent human rights solely by virtue of their humanity, is subject to debate. Philosophers with a background in moral philosophy often perceive human rights as inherently moral rather than purely legal concepts. However, it is not contradictory for governments to support human rights solely as national or international legal rights. As Louis Henkin (1978) argued, political forces have sometimes disregarded fundamental philosophical considerations, bridging the gap between natural human rights and positive legal rights.

Nonetheless, theorists who assert that legal rights are the sole determining factor, may encounter difficulties in providing comprehensive explanations for the universality, autonomy, and immense significance of human rights. Their perspectives may fall short in adequately addressing these key aspects of human rights.

The question of whether we should characterize human rights as identical to or "mirroring" moral rights is a subject of ongoing debate and differing perspectives. There is no consensus among scholars and practitioners in the field of human rights.

On one hand, some argue that human rights and moral rights are essentially synonymous. They contend that human rights derive their legitimacy and foundation from moral principles that are universally applicable to all individuals. According to this view, human rights are seen as a manifestation of moral rights and should be understood as such.

On the other hand, there are those who propose that while there may be overlap between human rights and moral rights, they are distinct concepts. They argue that human rights have a specific legal and institutional dimension, recognized and enforced by international treaties, conventions, and domestic laws. Moral rights, in contrast, may

encompass a broader set of ethical principles and personal beliefs that vary across different cultural, religious, and philosophical perspectives.

The characterization of human rights as identical to or "mirroring" moral rights has implications for how they are understood, implemented, and protected. It influences the approach to justifying and enforcing human rights, as well as the relationship between legal frameworks and moral principles.

Ultimately, whether one chooses to view human rights as identical to or "mirroring" moral rights depends on their theoretical and philosophical standpoint, as well as their perspective on the nature and foundations of human rights.

iv. Human rights: effective or ineffective?

Instead of viewing human rights as grounded in an objective moral truth, some theorists may conceptualize them as principles guiding a highly beneficial political practice that has been constructed or evolved by humans. From this perspective, the concept of human rights serves to safeguard essential human and national interests by fulfilling various political functions at both national and international levels. These functions include establishing criteria for evaluating governments' treatment of their citizens on the global stage and delineating circumstances in which economic sanctions or military interventions are deemed appropriate.

In addition to the four aforementioned characteristics, many political theorists argue for the inclusion of a set of political duties or functions. This line of thinking finds support particularly when considering the most significant international human rights that have emerged in the past five decades within the realms of international law and politics. However, it is important to note that the existence and operation of human rights are not contingent upon international monitoring or involvement, and they can even persist within a world consisting of a single state. For instance, in a scenario where an asteroid has devastated the global population except for those in New Zealand, aspects of human rights practice and the concept itself may endure in New Zealand, independent of international relations, law, and politics. Moreover, if it were discovered that a small group of individuals had survived in Iceland without a functioning government or state, New Zealanders would recognize that human rights dictate how these individuals should be treated, despite their lack of legal identification documents. Thus, the establishment of human rights in international law and practice does not necessitate a definitive resolution. However, it is reasonable to argue that the present international human rights movement fulfills the political duties outlined by Rawls and Beitz.

The effectiveness of human rights is a complex and multifaceted issue that varies across different contexts and perspectives. Evaluating the overall effectiveness of human rights involves considering various factors such as legal frameworks, implementation mechanisms, enforcement mechanisms, societal attitudes, and political will.

Human rights have played a crucial role in promoting and protecting the dignity, equality, and well-being of individuals and communities worldwide. They have been instrumental in challenging discrimination, promoting social justice, and advocating for the

rights of marginalized and vulnerable groups. Human rights frameworks have also provided a basis for holding states accountable for their actions and ensuring that individuals are able to exercise their rights.

However, the effectiveness of human rights can be hindered by numerous challenges. Some argue that the enforcement mechanisms for human rights can be inadequate or insufficiently implemented, leading to gaps between legal standards and their practical realization. Political considerations, power dynamics, and conflicting interests may also undermine the effective implementation of human rights obligations. In addition, cultural, social, and economic factors can pose obstacles to the full realization of human rights in different societies.

It is important to note that while human rights may face limitations and challenges, they remain a vital framework for promoting justice, equality, and dignity. Efforts to address the shortcomings and strengthen the effectiveness of human rights continue to be pursued through legal reforms, awareness-raising campaigns, advocacy, and international cooperation.

Ultimately, the assessment of whether human rights are effective or ineffective requires careful examination of specific contexts, concrete outcomes, and ongoing efforts to advance human rights principles and practices.

v. How does this international system plan to ensure that everyone's freedoms are protected?

The international system employs various mechanisms and institutions to ensure the protection of everyone's freedoms. These mechanisms are designed to promote respect for human rights, prevent human rights violations, and provide avenues for accountability when violations occur. Here are some key aspects of the international system's approach to safeguarding freedoms:

1. International Human Rights Treaties: The international community has developed a comprehensive framework of human rights treaties that outline the rights and freedoms to which individuals are entitled. These treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, establish legally binding obligations on States to respect, protect, and fulfill human rights.
2. Monitoring and Reporting Mechanisms: States that have ratified human rights treaties are subject to regular monitoring by international and regional human rights bodies. These bodies assess States' compliance with their obligations, review reports submitted by States, and issue recommendations and observations to address any human rights shortcomings. This monitoring process helps to identify areas where freedoms may be at risk and encourages States to take appropriate actions to protect those freedoms.

3. International Courts and Tribunals: International judicial bodies, such as the International Criminal Court (ICC) and regional human rights courts, play a critical role in upholding individual freedoms. These courts have the authority to hear cases involving human rights violations, prosecute perpetrators, and provide redress to victims. They contribute to the deterrence of human rights abuses and promote accountability on a global scale.
4. Diplomacy and Advocacy: Through diplomatic efforts, States and international organizations engage in dialogue, negotiations, and pressure tactics to address human rights concerns. Diplomatic interventions can involve public statements, resolutions, sanctions, or targeted measures to address violations and promote respect for freedoms. Civil society organizations and human rights defenders also play a vital role in raising awareness, advocating for change, and pressuring governments to protect and promote human rights.
5. International Cooperation and Development: The international system recognizes that protecting freedoms requires addressing underlying socio-economic factors. Efforts are made to promote development, eradicate poverty, ensure access to education and healthcare, and address inequalities. These initiatives aim to create an enabling environment for the full enjoyment of human rights and freedoms.

It is important to note that the effectiveness of these mechanisms can vary, and challenges exist in ensuring universal protection of freedoms. Factors such as political will, power dynamics, resource constraints, and cultural differences can impact the implementation and enforcement of human rights standards. However, the international system continually strives to strengthen these mechanisms and address gaps to better protect and promote the freedoms of individuals worldwide.

The *Socratic method* exemplifies how exploring this question gives rise to a multitude of related inquiries, such as defining the nature of rights, determining their recipients, and establishing the criteria for identifying individuals as human beings. These are the foundational concerns of the philosophical study of human rights.

Regarding the first issue, one straightforward approach is to ensure fairness and equity for all by implementing standards that reflect the principles enshrined in human rights legislation. However, legal frameworks can be rigid and resistant to adapt to new circumstances, similar to codified mathematics. It is idealistic and ambitious to propose that human rights legislation should serve as an absolute and universally applicable norm in all situations. Such a claim can be refuted on multiple occasions, necessitating a philosophical investigation of human rights regulations. Philosophy, characterized by its questioning nature and emphasis on the “why”, provides a comprehensive analytical tool to scrutinize and evaluate the inherent contradictions within the doctrinal foundation and essence of human rights.

To grasp the concept of human rights thoroughly, it is beneficial to delve into the underlying philosophical principles that underpin it. Human rights philosophy involves a

critical examination of the concept, its content, and its justification, employing a range of philosophically grounded approaches. The Universal Declaration of Human Rights, drafted in 1948, serves as a framework for contemporary understandings of human rights and serves as a suitable starting point for a comprehensive analysis. Article 1 of the UDHR, among other provisions, states:

> All human beings are born free and equal in dignity and rights.
> *Article 1 of the Universal Declaration of Human Rights, 1948.*

This article asserts that all individuals possess inherent value and legal protections. While this statement holds strong legal merit, it may not be entirely defensible from a philosophical standpoint. Nevertheless, it serves as a valuable contribution to our exploration of the nature and rationale of human rights. The philosophy underlying human rights can be traced back to the foundational principles expressed in this article, which serves as a philosophical cornerstone for the subject. Implicit within the first article of the UDHR is the notion of universality, as it applies to *all human beings* irrespective of time and place, signifying the global significance of the issue and affirming their entitlement to rights and freedoms.

Firstly, it is crucial to note that the UDHR should be understood as a set of guiding principles rather than binding legislation, as further examination of the language in this article reveals. From a critical legal studies perspective, particularly through the lens of feminist legal theory, one could argue that this article does not offer equal protection to women, as it specifically mentions *brotherhood* but not *sisterhood*. Despite the adoption of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[3] by the United Nations General Assembly in 1979, often referred to as an international bill of rights for women, it is evident that we still inhabit a patriarchal world where women's rights are not fully safeguarded. This realization came 31 years after the creation of the UDHR. If we already possess the Universal Declaration of Human Rights, does it imply that women are no longer recognized as fully deserving equal protection under the law? These thought-provoking inquiries serve to introduce students to the field of critical legal studies and illustrate how philosophical analysis can question various aspects of human rights.

Another aspect to consider is that the UDHR does not extend any protections to non-sentient animals. This raises questions about the inherent anthropocentrism embedded in the declaration, which assumes that humans are inherently superior and deserving of specific rights and protections. Furthermore, contemplating the implementation of human rights principles and regulations in a patriarchal world that still upholds monarchy as natural law, endures ongoing armed conflicts, faces disruptive terrorism, grapples with the

[3] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, Vol. 1249, p. 13, Available at: https://www.Refworld.Org/Docid/3ae6b3970.html [Accessed 9 September 2022].

legacy of colonialism, and confronts a global climate emergency becomes increasingly challenging. Additionally, it is essential to recognize the significant role played by capitalism in establishing and sustaining the global order.

In summary, these critical observations aim to familiarize students with the field of critical legal studies and emphasize how philosophical examination can raise doubts about various aspects of human rights. The complexities and limitations inherent in the UDHR become apparent when considering issues such as gender equality, animal rights, patriarchal systems, armed conflicts, terrorism, colonial legacies, and the influence of capitalism on global dynamics.

The UDHR serves as a highly impactful declaration that inspires positive societal, political, and legal transformations. However, taking a critical legal studies perspective, it is important to acknowledge that the UDHR does not possess legal enforceability and can be seen as a collection of aspirational ideals akin to "romantic letters" to Santa Claus or wishful thinking. When approaching the UDHR from a human rights student's standpoint, two interpretations emerge: firstly, as a document that establishes the foundation for contemporary human rights, providing a universal framework that informs national lawmakers in developing their own domestic legislation; and secondly, as a catalogue of fundamental human rights that emerged as a response to the aftermath of World War II, intending to safeguard the well-being of all individuals.

Whether we scrutinize human rights and the UDHR through the critical lens of a philosopher or the approving lens of a lawyer, one aspect remains evident: the UDHR, along with the subsequent proliferation of human rights, possesses political influence and carries value, despite not being philosophically defensible or universally applicable in all circumstances. From a utilitarian perspective, their significance lies in their potential to enhance overall human happiness and well-being.

A comprehensive understanding and critical evaluation of human rights necessitate the application of philosophical inquiry. While human rights may initially appear as a simple and evident concept, a closer analysis unveils the complexities that human rights education must confront, including the very definition of human rights and the determination of who qualifies as a *human* in this context. When viewed from the perspective of cultural relativism, it becomes evident that although human rights are widely perceived as morally significant and desirable within Western societies (the birthplace of the concept), their universal acceptance is not uniformly acknowledged in non-Western cultures (See: Cultural Relativism).

By the conclusion of this chapter, our comprehension of human rights will be enhanced, and we will possess the ability to confidently employ the philosophical methodological toolkit of analysis and examination. Analytic Philosophy, Ethics, and Critical Legal Studies furnish us with the theoretical frameworks and methodological resources that will underpin our exploration in this chapter. Given that human rights can be approached as a subject within various academic disciplines—including law, sociology, anthropology, politics, economics, and, as demonstrated in this chapter, philosophy—it is

evident that the field of human rights holds relevance across a wide spectrum of scholarly domains. It is crucial to acknowledge that human rights scholarship is inherently interdisciplinary, representing a vital aspect of human rights education that serves not merely as an academic exercise, but as a means to inform and facilitate the practical implementation of these rights.

The philosophical exploration of human rights holds relevance across various scientific domains, shaping our understanding of this subject matter. Delving into the philosophical foundations of human rights serves as an ideal approach to guide our learning in this field. Those with an interest in human rights would greatly benefit from engaging with the philosophical underpinnings of the discipline, approaching them with an open and critical mindset, and considering the compelling and thought-provoking assertions made in support of human rights. A central aspect of the concept of human rights revolves around the idea of the universality of inherent worth and the intrinsic value of human life. Contemplating this robust and somewhat paradoxical claim that forms the basis of human rights raises profound philosophical questions that have been contemplated since the inception of philosophy in ancient Greece. These questions include inquiries such as:

- Who is considered the *human* in this context?
- How do we define these rights beyond their legal aspects?
- What constitutes human dignity?
- What is the nature of morality?
- What is the origin or source of these rights?
- Exploring these philosophical questions is crucial for a comprehensive understanding of human rights and their underlying principles.

The concept of human rights is rooted in an idealistic vision of a global ethics system guided by a universally supreme morality. This perspective can be seen as reminiscent of natural rights theory rather than progressive legal theory, and it may be viewed differently by individuals, ranging from a beautiful narrative to a fictional tale. Pragmatically speaking, these constructed rights are based on strong assertions that have not received sufficient support from philosophy or the law. In this chapter, we employ critical legal studies, ethical theories, and analytic philosophy to delve into the key philosophical themes relevant to human rights.

Contrary to what legal professors might suggest, delving into the philosophical foundations of human rights is not an overwhelmingly challenging task. Philosophers engaged in the study of human rights often raise basic yet essential questions, such as “what are human rights?”, “who possesses them?” and “why?”. These inquiries serve as a starting point for unraveling the intricacies of human rights and understanding their philosophical underpinnings.

Additionally, there are more complex lines of inquiry that delve into the very core of human rights, examining their foundational principles and conceptual framework. These

deeper explorations seek to uncover the underlying assumptions, theoretical frameworks, and normative justifications that support the concept of human rights.

By engaging in critical analysis and philosophical inquiry, we can develop a more comprehensive understanding of human rights, critically evaluate their conceptual foundations, and contribute to ongoing discussions surrounding their nature, scope, and significance. Such investigations are essential for advancing the philosophical discourse on human rights and informing practical applications and implementations in the real world.

A.1.3 Human Rights in Ancient Greek Philosophy

To gain a comprehensive understanding of the philosophical underpinnings of human rights, it is crucial to delve into the wealth of philosophical resources available from ancient Greece. Although there is ongoing debate among scholars regarding whether the *Stoics* can be credited with inventing human rights, the connection between the fundamental ideas supporting the human rights doctrine and ancient Greek philosophy has become somewhat obscured in the international literature. This is largely due to the convenience of referencing modern philosophical writings rather than ancient ones. However, it is important to recognize that every philosophical theory claiming originality ultimately has roots in ancient Greek philosophy. Even when studying philosophers like Kant, Habermas, or Rawls, it is necessary to acknowledge their indebtedness to ideas originating in ancient Greece.

The question of whether the *Stoics*[4] were the inventors of human rights is a subject of academic inquiry worldwide among scholars of Stoic Philosophy. To shed light on this matter, it is essential to explore how concepts such as *isonomia* (equality before the law), *nomos* (law), and others, which flourished during the heyday of philosophy in ancient Greece, contributed to the development of human rights. For instance, Socrates' trial[5], conviction, and acceptance of punishment not only emphasized the importance of the rule of law but also highlighted the principles of *isonomia* and *justice*. These principles served to celebrate the rule of law and underscored the significance of equality before it.

While many people tend to think of human rights solely within the realm of law, shaped by legal precedents and evolving in a judicial arena, it is crucial to recognize that human rights are not merely a product of the marriage between law and politics. This realization is essential to bear in mind. As this is a textbook, it is important to avoid adopting dogmatic or absolute perspectives. However, it is valuable to critically examine

[4] Bett, R., (2012). Did the Stoics invent Human Rights? in Rachana K., (2012). *Virtue and Happiness: Essays in Honour of Julia Annas*, Oxford Studies in Ancient Philosophy (Oxford; online edn, Oxford Academic), https://doi.org/10.1093/acprof:oso/9780199646043.003.0009, (Accessed 20 Sept. 2022).
[5] Plato, (2000). *The Trial and Death of Socrates : Euthyphro, Apology, Crito, Death Scene from Phaedo*. Indianapolis, IN: Hackett Pub.

them as we provide the necessary facts for human rights education. This endeavor requires delving into the history of ideas.

Antecedents of the idea of human rights in Western political thought can be traced back to ancient Greece, often referred to as the birthplace of philosophy. With a touch of humor and deep appreciation for the source of philosophy, it has been said that a philosophical idea is true and valid if Aristotle discussed it before. Similarly, many philosophers recognize that the entire history of Western philosophy can be viewed as a series of footnotes to Plato, indicating that Plato had already addressed every topic that can be explored through philosophical methodology. Thus, it would be an act of hubris to ignore the fact that ideas of equality, freedom of thought and expression, individuality, and autonomy are clear products of ancient Greek philosophical thought. Moreover, the critical methodology employed by academics also stems from a long tradition of analytic philosophy, ethics, and logic.

The concept of human rights can be observed in theories derived from Natural Law and Natural Rights as understood and preserved in ancient Greece. For example, one can find the first recorded instance of civil disobedience in human history in Sophocles' play “Antigone”. The story of Antigone choosing to disobey Creon's decree and give her brother Polynices a proper burial serves as an illustration of civil disobedience, an act of refusing to obey unjust laws justified on moral grounds. By examining this case, we can gain insights into the conflict between natural law and individual rights.

It is important to highlight that philosophy, since its inception in ancient Greece, has nurtured the idea of human rights. Early theories that emerged from ancient Greece suggest that human progress is fueled by liberation from the order imposed by gods and nature. The appearance of ideas put forth by the sophists liberated humans from nature, fate, and divine order, introducing concepts such as autonomy, free will, and individuality. This shift occurred by redirecting philosophical thinking and logic towards humans. Consequently, legal criticism, individual freedom, and individuality gained prominence alongside the celebrated sophists.

Human rights have elevated the value of human beings to the forefront of international discourse. The underlying principle is that any person meeting the criteria for the category of *human* is entitled to protective rights that supersede any restriction or justification that may attempt to undermine their inherent value. The anthropocentrism of law is rooted in the notion that every individual should be afforded equal respect and security for their inherent rights, regardless of their location. It is impossible to separate human rights from the rule of law, morality, and the philosophy of law.

In ancient Greek thought, people were regarded as inherently wise and possessing a strong moral compass. The gods themselves were depicted in humanoid form (*Homomorphism*). The capacity for critical thinking increased a person's worth. Additionally, ancient Greek thought gave rise to classical humanism, the belief that the human being is the starting point and ultimate standard against which all other things are judged. This practice finds its origins in Greek mythology.

By exploring the ideas and concepts put forth by ancient Greek philosophers, we can develop a deeper understanding of the historical and philosophical foundations of human

rights. These insights help us appreciate the ongoing significance of human rights discourse in contemporary society.

The concept of human rights has a complex and extensive history, with its origins found in various philosophical traditions spanning different civilizations. One particularly significant period that contributed to the development of human rights discourse can be traced back to ancient Greek philosophy. Ancient Greek thinkers, renowned for their intellectual prowess and philosophical investigations, delved into fundamental questions concerning human existence, morality, justice, and the rights and obligations of individuals in society.

In ancient Greek philosophy, prominent philosophers like Plato, Aristotle, and the Stoics explored ethical and political theories that encompassed ideas relevant to human rights. These philosophers sought to comprehend the principles that govern human conduct, the nature of justice, and the inherent dignity of human beings.

A central theme in ancient Greek philosophy, that bears relevance to human rights, is the concept of natural law and natural rights. Philosophers engaged in debates regarding the existence of a universal moral order that transcends human-made laws and social institutions. They contemplated the notion that certain rights and moral principles are inherent to human nature, independent of societal conventions or political systems.

Furthermore, ancient Greek philosophers examined concepts such as equality, freedom, and the fair treatment of individuals. Plato, in his work “The Republic”, explored the significance of justice and the role of individuals in establishing a just society. Aristotle, in his ethical and political treatises, pondered the virtues necessary for a flourishing human life and the pursuit of the common good.

The Stoic philosophers, including figures like Epictetus and Marcus Aurelius, emphasized the moral worth of every individual and advocated for the equality and dignity of all human beings. Their teachings embraced the idea that humans possess rationality and moral agency, which entitle them to certain rights and freedoms.

While the ancient Greek philosophers did not explicitly articulate a comprehensive theory of human rights in the manner understood in contemporary times, their philosophical inquiries provided the foundation for subsequent developments in the understanding and promotion of human rights.

Exploring the topic of human rights in ancient Greek philosophy serves as a starting point for comprehending the historical and philosophical roots of this concept. By examining the ideas put forth by these ancient thinkers, we can gain insights into the foundations of human rights discourse and recognize its enduring relevance in today's society.

A.1.4 Human Rights in Modern Philosophy

In which moral framework are human rights established? The establishment of human rights is deeply rooted in moral beliefs, which serve as a guiding framework for determining morally appropriate behavior. Moral beliefs shape our understanding of what

constitutes good and immoral conduct, providing a basis for evaluating ethical actions. When examining human rights, which are a subset of moral rights, we encounter fundamental moral qualities that surpass any existing system of institutionalized rights and duties. Consequently, human rights can be viewed as the pinnacle of morality.

Given the foundational nature of human rights and their inherent moral significance, it is reasonable to expect their protection within the legal sphere. The Universal Declaration of Human Rights (1948) attests to the recognition of the moral imperative to safeguard individuals' rights. However, delving into the implications of this conviction and grasping the philosophical underpinnings of human rights necessitate an exploration of ethical theories.

By considering ethical theories, we can better comprehend the profound philosophical significance of human rights. These theories offer insights into the moral principles and values that underlie the concept of human rights. They provide frameworks for understanding the ethical dimensions and implications of human rights, shedding light on the philosophical power and ethical implications associated with their existence.

Human rights have continued to be a subject of exploration and development within the realm of modern philosophy. Philosophers in this era have engaged in extensive discussions, debates, and conceptual advancements regarding the nature, scope, and justification of human rights. Their contributions have played a crucial role in shaping the contemporary understanding and promotion of human rights.

Enlightenment thinkers, such as John Locke, Thomas Hobbes, and Jean-Jacques Rousseau, made significant contributions to the philosophical foundation of human rights. Locke, in his influential work “Two Treatises of Government”, argued that individuals possess natural rights, including the right to life, liberty, and property. He posited that governments are established to protect these rights and that individuals have the right to resist tyrannical rule. Hobbes, on the other hand, emphasized the need for a social contract to establish order and security, while recognizing the fundamental rights of individuals. Rousseau's writings, including “The Social Contract”, explored the relationship between the individual and society, highlighting the importance of individual freedom and the collective will of the people.

Immanuel Kant, a pivotal figure in modern philosophy, developed a moral and philosophical framework that influenced the understanding of human rights. Kant emphasized the intrinsic worth and dignity of every individual, asserting that individuals should be treated as ends in themselves and not merely as means to an end. He proposed the categorical imperative as a universal principle that guides moral action, which resonates with the concept of universal human rights.

Utilitarian philosophers, such as Jeremy Bentham and John Stuart Mill, approached human rights from a consequentialist perspective. They argued that the value of rights lies in their ability to promote overall happiness and well-being. Mill, in his work “On Liberty”, championed the importance of individual freedoms and limitations on State interference, providing a philosophical basis for civil and political rights.

In the 20th century, philosophers like Hannah Arendt and John Rawls made significant contributions to the understanding and discourse on human rights. Arendt, in

her works on political theory and the nature of power, emphasized the importance of public participation, plurality, and the protection of human rights as necessary conditions for a just society. Rawls, in his influential book "A Theory of Justice", developed the concept of justice as fairness, which encompasses principles of equal basic liberties and the protection of the most vulnerable members of society.

Contemporary philosophers continue to engage with human rights, addressing emerging challenges and expanding the discourse. Topics such as cultural relativism, intersectionality, and the role of human rights in a globalized world are being explored by scholars from various philosophical perspectives.

Through the ongoing philosophical inquiries and debates, modern philosophers have contributed to the understanding, refinement, and justification of human rights. Their insights and theories have provided valuable frameworks for addressing issues of social justice, equality, and the protection of human dignity in the contemporary world.

This discussion will encompass three moral theories[6] derived from the field of ethics:

i) Deontology[7]

Deontology, as a moral theory, has important implications for human rights education. Human rights education aims to foster an understanding of the rights and responsibilities that individuals possess by virtue of their humanity. Deontological ethics, with its emphasis on duty and moral obligations, provides a framework that aligns closely with the principles of human rights.

In the context of human rights education, deontology highlights the inherent value and dignity of every individual. It emphasizes that individuals have certain rights that are not contingent on external factors such as consequences or utility. Deontologists argue that these rights are fundamental and must be respected and protected regardless of the potential outcomes or benefits.

By incorporating deontological perspectives into human rights education, students are encouraged to critically examine the moral foundations of human rights. They are prompted to reflect on the principles that underpin the concept of human rights and the ethical obligations that arise from them. This examination can deepen their understanding of the moral significance of human rights and the importance of upholding them in various contexts.

Furthermore, deontology promotes the idea that individuals have a moral duty to respect the rights of others. Human rights education can emphasize the importance of recognizing and fulfilling these duties as responsible members of society. By cultivating a

[6] See: https://plato.stanford.edu/entries/moral-theory/ (Accessed 23 March 2022)
[7] See: https://plato.stanford.edu/entries/ethics-deontological/ (Accessed 30 March 2022)

sense of moral duty and obligation, deontological ethics can contribute to the development of a strong human rights culture and the promotion of social justice.

In summary, deontology provides a valuable framework for human rights education by emphasizing the intrinsic worth of individuals and their corresponding rights. Integrating deontological principles into human rights education fosters a deeper understanding of the moral foundations and obligations associated with human rights, ultimately promoting a more informed and conscientious approach to the protection and promotion of human rights.

The term *deontology* is derived from the Greek words *deon*, meaning duty, and *logos*, meaning science or study. Within contemporary moral philosophy, deontology belongs to the category of normative theories that address which choices are morally required, forbidden, or permitted. In essence, deontology falls under the purview of moral theories that guide and evaluate our decisions regarding what we ought to do (deontic theories), as opposed to theories that guide and evaluate the type of individuals we are and should aspire to be (aretaic or virtue theories). Deontologists, who adhere to deontological moral theories, stand in opposition to consequentialists within the realm of moral theories that assess our choices.

ii) Utilitarianism[8]

"***Utilitarianism,*** in normative ethics, a tradition stemming from the late 18th- and 19th-century English philosophers and economists Jeremy Bentham and John Stuart Mill according to which an action (or type of action) is right if it tends to promote happiness or pleasure and wrong if it tends to produce unhappiness or pain—not just for the performer of the action but also for everyone else affected by it. Utilitarianism is a species of consequentialism, the general doctrine in ethics that actions (or types of action) should be evaluated on the basis of their consequences. Utilitarianism and other consequentialist theories are in opposition to egoism, the view that each person should pursue his or her own self-interest, even at the expense of others, and to any ethical theory that regards some actions (or types of action) as right or wrong independently of their consequences (*see* deontological ethics)."

Utilitarianism, a consequentialist moral theory, also has implications for human rights education. Human rights education aims to promote an understanding of the inherent rights and dignity of individuals, and utilitarianism offers a perspective that considers the overall well-being and happiness of society as a whole.

In utilitarian ethics, the moral worth of an action is determined by its consequences and the amount of overall happiness or utility it produces. From a utilitarian standpoint, the protection and promotion of human rights can be justified if they contribute to the overall happiness and well-being of individuals and society.

[8] See: https://plato.stanford.edu/entries/utilitarianism-history/ (Accessed 12 March 2022).

In the context of human rights education, utilitarianism encourages students to critically analyze the potential consequences of respecting or violating human rights. It prompts them to consider the impact of human rights violations on individuals and communities, as well as the long-term consequences of upholding human rights for societal welfare.

Utilitarianism can also foster a pragmatic approach to human rights education by emphasizing the importance of balancing conflicting rights and interests. It encourages students to assess the potential trade-offs between different rights and weigh the overall benefits and harms that may result from different courses of action.

However, it is essential to recognize potential challenges and critiques when applying utilitarianism to human rights education. Critics argue that a strict utilitarian approach may overlook the inherent value and inviolability of individual rights, as it prioritizes overall happiness over the protection of individual liberties. Additionally, there are concerns about the potential for the majority to oppress minority rights if the utilitarian calculus solely focuses on maximizing overall utility.

Therefore, while utilitarianism can provide valuable insights and considerations for human rights education, it should be complemented by other moral theories to ensure a comprehensive and balanced understanding. Integrating utilitarian perspectives in human rights education can promote critical thinking and ethical deliberation, allowing students to explore the complex ethical dilemmas and considerations surrounding human rights issues.

iii) Consequentialism[9]

"*Consequentialism*, as its name suggests, is basically the view that normative properties depend only on consequences. This historically important and still popular theory embodies the basic intuition that what is best or right is whatever makes the world best in the future, because we cannot change the past, so worrying about the past is no more useful than crying over spilled milk. This general approach can be applied at different levels to different normative properties of different kinds of things, but the most prominent example is probably consequentialism about the moral rightness of acts, which holds that whether an act is morally right depends only on the consequences of that act or of something related to that act, such as the motive behind the act or a general rule requiring acts of the same kind."

It is true that human rights do not have a clear comprehensive philosophical theory, to prove their universal applicability; this has caused many scholars to question their validity and argue that human rights are a western idea, and as such, are not applicable to non-western societies and, by extension, not applicable to all human beings. Here, we

[9] See: https://plato.stanford.edu/entries/consequentialism/ (Accessed 7 Sept. 2022).

shall analyze these concerns and focus on the most pressing ones as they pertain to human rights.

Human rights are a peculiar concept, particularly when regarded from a meta-ethical vantage point, and they are supposed to be considered in the plural. Human rights are seen as having a place at the very pinnacle of any legal or philosophical hierarchy and are therefore recognized as an indisputable reality by both orthodox and critical scholars. This implies they have an ontological value and worth that is unrivaled by everything else in the universe.

Consequentialism, a moral theory that focuses on the consequences or outcomes of actions, also has implications for human rights education. Human rights education aims to promote an understanding of the inherent rights and dignity of individuals, and consequentialism offers a perspective that emphasizes the importance of the outcomes or consequences of respecting or violating human rights.

In consequentialist ethics, the moral rightness or wrongness of an action is determined by its consequences. The primary concern is to maximize overall well-being or utility, often understood as happiness or the satisfaction of preferences, for the greatest number of people.

In the context of human rights education, consequentialism prompts students to critically evaluate the potential outcomes of actions related to human rights. It encourages them to consider the impact on individuals and communities, and to assess whether upholding or violating human rights leads to overall positive or negative consequences.

Consequentialism can help students understand the practical implications of human rights and the potential benefits that arise from respecting and promoting them. By exploring the positive consequences of human rights, students can develop an appreciation for the social, political, and economic conditions that foster human dignity, equality, and well-being.

However, consequentialism also raises some important considerations and critiques when applied to human rights education. Critics argue that a sole focus on consequences may neglect the intrinsic value and inviolability of human rights, potentially leading to the oppression or neglect of minority rights in pursuit of majority interests. Additionally, there are concerns about the potential for the ends justifying the means, as consequentialism may justify morally questionable actions if they produce positive overall consequences.

Therefore, while consequentialism can provide valuable insights and considerations for human rights education, it should be supplemented with other moral theories to ensure a comprehensive and balanced understanding. Integrating consequentialist perspectives in human rights education can encourage students to think critically about the potential outcomes of their actions, the long-term consequences of human rights violations, and the importance of promoting human rights for the well-being and flourishing of individuals and societies.

The work of the acclaimed American philosopher John Rawls[10] contains one of the most helpful philosophical ideas we can employ to understand the fundamental underpinnings of human rights. "What moral standards ought to lead fairly just constitutional liberal democracies, in their foreign policy, treaty-making, and traditional international practices?", was one of the fundamental concerns that Rawls addressed in "The Law of Peoples" that is relevant to our research. And how they ought to engage with non-liberal or non-democratic states. Some claim[11] that Rawls does not deal with human rights in a clear and sufficient way. He didn't even try to address the subject of human rights in any great depth. So, the right to life (to means of subsistence and security); the right to liberty (freedom from slavery, serfdom, and forced occupation and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); the right to property (to personal property); and the right to formal equality as expressed by the rules of natural justice (that is, similar cases be treated similarly) all make up the Rawlsian catalogue of human rights.

Several of the rights enumerated in the 1948 Universal Declaration of Human Rights are absent from Rawls's writings. Specifically, the rights of democratic political participation and freedom of speech and association (UDHR, Articles. 19 and 20) are not included (UDHR, art. 21).

In order for a society to be considered a cooperative system, it should meet or exceed the moral requirements laid forth by this prominent contemporary philosopher's list of human rights. According to the Rawlsian philosophy, human rights have three roles:

1. their fulfilment is a necessary condition of decency,
2. their fulfilment suffices to exclude justified and forceful intervention by other peoples, and
3. they set a limit on pluralism among peoples.

Therefore, human rights are the absolute minimum necessary and cannot be equated with the broader constitutional rights afforded by liberal nations. Rawls begins his work by attempting to sketch a worldwide idea of justice for a society of liberal peoples, reflecting a broader focus in his writing from the domestic to the global. In order to distil a conception of international justice, Rawls reconstructs a theoretical "original position", where rational representatives of liberal societies come together to decide on the Law of Peoples; and he provides an elaboration on the interactions of nations & their moral obligations to each other and to human rights.

[10] Rawls, J., (1971). *A Theory of Justice*. Cambridge, MA: Harvard University Press.
[11] Burleigh, W., (2008). Rawls on Human Rights: A Review Essay. The Journal of Ethics 12, no. 1: 105–22. http://www.jstor.org/stable/40345341 (Accessed 2 March 2022).

Some feminist critical philosophers[12], including Susan Okin and Martha Nussbaum, have pointed out that Rawls protects the traditional family as it is, a vital source of inequality that serves as the "social reproduction of unjust gender hierarchy", by virtue of the familiar liberal liberties (freedom of association, freedom of religion, and so on). They contend that a fundamental reorganization of the family as an institution in modern free democracies is necessary for women to get "fair value for their political liberty" or "fair equality of opportunity". However, "Rawls fails to deal with the analytical and normative antecedent dynamic and group-based power relations (gender, racism, ethnicity, disability, etc.) through which both products and individuals are socially created or produced", as the authors put it. This corpus of philosophical work provides a compelling case for the normative foundation of international law; that is, he suggests a framework for understanding human rights and obligations that international treaties alone cannot provide. Questions regarding the very foundations of international society and international law were central to the primary points made. In an effort to broaden the scope of *practicable political possibility*, Rawls crafts a "realistic utopia". In so doing, he accepts the world for what it is. Since Thucydides, the universe in Rawls' view consists of individual units that engage in international relations among themselves. Although he challenges the concept that states or peoples are the fundamental entity requiring complete analytical analysis, he does not doubt the historical truth that states would unavoidably battle in a drive for dominance.

Professor Raz[13], very interestingly argues that, in order for an individual to reach complete and full enjoyment of her natural rights; in order for a society to reach real equality for the people and provide the same opportunities for all, then, the State should provide all the basis and ground for her to make the choices she wants at the different stages of her life; freed from limitations in potential and possibilities due to race, gender, class, religion, and I would add, all the discriminatory man-made categories of people, labelling and identifying each and everyone falling under its heading as copies and identical. Utopic ideals for many, but nonetheless, as very wisely Professor Douzinas argues, "human rights will come to an end, if we do not re-invent their utopian ideals"[14].

From a human rights standpoint, it may be said that we are now seeing the devaluation of human rights. Humanity has made great strides toward realizing a worldwide system of values and rights, including human rights to which all humans are born, as well as basic criteria and processes for its universal and regional protection; and ideals that may guide humanity towards a better future. One may argue that participation,

[12] Baehr, A. R. Toward a New Feminist Liberalism: Okin, Rawls, and Habermas. Hypatia 11, no. 1 (1996): 49–66. http://www.jstor.org/stable/3810355 (Accessed 5 April 2022)

[13] Raz, J., (1988). The Nature of Rights, The Morality of Freedom. Oxford, online edn, Oxford Academic. https://doi.org/10.1093/0198248075.003.0007, (Accessed 29 Nov. 2021).

[14] Douzinas C., (2000). *The End of Human Rights : Critical Legal Thought at the Turn of the Century.* Hart Pub.

nondiscrimination, and accountability are the most crucial components of human rights since they are key to empowering individuals.

It is therefore impossible to ignore the fact, when observing the new security emergency plans and governmental practices towards the realization of the desired absolute security, through the mobilization of totalizing control's theoretical paths and techniques, under the heading of the "War on Terror", that the states are pushed towards from protection of rights to suppression of rights agenda.

While the United Nations Security Council unanimously adopted Resolution 1373 in the wake of the 11 September 2001 terrorist attacks in the United States, obligating all States to criminalize assistance for terrorist activities, many States still provide assistance to terrorist organizations, including some of the greatest powers of the so-called first world countries, activities which easily fall under the prohibited acts under the European's Arrest Warrant list of terrorist acts[15]; the *academic* definition of *terrorism*, or the International Convention for the Suppression of the Financing of Terrorism[16].

The diminishment of the value of individual human rights in the name of collective rights or in the case of public safety and security, has changed the scenery of the human rights evolution we have witnessed since the Second World War, into a new table of negotiations of interrogable fundamental and unquestionable human rights, such as the right not to be subjected to torture or degrading or inhuman treatment. "If governments use torture and other ill-treatment, they resort to the tactics of terror. Both torturers and terrorists rely on fear to achieve their aims. Both deny and destroy human dignity. Both assume the end justifies the means".

There are two sides of the same coin, for example Dershowitz, argues that torture happens, it always has and it always will. It happens in democracies, it happens in dictatorships, it happens in Iran and it happens in the US. Thus, he says:

"Every democracy, including our own, has employed torture outside of the law. Throughout the years, police officers have tortured murder and rape suspects into confessing — sometimes truthfully, sometimes not truthfully."

This kind of thinking runs counter to liberal values, yet many liberal regimes have found it compelling; this is only one example of the cancellation of inderogable human rights in political practice when necessity or national security deem it appropriate. Rawls' theory, however, has been met with a number of critiques and objections. James Nickel and Allen Buchanan, for instance, have questioned Rawls' definition of human rights for its ostensibly deficient substance and political justification.

Problems plaguing the Human Rights Regime may be broken down into two categories: theoretical and practical. It is an undeniable fact that it is not without difficulty for utopian and idealistic ideas to become reality, to be put into practice, to be

[15] See: https://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/ (Accessed 20 March 2022).
[16] See: https://treaties.un.org/doc/db/terrorism/english-18-11.pdf (Accessed 14 February 2022).

implemented, and enforced. Rawls provides a theoretical schema, characterized as a *realistic utopia*, that is cognizant of the historical political context in which the states form inter-relationships and rejects the realist belief, that states by their birth were under a constant thread of invasion, of sovereignty, or were aggressive.

But the involvement of politics and international relations in the law-making processes creates new dangers and risks for more shadows to cover the credibility of the International Law; the need for transparent and better formed methods, freed from narrow political interest, of creating and establishing international legally binding rules, is obvious; there is, perhaps, no better way than the *original position* method, which, if used as a tool, can give birth to undeniable results.

"Liberal tolerance, however, has its limits. Decent societies must respect human rights, which are 'a special class of urgent rights' that entail things such as freedom from slavery, liberty of conscience, and security from genocide."[17] After laying the groundwork for a liberal and decent society, Rawls moves on to consider how its members might interact with those in less-decent cultures. These barbaric groups were classified by him as either outlaw governments (those prepared to resort to violence to achieve their goals) or burdened societies (those whose past, present, or future make it impossible to establish law and order and build a good society). Rawls argues that foreign policy's end objective should be to integrate these disadvantaged communities into the global community. His major goal, it may be said, is not merely to construct a theory of international justice for liberal countries, but to draw one that is applicable to all kinds of governments, liberal or non-liberal, western or non-western, eastern or northern, and southern.

He starts by explaining why liberal nations must tolerate *good* non-liberal nations. While the governments of these civilized groups of peoples are often hierarchical and do not provide their inhabitants with complete political equality, they do include their citizens in policymaking and protect their fundamental rights to life, liberty, property, and formal equality. Rawls argues that "liberal peoples should not deny them respect, because toleration of other worldviews is an integral part of liberalism and a denial of respect will only create bitterness".[18]

Rawls proposes three norms for directing international policy toward stressed-out nations. In the first place, he says, "a well-ordered society does not need to be wealthy; it merely requires the minimal resources required to develop and retain fair institutions". Second, Rawls contends that the *all-important* approach to transforming political and social institutions is to change the political culture. To Rawls, the political values of a society are more important than the material wealth of that community. Like Amartya Sen, he believes that political failure, rather than natural disaster, is to blame for famine. Aid in the form of money or food is not a solution, and direct interference is forbidden under The Law of the Peoples; thus, according to Rawls, the focus of well-ordered

[17] Rawls, J., (1999). *The Law of Peoples*. Cambridge, MA: Harvard University Press.
[18] Ibid

communities should be on investing in the provision of counsel. “Changing the political culture of a nation under pressure is difficult and there is no simple formula to do it”, he says. Rawls' last lesson emphasizes the need of empowering underdeveloped nations to take charge of their own affairs so that they may eventually become full members of the Society of Peoples. The so-called double standards of the intervening states, is an evil and creates many concerns, to human rights scholars and activists. What makes this contradiction so perplexing is that Human Rights were and remain the driving force for NATO's engagement and invasion of Kosovo. As a matter of human rights, all bombings and civilian deaths happened within these parameters. However, the double standards are a debatable issue that casts doubt on the legitimacy of NATO, the United Nations' goals and efficacy, and the whole human rights community.

While war is an inevitable part of historical progression, from Kant's liberal standpoint, it is best to avoid it if, at all, possible. Kant says that, “nature has chosen war as a means” of attaining its ends. In order to achieve these goals, humans have been both driven away and pushed together to establish countries and governments. This causes a shift toward republicanism and the pursuit of permanent peace. Thus, Kant enumerates the essentials of permanent peace, which include the fundamental principles of moderation and fairness in warfare. In his sixth piece, he argues that assassination and poisoning should be illegalized since they destroy the trust between people that is essential for lasting peace. “It must remain possible, even in wartime, to have some sort of trust in the attitude of the enemy…”.

This indicates that terrorism would be prohibited, as well as what Kant calls a “war of extermination” which could only conclude in “the vast graveyard of the human race”. Because of this, both Kant's philosophy of history and his political philosophy condemn acts of violence like terrorism and genocide that prevent the possibility of sustainable peace on earth. Important to note, Kant’s clear preference for a *pacific federation* as the solution to the problem of interstate violence as stated in the Second Definitive Article in Perpetual Peace (Kant, 1795:102-5).[19]

Numerous critics from the communitarian perspective highlight a key criticism of Rawls' theory, namely his emphasis on the primacy of individual autonomy. Rawls argues that a just government should refrain from endorsing any specific conception of the good life or any particular moral, religious, or philosophical doctrines, recognizing that complete neutrality is unattainable in practice. However, he does contend that a just government must adhere to the principles of justice and may even strive to cultivate civic virtues that are essential for fulfilling the demands of justice. Moreover, it must refrain from favoring any particular good over others, whether on an individual or collective level.

[19] Kant I., (1903). *Perpetual Peace; a Philosophical Essay 1795*. S. Sonnenschein.

A.1.5 Conclusion

The aim of this chapter is to provide an introductory overview of the philosophy of human rights, acknowledging that it is impossible to encompass every significant philosophical theory and concept within this limited space. The focus has been on presenting the most pertinent and influential landmarks that have shaped the development of human rights as a concept, idea, and doctrine, leading to its prominence in the contemporary international system. It is important to recognize that there are valuable contributions from scholars in the global south and feminist legal experts, that have not been explicitly mentioned or given proper credit in this section. The purpose here is to familiarize readers with the essential issues in human rights philosophy and lay a foundation upon which they can further explore and deepen their knowledge through additional reading and study.

At the core of the philosophical underpinnings of human rights, is the belief in the existence of a morally justifiable order that transcends specific social and historical circumstances, applying universally to all human beings. The central objective of human rights is to safeguard and uphold an individuals' civil, political, and economic liberties on a global scale. Examples of human rights encompass the freedom of religion, the right to a fair trial, the prohibition of torture, and the guarantee of adequate education. Philosophers who delve into human rights grapple with fundamental questions surrounding their reality, nature, universality, justification, and legitimacy. The grand assertions made by human rights advocates, such as their universality, inalienability, or their grounding as morally justifiable standards, have faced skepticism and counter-arguments, prompting a rich field of exploration within political and legal philosophy. Critiques of human rights can be found in the works of scholars like Douzinas 2000, Mutua 2008, Waldron 1988, adding complexity and nuance to the discourse.

In conclusion, the study of human rights philosophy is vast and multifaceted, with ongoing debates and inquiries into its nature and foundations. This chapter serves as a starting point for readers to engage with the critical questions and theories surrounding human rights, inviting them to delve deeper into this field of political and legal philosophy. By further exploring the complexities and potential answers to these questions, individuals can develop a more comprehensive understanding of the philosophical underpinnings and implications of human rights in our contemporary world.

▪ Important points to remember about "Human Rights Philosophy"

When studying "Human Rights Philosophy", it is crucial for students to keep in mind the following important points:

1. Universality of human rights: Human rights are based on the belief that there are fundamental rights and freedoms that apply to all individuals, regardless of their nationality, race, gender, religion, or other characteristics. This universality is a key principle in human rights philosophy.
2. Moral foundation: Human rights are grounded in a morally justifiable order that transcends specific social and historical circumstances. They are based on the recognition of the inherent dignity and worth of every human being.
3. Scope of human rights: Human rights encompass a wide range of civil, political, economic, social, and cultural rights. These rights include freedom of expression, the right to a fair trial, the right to education, the right to health, and many others. It is important to understand the diverse nature of human rights and their interconnections.
4. Balancing individual and collective interests: Human rights philosophy grapples with the tension between individual rights and collective interests. While human rights emphasize the importance of protecting individual liberties, they also recognize the need to consider the common good and address societal inequalities.
5. Justification and legitimacy: Human rights theorists explore the justification and legitimacy of human rights claims. This involves examining philosophical arguments, ethical theories, and legal frameworks that support the existence and enforcement of human rights.
6. Critiques and challenges: Human rights philosophy is not without its critiques and challenges. Scholars and thinkers have raised questions about the cultural relativity of human rights, the potential clash between different rights, and the limitations of human rights in addressing structural injustices. It is important to engage with these critiques and consider alternative perspectives.
7. Historical and contemporary context: Understanding the historical context in which human rights emerged, such as the Universal Declaration of Human Rights in 1948, provides insights into the evolution and ongoing relevance of human rights today. Additionally, considering current issues and challenges related to human rights enhances the understanding of their application in real-world contexts.

8. Interdisciplinary nature: Human rights philosophy is an interdisciplinary field that draws on various disciplines, including philosophy, law, political science, sociology, and ethics. Students should be prepared to explore diverse perspectives and engage with different academic disciplines when studying human rights.
9. Ongoing engagement: Human rights philosophy is a dynamic and evolving field. Students should recognize the need for ongoing engagement, critical thinking, and staying informed about current debates and developments in human rights theory and practice.

By keeping these points in mind, students can approach the study of human rights philosophy with a solid foundation and develop a nuanced understanding of the complexities and implications of human rights in our contemporary world.

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Test Your Knowledge

Here's a quiz about human rights philosophy, designed for students:

1. Who is considered the father of modern human rights philosophy?
    - Immanuel Kant b) John Locke c) Thomas Hobbes d) Jean-Jacques Rousseau
    - Answer: b) John Locke

2. What is the Universal Declaration of Human Rights?
    - A global treaty outlining the rights of animals b) A document establishing international trade regulations c) A landmark document proclaiming fundamental human rights d) A legal framework for environmental protection
    - Answer: c) A landmark document proclaiming fundamental human rights

3. Which principle states that human rights should be applied to all individuals, regardless of their cultural or social context?
    - Principle of cultural relativism b) Principle of universality c) Principle of social justice d) Principle of individual autonomy
    - Answer: b) Principle of universality

4. Which ethical framework is often associated with human rights philosophy?
    - Utilitarianism b) Virtue ethics c) Deontology d) Relativism
    - Answer: c) Deontology

5. What is the concept of human dignity in relation to human rights?
    - The belief that human rights vary based on cultural norms b) The idea that human rights should be prioritized over environmental concerns c) The inherent worth and value of every human being d) The principle that human rights should be applied selectively based on individual achievements
    - Answer: c) The inherent worth and value of every human being

6. What are negative rights?
    - Rights that require others to provide certain goods or services b) Rights that protect individuals from interference or harm c) Rights that can be limited by cultural or social contexts d) Rights that are not universally applicable
    - Answer: b) Rights that protect individuals from interference or harm

7. Which philosopher argued for the concept of natural rights, including life, liberty, and property?
    - Aristotle b) Plato c) Immanuel Kant d) John Locke
    - Answer: d) John Locke
8. What is the principle of non-discrimination in human rights?
    - The principle that human rights should be applied selectively based

on individual characteristics b) The principle that human rights are culturally determined and vary between societies c) The principle that human rights should be equally applied to all individuals, without discrimination d) The principle that human rights should prioritize the rights of certain groups over others

- Answer: c) The principle that human rights should be equally applied to all individuals, without discrimination

9. What is the role of philosophy in human rights?

- Philosophy provides the theoretical foundations for human rights and explores their ethical justifications b) Philosophy is unrelated to human rights and has no influence on their development c) Philosophy determines which rights are considered universal and which are culturally relative d) Philosophy is concerned with legal frameworks for the enforcement of human rights
- Answer: a) Philosophy provides the theoretical foundations for human rights and explores their ethical justifications

10. What is the principle of State Responsibility in human rights?

- The principle that individuals are responsible for protecting their own human rights b) The principle that human rights should be determined by each state's legal system c) The principle that governments have an obligation to protect and uphold human rights d) The principle that international organizations are solely responsible for promoting human rights
- Answer: c) The principle that governments have an obligation to protect and uphold human rights

Feel free to modify or add more questions to further expand the quiz!

Can you answer the following questions?

1. Are human rights and natural rights the same thing?

Answer: Human rights and natural rights are related concepts, but they are not exactly the same thing.

Human rights refer to the rights that are considered inherent to all individuals by virtue of their humanity. These rights are typically recognized and protected by legal frameworks, such as international human rights instruments and national constitutions. Human rights encompass a broad range of civil, political, economic, social, and cultural rights that are universally applicable to all individuals, regardless of their nationality or other characteristics.

On the other hand, natural rights are a concept rooted in natural law theory, which posits that there are fundamental rights that exist, independent of human-made laws and institutions. Natural rights are often believed to be derived from the nature of human beings or from a higher moral or divine order. They are seen as inherent to individuals by virtue of their status as rational beings or members of the human species.

While there is overlap between human rights and natural rights, the main distinction lies in their conceptual foundations. Human rights are typically based on legal and social conventions that arise from international agreements and domestic legislation. They are recognized and enforced within specific legal and political systems. Natural rights, on the other hand, are often seen as deriving from a higher moral or philosophical framework that transcends specific legal systems.

It is important to note that different philosophical and legal perspectives may use the terms *human rights* and *natural rights* interchangeably or with slightly different interpretations. However, in general usage, human rights tend to refer to the rights recognized and protected by legal frameworks, while natural rights refer to rights grounded in moral or philosophical principles.

Human rights and natural rights are closely intertwined concepts, although they possess distinct characteristics. Natural rights can be seen as the precursors to human rights, laying the foundation for their emergence. Under the naturalistic perspective, human rights are grounded in the intrinsic worth of individuals as beings of nature. Thus, every human being inherently possesses human rights as an inherent aspect of their identity.

The connection between natural rights and human rights stems from the belief that human beings possess certain entitlements by virtue of their existence. These entitlements, encompassing a wide array of rights, are recognized as essential to the well-being and dignity of individuals. Human rights, in their development, build upon the principles and values espoused by the natural rights framework.

It is fundamental to acknowledge that human beings are inherently entitled to the enjoyment of their human rights. This recognition emphasizes the notion that human rights are an integral part of every individual's birthright. By embracing this perspective, the significance and universality of human rights become apparent, serving as a vital framework for safeguarding the inherent worth and entitlements of every human being.

2. Do human rights belong to the discipline of law or to the field of philosophy?

Answer: Human rights are interdisciplinary in nature, encompassing both the discipline of law and the field of philosophy. While human rights have a legal dimension, as they are codified and protected by national and international legal frameworks, their philosophical underpinnings and theoretical foundations are equally important.

In the realm of law, human rights are enshrined in national constitutions, international treaties, and regional agreements. Legal frameworks provide the mechanisms and enforceable protections for individuals to exercise their human rights and seek remedies in case of violations. Human rights law establishes the legal obligations of states and institutions to respect, protect, and fulfill the rights of individuals.

On the other hand, philosophy plays a crucial role in conceptualizing and justifying human rights. Philosophical theories and ethical frameworks provide the intellectual basis for understanding the nature, scope, and universality of human rights. Philosophers delve into questions regarding the source of human rights, their moral and philosophical

justifications, and the implications they have for individual and collective well-being. The philosophy of human rights explores the foundational principles and values that underpin the concept of human rights, examining issues such as human dignity, equality, justice, and freedom.

Therefore, human rights can be seen as a dynamic intersection between the disciplines of law and philosophy. The legal dimension ensures their enforceability and protection, while the philosophical dimension establishes the conceptual framework and moral principles that guide their understanding and application.

Human rights have often been referred to as the *rights of the lawyers* due to the significant role played by legal professionals in shaping international human rights law. Lawyers have been instrumental in advocating for the establishment and development of the legal frameworks that form the basis of contemporary human rights law. Conversely, philosophers have been, and continue to be, crucial in translating human rights principles into a comprehensive system of moral principles recognized on a global scale.

The dynamic nature of human rights encompasses both their legal dimension, which necessitates legal treatment and protection, and their philosophical dimension, which explores the philosophical justifications and implications of these rights. Human rights can, thus, be situated within the discipline of law as they require legal mechanisms to safeguard their realization and enforcement. Simultaneously, they are an integral part of the discipline of philosophy as the conceptual exploration of human rights helps us grasp their essence, evolution, and aspirations toward becoming universally recognized and enjoyed principles.

It is important to recognize that human rights can be viewed as a distinct discipline in itself, characterized by its unique methods and characteristics. Additionally, human rights can be seen as an interdisciplinary enterprise, drawing from various disciplines such as law, philosophy, political science, sociology, and anthropology. This multidisciplinary and transdisciplinary approach allows for a comprehensive understanding of human rights, their foundations, and their evolving nature.

In summary, human rights can be understood as a convergence of law and philosophy. While their legal dimension ensures their protection, it is through philosophical inquiry that we delve into the essence of human rights, their evolution, and their ultimate aspiration to become universally recognized and respected principles. This interdisciplinary nature underscores the complexity and significance of human rights as a distinct field of study.

3. What do philosophers say about human rights?

Answer: Human rights have been defended by philosophers by referencing particular ideals like equality, autonomy, human dignity, core human interests, the capacity for rational agency, and even democracy.

Philosophers have offered diverse perspectives and theories regarding human rights. Their discussions encompass the nature, justification, scope, and implications of human

rights. While philosophers' views vary, here are some common themes and ideas explored in their discourse:

1. Inherent Dignity: Many philosophers argue that human rights are grounded in the inherent dignity of every individual. They contend that human beings possess intrinsic worth and moral status simply by virtue of being human, which entitles them to certain fundamental rights.
2. Universality: Philosophers often advocate for the universality of human rights, asserting that these rights apply to all individuals, regardless of factors such as nationality, race, gender, or culture. They argue that human rights are not contingent on particular social or legal systems but are applicable to all humans universally.
3. Moral Foundations: Philosophers explore the moral foundations of human rights. They examine various ethical theories, such as deontology, consequentialism, and virtue ethics, to assess the moral justifications for human rights and their compatibility with different ethical frameworks.
4. Legal and Moral Entitlements: Philosophers discuss whether human rights should primarily be understood as legal entitlements or as moral rights. Some argue that human rights are legal constructs that require legal protection and enforcement, while others emphasize their moral grounding as rights inherent to human nature.
5. Balancing Individual and Collective Rights: Philosophers explore the relationship between individual rights and collective interests. They analyze the tension between individual freedoms and societal needs, considering how to balance the rights of individuals with the welfare and common good of communities.
6. Critiques and Challenges: Philosophers offer critical perspectives on human rights, questioning their foundations, implementation, and potential limitations. They examine issues such as cultural relativism, the role of power dynamics in human rights discourse, and the challenges of enforcing and protecting human rights in practice.
7. Future Development: Philosophers also speculate on the future evolution of human rights, considering emerging challenges and potential advancements. They explore how human rights might respond to contemporary issues such as technological advancements, globalization, environmental concerns, and social justice movements.

It is important to note that the views of philosophers on human rights are diverse and evolving. Different philosophical traditions and individual thinkers may emphasize different aspects and raise unique critiques or perspectives, contributing to a rich and ongoing philosophical discourse on human rights.

4. Why are human rights important in philosophy?

Answer: The phrase *human rights* is frequently used in political and ethical discussions. The fundamental notion that all people possess certain unalienable fundamental rights is admirable and serves a crucial practical purpose: It encourages action to stop various wrongs and allows moral critique of those wrongs.

Human rights hold significant importance in philosophy for several reasons:

1. Ethical Inquiry: Human rights provide a fertile ground for ethical inquiry and reflection. Philosophers delve into questions of moral values, principles, and the nature of justice in the context of human rights. They explore the foundations and justifications for human rights, as well as the implications of these rights for individual and collective well-being.
2. Human Dignity and Worth: Human rights highlight the inherent dignity and worth of every individual. Philosophers engage with the concept of human dignity and its implications for moral and political philosophy. They examine the relationship between human rights and the recognition of individual autonomy, freedom, and the protection of basic needs and interests.
3. Universal Moral Standards: Human rights contribute to discussions on universal moral standards. Philosophers explore the possibility of a shared set of moral principles that apply to all humans, transcending cultural, social, and historical contexts. They investigate the idea that certain rights are inalienable and universally applicable, independent of specific legal systems or cultural relativism.
4. Political Philosophy: Human rights intersect with political philosophy, as they involve the relationship between individuals and the State or society. Philosophers analyze the nature of political authority, the legitimate exercise of power, and the role of government in safeguarding human rights. They examine questions of justice, equality, and the distribution of resources and opportunities within society.
5. Social and Legal Theory: Human rights provoke inquiries into social and legal theory. Philosophers explore the role of law, institutions, and governance in protecting and promoting human rights. They critically examine the relationship between legal rights and moral rights, the challenges of enforcement, and the gaps between legal frameworks and the lived experiences of individuals.
6. Normative Frameworks: Human rights provide a normative framework for assessing social, political, and legal practices. Philosophers use human rights as a tool for evaluating the legitimacy and fairness of laws, policies, and actions. They scrutinize issues of discrimination, oppression, and social inequalities through the lens of human rights, seeking to address and rectify injustices.
7. Practical Application: Philosophical discourse on human rights also informs practical applications in areas such as international law, human rights advocacy,

and policy-making. Philosophers contribute to shaping and interpreting legal frameworks, participating in debates on human rights violations, and offering theoretical insights that inform real-world efforts to protect and promote human rights.

By engaging with human rights in philosophy, scholars aim to deepen our understanding of the moral, political, and social dimensions of human existence. They seek to elucidate the principles and values that underpin human rights, challenge existing frameworks, and propose ways to advance the protection and realization of human rights in theory and practice.

5. How are human rights justified?

Answer: Human worth and the respect that is due to individuals, as well as basic human needs, prerequisites for human agency or autonomy, self-ownership, and some inalienable human rights, may all serve as the foundation for human rights. See naturalistic and political justifications for human rights.

Human rights can be justified through various philosophical approaches and justificatory frameworks. Here are some of the common ways in which human rights are justified:

1. Natural Rights: The natural rights approach asserts that human rights are inherent to all individuals by virtue of their humanity. It argues that certain rights exist independently of any legal or social systems and are based on the fundamental dignity and worth of human beings. According to this perspective, human rights are grounded in objective moral principles that apply universally.
2. Social Contract Theory: Social contract theories propose that human rights are justified through a hypothetical agreement or contract among individuals in a society. The rights are seen as essential for maintaining social order and promoting the well-being of all members of the community. People agree to respect and uphold these rights as part of a mutually beneficial social contract.
3. Utilitarianism: Utilitarianism, a consequentialist ethical theory, justifies human rights based on their overall utility or the maximization of happiness and well-being for the greatest number of people. Human rights are seen as instrumental in creating a society that promotes the greatest happiness and minimizes suffering.
4. Kantian Ethics: Immanuel Kant's deontological ethics provides another justification for human rights. According to Kant, individuals possess inherent dignity and moral autonomy, and they should be treated as ends in themselves rather than mere means to an end. Human rights are grounded in the principle of treating all individuals with respect and ensuring they have the freedom to pursue their own goals and moral autonomy.

5. Discourse Ethics: Discourse ethics, developed by philosophers such as Jürgen Habermas, argues that human rights are justified through a process of rational discourse and agreement among individuals in society. Through open and inclusive dialogue, people can establish norms and principles that respect the equal dignity and autonomy of all.
6. Feminist Ethics: Feminist perspectives on human rights emphasize the importance of gender equality and address the historical exclusion and marginalization of women. They argue for the recognition of women's rights as human rights and highlight the need to challenge patriarchal structures and norms that perpetuate discrimination and oppression.

It is important to note that these justificatory approaches are not mutually exclusive, and different philosophers may combine or draw upon multiple perspectives to justify human rights. The specific approach to justification depends on one's philosophical orientation and the particular context in which human rights are being examined or advocated for.

6. Are there online quizzes to advance my knowledge?

Answer: Yes! You can use any of following quizzes:
UNAI Human Rights https://www.un.org/en/academic-impact/unai-quiz-human-rights
WHO: Human Rights https://www.who.int/reproductivehealth/quiz-hr/en/

7. QUIZ: How Much Do You Know About Human Rights?

https://www.thelawyerportal.com/quizzes/how-much-do-you-know-about-human-rights-quiz/

Documentaries to watch

Here are some documentaries that can be informative and thought-provoking for human rights education and philosophy:

1. *The Act of Killing* (2012) - Directed by Joshua Oppenheimer, this documentary explores the Indonesian genocide of the 1960s and raises questions about moral responsibility, justice, and the nature of evil.
2. *The Invisible War* (2012) - Directed by Kirby Dick, this documentary sheds light on sexual assault in the U.S. military and examines issues of power, accountability, and gender inequality within the institution.
3. *The Corporation* (2003) - Directed by Mark Achbar and Jennifer Abbott, this documentary examines the power and influence of corporations and raises critical questions about corporate social responsibility, human rights abuses, and the ethics of profit-making.
4. *Citizenfour* (2014) - Directed by Laura Poitras, this documentary follows the story of Edward Snowden, the whistleblower who revealed the extent of global surveillance by intelligence agencies. It explores themes of privacy, government accountability, and individual freedoms.
5. *The Central Park Five* (2012) - Directed by Ken Burns, Sarah Burns, and David McMahon, this documentary delves into the wrongful conviction of five Black and Latino teenagers for a crime they did not commit. It raises issues of racial profiling, systemic injustice, and the flaws in the criminal justice system.
6. *The Cove* (2009) - Directed by Louie Psihoyos, this documentary exposes the annual dolphin hunt in Taiji, Japan, and addresses animal rights, environmental ethics, and cultural practices.
7. *The Look of Silence* (2014) - Directed by Joshua Oppenheimer, this companion film to "The Act of Killing" follows an optometrist who confronts the individuals responsible for the Indonesian genocide, exploring themes of justice, memory, and reconciliation.
8. *Human* (2015) - Directed by Yann Arthus-Bertrand, this documentary features interviews with people from around the world, sharing their stories and experiences on various topics, including love, war, poverty, and human rights. It offers a global perspective on humanity and the importance of empathy and understanding.
9. *How to Survive a Plague* (2012) - Directed by David France, this documentary chronicles the early years of the AIDS epidemic and the activism that emerged in response. It explores issues of healthcare access, discrimination, and social justice.

10. *13th* (2016) - Directed by Ava DuVernay, this documentary examines the history of racial inequality and mass incarceration in the United States. It explores systemic racism, the prison-industrial complex, and the impact of policies on marginalized communities.

These documentaries offer different perspectives on human rights issues, ethics, and social justice, and can serve as catalysts for critical thinking and discussions about these topics.

Chapter 2 Human rights and Constitutionalism

Abstract

The interplay between philosophy and law is integral to the understanding of the constitutional dimensions of human rights. This chapter aims to provide students with a comprehensive introduction to the constitutional aspects of human rights, traversing the realms of both theoretical foundations and their application in legal practice. By delving into the evolution of human rights from abstract theoretical constructs to concrete legal principles, we will explore the contours of Global Constitutionalism and its significance in shaping contemporary discussions. The analysis will encompass a range of topics, including the constitutional and international mechanisms for safeguarding human rights, the intricate relationship between human rights and constitutional rights within domestic legal frameworks, and the recognition of human rights as part of a broader framework of international constitutional rights. By examining these themes, students will gain a nuanced understanding of the intricate connections between human rights, constitutionalism, and the legal systems that strive to uphold and protect them.

Required Prior Knowledge

International law, Human rights law, Constitutional law, Administrative law, Law, Philosophy, Political Theory, ***Constitutionalism, Constitutional Law.***

A.2.1 Constitutionalism

Constitutionalism is the belief that a country's legal system or constitution determines the power of its government. Although limited government is commonly associated with constitutionalism[20], that association is merely one meaning of the term and is in no way the most prevalent one historically. The foundation of constitutionalism, is the Separation of powers, responsible and accountable government, popular sovereignty, independent judiciary, individual rights, and the rule of law are among the concepts of constitutionalism.

Gaining a comprehensive understanding of the relationship between *constitutional rights* and *human rights* is crucial. Delineating the boundaries between these two domains is not a straightforward task, as constitutional rights enshrined in national constitutions often encompass rights that are fundamental to human rights principles, such as the right to life, the right to vote, the right to a fair trial, protections for religious freedom, and just compensation for expropriation of property. This begs the question: are constitutional rights and human rights one and the same?

[20] See: https://plato.stanford.edu/entries/constitutionalism/ (Accessed 3 February 2021).

A constitution, as envisioned by the framers of constitutions like the US Constitution, embodies certain key characteristics. It establishes the fundamental rights of citizens, including the rights to life, liberty, and property, while outlining the government's duty to uphold and protect these rights. The constitution serves as the fundamental framework for any organized political society, holding a *sacred* status in the legal realm and serving as the highest source of legal principles that must be upheld without exception. This hierarchical nature of legal systems establishes the supremacy of constitutional rules over other laws within a state. Consequently, if a new law conflicts with any constitutional provision, it is considered ultra vires and must be invalidated and repealed.

Recognizing the hierarchical structure of legal norms, it becomes evident that human rights, both at international and national levels, occupy the pinnacle of this legal hierarchy. Human rights principles take precedence over other juridical rules, and they serve as guiding principles that should be upheld and protected by all legal systems. In essence, human rights occupy the highest rung on the ladder of legal norms.

Understanding the intricate relationship between constitutional rights and human rights requires careful analysis of the constitutional framework and the recognition that human rights occupy a privileged position within this structure. By exploring this interplay, we can gain deeper insights into the nature and significance of constitutional and human rights and their coexistence within legal systems.

To facilitate comprehension, legal scholars have categorized constitutional rights into two distinct types: procedural rights and substantive rights. Procedural rights encompass the rules and procedures that govern legal processes, ensuring that individuals and entities are treated fairly and equitably. These rights establish the framework for the development, application, and enforcement of substantive law, which consists of both broad and specific statutes that govern various legal contexts.

Procedural law is primarily concerned with upholding the principle of Procedural Justice, which involves rendering judgments and decisions in accordance with established legal procedures and principles. It emphasizes adherence to the letter of the law, ensuring that legal processes are conducted in a fair and impartial manner. The focus of Procedural Justice lies in guaranteeing procedural fairness and safeguarding individuals' rights throughout legal proceedings.

On the other hand, Substantive Justice delves into the realm of fairness in relation to the content and substance of laws themselves. It scrutinizes whether the laws, regulations, and statutes are just and equitable, considering their impact on society, individuals, and various groups. Substantive justice goes beyond procedural considerations and delves into the fundamental question of whether the laws themselves are fair and promote justice.

In summary, Procedural Justice emphasizes the adherence to established legal procedures, ensuring fair treatment within legal processes. Substantive Justice, on the other hand, focuses on the examination of the fairness and equity of the laws themselves. Fairness serves as the overarching principle guiding the pursuit of Procedural Justice, ensuring that legal processes are conducted in a just and equitable manner.

Human rights and civil rights, such as those enshrined in the US Constitution and Bill of Rights, differ in their origin and nature. While civil rights are granted by human authorities, such as governments or secular and religious bodies, human rights are inherent and inherent to the human condition itself. Constitutional rights, specifically, are bestowed upon individuals based on their citizenship or residency within a particular country. In contrast, human rights derive from the concept of natural law and are universally applicable and protected.

Constitutional rights, exemplified by the protections and liberties guaranteed by the US Constitution, encompass various provisions outlined in documents like the Bill of Rights. These constitutional rights include the freedom of speech ensured by the First Amendment and the right to a fair and public trial guaranteed by the Sixth Amendment. The opening principles of a constitution are widely regarded as crucial, with the initial words carrying significant weight. For instance, the US Constitution's powerful opening phrase, “We the People”21 establishes that the authority of the Constitution stems from the collective will of the people rather than a monarch or legislative body. This concept of popular sovereignty, emphasizing power vested in the people, forms the foundation upon which the entire Constitution rests.

In terms of their traditional constitutional interpretation, civil freedoms primarily emphasize individual liberty, unless otherwise limited by legislation or subject to ad hoc legal provisions. Human rights, on the other hand, encompass a broader scope and are grounded in fundamental principles that transcend specific legal systems or national boundaries. They are rooted in the inherent dignity and worth of every individual, independent of any governmental or legal recognition.

In summary, while civil rights are granted by human authorities and are contingent on factors like citizenship, human rights are inherent to individuals and derived from natural law. Constitutional rights, including civil rights, have a specific legal framework and are often tied to national contexts, whereas human rights possess a universal character that transcends individual nations.

However, apart from the aforementioned freedoms and rights, the European Convention on Human Rights and Fundamental Freedoms (referred to as the *ECHR*) delineates a comprehensive framework of human rights that individuals can enforce against the State. It is imperative to ensure that the court, which possesses the authority to shape legal principles, reflects the broader societal fabric and does not merely represent the perspectives and interests of a privileged elite seeking to perpetuate its influence. This argument pertains to the provisions of Article 6(1) and Article 14 of ECHR.

[21] U.S. Const. amend. XVIII (repealed 1933). See: https://constitutioncenter.org/the-constitution/full-text (Accessed 27 June 2022).

Article 6(1) of ECHR articulates the following:

In the determination of their civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interest of morals, public order, or national security in a democratic society. Such exclusion may also be justified to safeguard the interests of juveniles or to protect the privacy of the parties involved. Moreover, in special circumstances where publicity would prejudice the interests of justice, the court may decide, to the extent strictly necessary, to limit public access.These provisions underscore the crucial importance of safeguarding individuals' rights to a fair and public legal proceeding conducted by an independent and impartial tribunal. While transparency is generally upheld through public pronouncement of judgments, limited restrictions on public access may be justified in specific circumstances to preserve moral values, maintain public order or national security, protect the interests of minors, or ensure the privacy of the parties involved. Furthermore, the court has discretionary power to restrict publicity when necessary to prevent prejudice to the interests of justice.

By outlining these principles, the ECHR establishes a robust legal framework that ensures the protection and promotion of fundamental human rights within the European context. These provisions contribute to the development of a fair and equitable judicial system, serving as a cornerstone for upholding justice and safeguarding individuals' rights within a democratic society.

Article 14 of ECHR stipulates: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.”

It is important to note that Article 14 itself does not independently guarantee the right to non-discrimination. However, it serves as a crucial provision within the broader framework of the ECHR, emphasizing the principle that individuals should be able to exercise their rights and freedoms without facing any form of discrimination based on various grounds such as sex, race, religion, or political affiliation.

On a positive note, the judiciary, once appointed, benefits from tenure security, which ensures their independence. While the judiciary remains subject to the authority of the Parliament, there are mechanisms in place for administrative control. According to Barnett, the role of judges has demonstrated an increasing assertiveness in relation to judicial review of administrative actions and the interpretation and application of European Community law. This trend undermines arguments suggesting an ideological alignment between the judiciary and the executive, particularly when the executive branch holds conservative inclinations.

This observation highlights the evolving nature of the judiciary's engagement with administrative actions and European Community law, indicating a willingness to exercise

their authority and independence rather than simply aligning with the interests of the executive branch.

A.2.2 Global Constitutionalism

Global Constitutionalism refers to the idea and practice of extending constitutional principles and norms beyond the national level to the global arena. It involves the recognition and promotion of human rights as fundamental principles of governance and legal order on a global scale. Human rights play a central role in the discourse and implementation of Global Constitutionalism.

Human rights are considered essential elements of global constitutionalism because they provide a universal framework for protecting and promoting the inherent dignity and worth of all individuals. They are grounded in the belief that every person is entitled to certain rights and freedoms by virtue of being human, regardless of their nationality, ethnicity, religion, or any other characteristic.

Global Constitutionalism seeks to establish mechanisms and institutions, such as international treaties, courts, and organizations, that uphold and enforce human rights standards worldwide. These mechanisms aim to ensure that States and other actors respect, protect, and fulfill human rights obligations, and provide remedies for violations.

The incorporation of human rights into the framework of Global Constitutionalism has several implications. It recognizes the interdependence and interconnectedness of human rights across borders, emphasizing the need for cooperation and collective action to address global challenges. It also highlights the importance of accountability and accountability mechanisms to hold States and non-state actors responsible for human rights violations.

Furthermore, human rights provide a normative foundation for global governance, shaping the principles and values that guide decision-making at the international level. They influence the development and interpretation of international law, including the formation of treaties, conventions, and customary norms.

In summary, human rights are integral to the concept of Global Constitutionalism as they serve as universal standards that inform the establishment of legal frameworks and institutions at the global level. They promote equality, justice, and dignity for all individuals, and their incorporation into global governance contributes to the realization of a just and rights-respecting world order.

Global constitutionalism is an international law and international relations school of thought. Falk defines global constitutionalism as the "extension of constitutional thought to international order." [22] According to Falk, the *familiar answer* would be "the

[22] Falk RA. The Pathways of Global Constitutionalism. In: Falk RA, Johansen RC, Kim SS, editors. The

construction of a world government with centralized institutions equipped with coercive equipment." However, "reducing the vision of global constitutionalism to governmental alternatives to the State system" would be a mistake: constitutional theory may be applied to global governance that does not take the shape of a global government.

Global constitutionalism studies that gestational process critically, searching for achievements and failures in meeting the basic norms expected of a global constitutional system. In this regard, we disagree with Hawkins and Howe's definition of global constitutionalism as an "approach to governance that regards 'constitutionalisation' of the global arena as a necessary and good process" [23]. In the process of global constitutionalisation, global constitutionalism also "discovers legitimacy deficits" and "suggests remedies".[24]

Many global constitutionalism experts are dissatisfied with the Westphalian system of sovereign and independent nations, which has resulted in a condition of anarchy - absence of authority- at the global level. As a result, they are inclined to regard movements away from that anarchy with a charitable eye. However, they are conscious that the desire for a global rule of law runs the risk of validating undemocratic international organizations and "promoting dangerously alluring over-expectations."[25] In any event, the ability of a global constitutionalism approach to enable "severe inequality in the globe to be not only exposed but also denounced:" is what most interests us.

Sadly, there is not a concept of global constitutionalism that is commonly acknowledged. "Pushed since the 1930s in Europe and rediscovered in the 1990s, it has meant different things to different people, has been promoted for many diverse reasons, and has also been condemned on many different grounds", Besson adds.[26] Werner argues: "The vocabulary of constitutionalism has been used in different contexts and for different purposes, varying from in-depth critiques of existing international law to attempts to explain the rise of international tribunals, the revitalisation of international organisations, the self-understanding of European organisations in terms of constitutionalism or the development of a core of fundamental values in international law".[27] Despite this lack of agreement, there are three constitutionalist ideas, that appear to be significant for most global constitutionalist studies and can have special utility for human rights education in understanding the essence of human rights from a legal and philosophical perspective. The

Constitutional Foundations of World Peace. Albany: State University of New York Press; 1993.

[23] Hawkins B, Holden C. A Corporate Veto on Health Policy? Global Constitutionalism and Investor–State Dispute Settlement. J Health Polit Policy Law. 2016;41:7. Published online before print June 2, 2016.

[24] Peters A. The Merits of Global Constitutionalism. Indiana J Global Legal Studies. 2009;16(2):397–411.

[25] Macdonald R, Johnston DM. Introduction. In: Macdonald R, Johnston DM, editors. Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Leiden: Martinus Nijhoff; 2005.

[26] Besson S. Who's constitution(s)? In: Dunoff JL, Trachtman JP, editors. Ruling the World? Constitutionalism, International Law, and Global Governance. New York: Cambridge University Press; 2009.

[27] Werner W. The never-ending closure: constitutionalism and international law. In: Tsagourias N, editor. Transnational constitutionalism. New York: Cambridge University Press; 2007.

cross-fertilization of constitutional law and human rights law is becoming more and more obvious through an analytic examination, and understanding what is at stake in this field can be instrumental in our deeper understanding of human rights:

1. The extent to which rule-making authority is received or captured by global institutions is important in distinguishing between *ordinary* cooperation between states—presumably based on voluntary cooperation between equal, sovereign states, the kind of cooperation that Oye would call "cooperation under anarchy"[28] —and a new kind of cooperation in which states are sometimes compelled to follow the rules set at the global level, i.e., the process known as global constitutionalism.

2. The democratic legitimacy of the institutions to which rule-making authority is delegated is critical in determining whether or not the loss of sovereignty caused by global constitutionalisation is *compensated* by meaningful involvement in decision-making processes.

3. Human rights law, or the extent to which human rights are realized through rules set by global institutions, is used to assess the quality of the rules set by global institutions: similarly to how national rules that violate the basic rights enshrined in the constitution are referred to as *unconstitutional*, global rules that violate international human rights law are referred to as *un-global-constitutional*.

Most global constitutionalism assessments concentrate on global institutions that have been given a more official or informal mandate to develop, disseminate, or carry out international law when it comes to rule-making power. The goal of that focus is to make a distinction between transnational agreements that continue to rely on voluntary cooperation between equal sovereign states—states may enter or leave an agreement at any time—and agreements under which states cede at least some of their sovereignty because, once they sign on, they cannot easily back out, which occasionally results in decisions being made without their approval. For a study of global constitutionalism, only the second type of organization is relevant since it suggests the development of a level of decision-making above the state.

Even while the significance of democratic legitimacy is clear, it can be challenging to define what constitutes democratic legitimacy on a global scale if governments actively or passively delegate a significant portion of their decision-making authority to regional or

[28] Oye KA. Explaining Cooperation under Anarchy. In: Oye KA, editor. Cooperation under Anarchy. Princeton: Princeton University Press; 1986.

international organizations. The "one country, one vote" idea serves as the benchmark for democratic legitimacy and is directly derived from the principle of sovereign equality, upon which the United Nations (UN) system is based. From a wider global viewpoint, adhering to the "one person, one vote" idea is also problematic since it gives each citizen of a country with a very low population greater influence on the world stage than it does each citizen of the country with the highest population. Early on, a group of 11 scholars, most of whom were associated with the University of Chicago, felt that the UN was not democratic enough and proposed the establishment of a Federal Republic of the World with delegates chosen directly by the people of all states and nations, one delegate for every million of population or fraction thereof above one-half, at the Federal Convention.[29] Although the international community has never given the notion of a Federal Republic of the World much thought, the "1,000.000 individuals one vote" method is nonetheless helpful as a substitute for determining the legitimacy of democracies. While this is going on, *civil society* is presently the focus of the ongoing intellectual search for democratic legitimacy on a worldwide scale. As Besson articulates it: "Indeed, once the multilateral and multilevel international political community is understood as a pluralistic community of communities and as a hybrid community of states and individuals, the equivalence of sources and the plurality of specific regimes within international law becomes a democratic requirement".[30]In other words, in order to claim democratic legitimacy, global institutions should include representatives from civil society in its decision-making bodies. Last but not least, in order to claim democratic legitimacy, a global institution should, in our opinion, not only make decisions that reflect the views of the people or countries it represents, but it should also have the authority to ensure that those decisions are carried out by all parties involved. A government that decides to impose a tax on the properties of the wealthiest members of the population in accordance with the majority opinion, but is unable to make the wealthiest people pay the tax, is not a truly democratic government; in the end, the minority decides to pay the tax, or not. Both the *demos* (*people* in ancient Greek) and *kratos* (*power* in Greek) are necessary. This is the major barrier preventing the institutions at the center of the global health governance architecture from asserting democratic legitimacy.

[29] Committee to Frame a World Constitution. Preliminary Draft of a World Constitution (1947–1948). Chicago; 1948. [http://www.worldbeyondborders.org/chicagodraft.htm]

[30] Besson S. Who's constitution(s)? In: Dunoff JL, Trachtman JP, editors. Ruling the World? Constitutionalism, International Law, and Global Governance. New York: Cambridge University Press; 2009.

A.2.3 Europe

As of 1984 (when the Italian Constitutional Court published its *Granital* ruling[31]), when a national item of law conflicts with a European Union regulation endowed with direct force, the national judge directly implements the European Union provision. When a national piece of law disagrees with European Union regulations that have no immediate impact, lower courts are compelled to refer the issue to the Constitutional Court.

Here, in this context, it is possible for a piece of national law to raise questions about whether it is compatible with both the national Constitution and European Law (referred to as *dual preliminarity*). The Constitutional Court had traditionally required the lower judge to submit the reference for preliminary ruling first in cases where a lower court has doubts about the constitutionality of a piece of legislation and where, at the same time, the legislation appears to be at odds with European law endowed with direct effect. The Constitutional Court only permitted submission of a query on the legality of the same subject, if necessary, after the problem with the interpretation of EU law was resolved.

The Italian Constitutional Court addressed the question of *dual preliminarity* in the area of fundamental rights protection in its judgment from the end of 2017 by taking into account a case where a national statute may have violated both the Italian Constitution and the EU Charter of Fundamental Rights[32] (CFREU). The Court modified its prior precedent by overturning the procedural order where the preservation of basic rights is in jeopardy, but only in an *obiter dicta*. In accordance with the new Court's methodology, the lower judge should first knock on the door of the Constitutional Court in cases where basic rights protected by both the national Constitution and the CFREU are in jeopardy.

Lower judges are only still permitted to request a preliminary judgement from the Court of Justice of the EU in the event that there are still questions regarding consistency with EU law following the Constitutional Court's verdict. It appears that the obiter's goal is to stop regular courts from upholding constitutional rights without first consulting the Constitutional Court. However, it appears to be consistent with CJEU case law (C-188/10 C-189/10, *Melki and Abdeli*)[33], as the Constitutional Court keeps the prospect of a decision under Article 267 TFUE open for the lower judge once the constitutionality issue has been resolved. The Court of Justice of the European Union (CJEU) actually stated that Article 267 TFEU only prohibits national legislation that establishes an interlocutory procedure for the review of the constitutionality of national laws insofar as the nature of that procedure prevents all other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. While the CJEU

[31] G. Gaja, "Constitutional Court (Italy) Decision No. 170 of 8 June 1984, S.p.a. granital v Amministrazione delle Finanze dello Stato". (1984) 21 *CML Rev* 756.
[32] "Charter of Fundamental Rights of the European Union." Official Journal of the European Union C83, vol. 53, European Union, 2010.
[33] Joint Cases C-188/10 & C-189/10 Melki and Abdeli [2010] Facts. See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0188_SUM&from=ES (Accessed 20 August 2022)

determined that such national legislation is not prohibited by Article 267 TFEU, other national courts or tribunals are still free to ask the Court of Justice for a preliminary ruling at the conclusion of the interlocutory procedure for the review of constitutionality of any issue they deem necessary. This is, unquestionably, the case with the Italian Constitutional Court's new strategy. Nonetheless, the Italian Constitutional Court's ruling has a complex interpretation. On the one hand, it perfectly adheres to European legislation in tone and register. The European Union's fundamental rights charter's provisions are acknowledged by the Italian Constitutional Court as having "typical constitutional stamp" (para. 5.2) and having "primacy and direct effect" as stated in European and constitutional case law, respectively. The European-friendly concern of giving fundamental rights erga omnes protection and the accompanying necessity for a centralized system of constitutional review of laws, where the preservation of fundamental rights is at issue, appear to be the driving forces behind the Court's fine-tuning of its jurisprudence. The metaphor of judicial discourse is also explicitly mentioned by the Court within the context of the idea of faithful collaboration. On the other hand, the direction the Court is pointing to is reminiscent of the *Bundesverfassungsgericht's Solange I* decision [34], which stated that national constitutional adjudication should take precedence over the European circuit of adjudication as long as fundamental rights are protected by the national Charter (if not hierarchically, procedurally).

This new procedural rule was defined by the Court as a necessary *clarification*. In reality, it was unnecessary to resolve any lingering concerns about conformity with both national constitutional law and EU law in the current instance. The Italian Constitutional Court is determined to send a clear message to the national and European community of translators as seen by this pointless explanation. This statement appears to be consistent with the current approach taken by the Constitutional Court to assert its voice inside the European composite constitutional framework. In actuality, the Constitutional Court opted to avoid engaging in any direct communication with the CJEU for a number of years by contesting its authority to make preliminary referrals to the CJEU.

The Italian Constitutional Court reversed this tendency after decades of glorious seclusion, submitting its first reference for a preliminary judgement in 2008, which was then followed by a second reference in 2013. The Constitutional Court this year challenged the EU's supremacy with its third and last request for a preliminary judgement in the Taricco[35] issue, maintaining its resolve to speak out in the European circuit of adjudication despite its most dramatic events. Although several interpreters suggested an escape plan,

[34] Solange I (BVerfGE 37, 271 et seq.) See full decision here: https://www.servat.unibe.ch/dfr/bv037271.html (Accessed 6 January 2022)

[35] Piccirilli, G. (2018). The 'Taricco Saga': The Italian Constitutional Court continues its European journey: Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgment of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B. European Constitutional Law Review, 14(4), 814-833. http://doi.org/10.1017/S1574019618000433

which would have included open and instant disobedience to the CJEU, the Court once more chose a dialogic approach, emphasizing its voice.

A.2.4 Human Rights as International Constitutional Rights

The International Bill of Rights[36], which includes the Universal Declaration of Human Rights as its cornerstone, is the culmination of the work of three worldwide international human rights documents. How are international documents like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) similar to and different from domestic bills of rights? The trickier part to keep in mind, is that bills of rights usually have constitutional (or quasi-constitutional) standing inside domestic legal systems. Therefore, according to this train of thought, international human rights law has also become to some extent, *constitutional*.

Since one of international human rights law's principal responsibilities is to set boundaries for what governments may legitimately do to persons within their jurisdictions, there is surely something essentially constitutional about the nature and subject-matter of international human rights law. Given that international law (apart from EU supranationalism) does not explicitly organise and empower any universal political authority, this is likely the most direct and plain constitutional duty provided by any sort of international law.

But is there anything constitutional about the international human rights system beyond this essential purpose that is inherent in the mere existence of international human rights law? To evaluate the presence and scope of any difference between the two systems on this crucial topic, it will be useful to consider that there are three additional particular statements that need to be separated. The first argument is that there are now two sets of constitutional laws guaranteeing basic rights: the local one and the international one. This means that the protected rights' legal position has converged toward parity across all systems. The second argument is that the human rights system is best understood as a constitutionalized regime of international law, just like the European Union and other international regimes. This is true regardless of the precise legal status of the protected rights with respect to other types of international law. This may be like the domestic scenario when a bill of rights becomes part of the constitution and so formalises the public law system. The third argument is that international human rights law is an integral component of the larger argument for replacing the conventional, horizontal paradigm of international law based on the sovereign equality of States with a more

[36] UN General Assembly, International Bill of Human Rights, 10 December 1948, A/RES/217(III)A-E, available at: https://www.refworld.org/docid/3b00f08b48.html [accessed 20 November 2021]

vertical, constitutionalist, or *public law* paradigm. This is analogous to the domestic scenario when a bill of rights serves to constitutionalize a whole legal system.

It may be useful to look at two distinct processes of *constitutionalization*[37] which have been, on the whole, separately discussed by comparative constitutional lawyers and international lawyers, in order to clarify and evaluate these three claims about what, if anything, is constitutional about human rights law. The first procedure has to do with the standing of basic rights within the law of a particular regime, and more specifically the elevation of rights from the realm of ordinary law to that of higher law, a phenomenon that has marked a great number of national systems since 1945. The Canadian Charter of Fundamental Rights and Freedoms, which replaced the country's statutory Bill of Rights in 1982[38], and the United Kingdom's Human Rights Act of 1998[39], which established a comprehensive bill of rights within the domestic legal system for the first time, albeit by *constitutional statute*, are both relatively recent examples of such internal constitutionalization of rights. Human rights law becoming international constitutional law, is the first argument that raises the question of whether a comparable change has occurred.

The second aspect of constitutionalization that has primarily interested international lawyers is the transition of a specific international law regime from a solely treaty-based institution to a *constitutional*one. The European Union serves as a paradigmatic model, and an increasing body of work on international constitutionalism explores the question of whether or not other international regimes may be claimed to have adopted similar principles. The second claim examines whether the human rights system has become a constitutionalized regime of international law in this way, and the third asks if and how human rights has contributed to the constitutionalization of international law.

Human rights law serves to set limits on what governments can do to individuals within their jurisdictions, so it can be said that it has a constitutional quality; the question at hand, however, is whether or not this constitutional quality currently amounts to giving human rights the precise legal status of constitutional law. Constitutional, statutory, common law, administrative, customary, or just political/pragmatic constraints are only some of the legal and non-legal forms that restraints on governments may and do take in the strictly domestic setting. Given that constitutional law is a subset of the law, there is always some formal meaning to this inquiry, even if it must be removed from its strictly domestic setting. In fact, constitutional law is no longer practically restricted to the

[37] Loughlin, M., (2010). What is Constitutionalisation?, in Dobner, P. and Loughlin M. (2010). The Twilight of Constitutionalism?, Oxford Constitutional Theory (Oxford, 2010; online edn, Oxford Academic, 1 May 2010), https://doi.org/10.1093/acprof:oso/9780199585007.003.0003 (Accessed 20 Nov. 2022).

[38] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), c 11.

[39] United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998, available at: https://www.refworld.org/docid/3ae6b5a7a.html (Accessed 29 December 2021).

national level, and so cannot be defined as such. This is because the EU is now widely recognised to have constitutional law (although without a written constitution), of which its human rights legislation is a component. In the broad meaning illustrated by numerous domestic bills of rights, there are some defining features of constitutional law that could be useful to consider in order to understand better what is at stake for human rights. For example, constitutionalization differs from the typical, ongoing processes of lawmaking since it is enacted by a distinct, sporadic, and self-consciously constituent authority, whether that power is actual, notional, or difficult to discern in practice. Such authority may be shown less in the quality and duration of discourse than in a specially appointed constituent assembly, a distinct ratification or decision-making procedure, or the same body wearing a different hat. Second, in the event of a disagreement between two different forms of positive law, constitutional law will always take precedence since it is *higher law* in the hierarchy of norms containing all types of positive law. Third, unlike statutes or other kinds of legislation, constitutional law is protected from being changed or repealed via the normal channels by requiring an extra procedure or a supermajority vote. Constitutional law is the greatest kind of law since it comes from a specific constituent authority, and as such, it may only be altered or abolished by the same authority or one with similar power. However, we should clarify at this point that even constitutional legislation can be altered or abolished entirely, by judicial interpretation.

Although judicial review has been a hallmark of the domestic constitutional law protection since 1945, it is not necessary to resort to this or any other means of enforcement. Despite the explicit lack of judicial review in its constitution, the Netherlands safeguards basic rights through constitutional law in a clear and meaningful sense, whereas the United Kingdom and New Zealand do not. However, in the context of international human rights, where there is a significant difference between regional and global systems, the question of whether fundamental rights are effectively protected without some form of judicial review is distinct from this and nonetheless very important from a practical standpoint.[40]

There is no single international human rights system but rather regional and global ones which overlap and interact in complex ways, and two, there is no single international legal source of human rights law and many of the sources overlap. This makes it difficult to determine whether or to what extent some or all of international human rights law satisfies these various criteria. Human rights have often been codified via international treaties, although many aspects of human rights legislation, including many rights that are also codified through treaties, may be traced back to basic principles or even to custom. Certain human rights norms, such as the prohibition of genocide, may fall into every

[40] See: https://www.coe.int/en/web/human-rights-convention/landmark-judgments (Accessed 23 March 2022).

category, especially when taking into account the tiny subset of human rights which have gained jus cogens[41] status, and also, the subset imposing erga omnes responsibilities[42].

In fact, more broadly, one may wonder whether the debate over human rights law's worldwide constitutional legitimacy really amounts to anything. It is common knowledge that opinions greatly vary on the topic of whether or not international law has a general hierarchy of standards. Even if it did, the only practical case where international constitutional status would matter is when a State's human rights duties collide with another responsibility under international law. When a State's human rights commitment conflicts with (1) its own solely domestic legislation or action, or (2) its international activity that is not undertaken as a matter of international obligation, the former is the more prevalent scenario. Even if there is such a dispute, international human rights monitoring or enforcement authorities often lack the authority to settle the matter at hand and can only look into whether or not a violation of the human rights they are tasked with protecting, has occurred. Consequently, when such a dispute arises, the international human rights court, for instance, would likely frame the problem as to whether the later international commitment justifies the restriction of the right in regards to the human rights treaty. That is to say, the court will likely treat it as its first priority. It may be argued that only a larger, more representative international court would have the power to decide which of two competing obligations under international law should be given precedence and therefore settle the dispute.

It is worthwhile to investigate the above mentioned issues, because of the potential light it may shed on the human rights system, both favourably and adversely. Given the above, it is possible that the solution doesn't always have huge implications in the real world. However, domestic bills of rights are usually assigned constitutional status - and sometimes placed at the beginning of a constitutional text for expressive purposes, to indicate a common commitment to fundamental rights as the most essential legal standards within that system. The question of whether the international legal system now shows a comparable commitment, is an interesting one. In addition, international human rights legislation is likely to be included in any international constitutionalism that exists, that is developing, or is being initiated.

Let's put the criteria to the test in a new international setting by inquiring into their applicability to European Union (EU) law, where it is commonly accepted that both the Treaty of Rome[43] and EU human rights standards function as constitutional law inside the EU legal system. The primary reason for this is the elevated legal standing of these

[41] Carnegie Endowment for International Peace. The Concept of Jus Cogens in Public International Law Papers and Proceedings. Geneva, Switzerland, 1967.
[42] Ardit M., Bekim N., (2013). The Concept of Erga Omnes Obligations in International Law,New Balkan Politics, Issue 14, Available at http://dx.doi.org/10.2139/ssrn.3502662 (Accessed 11 March 2022).
[43] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, available at: https://www.refworld.org/docid/3ae6b39c0.html (Accessed 10 November 2021).

organisations. Therefore, in the event of a contradiction between different forms of EU legislation, the Treaty and the ECJ's human rights jurisprudence take precedence. In fact, it could be argued that EU human rights law would take precedence over the Treaty in the event of a conflict; however, the ECJ would likely rationalise this situation to the effect that, as general principles of law, EU human rights law is authorised by, and so part of, the Treaty itself (at least until the Charter of Fundamental Rights is made binding and incorporated into the Treaty). As far as the Treaty is concerned, supremacy is not the sole relevant condition for awarding constitutional status. It is reasonable to consider the lengthy and careful process of advancing European integration via legislation that resulted in the 1957 Treaty to be a *constitutional moment*, and to apply the same logic to some later changes and additions. The Treaty of Rome is more firmly established than many other treaties, including some human rights ones, due to its onerous amending procedure, which involves convening an international conference and requiring universal acceptance before its recommendations take effect. If the three requirements are to be applied to international human rights legislation, how would this be done? Regarding constituent authority, the processes of international lawmaking, apart from treaties, are notoriously difficult to articulate with any degree of accuracy. Moreover, in international law, the idea of a constituent power is not well-defined. While most international law was not the result of constitutional moments - of a constituent authority - the UN Charter, the UDHR, and the other human rights treaties that they authorised and that took 20 years to negotiate, all have credible claims to this effect, much like the Treaty of Rome.

There is substantial disagreement and debate on the questions of whether or not there is a hierarchy of norms within international law in general, whether or not this is a question worthy of further inquiry, and whether or not human rights law is superior to other types of international law, in particular. In terms of human rights law, there appears to be consensus that a small but critical core of the most important human rights law has achieved jus cogens and, thus, higher law status as binding treaty makers, and probably also trumping conflicting custom (if such a conflict is even a conceptual possibility). However, there appears to be less consensus about the process by which norms achieve this status, which may prevent the list from being expanded. There are others who believe that the next wave of human rights legislation will include *erga omnes* responsibilities on governments, although it is unclear what those duties will be or how they will be ranked.

As a last point, the UN Charter has a supremacy provision in Article 103. It states that "[i]f there is any conflict between the obligations of the Members of the United Nations under the present Charter and the obligations of the Members of the United Nations under any other international agreement, the obligations of the Members of the United Nations under the present Charter shall prevail."[44] It is unclear, however, to what degree Article 103 integrates subsequent human rights measures required or permitted

[44] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html (Accessed 12 December 2021).

under the broad auspices of the Charter, given that the Charter itself contains no particular human rights duties. Rights expressly stated to be non-derogable are sometimes claimed to be hierarchically superior to derogable ones, but the question of whether there is a hierarchy among human rights is not directly relevant to the question of whether human rights are superior to other types of international law.

When it comes to human rights on a regional level, the European Court of Human Rights has always prioritised the ECHR above other treaty commitments of Member States. This is shown, for example, by the fact that the ECHR treats violations of Convention[45] rights based on future international duties as problems of reasonable restrictions under the ECHR (on the premise that the ECHR controls), and by its general pronouncements concerning the very character of the ECHR. The ECHR is a "constitutional instrument of European public order", and the Court has said that the Convention's protections have a "peremptory character". Perhaps most importantly, it has confirmed that "Convention responsibility in respect of treaty obligations subsequent to the entrance into force of the Convention" remains with Member States.

A.2.5 Does human rights legislation function as a constitution when it comes to international law?

Human rights legislation does not function as a constitution in the same way as a national constitution does within the context of international law. While human rights legislation plays a crucial role in promoting and protecting human rights at the national level, international law operates differently.

International law consists of a framework of rules and principles that govern the relationships between sovereign Sates and other international actors. It encompasses various sources, including treaties, customary international law, general principles of law, and judicial decisions. Human rights legislation, on the other hand, refers to laws enacted at the national level to implement and enforce human rights standards.

International human rights law, which is a branch of international law, establishes a set of universally recognized rights and freedoms that States are obligated to respect, protect, and fulfill. These rights are primarily codified in international treaties and conventions, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

While human rights legislation at the national level may incorporate and align with international human rights standards, it does not replace or function as a constitution

[45] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html (Accessed 20 November 2022).

within the realm of international law. Instead, international human rights law sets the minimum standards and obligations that States should adhere to, and it provides a framework for accountability and monitoring of State compliance.

Additionally, international human rights law is enforced through various mechanisms, such as international courts and tribunals, treaty bodies, and regional human rights institutions. These mechanisms allow individuals and groups to bring complaints of human rights violations against States and seek redress.

In summary, human rights legislation operates within the framework of national legal systems and serves to implement and enforce human rights standards at the domestic level. International law, including international human rights law, provides a broader framework of legal principles and obligations that govern the behavior of States in relation to human rights, but it does not function as a constitution in the same way as at the national level.

Human rights legislation is typically not considered binding on international organizations, which is an important aspect contributing to its constitutional nature. This is because non-state actors, such as international organizations, do not fit neatly into the customary international law framework. They are not signatories to human rights treaties, nor are they explicitly subject to international law due to jus cogens principles. Consequently, there is a significant limitation on the constitutional status of human rights legislation compared to both national and transnational constitutional law. It is inconceivable to envision a scenario where the political institutions of a constitution are not bound by a bill of rights.

Furthermore, human rights treaties possess unique characteristics that differentiate them from other types of treaties. They possess pre-existing and autonomous normative power, which is particularly evident in their subset that is granted jus cogens status. This distinctiveness contributes to the unique validity of human rights legislation in comparison to other forms of international law. However, the implications of this substantive factor in terms of supremacy are less clear. Nevertheless, it suggests a hybrid status resembling the *new commonwealth model of constitutionalism* adopted by countries in the domestic context. This implies a legal status for fundamental rights that transcends the traditional dichotomy of constitutional versus non-constitutional law.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) can be regarded as *constitutional treaties*. They establish a form of quasi-constitutional law at the international level, akin to specific *super* or constitutional *statutes* found in domestic settings. These statutes are accorded a higher status than ordinary statutes through interpretive rules that mandate subsequent statutes to be interpreted in a manner consistent with them, whenever possible. Additionally, they include provisions that prevent implied repeal of these constitutional statutes.

The next point to consider in our quest to grasp the complexities of global constitutionalism, is whether or not international human rights legislation is firmly established. Only a few of fundamental human rights have been recognised as jus cogens,

making them inviolate under international law and immune to treaty change or repeal. However, to the degree that international treaty (Article 53 of the Vienna Convention on the Law of Treaties[46]) is the source of the very category of jus cogens in positive law, the treaty may be changed according to the treaty's own default method. Either (a) the category of *jus cogens* or (b) which standards have this status is a matter of custom or public acceptability, and both could be subject to change in the same manner that they were originally formed.

Regarding other human rights norms contained in the major international treaties, the treaties themselves typically contain a formal amendment process that is somewhat more onerous and specific than the general or default international law of treaty amendments contained in the Vienna Convention, which permits amendment by, and insofar as there is, "agreement between the parties". The Vienna Convention only specifies that "any proposal... must be notified to all the contracting States, each of which shall have the right to participate in: (a) the decision as to the action to be taken regarding such a proposal; and (b) the negotiation and conclusion of any agreement for the amendment of the treaty". So, for instance, the ICCPR necessitates (1) the convening of an amendment conference upon at least one-third of States parties favouring one following a proposed amendment, (2) a majority vote at the resulting conference, (3) approval of the proposed amendment by the General Assembly, and (4) ratification by a two-thirds majority of the States Parties. As with the default norm, the ICCPR is partly entrenched by the prescribed processes, although changes bind only nations that have accepted them. Contrary to the European Union, however, revisions do not need to be approved by a majority vote of Member States before being implemented. In other words, rather than a blocking veto, States have an *immunity* veto.

The ICCPR[47] in particular has been seen as more entrenched than a usual, non-human rights instrument on the topic of withdrawal from human rights treaties. The Vienna Convention states that "the termination of a treaty or the withdrawal of a party may take place: (a) in accordance with the provisions of the treaty; (b) at any time by consent of all the parties;" or (c) where there is no provision, the intention to permit withdrawal is established or "may be implied by the nature of the treaty". There is no provision in the ICCPR for termination or withdrawal, and the Human Rights Committee ruled in General Comment 26 in 1997 that there was no such purpose so that a State may not withdraw from it. The Committee did this to highlight the difference between the

[46] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html (Accessed 10 September 2021).
[47] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html (Accessed 6 September 2022).

more *temporary nature* of many other accords and the permanent protection provided by the "International Bill of Human Rights", as a whole.

A.2.6 Human Rights as Constitutionalized International Law

What are the additional ways in which international human rights legislation could be considered constitutional? Legalization, judicialization, and constitutionalization are three distinct processes that must be distinguished from the beginning. There is no denying that the human rights system, much like the international economic system, has been more regulated by law and, to a lesser degree, by the courts. Constitutionalization, however, is more than the simple aggregation of these two steps.

At least two distinct constitutionalization processes are involved, as we've shown above. The path taken by basic freedoms to become constitutionally protected norms across the world. The main distinction to be made here is between common law and superior law. The evolution of a given international law regime from a horizontal, intergovernmental institution to a more vertical, supranational, or autonomous one. The main difference between constitutions and treaties is discussed below. An analysis will follow of the prospect of enshrining the human rights system in a constitution, and the human rights system's potential influence on a broader effort to constitutionalize international law.

International institutions founded on treaties are different to some extent from those founded on constitutions, in this second round of constitutionalization. There are two key distinctions in this setting, either of which is adequate to establish convincing claims of a constitutionalized regime of international law, albeit it is clear that the spectrum is not sharply divided. The first is that treaty-based regimes function largely at the international level, but constitution-based regimes permeate local legal systems to some major degree, therefore structuring a link between the two levels. This shift from dualism to federalism is another way of describing constitutionalization. The second distinction is that constitutional institutions have the ability to impose duties on nations that are not fixed nor consensual, unlike treaty-based systems. Such additional duties may be imposed by an independent legislative body exercising majority rule, and they may be enforced by an adjudicatory body with coercive authority. The constitutionalization process involves a transition from voluntary participation to mandatory compliance.

The European Union (EU) is the prototypical constitutionalized regime of international law since it has advanced significantly in both directions. Its *supranational* character results from (1) the federalization of EU law, (2) a governance system in which new legal responsibilities are generated by a kind of majority decision-making, and (3) enforcement by an international court with compulsory jurisdiction, in addition to local courts. No more explanation is necessary at this point on the process by which the European Union evolved from a treaty-based organisation to a supranational body. Direct effect, when it applies, means that EU law operates of its own force within the domestic legal system without the need for any national legislative or other measures and

regardless of the domestic constitutional status of treaty law. This is a crucial part of the story of constitutionalization as federalization. Direct impact, in tandem with the long-held belief in international law's preeminence over national legislation, has resulted in a body of binding EU law on which individuals may depend in national courts without fear of retaliation from individual Member States. Thus, a vertical, transnational system of international law was established, to which some of their sovereign authority was entrusted. Human rights are often seen as having played no fundamental part in this transition, but instead merely an instrumental or pragmatic one as the candy aiding the courts of certain Member States to swallow the pill.

When comparing human rights regimes on a worldwide scale, it is observable that different regions face different constitutional challenges. Although it took a different path, the ECHR has reached a level of constitutionalization that is comparable to federalization.[48] The European Court of Human Rights (ECtHR) is well on its way to establishing federal supremacy over the domestic laws of Member States, in addition to its increasing constitutional supremacy over other sources of international law outlined in the preceding section. The European Convention on Human Rights (ECHR) does not formally require that its provisions be invocable in, and penetrate, the domestic legal system; rather, it only mandates that individuals who have had their rights violated "shall have an effective remedy before a national authority". Direct effect is a central constitutional principle of European Union (EU) law. While the ECHR does not have *de jure* immediate effect, all 46[49] member nations have adopted some version of the ECHR into domestic law, making it possible for people to bring claims based on the ECHR in national court. The ECtHR's interpretation of a Convention right is binding in a number of countries, and local courts are required to "take into consideration" that interpretation when it is invoked. Similarly, the ECHR has achieved de facto supremacy over domestic law because Member States generally abide by the decision of the Strasbourg Court, as required by Article 46, and, where necessary, amend or repeal domestic laws and/or policies, including constitutions, to accommodate the incorporated right, regardless of the particular internal hierarchy of norms with regard to the incorporated right. The European Court of Human Rights (ECtHR) may be thought of as a regionalized or constitutionalized federalized or supreme law system for human rights since it functions inside the legal systems of Member States as an invocable and supreme law.

Domestic systems are similarly permeated by the American Convention on Human Rights, at least structurally if not usually in reality. Unlike the ECHR, this treaty is generally

[48] Davies, G., (2022). Interpretative Pluralism and the Constitutionalization of the EU Legal Order, in Dawson, M., Jachtenfuchs M. (2022). *Autonomy without Collapse in a Better European Union,* Oxford: online edn, Oxford Academic, https://doi.org/10.1093/oso/9780192897541.003.0007 (Accessed 10 July 2022).

[49] While the member States of the Council of Europe were 47, as of 2023 Russia is no longer a Member State. Hence, the number of Member States is down to 46.

enforceable in national courts since most have adopted it into domestic law (although this is not a requirement for State Parties). In some nations, such as Argentina and Venezuela, the Convention (and other human rights treaties) has been given constitutional rank; in others, such as Costa Rica and Paraguay, it has been given legal status below the constitution but above statutes; and in still others, it has been given equal rank with statutes. Furthermore, unlike the ECHR, Article 2 of the American Convention on Human Rights imposes an obligation on the States Parties "to take... such legislative or other measures as may be required to give effect" to the protected rights. When this obligation is met, those who depend on the resultant law in national courts are indirectly invoking the Convention, just as they do when relying on correctly transferred EU Directives.

Overall, the process of constitutionalization of the global human rights system has not advanced as far as federalization. Several important international human rights treaties, such as the ICCPR and CEDAW, have a provision analogous to Article 2 of the American Convention on Human Rights, which mandates domestic legislation and other actions to give effect to the rights. Again, it is not essential, but a number of nations have made international treaties part of their domestic law in either a broad or specific way (because of a general monist perspective) (incorporating either all ratified human rights treaties or particular ones). However, the percentage of such integration is far lower than that of the ECHR or the American Convention on Human Rights, and reservations and assertions of non-self-executing character are more common at the global level. Finally, when interpreting national constitutions, local courts are significantly more likely to take into account or depend on regional treaties to which their State is a party than global ones.

The EU is also indicative of the second form of transition from treaty to constitution, from agreement to compulsion, as we have shown. As a result, the Court of Justice of the EU has obligatory jurisdiction over all Member States, and qualified majority voting is a mandatory part of its general governance structure. In contrast to other areas of international law, the United Nations has only a limited amount of mandatory governance structures in place, such as the Appellate Body of the World Trade Organization and the European Court of Human Rights, both of which have the power to compel parties to their decisions due to their binding nature. In contrast to the human rights system, which must inevitably apply to and cut across all governmental responsibilities, the paradigm of constitutionalization through obligatory governance structure appears most suitable to functionally self-contained international institutions like the World Trade Organisation. In addition, bills of rights are not intended to create a new form of government but rather to place constraints on preexisting or newly established systems. The European Court of Human Rights (ECtHR) is the only human rights court with mandatory jurisdiction (strong sense) as a condition of membership. For the controversial cases it hears, the Inter-American Court of Human Rights only has mandatory jurisdiction over the 20 out of 24 States who are now parties to the treaty.

The third and final argument that human rights have a constitutional basis, emphasises the human rights system's significance in the constitutionalization of

international law more generally than the human rights system itself. As before, this would have the same impact as a bill of rights in constitutionalizing a domestic legal system like that of Canada. For some who contend that the human rights system's expansion necessitates or justifies a move in overall paradigm from a horizontal view of sovereign equality to a more vertical, *constitutionalist* vision, the expansion of the system is a crucial aspect of the argument.

One of the most important shifts is that, in addition to governments, persons are now now subject to modern international law. That is to say, rights and obligations under international law now extend to individuals, as well as nations. The Court of Justice of the EU famously said[50] in Van Gend en Loos in 1963 that EU law constitutes "a new legal order of international law" on the basis of this very feature of EU law. Since 1963, the same description may be applied to all international law. Of course, the major source and manifestation of the rights' side of the transformation is the re-launch of human rights law a few years later with the opening of the two international covenants for signature, while the rapid development of individual liability under international criminal law in the last decade is arguably the major source and manifestation of the duties side of the transformation. Since the *private law* model of international law viewed it solely as regulating horizontal relations among sovereign equals, the *public law* model viewed it as regulating vertical relations between States and individuals. This transformation in the basic subjects of international law can be thought of as constitutional in nature.

In addition to the growth of non-consensual State obligations (such as forms of binding majority decision-making and compulsory adjudication of international courts), the general objective of securing the common interests of humanity rather than simply the individual or aggregate interests of States, and the establishment of the United Nations, the European Union, etc have all been adduced in support of this claim of implicit constitutionalization in international law. According to Judge Brun-Otto Bryde of the German Constitutional Court, "a constitutionalist notion of international law aims to bind these players [states and international organisations]..."[51], providing a normative alternative on the aforementioned descriptive assertion. to the core values of our Constitution, including the separation of powers and respect for individual liberties and the rule of law. As opposed to the notion of explicit constitutionalization of international law, which sees the UN Charter as the constitution of the international community, the role of human rights is far less essential. This is because human rights have a very little role in that particular constitution.

The modern human rights system is undeniably one of the strongest components of this general constitutionalist claim, as it serves as both a general public law mechanism for regulating relations between the State and individuals and a specific constitutional

[50] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastigen* [1963] ECR 1, at para. 12.
[51] Brun-Otto Bryde. Judge of the German Constitutional Court and Professor for Public Law and Political Science, Justus Liebig-Universität Giessen. J.D. 1971, Hamburg. 80 Tul. L. Rev. 203 (2005).

mechanism for limiting governmental power. Given that the United Nations is not often credited with achieving the second key constitutional role of establishing an independent governance structure, this is perhaps the most compelling argument in favour of the assertion. However, this assertion concerning the significance of human rights in constitutionalizing international law also has some significant flaws. To begin with, the human rights system, as pointed out by Joseph Weiler, tends to treat people more like objects, or beneficiaries, of rights (like endangered species or the environment) than subjects (in the strong, authoritarian sense) of rights. This is in contrast to most current constitutions, which normally claim their legitimacy from being the active, engaged workmanship of "we the people", and so weakens the claim of a fundamental shift in international legal subjecthood.

Second, the human rights system does not often impose binding obligations on governments against their will, creating a contradiction with the other elements driving the non-consensual, constitutionalist paradigm. As a matter of fact, the United States' inability to ratify many treaties illustrating the treaty foundation of most contemporary human rights legislation, demonstrates that State assent is required. Furthermore, on a strictly positivist understanding of *jus cogens* as originating entirely from the Vienna Convention, such standards mostly serve to limit a State's treaty-making capacity without explicitly imposing the substantive duty on an unwilling State.

For the third and final reason, the still-dominant consensual concept of State subjects of international law in this domain means that international human rights do not typically bind international organisations or the formed systems of international administration. Human rights treaties often inspire the formation of non-state actors that are neither signatories nor beneficiaries of such accords. Not only does this set the international human rights system apart from local bills of rights, the fundamental purpose of which is to constrain the constituted political power, but it also sets it apart from the EU's human rights system, which is based on the constitutionalist paradigm.

A.2.7 Case law that made history at the Supreme Court of the United States

- The question at the heart of Marbury v. Madison (1803)[52] was: Who has the authority to determine the law?

As a result, "it is precisely the province and obligation of the Judicial Department to explain what the law is."

[52] *Marbury v. Madison* 5 US 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 - Supreme Court, 1803

Consequences: The Court now has the authority to invalidate statutes on the basis that they violate the Constitution (a power called judicial review).

► Case of Dred Scott v. Sandford (1857)[53]

Issue: The issue in this case from before the Civil War was whether or not Congress had the authority under the Constitution to outlaw slavery in free areas. The second issue was whether or not the Constitution guaranteed the ability of African Americans to file lawsuits in federal court.

The Supreme Court ruled in 1857 that Congress lacked the authority to outlaw slavery in the territories and that African Americans lacked the legal standing to bring suit in federal court. The Court reached its conclusions by applying original meaning to the Constitution prior to the Civil War Amendments (Constitutional Amendments 13, 14, and 15), which abolished slavery. The Court went on to say that since slaves were considered *property*, their owners had a right to a fair trial before having them taken away. It is impossible to overstate the significance of the *Dred Scott* case in fanning the fires that eventually led to the American Civil War and the extension of slavery.

► Court Case: Brown v. Board of Education (1954)

Is it a violation of the Equal Protection Clause for public schools to be racially segregated?

The answer is yes. In a unanimous decision, the Supreme Court has ruled that State laws that require or allow racially segregated schools are in violation of the Fourteenth Amendment's Equal Protection Clause. Separate educational facilities are fundamentally unequal, the Court memorably said.

Brown v. Board of Education (1954) overturned *Plessy v. Ferguson* (1896), the case that established the *separate but equal* concept, and is widely regarded as a watershed moment in the history of the Supreme Court. Overturning the doctrine established in Plessy, the Court paved the way for the civil rights movement and integration across the country by finding that a Louisiana law requiring racial segregation of rail passengers did not violate the Fourteenth Amendment's Equal Protection Clause so long as the accommodations at issue were *separate*, *but equal*.

► *Roe v. Wade* decision (1973)

Is it a violation of the Constitution to pass laws that severely limit or prevent a woman's access to abortion?

The answer is yes. The Court held that such regulations violate the right to privacy guaranteed by the Constitution. The Court ruled that, under the Fourteenth Amendment's

[53] Taney, Roger Brooke, and Supreme Court Of The United States. U.S. Reports: *Dred Scott v. Sandford*, 60 U.S. 19 How. 393. 1856. Periodical. https://www.loc.gov/item/usrep060393a/ (Accessed 21 February 2022).

Due Process Clause, governments may only limit abortions at the end of a pregnancy to preserve the woman's or fetus's life. *Roe v. Wade* has become a focal point in the debate over abortion rights, both in the public and in front of the Supreme Court.

However, in June 2022, the Supreme Court reversed *Roe v.Wade* through their decision in *Dobbs v. Jackson Women's Health Organization*, where the Judges ruled that the substantive right to abortion was not “deeply established in this Nation's history or tradition” and was unknown in U.S. law before *Roe v. Wade*. This position was questioned by legal historians and attacked by the opposing opinion, which contended that contraception, interracial marriage, and same-sex marriage did not exist when the Due Process Clause was enacted in 1868 and hence were not constitutionally protected.

A.2.8 Conclusion

The human rights system's content and breadth are at odds with one another, as seen through the lens of the constitutionalist paradigm of international law. This contradiction does not occur within the constraints of a human rights system, which does not claim to have its own independent governing structure. This gap in coverage becomes glaringly obvious, however, if human rights legislation is seen as part of a bigger framework of international governance. That is especially true when people point to the growth and formation of international organisations as proof that international law is expanding its scope beyond protecting national interests. In light of this, appeals from international constitutionalists for human rights to bind international organisations are both necessary and warranted; yet, in order to be effective, this must apply to all human rights, not just economic ones.

We have seen that the international bill of rights is quite similar to local bills of rights in terms of purpose, age, content, and form. While investigating the latter leads us to wonder what, if anything, is constitutional about the key international human rights accords, the most evident distinctions seem to be in legal status and means of enforcement. Without a question, they fulfil the fundamental constitutional role of establishing constraints on the ways in which governments may interact with their citizens. On a more granular level, it is arguable that they meet the requirements for international constitutional law, especially the requirements of constituent power and entrenchment. Furthermore, the human rights system and international law are both undergoing a process of implicit constitutionalization, although one that is limited by the continued significance of the function of State assent and the inability of human rights in general to bind international organisations. These changes to the human rights framework have helped advance and popularise constitutionalism on a worldwide scale.

The international human rights system, this argument claims, does not just reproduce local bills of rights but, by externalising the restrictions in major ways, it advances constitutionalism to a new stage in its historical evolution. In addition to

protecting basic rights as rights of human beings, rather than rights of citizens, I have argued that international human rights legislation also serves to embody and define this different moral grounding. Therefore, what is irreducibly *international* in the International Bill of Rights, is based on whether or not it develops into a more unqualifiedly constitutional charter.

▪ Important points to remember about "Human Rights and Constitutionalism"

When studying "Human Rights and Constitutionalism", it is crucial for students to keep in mind the following important points:

1. Universality of Human Rights: Human rights are inherent to all individuals, regardless of their nationality, ethnicity, gender, religion, or any other characteristic. They apply universally and are applicable to every human being.
2. Interdependence and Indivisibility of Rights: Human rights are interrelated, interdependent, and indivisible. They are interconnected and should be treated as a whole, without prioritizing one right over another. For example, civil and political rights are inseparable from economic, social, and cultural rights.
3. Non-Discrimination: Human rights should be enjoyed by all individuals without any discrimination. It is essential to promote equality and eliminate discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.
4. Human Dignity: Human rights are based on the inherent dignity and worth of every human being. Respecting and protecting human dignity is fundamental to the realization of human rights.
5. State Obligations: Governments have the primary responsibility to respect, protect, and fulfill human rights. States should enact laws, create institutions, and implement policies to ensure the enjoyment of human rights by individuals within their jurisdiction.
6. Constitutional Protection: Constitutionalism plays a crucial role in safeguarding human rights. Constitutions provide the legal framework for protecting and promoting human rights, establishing the separation of powers, and ensuring accountability and the rule of law.
7. International Human Rights Standards: International human rights instruments, such as the Universal Declaration of Human Rights and international treaties, provide a common framework and set of standards for the promotion and protection of human rights globally.
8. Access to Justice: Effective access to justice is essential for individuals to seek remedies and redress for human rights violations. It includes fair and impartial judicial systems, legal aid, and mechanisms for accountability.
9. Civil Society Engagement: Civil society organizations, human rights defenders, and activists play a vital role in promoting and protecting human

rights. Their engagement and advocacy contribute to raising awareness, holding governments accountable, and driving positive change.

10. Continuous Learning and Action: Human rights are not static but evolve and adapt to the changing social, political, and cultural contexts. It is crucial for students to continue learning, staying informed, and taking action to promote human rights and contribute to a more just and equitable society.

Remember, these points are meant to guide students in their study of human rights and constitutionalism, but they are not exhaustive. It is essential to explore and engage with different perspectives, case studies, and real-world examples to develop a comprehensive understanding of human rights and their significance in society.

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Test Your Knowledge

1. **What are constitutional rights in simple words?**

Answer: Human rights are inherent and considered to be characteristics of the human personality as opposed to constitutional rights, which are granted to people by virtue of their citizenship or place of residence in a particular country. A human right can be both theoretical and actual.

2. **Why are constitutional rights important?**

Answer: A constitution outlines and guards against governmental abuse of citizens' rights. Additionally, it restricts and balances the government's power in relation to other individuals and institutions, protecting the rights of minorities. Other terms that can refer to constitutional rights, are: civil rights, civil liberties, natural rights, rights of citizenship, unalienable rights.

3. **How does a Constitution protect human rights?**

Answer: Human rights are fundamental rights that are required for a person's growth as a human being. The Constitution protects fundamental rights such as Fundamental Rights and DPSPs. The fundamental rights have received more attention, and they are now immediately enforceable in court.

4. **What is a constitution?**

Answer: A State's constitution serves as its rulebook. It lays out the guiding ideals that the State is governed upon. It provides an overview of the State's primary institutions and outlines their interrelationships (for example, between the executive, legislature and judiciary).

5. **What is the opposite of a constitutional right?**

Answer: In contrast to in conformity with a constitution. unconstitutional, unlawful, illegitimate, and illegal.

6. **Are constitutional rights positive or negative?**

Answer: Every right outlined in the Bill of Rights is intended to place restrictions on the executive branch. They focus on what the government cannot accomplish rather than what it must. In contrast to positive rights that call on the government to provide services like jobs and healthcare, such restrictions are referred to as negative rights.

7. **What happens if constitutional rights are violated?**

Answer: You can submit a move for a new trial or file an appeal based on a criminal procedural mistake or jury misconduct when your constitutional rights are violated throughout the criminal justice process and the violation results in a guilty conviction.

Documentaries to watch

Here are some documentaries that explore the themes of human rights and constitutionalism:

1. *The Constitution Project* (2013) - This documentary delves into the development and interpretation of the United States Constitution, examining its impact on individual rights and societal issues.
2. *The Trials of Henry Kissinger* (2002) - This film investigates the alleged war crimes committed by former U.S. Secretary of State Henry Kissinger and raises questions about the accountability of government officials for human rights violations.
3. *The Invisible War* (2012) - Focusing on the issue of sexual assault in the U.S. military, this documentary sheds light on the systemic failures within the military justice system and advocates for constitutional rights and justice for survivors.
4. *The Supreme Price* (2014) - This documentary explores the struggle for democracy and human rights in Nigeria, focusing on the activism of Hafsat Abiola, daughter of the late Nigerian politician Moshood Abiola.
5. *The Act of Killing* (2012) - This chilling documentary examines the Indonesian killings of 1965-1966, in which death squad leaders were invited to reenact their crimes, prompting reflection on impunity, human rights, and the role of the constitution in post-conflict societies.
6. *The Squar*e (2013) - This film provides a firsthand account of the Egyptian Revolution of 2011, capturing the human rights struggles, political upheaval, and constitutional changes in Egypt.
7. *13th* (2016) - Exploring racial inequality and mass incarceration in the United States, this documentary examines the impact of the 13th Amendment on the constitutional rights of African Americans.
8. *The Dictator's Playbook* (2019) - This series examines the rise and fall of authoritarian leaders and explores the tactics they employ to consolidate power and undermine constitutional rights.
9. *The Price of Kings: Yasser Arafat* (2012) - This documentary focuses on the life and political career of Yasser Arafat, former leader of the Palestine Liberation Organization, and explores the challenges of achieving peace, self-determination, and respect for human rights in the Israeli-Palestinian conflict.
10. *The Interrupters* (2011) - This documentary follows a group of violence interrupters in Chicago who work to mediate conflicts and prevent violence, highlighting the role of community engagement, social justice, and constitutional rights in addressing systemic issues.

These documentaries provide insightful perspectives on human rights, constitutionalism, and the challenges faced in protecting and promoting these principles in different contexts around the world.

Chapter 3 Human Rights: Definitions, Categories and Generations

Abstract

This chapter delves into the classification of human rights and explores the reasons behind categorizing them into civil, political, economic, social, and cultural rights. It seeks to address questions such as why certain rights are considered part of the first, second, or third generation of human rights. Furthermore, it investigates the rationale behind distinguishing between individual rights and collective/group rights. The significance of this classification in contemporary times is also examined.

Drawing upon United Nations instruments, statements, and practices, the chapter emphasizes the interdependence and indivisibility of all human rights. It highlights the interconnectedness of these rights and the recognition that they are inherently intertwined. By referencing relevant international frameworks and conventions, the chapter aims to provide a comprehensive understanding of the intricate nature of human rights and their universal applicability.

Through this exploration, the chapter aims to shed light on the classification of human rights and its relevance in contemporary human rights discourse. It encourages readers to critically analyze the implications of such classifications and to consider the broader implications for the protection and promotion of human rights worldwide.

Required Prior Knowledge

Law.

A.3.1 Human Rights

Students should have a comprehensive understanding of human rights to develop a strong foundation in this important field. Here are key points that students should know about human rights:

1. Definition and Universality: Human rights are inherent rights and freedoms that belong to all individuals by virtue of their humanity. They are universal, meaning they apply to everyone, regardless of their nationality, race, gender, or any other characteristic.
2. Historical Context: Students should be familiar with the historical development of human rights, including key milestones such as the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948. Understanding the historical context helps students grasp the progress and challenges in the field.

3. Categories of Human Rights: Human rights can be categorized into civil and political rights, economic and social rights, and cultural rights. Students should be aware of the different dimensions of human rights and how they interrelate.
4. Fundamental Rights: Certain rights are considered fundamental and are essential for human dignity and well-being. These include the right to life, liberty, security, equality before the law, freedom of thought, expression, and religion.
5. Non-Discrimination and Equality: Human rights promote non-discrimination and equality for all individuals. Students should understand the importance of treating all people with respect and dignity, irrespective of their differences.
6. International Legal Framework: Familiarity with international human rights instruments and conventions is crucial. Students should be aware of key documents such as the UDHR, International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR).
7. State Obligations: States have a responsibility to respect, protect, and fulfill human rights. Students should understand the role of governments in upholding human rights and the mechanisms available for accountability and redress.
8. Challenges and Contemporary Issues: Students should be aware of current human rights challenges, such as gender inequality, discrimination, poverty, migration, climate change, and conflicts. Understanding these issues enables students to critically analyze and address human rights violations.
9. Advocacy and Activism: Students should learn about the role of advocacy and activism in promoting human rights. They should be encouraged to engage in efforts to raise awareness, support marginalized communities, and advocate for positive change.
10. Ethical Considerations: Human rights discussions often involve ethical dilemmas and considerations. Students should explore ethical frameworks and principles that guide human rights discourse, including human dignity, autonomy, and the principle of non-maleficence.

By gaining knowledge and understanding of these aspects of human rights, students can develop a strong foundation in this field and contribute to promoting and protecting human rights in their personal and professional lives.

Human rights are fundamental rights and freedoms that are inherent to all individuals, regardless of their nationality, ethnicity, gender, religion, or any other status. They are considered universal, inalienable, and indivisible, meaning they apply to every person and cannot be taken away or separated from one another.

These rights are grounded in the belief in the inherent dignity and worth of every human being. They provide a framework for the protection and promotion of individuals' well-being, equality, and freedom, ensuring that they can live a life of dignity, free from discrimination, oppression, and injustice.

Human rights encompass a broad range of principles and entitlements that cover civil, political, economic, social, and cultural aspects of life. Some examples of human rights include the right to life, liberty, and security of person; the right to freedom of expression, religion, and peaceful assembly; the right to education, health, and adequate standard of living; the right to work, fair wages, and social protection; and the right to participate in cultural and community life.

These rights are protected and upheld through national and international legal frameworks, including constitutions, international treaties, and human rights conventions. International bodies, such as the United Nations and regional human rights organizations, play a crucial role in monitoring and promoting human rights standards globally.

Human rights advocacy and activism aim to raise awareness, challenge human rights violations, and advocate for the implementation of human rights standards at local, national, and international levels. The protection and realization of human rights are essential for building just, inclusive, and equitable societies where every individual can fully enjoy their rights and contribute to the well-being of their communities.

Human rights has been one of the most progressive and fair human creations and undoubtedly the manifestation of ideal principles of justice.[54] They can be viewed as legal beings, or as philosophical ideas. However there are many unsolved challenges in the application of universal human rights. Human rights can be seen as providing a floor and not a ceiling for the protection of basic natural rights. They can be viewed as tamers of State's power. Or they can be viewed as the cornerstone of any democratic society where citizens are being valued and protected. For the past three decades human rights have been categorized in first generation, second and third generation of human rights.

A.3.2 Civil and Political Rights (First Generation Rights)

The first generation of human rights encompasses civil and political rights and fundamental freedoms traditionally found in national constitutions. This cluster of rights referred to rights that protect the physical security and the civil liberties of each person to enjoy independence and autonomy in a socio-political context while creating (primarily) *negative* obligations for the State. *Negative* obligations refer to the duty of the State not to interfere with these rights, which include the right to life, the freedom from torture and degrading treatment, the freedom to liberty, the right to political participation, freedom of religion and freedom of expression, etc. The International Covenant on Civil and Political Rights (ICCPR) contains this cluster of rights.

[54] K. Chainoglou, B. Collins, M. Phillips, J. Strawson, *Injustice, Memory and Faith in Human Rights*, (London: Routledge, 2019).

Certain civil and political human rights cannot be subjected to derogation, even in times of war or emergency, thus theyoffer absolute protection to individuals. For example, the ICCPR does not allow for derogation from the right to life, freedom from torture, freedom from slavery and freedom from medical or scientific experimentation. Similarly, the ECHR does not allow for derogation from the right to life, freedom from torture and slavery and the right not to be subjected to punishment without law.

A.3.3 Social, Economic and Cultural Rights (Second Generation Rights)

The second generation concerns a cluster of economic, social, and cultural rights (ESC rights). For example, the right to education, the right to health, the right to just and favourable conditions of work; the right to participate in cultural life, the right to social security; the right to housing, etc. The core of these rights refers to the socio-economic aspects of the life of the individual, which complement the civil and political qualities of their life. As opposed to the civil and political rights that protect the individual's liberty from interference from the State, social, economic and cultural rights create positive obligations on the States to protect the individual from want or need. The International Covenant on Economic, Social and Cultural Rights which provides for the protection of the second generation of human rights stresses out that each State will "take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" therein (Art. 2 ICESCR). Under the Covenant, it is also the obligation of the States Parties to seek international cooperation in order to fulfil ESC rights. The fact that the realization of these rights is highly dependent on the budgetary constraints of each State means that for many decades these rights were partially enforced. In 1993, the Committee on Economic, Social and Cultural Rights rightly pointed out the shocking tolerance of witnessing the legal protection of ESC rights being weaker in practice:

> States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horrors and outrage and would lead to concerted calls for immediate remedial action.55

Since the adoption of the ICESCR , concerns have been expressed over the status and justiciability of ESC rights and the lack of certainty about their boundaries and when and how they might be enforced. In the literature of 1970s and 1980s there has been a strong line of argumentation regarding the superiority of civil and political rights *vis-a-vis*

[55] A/CONF.157/PC/62/Add.5, para. 5, cited in UN ECOSOC, Report of the UN Commissioner for Human Rights, 21 June 2006, E/2006/86.

the ESC rights alongside a misperceived belief that human rights formulate in a hierarchy of different generations of rights. To a certain extent this assumption explained the neglect and violation of ESC and the delay in establishing an individual or inter-state complaint procedure. Despite the indivisibility and interdependence of all human rights, the fact that the content of ESC rights is less well-defined than civil and political rights, is rather indicative of their exclusion from or underrepresentation in processes of national and international adjudication. At national level there has been a persistent reluctance to afford courts any role in providing judicial remedies to address ESC' rights violations. As the UN High Commissioner has pointed out:

> Judicial protection of economic, social and cultural rights has also raised the question of the appropriate role of the judiciary in hearing claims that could involve questions of social policy, distributive justice and resource allocations. This raises questions of the separation of powers and the appropriate role of the judiciary in light of the key role of the legislature and the executive in the area of policymaking and resource allocation. It is, however, important to State that many aspects of the adjudication of economic, social and cultural rights need not necessarily involve questions of policy or resource allocation.56

Furthermore, the extraterritorial scope of the ICESCR has been confirmed by the ICJ.57 For example, States have duties under the ICESCR to "territories over which a State Party has sovereignty and to those over which that State exercises territorial jurisdiction" and, thus, occupying forces cannot hinder access to educational facilities, water resources, etc.58

While at universal level the ICESCR deals with the ESC rights, the regional counterpart in Europe is the Charter of Fundamental Rights and Freedoms of the European Union and the European Social Charter of the Council of Europe. The regional counterpart in Africa is the African Charter on Human and Peoples' Rights (Banjul Charter) which covers both civil and political and ESC rights. The regional counterpart in the Americas is the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador Protocol). More recent human rights treaties which are devoted to vulnerable groups, for example women or children, tend to provide for both first- and second -generation human rights.

[56] Ibid, para 36.
[57] ICJ, Case Concerning Armed Activities on the Territory of Congo, Democratic Republic of Congo v. Uganda, Judgment 19 December 2005, para. 216; ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, paras. 178-181.
[58] ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, paras. 111–113.

A.3.4 Solidarity Rights (Third Generation Rights)

The rights to development, peace, a healthy environment, participation in the exploitation of humanity's common heritage, communication, and humanitarian aid are the particul ar rights most usually mentioned in the category of third-generation rights.

Conditions such as severe poverty, war, ecology and natural disasters have resulted in extremely little development in terms of human rights in parts of the world. As a result, many individuals believe that the recognition of a new category of human rights is required: these rights would create the adequate circumstances for countries, particularly in the developing world, to be able to offer the previously recognized first and second-generation rights.

The third generation of human rights refers to a broad category of rights, which are purported to be exercised and enjoyed by groups or as collective rights of society or peoples, such as the right to sustainable development, to peace or to a healthy environment, humanitarian assistance, or even the right to access the internet. These rights have been known as *solidarity rights*. The normative underpinnings of such rights lie in soft law instruments, such as the UN General Assembly Resolutions, declarations and soft-law instruments of regional organizations, and occasionally in case law.

This cluster of rights raises the question as to who are the holders of the rights and accordingly what is the extent of the obligations of the duty bearers. The content of such rights is also without boundaries, thus, raising issues that have to do with accountability and good governance.

A.3.5 Critical Analysis

Today, the categorisation of human rights is considered outdated and rather reflecting their chronological development. Also, there has been significant dispute over this category of rights. Some experts are opposed to the concept of these rights since they are *collective rights*, in the sense that they are possessed by communities or even entire governments. They contend that only people have human rights. Some individuals are concerned that a shift in vocabulary may give a *justification* for certain repressive regimes to deny (individual) human rights in the name of collective human rights, such as severely restricting civil liberties in order to achieve *economic growth*.

Regardless of what we name them, there is widespread agreement that these areas demand additional investigation and attention from the international community. Some collective rights are already recognized, most notably in the Banjul Charter and the UN Declaration on the Rights of Indigenous Peoples. The right to self-determination is included in the UDHR, and a human right to development was formalized in a UN General Assembly Declaration in 1986.

For ideological and political reasons, social and economic rights have had a tough time being recognised on an equal footing with civil and political rights. Although it is obvious to the average person that a minimal quality of living, housing, and fair working

circumstances are all necessary for human dignity, governments have not always been so willing to admit this. One factor is, undeniably, that guaranteeing fundamental social and economic rights for everyone on the planet would need huge resource redistribution. Politicians understand that this is not the sort of policy that garners votes.

A second point is that there is a basic theoretical distinction between first- and second-generation rights: the former need governments just to refrain from specific actions (so-called *negative* rights), but the latter require governments to intervene positively (these are *positive* rights). The argument goes that expecting governments to take beneficial initiatives, such as providing food for everyone, is unrealistic, and that they are, hence, not obligated to do so. There can be no right in any meaningful sense if there is no duty on anyone's behalf.

This line of reasoning, however, contains two fundamental flaws: Firstly, civil and political rights are not entirely bad. For a government to guarantee freedom from torture, for example, it is not enough for State organs to refrain from torturing individuals. Genuine freedom in this area frequently necessitates the establishment of a system of checks and balances, including policing systems, legal processes, freedom of information, and access to sites of detention, among other things. The same is true for obtaining the right to vote, as well as all other civil and political rights. In other words, the government must take positive action in addition to refraining from negative action, to protect fundamental rights.

Secondly, social, economic and cultural rights, like civil and political rights, require governments to refrain from certain activities, such as providing large tax breaks to corporations, encouraging development in regions that already have a comparative advantage, and imposing trade tariffs that penalize developing countries, among other things.

An illustrative example of the additional challenges that rise from categorising human rights as belonging to generations, is the fact that, for example, both self-determination and the right to development are at once individual and collective rights; many of the rights that can be found in both generations can be classified either way, so the question that logically rises at this point is who is to decide to which generation they belong to?

There are several methods of separating rights in light of the *generations approach*. In times of a public emergency, some rights may be suspended; others may not. The prohibitions against genocide, slavery, and systemic racial discrimination are examples of rights that are recognized as *jus cogens*, or principles from which no deviation is authorized by the worldwide community of nations. Some rights, as was demonstrated above, such as the ban against torture, are *absolute* in the sense that they cannot be susceptible to derogation or limitation in their manifestation. For several economic and social rights, such as the right to basic housing, education, and primary healthcare, *minimum core* requirements have been recognized. However, since the COVID-19 pandemic, it became clear that even social, economic and cultural rights, like for example the right to health, should also enjoy an absolute and non-derogable protection.

Undeniably, the inflation of human rights is a critique that exposes the inadequacies of the generations system of human rights. Human rights inflation refers to the notion that a rising number of human rights are being claimed, particularly by critics who feel that an increasing number of claims will undermine the esteem for human rights. The inflation of human rights is essentially forecasting a devaluation of human rights in the future[59]- but for a student of human rights it is useful to reflect and critically question whether the inflation of human rights in our complex world is inevitable. For example, considering the increasing number of more and more vulnerable groups claiming special protection and specifically deisgned human rights for their unique cases and issues, one could easily conclude that the inflation of human rights is a natural development that should be welcomed by all stakeholders in the human rights world since it can help the human rights project to grow, mature, and fulfil its promise for human rights for all!

A.3.6 Human Rights during the pandemic

The quest of defining *vulnerable groups* under human rights law, can be utopian. Vulnerable groups can be identified due to the fact that they are not able to enjoy their human rights on the same level with the mainstream population in a given society. This does not preclude the fact that new vulnerable groups may emerge or be identified in a specific context. After all, not all States have the resources to provide sufficient protection for all human rights of every single person. However, what States are obliged to do under human rights law is to remain vigilant about the intersecting identities of people which may increase their vulnerability.

For many activists, civil society actors, academics and international organisations, the outbreak of COVID-19 was feared to be a pretext upon which governments would enact policies and measures leading to a regression of human rights. This fear did not only concern totalitarian and autocratic regimes but even democratic States with decent human rights records.[60] A snapshot of some of the human rights violations that marked 2020 and 2021, in different contexts, concerned the suppression of: freedom of movement, freedom of expression, access to Internet and access to information[61] and communication technologies while there has been a common feeling that vulnerable groups were left behind in the pandemic responses.

The civil society, which serves as a critical link between governments and the public in terms of transparency, information and accountability, became a victim of the

[59] Theilen, J. (2021). "The inflation of human rights: A deconstruction". Leiden Journal of International Law,34(4), 831-854. http://doi.org/10.1017/S0922156521000297

[60] UN Human Rights Office of the High Commissioner, GANHRI, & UNDP, COVID-19 and National Human Rights Institutions, 31/3/2021,

[61] See Toby Mended and Laura Notess, The Right to Information in Times of Crisis: Access to Information-Saving Lives, Building Trust, Bringing Hope, CI-2020/WTR/4.

pandemic, too. The shrinking space for the civil society, caused by the restrictions on movement and assembly, as well as the political repression in non-democratic regimes, curtailed the influence that civil society could have on good governance. The suppression of the civil society came along with the distrust in democratic and public institutions and it created a dangerous precedent for human rights.[62] Lack of civil society oversight increased the potential for disinformation and distrust in democratic procedures. It is perhaps no wonder that in 2021 the number of autocratic regimes exceeded the number of democratic States and that "nearly 75 percent of the world's population lived in a country that faced deterioration". [63]

Thus, it became clear that governments needed to be transparent and open in the COVID-19 response measure. For this reason, the UN and other UN bodies constantly emphasized the need to be careful with the use of "state of emergency" measures and to essentially set strict limits on and justify measures that infringe human rights:

> International human rights law permits, in an emergency that threatens the life of the nation, that certain rights can be derogated. The emergency must be officially proclaimed, and such measures must:
>
> - only be taken to the extent strictly required by the exigencies of the situation;
> - not be inconsistent with other obligations under international law;
> - be time-limited; and
> - not discriminate.
>
> No derogation is permitted from certain specified rights, including the right to life. Other States have not formally declared a State of emergency but have adopted emergency measures to combat the virus. Where these measures impact human rights, they must not discriminate, be provided for by law and necessary and proportionate to meet the public health crisis.[64]

Democratic oversight of the national measures taken and respect for the rule of law were considered of utmost importance to the COVID-19 responses. [65] The use of *emergency powers* by an "unprecedented number of states" in Europe was feared that it would "have the effect of normalising lower standards and habituating populations to

[62] See European Parliament Resolution of 8 March 2022 on the Shrinking Space for Civil Society in Europe, 2021/2103 (INI)

[63] EU, Report of the EU High Representative for Foreign Affairs and Security Policy, 2021 Annual Report on Human Rights and Democracy in the World.

[64] Ibid, p. 17

[65] Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights: The Impact of the COVID-19 pandemic on Human Rights and the Rule of Law, http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2020/20200702-CovidImpact-EN.pdf

greater interference with their rights".[66] Many countries, like the Nordic countries, set up national commissions to assess the handling of COVID-19 crisis.[67] A number of countries, like Britain, invited human rights impact assessment of the COVID-19 measures by civil society organisations.[68]

Differences in the use of emergency powers by the States may lie in the democratic and constitutional setting of each country as much as on the existing civil preparedness at national level. Without democratic or independent oversight, there is a strong likelihood that the pandemic will further exacerbate existing inequalities for vulnerable groups. In many countries, especially during the first phase of the pandemic, the judicial systems were temporarily halted and legislation was adopted through rapid procedures that derogated from the normal checks and balances system.[69] Due to the expedited nature of such legislation, concern was expressed by academics and civil society actors over the potential human rights trade-off and the ramifications on the established roles of the judiciary and the legislature. Such legislation could be controversial or lack *weight and legitimacy* if it did not clearly respond to an evidence-based need, did not pursue a legitimate aim and did not amount to a minimum intervention to meet that legitimate aim. For example, in the case of Ireland, the expansion of police powers in a variety of areas, including inspection and enforcement, was deemed to be overbroad and unclear for the public to understand what exact powers had been expanded.[70] In the case of Australia, the NSW Parliament was criticized for passing legislation that was not scrutinized for its human rights implications.[71] Overall, despite the pandemic being a catalyst for growing awareness of structural inequalities with prevalence of social and economic inequalities, there has been substantial evidence that the human rights situation across many countries, continues to decline.[72]

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[66] Ibid, p. 2., para. 6.

[67] Ingrid Sperre Saunes, Karsten Vrangbæk, Haldor Byrkjeflot, Signe Smith Jervelund, Hans Okkels Birk, Liina-Kaisa Tynkkynen, Ilmo Keskimäki, Sigurbjörg Sigurgeirsdóttir, Nils Janlöv, Joakim Ramsberg, Cristina Hernández-Quevedo, Sherry Merkur, Anna Sagan, Marina Karanikolos, "Nordic responses to Covid-19: Governance and policy measures in the early phases of the pandemic", Health Policy, 2021, ISSN 0168-8510, https://doi.org/10.1016/j.healthpol.2021.08.011

[68] UK Parliament, The Government's Response to COVID-19: Human Rights implications, 21 September 2020.

[69] Ottavio Marzocchi, EU Policy Department for Citizens' Rights and Constitutional Affairs, The Impact of COVID-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU, https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI(2020)651343_EN.pdf; Alice Donald& Philip Leach, Human Rights- The Essential Frame of Reference in the Global Response to COVID-19, 12 May 2020, Verfassungsblog on Matters Constitutional, http://doi.org/10.17176/20200512-133728-0.

[70] Doireann Ansbro, Elizabeth Carthy, Olga Cronin, Gemma McLoughlin-Burke, "Human Rights in a Pandemic: A Human Rights Analysis of the Irish Government's Response to COVID-19", Irish Council for Civil Liberties and the Community Foundation for Ireland, May 2021, p. 29.

[71] Cho J. NSW parliament's oversight of human rights in the first year of the COVID-19 pandemic. Alternative Law Journal. 2022;47(1):67-73.

[72] See for example, CIVICUS Monitor (2022) National Civic Space Ratings: 39 rated as Open, 41 rating as

As the COVID-19 pandemic spread around the world, the governments were called to respond in unprecedented ways. Historic underinvestment in health systems across many countries meant that the international community was far from being prepared to deal on the same footing with the many aspects of COVID-19, whether that related to treating patients, providing PPE to medical personnel, having in stock medication or testing materials, or providing access to intensive-care facilities and services to those in need.

The international organisations, primarily the UN, swiftly reacted to the new reality and offered high-level guidance concerning policy and legal national responses to COVID-19. For the UN, the health crisis was a human rights crisis. Hence, human rights were deemed critical for the response and recovery from the beginning of the pandemic. For example, the UN issued a report that identified three rights at the frontline in the pandemic:

> Right to life and duty to protect life: We are combating COVID-19 to protect the lives of all human beings. Invoking the right to life reminds us that all States have a duty to protect human life, including by addressing the general conditions in society that give rise to direct threats to life. States are making extraordinary efforts to do this, and it must remain the primary focus.
> The right to health and access to health care: The right to health is inherent to the right to life. COVID-19 is testing to the limit States' ability to protect the right to health. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. Everyone, regardless of their social or economic status, should have access to the health care they need.
> …
> The central challenge to freedom of movement: Controlling the virus, and protecting the right to life, means breaking the chain of infection: people must stop moving and interacting with each other. The most common public health measure taken by States against COVID-19 has been restricting freedom of movement: the lockdown or stay-at-home instruction. This measure is a practical and necessary method to stop virus transmission, prevent health-care services becoming overwhelmed, and thus save lives. However, the impact of lockdowns on jobs, livelihoods, access to services, including health care, food, water, education and social services, safety at home, adequate standards of living and family life can be severe. As the world is discovering, freedom of movement is a crucial right that facilitates the enjoyment of many other rights. While international law permits certain restrictions on freedom of movement, including for reasons of security and

Narrowed, 43 rated as Obstructed, 49 rated as Repressed & 25 rated as Closed. Available at: www.monitor.civicus.org (Accessed: 2022-05-16).

> national emergency like health emergencies, restrictions on free movement should be strictly necessary for that purpose, proportionate and non-discriminatory. The availability of effective and generalised testing and tracing, and targeted quarantine measures, can mitigate the need for more indiscriminate restrictions.[73]

On the one hand, governments were called to ensure access for everyone, without discrimination, to health-care. On the other hand, they were called to adopt policies and measures that would mitigate the negative impact of COVID-19 with emphasis on the protection of economic and social rights. Structural inequalities and intersecting forms of discrimination fueled the spread of the virus as much as disproportionately affected the marginalised and most vulnerable across the societies.

A persistent problem concerning the designing of appropriate COVID-19 responses, was the identification of vulnerable groups. The UN in its first reports had singled out women, children, Indigenous people, persons with disabilities, LGBT, people with HIV, health workers, older persons, racial, ethnic and religious minorities, people in detention, people affected by armed conflicts (refugees and IDPs), as well as migrants as being the top vulnerable groups to be disproportionately affected by COVID-19.[74] Many countries utilized resources for vulnerable groups based on their national understanding and classification of vulnerable groups. For example, in the case of Canada, Indigenous communities (First Nations, Métis and Inuit peoples and communities, including urban, rural, remote and Northern communities; East Asian and other racialized communities) were on the top of the list of vulnerable groups due to their increased vulnerability that is the outcome of the "pre-existing and ongoing impact of colonialism and racism".[75] In other national settings, new vulnerable groups were identified based on their access to medical personal protective equipment, medication or even COVID-19 vaccines. Additionally, the need to adequately identify vulnerable groups has been extremely important for mapping and COVID-19 surveillance strategies. Early detection, assessment and rapid containment of outbreaks could prevent wasting of resources and duplication of efforts. For example, the WHO recommended the inclusion of community organisations and community/religious leaders who work with vulnerable groups in the surveillance efforts. Furthermore, the WHO has suggested taking consideration of "characteristics such

[73] UN, COVID-19 and Human Rights: We are all in this together, April 2020,p.4.
74 UN, COVID-19 and Human Rights: We are all in this together, April 2020,p. 1.
75 Ontario Human Rights Commission, Policy statement on a human rights-based approach to managing the COVID-19 pandemic, https://www.ohrc.on.ca/en/policy-statement-human-rights-based-approach-managing-covid-19-pandemic But other groups were also included, such as "workers in precarious employment and foreign-temporary workers; People experiencing poverty, living in shelters, who are street-involved or at risk of homelessness; Women and children facing domestic violence and/or child abuse; Single parents; People with disabilities, mental health needs and/or addictions; LGBTQ2+ people; Older persons; People living alone or in government-run institutions; Prisoners".

as geographical residence, socioeconomic status, age, sex, employment status, immigration status, as well as health-care seeking and risk behaviour".[76]

One of the important messages coming from the UN reports at the time was the need to acknowledge the indivisibility of human rights as much as the need to adopt a human-rights based approach in all recovery efforts, whether short-term or long-term:

> "Recovering better requires addressing inequalities and discrimination; ensuring participation for all; putting in place a new social contract and transforming economies; and building global responses".[77]

Having the UN calling for a *new social contract* in this highly-interconnected world, with a wide variety of actors participating (governments, corporations, financial institutions, civil society actors, etc), is the international community's gift to the next generations; this is a vision to remove barriers preventing persons from enjoying human rights and opportunities for all, and in particular access to high-quality education and access to universal health coverage.

76 WHO, Consideration for COVID-19 Surveillance for Vulernable populations, Interim Guidance, 17 September 2021.

[77] UN, Annual report of the United Nations High Commissioner for Human Rights, Impact of the coronavirus disease (COVID-19) pandemic on the enjoyment of human rights around the world, including good practices and areas of concern, A/HRC/46/19, 18 January 2021.

- **Important point to remember about "Human Rights: Definitions, Categories, and Generations"**

When studying "Human Rights: Definitions, Categories, and Generations", it is crucial for students to keep in mind the following important points:

1. Definition of Human Rights: Human rights are inherent rights and freedoms to which all individuals are entitled by virtue of being human. They are based on the principles of dignity, equality, and non-discrimination.
2. Categories of Human Rights: Human rights can be broadly categorized into three main categories: civil and political rights, economic, social, and cultural rights, and collective rights. Civil and political rights include rights such as freedom of speech, right to life, and right to a fair trial. Economic, social, and cultural rights encompass rights like the right to education, right to health, and right to adequate housing. Collective rights pertain to the rights of specific groups, such as Indigenous peoples or minorities.
3. Generations of Human Rights: Human rights can be classified into three generations or dimensions. First-generation rights are civil and political rights that emerged in the 18th and 19th centuries, focusing on individual freedoms and protections. Second-generation rights are economic, social, and cultural rights that emerged during the 20th century, emphasizing social justice, equality, and access to basic needs. Third-generation rights, also known as solidarity rights or collective rights, include rights such as the right to development, the right to peace, and the right to a healthy environment.
4. Universality and Inalienability: Human rights are universal, meaning they apply to all individuals without distinction. They are inalienable, meaning they cannot be taken away or voluntarily relinquished.
5. Interdependence and Indivisibility: Human rights are interdependent and indivisible. The realization of one right often depends on the realization of other rights. For example, the right to education (economic, social, and cultural right) can enable the exercise of the right to freedom of expression (civil and political right).
6. Non-Discrimination: Human rights should be enjoyed by all individuals without discrimination. Discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is prohibited.
7. State Obligations: States have the primary responsibility to respect, protect, and fulfill human rights. They are obligated to respect human rights within their jurisdiction, protect individuals from human rights violations, and take

measures to ensure the effective enjoyment of human rights.

8. International Human Rights Framework: International human rights instruments, such as treaties, conventions, and declarations, provide a framework for the promotion, protection, and enforcement of human rights at the global level. Examples include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.
9. Monitoring and Accountability: Mechanisms exist at the national, regional, and international levels to monitor the implementation of human rights obligations and hold States accountable for human rights violations. These mechanisms include human rights commissions, courts, and treaty bodies.
10. Importance of Human Rights Education: Human rights education is essential for raising awareness, promoting respect for human rights, and empowering individuals to take action to protect and promote human rights. It plays a crucial role in building a culture of human rights and fostering social justice.

Remember, these points provide a foundation for understanding human rights, their categories, and their generational dimensions. It is important to engage with specific case studies, examine current human rights issues, and explore the diverse perspectives and challenges related to human rights in order to develop a comprehensive understanding of this complex field.

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Test your knowledge

1. **Which human rights generation is considered the most important?**

Answer: Civil and Political Rights of the First GenerationThe primary focus of the first generation of human rights was on civil and political rights.

2. **How many generations of human rights have been mapped out?**

Answer: The "Three Generations Theory of Human Rights", which is famous for categorising human rights into three distinct generations based on three different pillars:

- civil and political rights;
- economic, social, and cultural rights; and
- collective or solidarity rights.

3. **Which generation of Human Rights embodies freedom of speech and assembly?**

Answer: Human rights of the first generation**:** First-generation rights include items like the right to life, the right to equality before the law, the right to free speech and religion, the right to own property, the right to a fair trial, and the right to vote.

4. **What are the main characteristics and categories of human rights?**

Answer: The United Nations has established a vast array of globally recognised rights, such as civil, cultural, economic, political, and social rights. All people, regardless of their colour, gender, country of origin, ethnicity, language, religion or socioeconomic level, are entitled to basic human rights. The list of human rights is extensive, including the right to life and freedom, the right to be free from slavery and torture, the right to freedom of speech, and the right to labour and education.

Documentaries to watch

Here are some documentaries that explore the topic of "Human Rights: Definitions, Categories, and Generations":

1. *The Human Rights Paradox* (2019) - This documentary examines the concept of human rights, exploring its origins, different definitions, and the challenges faced in achieving universal recognition and implementation.
2. *The Universal Declaration of Human Rights* (2017) - This film explores the history and significance of the Universal Declaration of Human Rights, delving into the drafting process and the impact of this landmark document on human rights protection worldwide.
3. *Human Rights Watch: Stories of Human Rights Defenders* (2020) - This documentary features personal stories of individuals working as human rights defenders around the globe, shedding light on their struggles, achievements, and the importance of their work in advancing human rights.
4. *Inequality for All* (2013) - While not solely focused on human rights, this documentary by Robert Reich explores the widening wealth gap in the United States and raises important questions about economic and social rights as a dimension of human rights.
5. *The Price of Free* (2018) - This documentary follows Nobel laureate Kailash Satyarthi in his mission to end child slavery and exploitation, highlighting the importance of children's rights and the fight against human trafficking.
6. *The Trials of Spring* (2015) - This documentary series depicts the stories of women who played a crucial role in the Arab Spring uprisings, examining their struggles for freedom, justice, and gender equality.
7. *The Interpreters* (2018) - This film focuses on the plight of Afghan and Iraqi interpreters who worked alongside the U.S. military, shedding light on their struggles, risks, and the challenges they face in seeking asylum and protection of their human rights.
8. *No Fire Zone: The Killing Fields of Sri Lanka* (2013) - This documentary investigates the alleged war crimes and human rights abuses committed during the Sri Lankan civil war, highlighting the need for accountability and justice.
9. *The Act of Killing* (2012) - While not directly about human rights definitions and categories, this film explores the human rights implications of the Indonesian killings of 1965-1966 and raises questions about impunity, justice, and the impact on survivors.
10. *Ai Weiwei: Never Sorry* (2012) - This documentary follows the renowned Chinese artist and activist Ai Weiwei, shedding light on his efforts to promote freedom of expression and human rights in China.
11. *Camp 14-Total Control Zone* (2012).
12. *The First Wave* (2021).
13. *Mariupolis 2* (2022).

These documentaries provide valuable insights into different aspects of human rights, including their definitions, categories, and the struggles faced by individuals and communities in their pursuit of justice, equality, and dignity.

Chapter 4 UN Human Rights Protection System: Treaty-based bodies, Institutions, & Mechanisms

Abstract

Scholarly questions on global governance, power and politics are endemic to the discipline of international law and international organisation. Traditional scholarship focuses on the prevalence of realist and constructivist theories in analysing the effectiveness of the UN system and the overall development and evolution of international organisations and international law. Over the past two decades scholarship and policy documents, though, reveal that human rights can stand as global governance norms themselves and can limit the power of states and constrain the action of states. This chapter explores how global governance considerations are threaded through the institutional developments that have been taking place within the UN system with regard to the protection of human rights and it presents the role these UN institutions play in contemporary global human rights governance.

Required Prior Knowledge

Human Rights, International Organisations

A.4.1 UN

Since 1945 and as the international system is progressively moving deeper toward global governance, international organisations and other processes of global governance (i.e. the increased participation of non-State actors and informal mechanisms in identifying new norms, rules and processes), play a central role in enriching the normative environment by elaborating the scope of State responsibility (i.e. governments are increasingly expected to provide for their citizens) and advancing the protection of human rights at international level (i.e. States are now expected to protect human rights not only domestically but also extraterritorially). This chapter presents the UN human rights protection system with reference to the treaty-based bodies and other institutionalised mechanisms and processes which are complementary to the procedures of the UN bodies. The chapter explains how all these bodies, institutions, mechanisms and processes build on the existing global governance structure of the UN system and also have the potential to protect human rights even in the darkest corners of the world.

The UN system is predisposed to safeguard the sovereignty and autonomy of its Member States while providing room for persuasion and the exercise of soft power. The history of the UN system reveals that, at the time of its creation and subsequent development, there was little concern for theoretical criticisms. Indeed, the Member States' delegates at the San Francisco Conference of 1945 were busy with approving the

universal quasi-constitutional structure of what would eventually be called the "UN system" without caring to provide for strict definitions in the UN Charter provisions, i.e. as to the "peace-loving states" (Arts. 3-4 of the UN Charter) that would be members of the new organization or the prohibition of interference with affairs "which are essentially within the domestic jurisdiction of states" (Art. 2 (7) of the UN Charter). Indeed, the UN was predestined to safeguard the conventional autonomy of Member States and preserve the sovereignty of its members leaving few options for compulsion and enforcement of the decisions of the UN bodies.

The UN Charter proved, from the beginning, to be a compromise between realist and functionalist notions. For example, the great powers of the international system in the post-war II period; the permanent five members of the Security Council (UK, France, USA, Russian Federation and China) retain the right to veto within the Security Council. The UN Charter offers a limited range of measures for compulsion should one Member State, let alone one of the P5 States, not comply with the Security Council resolutions. Furthermore, in the context of the use of force, it has been observed that not all governments carry out much of what the Security Council has decided in its deliberations. And with the possibility of the veto power, no further action may be taken against the deviant Member State. In these cases, governance issues as the use of force can succumb to the realist prevalence of "might makes right". Despite the fact that all Security Council members carry one vote (Art. 27 (1) of the UN Charter), the right to veto, which is the prerogative of the P5, can throw an item off the agenda of the Security Council or stop a proposed resolution from coming into life. Along the same lines, the second most important organ of the UN, the General Assembly has the power to adopt only non-binding Resolutions.

Practically speaking, with no forces of its own and with a relatively tiny budget accompanied by a complicated bureaucratic structure, the UN has only as much hard power as it can borrow from its Member States. So the question that arises then is, if the UN does not have any actual hard power, how does the UN system enable global governance? Why does it appeal to governments? Is it because of the institutionalisation of the international legal system? Is it because the UN has evolved to employ specialised institutional architecture that is premised on standard setting and enforcing international law? Responding to the growth of the UN membership list, the UN system today has expanded its originally modest mandate and has created a governance system that maintains international peace and security through a human rights angle and by making efforts to control the use of all forms of violence by various actors. This paradigm shift did not occur overnight; to the contrary, it was supported by a normative and institutional evolution that took place over the course of decades after the creation of the UN.

A.4.1.1 The Normative Evolution (the evolution of international law and international protection of human rights)

The international legal system, as an institution, predates both international organisation and global governance. It is an institution that comprises norms, rules, processes and institutions which have been created based on sovereign consent. The inherent flaw and

privilege of the international legal system is that it is self-enforcing, despite the threat of sanctions or penalties. At the end of the day, the authority, legitimacy, development and effectiveness of the international legal system has always been dependent on a number of factors that are related to the political and economic interests of states. And the venues to pursue these very interests have primarily been the international organisations. This practice was established in the nineteenth century and has been maintained until today.

What has changed since the creation of the UN and other international organisations, is a gradual shift from states' values and interests to human values and human rights. In the aftermath of the WW2, for some states the agenda of human rights coincides with universal peace. This was reflected in the UN Charter according to which States are obliged to promote human rights (Articles 55 and 56). At the same time, some States believe in categorical imperatives, i.e. genocide should be prohibited; war crimes and crimes against humanity must be prosecuted; self-determination must be guaranteed, which they project from the national to the international level. Other States believe human rights are weapons against communism, fascism, militarism or other conflicting ideologies. From all aspects, human rights become a prominent feature of international relations in the post-WW2 order and human rights are deemed an integral part of good and/or global governance.

The historical process since 1945, affirms the increased attention given to human rights and international law-making as tools of global governance. Numerous international conventions have been agreed even by States that are not *democratic* or *peaceful*; perhaps the need to side with the major Western states that championed the human rights agenda (even though Communist states had developed their own human rights agenda pertaining to social, economic and cultural rights) or the quest to avoid the pressure of *shaming* at international level, made a number of states proponents of loosely worded international conventions (especially in the 1950s-1970s) and members of many regional organisations that follow similar (yet distinctive) to the UN patterns in Europe, the Americas and Africa.

The UDHR that was produced by the UN's Commission on Human Rights in 1948 and adopted without negative votes (but with eight abstentions), became the cornerstone of the subsequent human rights agenda at universal, regional and national level. Despite the UDHR being a non-binding instrument encompassing civil, political, economic, social and cultural rights, it nonetheless generated a broad influence on subsequent international relations and international organisations. On the one hand, at UN level, the UDHR spiralled the adoption of two human rights instruments, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are today known as the international bill of human rights. On the other hand, regional organisations became the venues for advancing the human rights agenda and promoting regional interpretations of human rights; in Europe, States proved far more experimental with delegating national authority to international organisations for the purpose of protecting and enforcing human rights in an evenhanded way. For example, any States joining the Council of Europe have to ratify the European Convention on Human Rights and accept the competence of the European Court of Human Rights with the

authority to rule on claims of rights violations by individuals. It should be noted though, that unlike the UDHR, the ECHR is a binding instrument; yet, its provisions are limited to civil and political rights only. In addition to the Council of Europe, the European Union has recently evolved to protect human rights too, pursuant to the Charter of Fundamental Rights which is made up predominantly of *human rights* featuring in the ECHR.

Although this normative evolution, with respect to international law and human rights, is accompanied by an institutional evolution (i.e. with the increase of international organisations or the adoption of new procedures at organisational level), this does not necessarily result in States relinquishing their sovereignty or fully changing their behavioural or policy patterns (especially with regard to human rights). Yet, at the same time, the evolution of international law and human rights has been a *game changer*. Indisputably, human rights are constructed in diplomatic and political processes within the UN and other international organisations; this results in a form of global human rights governance. However, there are still criticisms as to the effectiveness of the UN and the protection of human rights, as such. Forsythe admits that "the political game is not played the same way as before 1945. Some action, including action through international organisations, is indeed taken to protect universal human rights, and some progress in this matter can be documented. But….the glass is not close to being full, with much remains to be done to achieve effective managements of serious human rights violations around the world".[78]

A.4.1.2 Institutional Evolution

Since 1945 and as the international system is progressively moving deeper toward global governance, international organisations and other processes of global governance (i.e. the increased participation of non-state actors and informal mechanisms in identifying new norms, rules and processes), play a central role in enriching the normative environment by elaborating the scope of State responsibility (i.e. governments are increasing expected to provide for their citizens) and advancing the protection of human rights at international level (i.e. States are now expected to protect human rights not only on domestic level but also extraterritorially). As a consequence, international law-making and implementation during the past 40 years has increased and has been made more participatory (i.e. NGOs have observer status within international organisations and submit reports on States or there are now established monitoring and follow-up procedures on States' behaviour).

From the beginning, the UN Charter provided room for the development and operation of *international machinery*. This *international machinery* consists of the UN specialized agencies, the UN bodies and committees that have been created by the permanent UN organs and the regional organizations. The "international machinery"

[78] David P. Forsythe, 'Human Rights' in Thomas G. Weiss and Rorden Wilkinson, *International Organisation and Global* Governance, (2nd ed., Routledge, London and New York 2018), 511-522, 512.

functions within the framework of the UN system and has been enriched lately by collaborating NGOs. The complicated organizational layering, whether within the strict contours of the UN or the broader *UN system*, connects now to a primacy of procedures, voting systems, numerous meetings, national reporting, monitoring, while sometimes interlocking or overlapping agendas of the said UN specialized agencies, UN bodies and regional organizations. The policies, programmes and agendas that are being advanced by the UN could not be carried out without adopting more processes and procedures within the UN system and setting up more bodies and institutions around the decentralised management system of the UN. All these (new) institutions within the UN, continuously seek to improve their effectiveness by streamlining and harmonising their working methods and practices. This is what could be described -at best- as global governance. What the UN has essentially done is to promote organised cooperation and coordination between national governments and UN bodies and agencies through the supply of international civil services, the dispense of expertise and information (see e.g. the mandate and work of the UN Chief Executives Boards), the coordination of annual meetings with the heads of UN bodies (see e.g. the Meeting of Chairpersons of the Human Rights Treaty Bodies[79]) aimed at the streamlining and harmonization of working methods and practices of these UN bodies, and the running of many operational inter-agency assignments. Yet, this structure often meets the constraints of its aims; while this unique global governance structure, the UN, is collectively supported by all participating actors, this structure is premised on sovereign States but with the increasing participation of other actors that are pursuing their own autonomy within the UN system (often in a competing manner against other UN bodies). Furthermore, not many States are willing to pay high sovereignty costs to see that UN policies can threaten their national interests. Sometimes, governments are unwilling to or unable to supply financing or are incapable of running away from their national and international political agenda. At the same time, the UN bodies and agencies may face their own constraints that are set by the complexities of their aims, processes and organisational culture. For example, States often voice concerns over the procedural differences displayed by the various UN organs, bodies and agencies and urge further co-ordination and harmonization. In some cases, UN bodies are overwhelmed by a growing backlog of State reports or individual communications or the need to deal with urgent actions. In other cases, the UN bodies display an organisational tiredness dealing with the insufficient compliance by State Parties with their national reporting obligations. For this reason, every UN Secretary General during the past two decades has pushed for further institutional reforms in view of strengthening the UN bodies and agencies. In addition, this is another reason why so many meetings with stakeholders are taking place, thus, painting a very bureaucratic picture of the UN system.

Space limitations prevent a further discussion about the theoretical perspectives of

[79] See for example UN General Assembly, Resolution 62/268 on Strengthening and enhancing the effective functioning of the human rights treaty body system, A/RES/68/268, 21 April 2014.

institutional evolution; the following section presents how the human rights agenda has been supplemented by the institutional developments wi thin the UN. The aim of this section is to show how the internationally organised efforts to protect human rights with the creation of UN bodies, has set up a human rights governance system that is often met with dubious feelings.

A.4.1.3 UN Treaty-based Human Rights Bodies

The UN Charter reaffirms in its preamble "the faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of mean and women". Article 1 of the UN Charter places the respect for human rights within the purposes of the organisation. Since 1945, the UN system has developed a wide range of bodies to fulfil these functions. Some of the bodies are Charter-based organs, i.e. the UN ECOSOC, the former Commission on Human Rights which was replaced in 2006 by the Human Rights Council, while others have been set up as complementary bodies by the UN organs or UN human rights treaties (see discussion below). The mandate of all these bodies is supported by a rich and complicated net of institutionalised (and sometimes novel) mechanisms and processes, such as the Universal Periodic Review (UPR) and the Human Rights Council Advisory Committee (former Sub-Commission on the Promotion and Protection of Human Rights)[80]. These institutionalised mechanisms and processes are complementary to the procedures of the UN bodies, build on the existing global governance structure of the UN system and also have the potential to protect human rights even in the darkest corners of the world. While this section is devoted to the UN treaty-based bodies, some aspects of the work of the UN Human Rights Council should be briefly presented here.

The Human Rights Council is basically made up of 47 UN Member States elected by the UN General Assembly. It works on thematic areas and demarcates the boundaries of human rights standards. In its Resolutions, the Human Rights Council has recently addressed cross-cutting issues such as the destruction of cultural heritage or the right to a clean environment. The Human Rights Council appoints thematic rapporteurs, such as the Special Rapporteur on climate change (established in 2021), and sets up independent expert mechanisms[81], such as the International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement , the purpose of which is to address systemic racism in law enforcement against Africans and people of African descent, and commissions of inquiry and fact-finding missions to respond to flagrant violations of human rights across the world[82].

[80] This is the think-tank of the Human Rights Council and although it provides expertise on thematic issues that fall within the mandate of the Human Rights Council it does not adopt any Resolutions or decisions.

[81] Other expert mechanisms include the Expert Mechanism on the Rights of Indigenous People; Expert Mechanism on the Right to Development, Forum on Minority Issues; Social Forum; Forum on Business and Human Rights; Forum on Human Rights, Democracy and the Rule of Law.

[82] For example in Nicaragua, Ukraine, Ethiopia, Occupied Palestinian territories and Israel, Belarus, Libya,

The Universal Periodic Review (UPR) is run under the auspices of the Human Rights Council, hence should a Member State not comply with the recommendations issued after its review, the Human Rights Council will decide on the appropriate measures that need to be taken. The value of this mechanism is that each UN Member State has at least once been reviewed with regard to its human rights obligations arising under the UN Charter; the Universal Declaration of Human Rights; human rights instruments (conventions, treaties, etc) to which the State is party; the national human rights policies of the state; and international humanitarian law.

The UPR mechanism is a novel peer-review exercise within the UN which is structured around three pillars: the national report, the compilation of UN information submitted by UN Rapporteurs, independent experts and working groups (known as Special Procedures) and other UN entities, and the summary of stakeholders' information (i.e. NGOs, national human rights institutions, regional organisations etc).

The review procedure entails a number of steps: 1) the review is conducted by the UPR Working Group, 2) the review is assisted by a *troika*, a group of three States, 3) the review takes place with the participation of other States that can submit questions or recommendations to the State under review. This interactive dialogue between States lasts strictly 3,5 hours. 4) a report, the *outcome report*, is prepared by the troika with the involvement of the State under review and assistance from the OHCHR. This report compiles a summary of all information submitted and discussed during the review process, including the recommendations of the other States and the responses of the State under review. At this stage, the State under review can indicate whether it accepts or notes the recommendations made therein. A final outcome report is drafted with all amendments. 5) the final outcome report is then adopted by the Human Rights Council at a plenary session where the State under review can reply to issues not fully addressed or recommendations made therein. At this stage, national human rights institutions that meet the Paris Principles[83] can make oral interventions of up to 2 minutes. 6) the State under review will be expected to submit information as to the implementation of the recommendations in the second review the State undergoes (follow-up phase).

It should be emphasised that the aim of the UPR process is not to replace the UN-treaty based process (see discussion below); to the contrary, the UPR is complementary to the procedures of the UN treaty-bodies. The UPR is a participatory process and simultaneously an exercise of coordination between different stakeholders, including UN entities, States, civil society actors and national human rights institutions. It actually sheds light on the evolving relationship between civil society actors and governments across the globe; moreover, it has encouraged the dialogue among civil society actors themselves on highly contentious issues. The fact that all Member States have participated in the UPR

Venezuela, Myanmar, Syria, South Sudan, DRC.

[83] See for example the list of accredited national human rights institutions.

process is a testimony of success in itself and a proof of its universality. One scholar, has summed up the criticisms concerning the UPR:

> [s]ome states avoid negative UPR assessments by ensuring that friendly governments praise their human rights record and ignore their shortcomings. Thus, the outcome of the review may not address human rights violations that are occurring within the state. In addition, the response of the State under review to recommendations may not be clear. The proliferation of recommendations has also raised concern, as has the fact that some may be repetitive. Others raise the issue that some recommendations are so vague as to be unimplementable.[84]

Indeed, all these criticisms may be true, especially the ones pointing to the fact that the UPR lacks the competence (or the hard power) to enforce or accelerate the implementation of all recommendations on the State under review. Yet, one has to bear in mind that the UPR is not the only form of monitoring the human rights situation in a particular country. The UPR is a piece of a broad human rights governance structure that connects holistically many processes of monitoring human rights within the UN system. For the time being, the UPR has proven its worth.

At the UN level, there are 9 core human rights treaties (see table below) whose implementation is monitored by treaty-based bodies of experts. The UN human rights bodies have been set up with a tripartite mandate. They act as diplomatic and political fora, with the limited competence to make recommendations to a political parent body and the State Parties; they act as technical committees of experts; and they also have a quasi-judicial function to examine individual and inter-state complaints.

[84] Jane Connors and Markus Schmidt, 'United Nations' in Daniel Moeckli, Sangeeta Shah, and Sadness Sivakumaran (eds.), International Human Rights Law, (Oxford, Oxford University Press 2014), 359-397, 364-5.

UN HUMAN RIGHTS TREATIES	UN TREATY-BASED MONITORING BODY	NUMBER OF State PARTIES (AS OF 24/6/2023)
International Convention on the Elimination of All Forms of Racial Discrimination 21 Dec 1965	CERD Committee on the Elimination of Racial Discrimination	182 STATES
International Covenant on Civil and Political Rights 16 Dec 1966	CCPR Human Rights Committee	173 STATES
International Covenant on Economic, Social and Cultural Rights 16 Dec 1966	CESCR Committee on Economic, Social and Cultural Rights	171 STATES
Convention on the Elimination of All Forms of Discrimination against Women 18 Dec 1979	CEDAW Committee on the Elimination of Discrimination against Women	189 STATES
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 Dec 1984	CAT Committee against Torture	173 STATES
Convention on the Rights of the Child 20 Nov 1989	CRC Committee on the Rights of the Child	196 STATES
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 18 Dec 1990	CMW Committee on Migrant Workers	58 STATES
Convention on the Rights of Persons with Disabilities 13 Dec 2006	CRPD Committee on the Rights of Persons with Disabilities	186 STATES
International Convention for the Protection of All Persons from Enforced Disappearance 23 Dec 2010	CED Committee on Enforced Disappearances	70 STATES
Optional Protocol to the Covenant on Economic, Social and Cultural Rights 10 Dec 2008	CESCR Committee on Economic, Social and Cultural Rights	26 STATES

Optional Protocol to the International Covenant on Civil and Political Rights 16 Dec 1966	CCPR Human Rights Committee	117 STATES
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 15 Dec 1989	CCPR Human Rights Committee	90 STATES
Optional Protocol to the Convention on the Elimination of Discrimination against Women 10 Dec 1999	CEDAW Committee on the Elimination of Discrimination against Women	115 STATES
Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 25 May 2000	CRC Committee on the Rights of the Child	173 STATES
Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 25 May 2000	CRC Committee on the Rights of the Child	178 STATES
Optional Protocol to the Convention on the Rights of the Child on a communications procedure 14 Apr 2014	CRC Committee on the Rights of the Child	50 STATES
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 18 Dec 2002	SPT Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	91 STATES
Optional Protocol to the Convention on the Rights of Persons with Disabilities 12 Dec 2006	CRPD Committee on the Rights of Persons with Disabilities	104 STATES

A.4.1.3.1 National Reporting

State Parties to the UN human rights treaties undertake to report on a regular basis before the UN treaties-based committees. All of these committees have issued reporting guidelines as to the initial and periodic reports that the State Parties have to submit. At national level, this requires that the competent ministry (usually the Ministry of Justice or the Ministry of Foreign Affairs) will compile all relevant information as to the implementation of the provisions of the relevant human rights treaty. The preparation of this report includes a review of measures (whether legislative, administrative, policy and other measures) that have been adopted in order to comply with the spirit and the letter of the UN human rights treaty. It is also expected that the national report will identify the progress made with regard to any previous concluding observations and any gaps in the implementation of the treaty and evaluate future challenges and needs as to the implementation of the treaty. Ideally, it is expected that the national authorities will co-operate with independent human rights bodies, as well as NGOs that monitor the human rights situation at national and local level.

Consideration of reports usually takes place in public session with the presence of the State Parties' delegate. Following the consideration of the national report, the UN treaty-based committee will adopt *Concluding Observations* and identify the measures that need to be further taken by the State Party in question. It should be noted that, the *Concluding Observations* usually make pragmatic and targeted recommendations as to the short-term and long-term goals that can be achieved by the State with regard to its human rights obligations.

An important feature of the reporting process is the follow-up process which allows the State to take up to two years to implement the recommended measures; it is up to the State to devise and choose its own measures as well, in order to achieve the goals set up by the treaty-based Committee. To this end, the State can utilise all the technical expertise and capacity-building offered by the international community during its UPR review and the follow-up process.

A.4.1.3.2 General Comments or Recommendations

All human rights treaty-based bodies issue *general comments* or *general recommendations* which offer authoritative interpretation as to the general and specific scope of the treaty obligations of State Parties and as to the practical implementation of the said treaty obligations. The very first general comments and recommendations of the treaty-based bodies were rather brief; however, during the past fifteen years they have become more eloquent, detailed and responding to human rights issues that emerge in the international scene. This means that, the most recent comments have affirmed not only the obligations of State actors, but also the obligations of non-state actors that are not parties to the human rights treaties in question.

Overall, the general comments and recommendation are produced after lengthy consultative and participatory processes where also non-state actors, i.e. human rights experts, NGOs and think-tanks are openly invited to submit their own considerations and

contextual interpretations as to the provisions of the human rights treaty that is examined every time.

General comments and recommendations are not international agreements; hence, they do not require the ratification by State Parties to the UN human rights treaties. However, it should be noted that, when the treaty-based body is reviewing the national reports by States Parties with regard to the progress of the human rights situation in a particular country, the general comments/recommendations are taken into consideration by the treaty-based body and they are used as yardsticks as to the implementation of the human rights treaties. This means that it is not enough to respect human rights provisions, i.e. to refrain from violating human rights provisions of the said human rights treaty, but it is expected that the State will protect and fulfil human rights. This is known as the tripartite obligation that all State Parties to human rights treaties undertake: "to respect, protect and fulfil human rights".

UN TREATY-BASED BODY	NUMBER OF GENERAL COMMENTS/ RECOMMENDATIONS ADOPTES	MOST RECENT GENERAL COMMENT/RECOMMENDATION	DATE
Human Rights Committee [CCPR]	37 General Comments	General Comment No. 37 Article 21: Right of Peaceful Assembly	17 September 2020, CCPR/C/GC/37
CESCR	26 General Comments	General comment No. 26 (2021) Land and economic, social and cultural rights	22 December 2022, E/C.12/GC/26
CAT	4 General Comments	General comment No. 4 Implementation of Article 3 of the Convention in the context of Article 22	4 September 2018, CAT/C/GC/4
CEDAW Committee	39 General Recommendations	General recommendation No. 39 (2021) Indigenous women and girls	26 October 2022, CEDAW/C/GC/39
CERD	36 General Recommendations	General Recommendation No. 36 Preventing and Combating Racial Profiling by Law Enforcement Officials	17 September 2020, CERD/C/GC/36
CRPD	8 General Comments	General Comment No. 8 Article 27: Work and Employment	9 September 2022, CRPD/C/GC/8

CRC Committee	26 General Comments 4 Joint General Comments with other human rights treaty-based bodies	-General comment No. 26 Children's rights and the Environment with a Special Focus on Climate Change (Draft) -Joint general comment No. 4 (2017) of the CMW and No. 23 of the CRC on State Obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return	-n/a -16 November 2017, CMW/C/GC/4-CRC/C/GC/23
CED	1 General Comment	General Comment No. 1: Enforced Disappearances in the context of Migration	Consultation on the first draft ongoing as of March 2023
CMW	4 General Comments 2 Joint General Comments with other human rights treaty-based bodies	-General comment No. 6 The Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration -Joint general comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return	- n/a -16 November 2017, CMW/C/GC/4-CRC/C/GC/23

A.4.1.3.3 Inquiries

Inquiries over serious, grave or systematic violations by a State Party may be conducted by six treaty-based bodies (CESCR, CEDAW Committee, CED, CAT, CRC Committee, CRPD) on their own initiative. However, this procedure benefits from an opt-out clause should the State Party not recognize the competence of the Committee in question to conduct inquiries, for example by making a declaration or reservation under the clause of the relevant human rights treaty. The only exception to this rule is CED, which does not require the recognition of its competence to conduct inquiries by the State Parties (Article 33 ICPPED).

There are six steps in this procedure:

1. The Committee invites the State party to co-operate in the examination of the information by submitting observations.

2. The Committee may, on the basis of the State party's observations and other relevant information available to it, decide to designate one or more of its members to conduct an inquiry and report urgently to the Committee. Where warranted and with the consent of the State party concerned, an inquiry may include a visit to its territory.
3. The findings of the member(s) are then examined by the Committee and transmitted to the State party together with any comments and recommendations.
4. The State party is requested to submit its own observations on the Committee's findings, comments and recommendations within a specific time frame (usually six months) and, where invited by the Committee, to inform it of the measures taken in response to the inquiry.
5. The inquiry procedure is confidential and the cooperation of the State party shall be sought at all stages of the proceedings.[85]

It should be noted that a report on the inquiry can be published in the committee's annual report only when the State Party expresses its consent to do so.

Two human rights treaty-based bodies have developed further the mechanism of inquiries. The CED under Article 30 of the Convention, may receive and consider requests for urgent action submitted by the relatives of a disappeared person or their legal representatives or any other person having a legitimate interest. Interim measures can be ordered in such urgent cases and the State will be asked to adopt measures to avoid irreparable damage to the person concerned. Furthermore, under Article 34 the CED can bring the matter to the attention of the UN Secretary General and the General Assembly. The second human rights treaty-based body, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, in collaboration with the national preventive mechanisms, may carry out visits to places of detention. What is noteworthy is that, this procedure is complementary to the inquiries procedure that is already implemented by CAT. The national preventive mechanisms are not replicas of the UN human rights-treaties bodies; their mandate is not to investigate complaints concerning torture but to identify patterns and detect systemic risks of torture. Furthermore, the national preventive mechanisms must have unrestricted access to all places of detention, the definition of which is quite expansive, i.e. they can include *inter alia*

, means of transport for the transfer of detainees; unofficial places of detention; security and intelligence service facilities; psychiatric/mental health institutions; border police facilities and transit zones.

[85] UN, Human Rights Council Complaint Procedure, available at https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx

A.4.1.3.4 Individual Complaints Procedures

Perhaps there is no better example of where global governance meets the individual at international level, than the complaints procedures for violations of the human rights treaties. These procedures include the individual communications, state-to-state complaints, and inquiries. The treaty-based complaints procedures are complemented with two more options which albeit outside the treaty-based body system, they are still offered within the UN system: the Special Procedures of the Human Rights Council[86] and the Human Rights Council Complaint Procedure.[87] The Human Rights Council may examine complaints concerning consistent patterns of gross violations of human rights in any part of the world and under any circumstances; the procedure is confidential in order to facilitate cooperation with the State concerned.[88] The complaints procedure under the Human Rights Council is different to the complaints procedure under the other UN human rights treaties bodies, in that, the complaint can be submitted against a State irrespective of whether the State in question is a State Party to a particular treaty or whether it has made a declaration accepting the competence of the human rights body. The Human Rights Council reports that up to 15,000 complaints are submitted every year with 90% of them being filed by individuals or groups of individuals and 10% of them by NGOs. The initial screening of complaints is done by the Chairperson of the Working Group on Communications. Admissible complaints are transmitted to the States concerned for further information and the States' views on the matters. Then, the Working Group on Communications considers the complaint with the possibility of keeping the matter under review or transmitting the complaint to the Working Group on Situations for further consideration. Once reviewed by the Working Group on Situations, the matter may be kept under review and further information may be required or it can be transmitted to the Human Rights Council if a pattern of gross violations of human rights is revealed. Then, the Human Rights Council may decide whether to request further information, appoint an independent expert to monitor the situation and report back to the Council, discontinue the case in order to take up public consideration, or recommend OHCHR to provide technical assistance to the State concerned.[89]

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[86] There are two types of Special Procedures: the Thematic Mandates and the Country-Specific Mandates. The most recently established Thematic Mandates are the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2016); the Special Rapporteur on the right to development (2016); and the Independent Expert on the enjoyment of human rights by persons with albinism (2015). The most recently established Country-Specific Mandate is the Independent Expert on the situation of human rights in Central African Republic (2013).

[87] The Human Rights Council Complaint Procedure aims to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. See UN, Human Rights Council Complaint Procedure, available at https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx

[88] UN Human Rights Council Resolution 5/1, 18 June 2007.

[89] UN Human Rights Council, Complaint Procedure of the Human Rights Council,

Eight treaty-based bodies (HRC CCPR, CESCR, CRC Committee, CEDAW Committee, CAT, CRPD, CERD, CED) have the competence to consider individual communications under the precondition that a) the State is a party to the human rights treaty in question and b) that the State has recognised the competence of the said body in question (for example, the State is a party to the optional protocol of the human rights treaty in question: ICCPR, CEDAW, UN CRPD, ICESCR and UN CRC) or has made a declaration to that effect under a specific article of the Convention (in the case of CERD, CAT, CED and CMW). As of 2022, the only treaty-based body that cannot consider individual (or inter-state) complaints yet, is the CMW; once 10 State Parties have made the required declaration under Art. 76 (individual complaints) or Art. 77 (inter-state complaints) of International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, then, the relevant complaint procedure will become operative.

The individual complaints procedure is a simplified *quasi-judicial* procedure which concludes with the decision, known as *Views* and recommendations by the relevant committee. The individual complaints procedure has been described as procedure for the *layperson*, meaning that there is no official requirement for legal representation. Anyone can submit a complaint for a violation of one or more of the provisions of UN human rights treaties, including third parties on behalf of individuals that have given their written consent or are unable to do so due to their special circumstances, i.e. they are victims of enforced disappearance.

The general rule for the submission of complaints at international level is that the individual has exhausted all available domestic remedies. As to the admissibility of the complaint, the Committee may consider one or several of the following factors:

- If the complainant acts on behalf of another person, has he/she obtained sufficient authorization or has he/she otherwise justified the reasons in doing so?;
- Is the complainant (or the person on whose behalf the complaint is brought) a victim of the alleged violation? It has to be shown that the alleged victim is personally and directly affected by the law, policy, practice, act or omission of the State party which constitute the object of the complaint. It is not sufficient simply to challenge a law or State policy or practice in the abstract (a so-called *actio popularis*) without demonstrating how the alleged victim is individually affected;
- Is the complaint compatible with the provisions of the treaty invoked? The alleged violation must relate to a right actually protected by the treaty. If the complainant has filed a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights, for example, he/she cannot claim a violation of the right to property since

https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CP_information_leaflet.pdf

the Covenant does not protect that right. In such a case, the claim would be, in legal terms, inadmissible ratione materiae;

- Is the Committee in question required to review the facts and evidence in a case already decided by national courts? The Committees are competent to consider possible violations of the rights guaranteed by the treaties concerned, but are not competent to act as an appellate instance with respect to national courts and tribunals. Thus, the Committees cannot in principle examine the determination of administrative, civil or criminal liability of individuals, nor can they review the question of innocence or guilt;
- Is the complaint sufficiently substantiated? If the relevant Committee considers, in the light of the information before it, that the complainant has not sufficiently presented/ described the facts and arguments for a violation of the Covenant, it may reject the case as insufficiently substantiated, and thus inadmissible;
- Does the complaint relate to events that occurred after the entry into force of the complaint mechanism for the State party concerned? As a rule, a Committee does not examine complaints where the facts occurred prior to this date. If this is the case, the complaint would be regarded as inadmissible *ratione temporis*. There are, however, exceptions to this rule, for instance in cases where the effects of the event in question result in a continuous violation of the treaty;
- Has the same matter been submitted to another international body? If it has been submitted to another treaty body or to a regional mechanism such as the Inter-American Commission on Human Rights, the ECtHR, the African Commission on Human and Peoples' Rights, or the African Court on Human and Peoples' Rights, the Committees cannot examine the complaint. The aim of this rule is to avoid unnecessary duplication at the international level. This is an issue that the complainant should indicate in the original complaint, specifying the body to which it was submitted;
- Have all domestic remedies been exhausted? A cardinal principle governing the admissibility of a complaint is that the complainant must have exhausted all relevant remedies that are available in the State party before bringing a claim to a Committee. This usually includes pursuing the claim through the local court system. The mere doubts about the effectiveness of a remedy do not, in the Committees' view, dispense with the obligation to exhaust it. There are, however, exceptions to this rule, when proceedings at the national level have been unreasonably prolonged, or the remedies are unavailable or would plainly be ineffective. The complainant should, however, give detailed reasons why the general rule should not apply. On the issue of exhaustion of domestic remedies, the complainant should describe in his/her initial submission the efforts he/she has made to exhaust local remedies, specifying the claims advanced before the national authorities and the dates and outcome of the proceedings, or alternatively stating why any exception should apply;

- Is the complaint precluded by a reservation made by the State to the treaty in question? Reservations are formal statements by which States limit the obligations that they accept under a particular provision of a treaty. A State may have entered a substantive reservation to the treaty or a procedural reservation to the complaint mechanism limiting the Committee's competence to examine certain complaints. For example, States may preclude a Committee's consideration of claims that have in the past been considered by another international mechanism;
- Is the complaint an abuse of the procedure? In some cases, the Committees may consider the claims to be frivolous, vexatious or otherwise inappropriate use of the complaint procedure and reject them as inadmissible, for example if the same individual brings repeated claims to the Committee on the same issue when the previous identical ones have already been dismissed.[90]

Once the claim is considered admissible, then the relevant Committee examines it on its merits and communicates the outcome to the respondent State.

The jurisprudence that is being produced by the UN treaties-based committees on the interpretation and application of the relevant human rights treaty, carries great weight on current human rights law. The Views of the Committees amount to authoritative determination by independent bodies established specifically to supervise the relevant UN treaty and are regarded as sources of international law under Article 38 1(d) of the International Court of Justice Statute. The Views of the Committees are usually brief in length; there is a common formula used by all UN human rights-based bodies in their decisions: "finding the facts, stating the law, and applying the law to the facts in order to reach a conclusion".[91]

The individual complaints procedure has been very popular over the past decades. The jurisprudence that has been produced by the human rights treaty-based bodies has not only contributed to the promotion of human rights and implementation of human rights provisions at national level, but also to the expansion of human rights awareness globally. This has led to an increased pressure (stemming mainly from civil society actors) for two more human rights treaty-based bodies, the CERD and the CRC Committee, to acquire the competence of considering individual complaints.

The CESCR received the first individual complaints only in 2014. While at the time it was expected that the CESCR would be overwhelmed with individual complaints over the violations of cultural rights, the cases that have been submitted before the CESCR concern mostly alleged violations of social security and work/employment rights.[92] As soon as the

[90] See UN, Individual Complaint Procedures Under the United Nations Human Rights Treaties, New York and Geneva, 2013.
[91] Frans Viljoen, 'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms', [2004] 8 Max Planck UNYB , 49, 64.
[92]UN CESCR, Communication 10/2015, UN Doc. E/C.12/63/D/10/2015, 26 March 2018,

CESCR reaches its decision, in the form of the adoption of the so-called *Views*, the CESCR communicates its views to the State in question. It is then expected that the State will submit a response to the Committee within six months and indicate information on measures that have been taken based on the Views of the Committee. The Committee will, in turn, pursue its Follow-Up procedure.

The CRC Committee received its first individual communication only in 2014. The CRC Committee has examined communications on a variety of human rights issues, one of them being female genital mutilation. The case of *I.A.M v. Denmark*[93] concerned the deportation of a girl to Somalia, where she would face an alleged risk of being forcefully subjected to female genital mutilation. In this case, the CRC Committee reaffirmed that the Convention on the Rights of the Refugees should be interpreted in an age and gender-sensitive manner and that there is a formative relationship between international human rights law and refugee law that should be taken into consideration by States when devising policies and legislation. Furthermore, the CRC Committee reiterated that female genital mutilation is a harmful practice and that:

> Legislation and policies relating to immigration and asylum should, in particular, recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum; and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman.[94]

The CRC Committee found that Denmark had failed to consider the best interests of the child when assessing the alleged risk of the author's daughter being subjected to female genital mutilation if deported to Puntland (a semi-autonomous region of Somalia) and to take proper safeguards to ensure the child's well-being upon return, in violation of Articles 3 and 19 of the Convention. By 2021 Puntland announced that it approved a bill 151ecognized151al the practice of female genital mutilation.[95]

Finally, two more human rights treaty-based bodies, the CED and the CRPD, should be briefly discussed here. These two committees were enthusiastically expected to start considering individual complaints as the particular category of human rights they monitor is often violated in particular geographical zones and is met with resistance on the domestic political scene (for example, there is a persistent clash between the rights of persons with psychosocial and metal disabilities and the political, social and cultural paradigms of mental health and disability in various countries across the globe, including Canada and the USA) .

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[93] UN CRC, Communication 3/2016, CRC/C/77/D/3/2016, 25 January 2018

[94] Para. 11.4

[95] "Somalia's Puntland Moves to Ban Female Genital Mutilation", 11 June 2021, https://www.voanews.com/a/africa_somalias-puntland-moves-ban-female-genital-mutilation/6206903.html

Despite the expectations for the large volume of individual complaints that the CED would receive, so far the CED has examined only a handful of individual complaints. At the time of the writing of this chapter, there are two pending individual complaints against Mexico.[96]

The first complaint was filed against Argentina. In this case, the claimants were the relatives of the deceased victim, Mr. Yrusta, who was disappeared for an approximate period of more than seven days following his transfer to a prison facility — which he had not been informed about and had not consented to — in violation of Articles 1 and 2 of the Convention. The claimants argued that the national authorities failed to respond to questions concerning the circumstances of Mr. Yrusta's death and the courts refused to admit their complaint "on procedural grounds". Moreover, the claimants argued that the national authorities violated the deceased's right to communicate with his family, counsel or any other person of his choice and his right to receive visits by holding him totally incommunicado in isolation cells until the day he died. The CED found that the State Party must:

> (a)Recognize the authors' status as victims, thereby allowing them to play an effective part in the investigations into the death and enforced disappearance of their brother;
>
> (b)Ensure that the investigation into the case of Mr. Yrusta is not confined to the causes of his death but instead also entails a thorough and impartial investigation of his disappearance at the time of his transfer from Córdoba to Santa Fe;
>
> IProsecute, judge and punish the persons responsible for the violations that have been committed;
>
> (d)Provide the authors with rehabilitation and prompt, fair and adequate compensation, in accordance with article 24 (4) and (5) of the ConventioI(e)Adopt all necessary measures to enforce the guarantees of non-repetition stipulated in article 4 (5) (d) of the Convention, including compiling and maintaining registers that meet the requirements of the Convention and to ensure that the relevant information is accessible to all persons with a legitimate interest therein, as set out in articles 17 and 18 of the Convention.
>
> The State party is further urged to make public the present Views and disseminate their content widely, in particular, though not solely, among members of the security forces and prison personnel who are in charge of persons deprived of their liberty.
>
> The Committee hereby requests the State party to provide it with information, within six months of the date of transmission of these Views, on the action that it

[96] Case number 004/2021, concerning the alleged violations of Arts. 1, 2, 12 (1), 23 (3), 24 (2), 24 (3), 24 (4), 24 (5a) in the case of an enforced disappearance of an underage boy from his home, and Case number 005/2021, concerning the alleged violations of Arts. 2, 3, 1, 24,12 in the case of the disappearance of a man by abduction.

has taken to implement all previous recommendations. [97]

In *E.L.A. v. France*, the CED examined a claim by an asylum-seeker in France whose asylum applications had failed.[98] He claimed that his return to Sri Lanka would pose a real and present risk of him being subjected to enforced disappearance as his brother had already been abducted some years before. The French competent authorities, when examining the applicant's asylum application on more than 10 occasions, had carried out a thorough analysis of his risk of being subjected to disappearance if he was returned to his country of origin; yet, they had dismissed all his applications. The CED found that his return would constitute a violation of Art. 16 of the ICPPED and requested from France to examine his asylum claim in light of the obligations arising under the Convention and the Views of the Committee:

> [t]he risk of enforced disappearance must be examined by the domestic courts in a comprehensive manner. In this respect, domestic courts must meticulously examine the essential issues before them, rather than merely giving formal answers to the arguments raised by the author or simply endorsing the conclusions of a lower court or both. In the present case, the mere fact that the courts of appeal endorsed the decisions adopted in this case by the French Office for the Protection of Refugees and Stateless Persons and the arguments on which they were based could not release them from their obligation to examine the merits of the issues raised in the author's appeals.[99]

It is noteworthy that, there is a dissenting opinion by Juan Jose Ortega pointing out that the existence of widespread violations of human rights on the territory of a State cannot be associated with the alleged material breach of the claimant's rights under the Convention: the existence of a situation of risk cannot be inferred from the overall deteriorating human rights situations in the State. Citing relevant caselaw from the ECtHR, in his dissenting opinion, Ortega concludes that there "is disagreement between the treaty bodies and the European Court of Human Rights in Strasbourg and which is all the more regrettable as it concerns an area of protection in which the regional system is particularly active".[100] Hopefully, this fragmentation will be addressed in the future by the CED.

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[97] UN CED, Views approved by the Committee under Article 31 of the Convention concerning Communication No. 1/2013, CED/C/10/D/1/2013, 12 April 2016, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqHAt1io0LEyZRdFBvELram8mBjEEkqtGr7ITNHtLRhwkHQbt61SgB%2bokq4b8V9K9Yi9V9TETUUrfEGYMv2k2pBpBqxaFsMQ2TsqGHuTk7cN0sIeCnAh3unE5BQBCkNA7ylQ4kpdAL05pWZPvX4jdMo%3d accessed 29 August 2018

[98] UN CED, Views adopted by the Committee under Art. 31 of the Convention, concerning Communication No. 3/2019, 12 November 2020, CED/C/19/D/3/2019.

[99] Para. 7.6.

[100] Individual Opinion of Juan Jose Lopez Ortega (dissenting), para. 13

The CRPD jurisprudence is also worthy of mentioning here as it contributes to the political momentum for securing equal rights for persons with disabilities and to the shifting from a medical to a social disability model. The CRPD jurisprudence stands as a compass for creating a more inclusive future and raises the stakes of disability politics on a domestic and regional level. *Al Adam v. Saudi Arabia*[101] is an interesting case concerning the ill-treatment of a person with a partial hearing impairment by the Saudi security forces resulting in his losing hearing in his already-affected ear. The CRPD found that Saudi Arabia had violated a string of human rights obligations under UN CRPD (Arts. 4, 13(1), 15, 16, 25) and ordered Saudi Arabia to "provide him with an effective remedy, including an impartial, effective and thorough investigation into the claims of torture, prosecution of those responsible and effective reparation to the author and his family, and adequate monetary compensation for the loss of hearing in his right ear following the denial of access to necessary medical services"[102]. The CRPD requested *inter alia* the prohibition of any acts of torture within the justice and prison system and the abolition of death penalty. It is noteworthy that the CRPD addressed the issue of procedural accommodation measures *vis-à-vis* reasonable accommodation measures and held that:

> …the rights and obligations with respect to equality and non-discrimination outlined in article 5 raise particular considerations with respect to article 13, which, among others, call for the provision of procedural accommodations. These accommodations are distinguishable from reasonable accommodation in that procedural accommodations are not limited by disproportionality. In the case of the author, the State party is therefore under the obligation to take all procedural accommodation that is necessary to enable his effective participation in the process, taking into account his hearing impairment...[103]

Fiona Given v. Australia[104], concerned a claim brought by an individual who has cerebral palsy with limited muscle control and dexterity and no speech; the author claimed that her rights under UN CRPD were violated, as she was denied the rights to accessible voting procedures and facilities, to vote by secret ballot utilizing assistive technology and to obtain voting assistance from a person of her choice, and as a consequence she could not fully participate in the political and public life on an equal basis with others. The CRPD found that Australia has failed to fulfil its obligations under Article 29 (a) (i) and (ii), read alone and in conjunction with Articles 5 (2), 4 (1) (a), (I (d), (e) and

[101] *Al Adam v. Saudi Arabia*. Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication No.38/2016, CRPD/C/20/D/38/2016, 24 October 2018.
[102] Para. 12.
[103] Para. 11.5.
[104] UN CRPD, Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication No. 19/2014, CRPD/C/19/D/19/2014, 29 March 2018.

(g) and 9 (1) and (2) (g) of the Convention. In particular, the CRPD found that the State Party is under an obligatto:

> **(A)** (i) Provide her with an effective remedy, including compensation for any legal costs incurred in filing the present communication;
>
> (ii) Take adequate measures to ensure that the author has access to voting procedures and facilities that will enable her to vote by secret ballot without having to reveal her voting intention to any other person in all future elections and referendums in the State party;
>
> (iii) Publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population.
>
> (b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In that regard, the Committee requires the State party to:
>
> (i) Consider amending the Electoral Act in order to ensure that electronic voting options are available and accessible to all people with disabilities who so require, whatever the types of impairment;
>
> (ii) Uphold, and guarantee in practice, the right to vote for persons with disabilities, on an equal basis with others, as required by article 29 of the Convention, by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, and protect the right of persons with disabilities to vote by secret ballot through the use of assistive technologies;
>
> (iii) Consider amending the Electoral Act in order to ensure that, in cases where assistance by another person may be necessary to enable a voter to cast his or her vote, the person providing such assistance is under an obligation to maintain the confidentiality of that vote…[105]

A.4.1.3.5 Inter-state Complaints Procedures

The inter-state complaints (known as *communications*) procedure is also available at the UN level. As a procedure, it is considered to be an extreme diplomatic, political and legal measure as, on the one hand, it entails that both States h155ecognizede recognised the competence of the Committee to receive such communications and, on the other hand, it is a rather abrasive action from one State to address the human rights situation in another State. The inter-state complaint procedure is highly dependent on the political motivation of the State Parties involved as it can prove to be highly threatening to the culprit state's interests, but, at the same time, it can be highly damaging to the diplomatic relations of the State that wishes to pursue the claim. For this reason, the inter-state complaints procedure, albeit available at UN level, was barely in use until recently. Unlike the ICERD

[105]Para. 9.

inter-state complaint procedure which is compulsory, the availability of the inter-state complaints under the other human rights treaties was very much dependent on whether States had opted in in the procedure.[106] Hence, the optional and reciprocal nature of the inter-state complaints procedure was a major obstacle to their use.

Under Article 21 of CAT, Article 74 of CMW, Article 32 of ICPPED, Article 10 of the Optional Protocol to ICESCR, and Article 12 of the Optional Protocol (on a communications procedure) to the Convention on the Rights of the Child, States can pursue claims concerning violations of the said treaty provisions against another State.

Under Articles 11-13 of ICERD, Articles 41-43 of ICCPR, and Article 12 of the Optional Protocol (on a communications procedure) to the Convention on the Rights of the Child in conjunction with Rule 47 of the Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure,[107] the inter-state procedure entails the establishment of an *ad hoc* Conciliation Commission.

The ICERD inter-state communications procedure is the only one among the UN human rights treaties not to require the consent of the respondent State to be activated. In the case of inter-state complaints under ICERD, the treaty provides for a number of steps for the inter-state dispute resolution.

Article 11(1) ICERD reads:

> If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 11(2) further clarifies that:

> If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

Article 12(1)(a) then allows for the next step:

[106] Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (May 1988) Vol. 10, No. 2 Human Rights Quarterly 249; See Rachel Reilly & Hannah Trout, Interstate Complaints in International Human Rights Law, British Institute of International and Comparative Law, 2022, https://www.biicl.org/documents/153_inter-state_complaints_in_international_human_rights_law_-_event_report.pdf

[107] UN CRC, Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, CRC/C/62/3, 8 April 2013.

> The Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention.

Article 12(1)(b) provides a mechanism of secret ballot among CERD members in the event of a failure to agree on some or all of the composition of the Commission. Article 13(1) then reads:

> When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

Within three months, States have to declare whether they accept or not the issued recommendations and findings of the Committee. In 2018, for the first time in the history of the CERD, three intestate complaints were submitted.

A.4.1.3.5.1 Inter-state Complaints: *Qatar v. Kingdom of Saudi Arabia, Qatar v. UA Emirates*

On 8 March 2018, Qatar submitted two inter-state complaints against Saudi Arabia and the United Arab Emirates according to Art. 11 (1) of ICERD and renewed its submission to the Committee on 29 October 2018. On 14 December 2019, the Committee invited the States Parties to the dispute to submit any relevant information and on 27 August 2019 the Committee issued its decision on the admissibility of each case.[108] The Committee called the Chair to appoint two *ad hoc* Conciliation Commissions and initiate the procedure under Art. 12 (1). In February 2020, the members of the two *ad hoc* Conciliation Commissions were appointed; however, the two Commissions did not advance to the adoption of Rules of Procedure as they were discontinued. In the case of *Qatar v the Kingdom of Saudi Arabia*, in 2021, Qatar requested the suspension of the proceedings

[108] Committee on the Elimination of Racial Discrimination, Admissibility of the Inter-State Communication submitted by Qatar against the Kingdom of Saudi Arabia, 30 August 2019, CERD/C/99/6; Committee on the Elimination of Racial Discrimination, Admissibility of the Inter-State Communication submitted by Qatar against the United Arab Emirates, CERD/C/99/4, 30 August 2019; Committee on the Elimination of Racial Discrimination, Jurisdiction of the Inter-State Communication submitted by Qatar against the Kingdom of Saudi Arabia, 30 August 2019, CERD/C/99/5; Committee on the Elimination of Racial Discrimination, Jurisdiction of the Inter-State Communication submitted by Qatar against the United Arab Emirates, 30 August 2019, CERD/C/99/3.

following the agreement between the two States Parties. The *ad hoc* Conciliation Commission remains seized of the matter and requested from the States Parties to inform them within one year whether they wish to resume the consideration of the matter or to provide any relevant information.[109] On a similar note, Qatar requested the suspension of the proceedings following the agreement between Qatar and the United Arab Emirates. Therefore, the *ad hoc* Conciliation Commission remains seized of the matter and requested from the States Parties to inform her within one year whether they wish to resume the consideration of the matter or to provide any relevant information.[110]

With regard to the Resolution of inter-State disputes, Article 22 of ICERD, Article 29 of CEDAW, Article 30 of CAT, Article 92 of International Protection on the Rights of All Migrant Workers and Members of their Families and Article 32 of ICPPED provide for disputes between State Parties to be resolved primarily by negotiation or by arbitration. In case that this form of dispute resolution fails, then the aforementioned provisions empower a State Party to the dispute, to refer the dispute to the International Court of Justice, unless the disputants agree to another mode of settlement. If State Parties wish to opt out from this procedure, then at the time of the ratification, they have to make a declaration or reservation against the particular provision. For example, in the case of ICERD, when States make a declaration or reservation which reads as follows "The State X does not consider itself bound by the provisions of Article 22 of the said Convention", then the matter appears confined to the mechanisms of Articles 11-13 for its resolution. Also, a State Party cannot unilaterally file an application before the International Court of Justice even when the parties have failed to settle the dispute through negotiation.

Article 22 ICERD provides that a dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

During the past few years, Article 22 of ICERD has been invoked by some States in order to address their intestate disputes. For example, Georgia and Ukraine invoked Article 22 before the International Court of Justice against the Russian Federation, on separate occasions. In the case of Georgia, the ICJ found that Georgia failed to exhaust a preliminary requirement under Art. 22 of ICERD to attempt to resolve the dispute by negotiation before submitting it to the ICJ and dismissed the case on procedural grounds,

[109] Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication Qatar v the Kingdom of Saudi Arabia, 15 March 2021, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9382_E.pdf

[110] Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication Qatar v the United Arab Emirates, 15 March 2021,https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf

concluding that Georgia neither attempted to negotiate ICERD-related matters with the Russian Federation nor invoked any other procedures expressly provided for in CERD to settle the dispute[111]. In the case of Ukraine, whereby it alleged that the Russian Federation was conducting a "policy of cultural erasure" through its discrimination against the Crimean Tatar and ethnic Ukrainian population, the ICJ found that it had jurisdiction to indicate provisional measures in respect of ICERD and held that:

> … with regard to the situation in Crimea, the Russian Federation must refrain, pending the final decision in the case, from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis. In addition, the Russian Federation must ensure the availability of education in the Ukrainian language.[112]

In 2018, Qatar instituted proceedings against the UAE, before the ICJ, following a 12-month diplomatic and transport boycott by a Saudi Arabia-led alliance (including Saudi Arabia, Egypt and Bahrain) with regard to alleged violations of ICERD.[113] Within this 12-month period, a number of measures were adopted by the boycotting countries, and especially the UAE, that allegedly discriminated against Qataris based on their national origin, including "expelling them from the UAE, prohibiting them from entering or passing through the UAE, ordering UAE nationals to leave Qatar, closing UAE airspace and seaports to Qatar"[114] and separating Qataris living in mixed marriages in the boycotting countries from their spouses and children. By taking its case to the International Court of Justice, Qatar sought to prove that the UAE failed to respect its obligations under Articles 2 (condemnation of racial discrimination), 4 (prohibition of incitement to racial

[111] See ICJ, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, *Georgia v. Russian Federation*, Judgment of 1 April 2011, para. 157, https://icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-EN.pdf (accessed 10 September 2018):
"Negotiations entail more than the plain opposition of legal views or interests between two parties (…). As such, the concept of "negotiations" (…) requires (…) a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute".

[112] ICJ, Ukraine v. Russian Federation, Request for the Indication of Provisional Measures, Order of 19 April 2017, para. 102, https://www.icj-cij.org/files/case-related/166/166-20170419-ORD-01-00-EN.pdf (accessed 10 September 2018). An abstract from the Order reads: "96. The Court notes that certain rights in question in these proceedings, in particular, the political, civil, economic, social and cultural rights stipulated in Article 5, paragraphs (c), (d) and (e) of CERD are of such a nature that prejudice to them is capable of causing irreparable harm. Based on the information before it at this juncture, the Court is of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable".

[113] It should be noted that the Saudi Arabia, Egypt and Bahrain have opted out of Art. 22 and therefore therefore they can neither take another country to the ICJ, nor be taken to it for violations of the CERD provisions. See the reservations deposited on https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en#EndDec (accessed 28 August 2018).

[114] Dmitry Zhdanikov, "Qatar takes UAE to UN human rights court over boycott", Reuters, 11 June 2018, https://www.reuters.com/article/us-gulf-crisis-qatar-emirates/qatar-takes-uae-to-u-n-human-rights-court-over-boycott-idUSKBN1J713S (accessed 28 August 2018).

discrimination), 5 (prohibition of racial discrimination in the enjoyment of a number of civil, economic, social and cultural rights), 6 (effective protection and remedies against any acts of racial discrimination) and 7 (undertaking to adopt measures to combat racial discrimination) of ICERD. Accordingly, Qatar sought to make the UAE comply with its obligations under the CERD by ceasing and revoking the measures and restoring the rights of Qataris. On 23 July 2018 the ICJ issued its Order and noted that it had jurisdiction to adjudicate on the matter based on Art. 22 of ICERD; according to the Court, the facts were sufficient to establish the existence of a dispute between the Parties concerning the interpretation or application of ICERD. In particular, the ICJ reviewed the facts of the case and observed that"… because of the measures taken on 5 June 2017, UAE-Qatari mixed families have been separated, medical care has been suspended for Qataris in the UAE, depriving those who were under medical treatment from receiving further medical assistance, Qatari students have been deprived of the opportunity to complete their education in the UAE and to continue their studies elsewhere, since UAE universities have refused to provide them with their educational records, and that Qataris have not been granted equal treatment before tribunals and other judicial organs in the UAE.…[t]he acts referred to by Qatar, in particular the statement of 5 June 2017 which allegedly targeted Qataris on the basis of their national origin whereby the UAE announced that Qataris were to leave its territory within 14 days and that they would be prevented from entry, and the alleged restrictions that ensued, including upon their right to marriage and choice of spouse, to education as well as to medical care and to equal treatment before tribunals, are capable of falling within the scope of ICERD *ratione materiae*".[115] Hence, the Court ordered provisional measures against the UAE and also special measures directed to both State Parties and aimed at ensuring the non-aggravation of their dispute. The order affirms the UAE's duty to comply with its obligations under ICERD:

> the Court considers that…the UAE must, pending the final decision in the case and in accordance with its obligations under CERD, ensure that families that include a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited, that Qatari students affected by those measures are given the opportunity to complete their education in the UAE or to obtain their educational records if they wish to continue their studies elsewhere, and that Qataris affected by those measures are allowed access to tribunals and other judicial organs of the UAE.[116]

[115] International Court of Justice Summary, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), 23 July 2018, https://www.icj-cij.org/files/case-related/172/172-20180723-SUM-01-00-EN.pdf (accessed 28 August 2018).

[116] International Court of Justice Summary, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), 23 July 2018, https://www.icj-cij.org/files/case-related/172/172-20180723-SUM-01-00-EN.pdf (accessed 28 August 2018).

In its judgment, the ICJ upheld that it does not have jurisdiction to hear the application filed by Qatar in 2018.[117] The Court, taking in stock the object and the purpose of ICERD, held that the term *national origin*[118] did not encompass current nationality and maintained that the measures of which Qatar complained about, did not "give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin".[119] Measures against media corporations also did not fall within the scope of ICERD. The Court concluded that the provisions of ICERD apply only to individuals or groups of individuals. The ICJ also clarified that declarations which criticize a State's policies cannot be classified as racial discrimination within the meaning of ICERD.[120] *Ad hoc* Judge Daudet issued a declaration arguing in favour of the applicability of Art. 22 of ICERD: as negotiations between the State Parties had failed, the ICJ had jurisdiction over the issue.[121]

A.4.1.3.5.2 Inter-state Complaints: *Palestine v. Israel*

The CERD received an inter-state complaint by Palestine against Israel under Art. 11 of ICERD alleging discrimination based on national or ethnic origin.[122] In its complaint, Palestine argued that Israel had engaged in large-scale violations of CERD by pursuing policies that had a direct and negative impact on the lives and basic rights of the Palestinian people. Palestine maintained that, as a State Party to ICERD "is duty bound towards its citizens to protect and safeguard their rights from abuse, domestically and otherwise. As a State whose territory remains under a foreign belligerent military occupation, the State of Palestine is subjugated to foreign policies imposed upon its citizens for the purpose of maintaining a colonial occupation whose actions aim to displace and replace the indigenous Palestinian population".[123] The Committee declared Palestine's

[117] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates, Preliminary Objections, Judgment of 4 February 2021, I.C.J. Reports 2021, p.71.

[118] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates, Preliminary Objections, Judgment of 4 February 2021, I.C.J. Reports 2021, para. 88.

[119] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates, Preliminary Objections, Judgment of 4 February 2021, I.C.J. Reports 2021, para. 112

[120] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates, Preliminary Objections, Judgment of 4 February 2021, I.C.J. Reports 2021, para. 112

[121] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates, Preliminary Objections, Judgment of 4 February 2021, Declaration De M. Le Judge Ad Hoc Daudet, I.C.J. Reports 2021, pp. 183-186.

[122] Palestine v Israel, Interstate Communication submitted by the State of Palestine against Israel, 12 December 2019, CERD/C/100/3; CERD, Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel (Palestine v Israel), CERD/C/103/R.6, 20 May 2021

[123] Ministry of Foreign Affairs of the State of Palestine, Interstate Complaint under Articles 11-13 of the International Convention for the Elimination of All Forms of Racial Discrimination, State of Palestine v Israel, 23 April 2018, para. 98.

communication to be admissible.[124] One of the thorny issues has been the availability of domestic remedies and whether Palestinians had exhausted Israeli legal avenues to challenge legislative or administrative practices in violation of the norms embodied in ICERD. The Committee noted that there is caselaw from regional human rights systems on the requirement of the exhaustion of domestic remedies in the context of interstate procedures; however, the Committee also noted relevant caselaw which recognizes an exception to the rule of domestic remedies, for example where there is "an alleged existence of a generalised practice of discrimination"[125] in the State in question:

> The Committee considers that the allegations of the applicant [State of Palestine] refer to measures undertaken as part of a policy ordered and coordinated at the highest levels of government, which may amount to a generalized policy and practice on a range of substantive issues under the Convention. The Committee considers that exhaustion of domestic remedies is not a requirement where a 'generalized policy and practice' has been authorized. In line with the jurisprudence of regional human rights commissions and courts, the Committee considers, however, that it is not sufficient that the existence of such a generalized policy and practice is merely alleged but that *prima facie* evidence of such a practice must be established.
>
> In this context, the Committee recalls the concerns expressed in its Concluding observations on Israel under Article 9 of the Convention with regard to 'the maintenance of several laws which discriminate against Arab citizens of Israel and Palestinians in the Occupied Palestinian Territory, and create differences among them, as regards their civil status, legal protection, access to social and economic benefits, or right to land and property. The Committee furthermore expressed concerns about "the lack of detailed information on racial discrimination complaints filed with the national courts and other relevant Israeli institutions, as well as on investigations, prosecutions, convictions, sanctions, and on the reparations provided to victims" and that "people belonging to minority groups, including Palestinians, may face obstacles in accessing justice while seeking remedies for cases of discrimination". Furthermore, the Committee expressed concerns regarding the continuing segregation between Jewish and non-Jewish communities. The Committee had also expressed its concerns regarding '[r]eports that the judiciary might handle cases of racial discrimination by applying different standards based on the alleged perpetrator's ethnic or national origin'. In light of the submissions of

[124] Committee on the Elimination of Racial Discrimination, Decision on the Admissibility of the Inter-State Communication submitted by the State of Palestine v Israel, 20 May 2021, CERD/C/103/R.6.
[125] Inter-American Commission on Human Rights, Report No. 11/07, Interstate Case 01/06, Nicaragua v. Costa Rica, March 8, 2007, paras. 253.

> the State parties as well as in light of the concluding observations of the Committee , the Committee is satisfied that the threshold of *prima facie evidence of a generalized policy and practice that touch upon substantive issues under the Convention is fulfilled and consequently, the rule on exhaustion of domestic remedies does not apply.* [126]

Albeit at a slow pace, the Committee proceeded with the appointment of an *ad hoc* Conciliation Commission which published its Rules of Procedure in April 2022.[127] This delay of the Committee is associated, on the one hand to the fact that the procedure has not been used before and on the other hand, to the overall feeling of discomfort that stems from the initial disagreement between Palestine and Israel to decide on the composition of the *ad hoc* Commission (indicating, thus, that there are slight changes of achieving an amicable settlement in the future). The Rules of Procedure of the Commission provide *inter alia* for oral hearings to take place and for the mandate of the Commission to be complete within a reasonable timeframe. Even in the scenario that one of the two States does not cooperate in good faith with the *ad hoc* Conciliation Commission, this would only "remove the potential for conciliation via an agreed settlement" but would not preclude the Commission from publishing a "final report with findings of fact and recommendations for the amicable solution of the dispute". [128]

The importance of this case is not limited to the fact that it concerns a dispute between Palestine and Israel in a heavily politicized context, but it is related to the fact that it is going to be the first inter-State complaint decided on the merits by a UN human rights body. Hence, other States may wish to pursue this course of action in the future. The implications of this particular intestate complaint over the human rights situation in territories that are under prolonged military occupation should not be underestimated; we may witness more and more States taking recourse to this mechanism to address ICERD violations in occupied territories.[129]

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[126] Committee on the Elimination of Racial Discrimination, Decision on the Admissibility of the Inter-State Communication submitted by the State of Palestine v Israel, 20 May 2021, CERD/C/103/R.6, paras. 63-64. All footnotes omitted therein.

[127] Committee on the Elimination of Racial Discrimination, Rules of Procedure of the ad hoc Conciliation Commission on the interstate communication submitted by the State of Palestine against Israel under Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, 25 April 2022.

[128] Jan Eiken and David Keane, "New Rules of Procedure of the Ad Hoc Conciliation Commission in Palestine v Israel", EJIL: Talk, 23 May 2022, https://www.ejiltalk.org/new-rules-of-procedure-of-the-ad-hoc-conciliation-commission-in-palestine-v-israel/; Nora Salem, "A Procedural Win in Palestine's Quest to Seek Justice for Israel's Apartheid Regime before the CERD", Opinio Juris, 19 November 2021, https://opiniojuris.org/2021/11/19/a-procedural-win-in-palestines-quest-to-seek-justice-for-israels-apartheid-regime-before-the-cerd/

[129] For example, it would be interesting to see Cyprus following this precedent, given the fact that its northern territory has been under illegal military occupation by Turkey since 1974. See also Ilias Kouskouvelis and Kalliopi Chainoglou (2016). "Against the Law: Turkey's Annexation Efforts in Occupied

A.4.1.4 Conclusion

There is much room for debate as to whether the UN is a successful international organisation and even more so, why the UN appeals to states. Despite being a heavily bureaucratic organisation with endless rules of procedures, numerous organs, bodies and other entities, a limited budget and a diverse State membership ranging from autocratic and dictatorial States with poor human rights to the most powerful States that wish to maintain their autonomy and sovereignty, the UN is the only international organisation in history that has achieved to last this long and to expand its mandate to new directions. At the same time, the UN has succeeded in advancing human rights norms within a complicated and ever-developing structure that admittedly constrains the actions of States. Even though, many of the UN bodies adopt non-binding decisions and resolutions, the institutionalised processes themselves are hard to succumb to states' interests. And even when there are deviant states with poor human rights records or assertive unilateralist states, the UN governance human rights structure is still keeping them in tow.

The access of persons to the individual complaints procedures before the UN treaty-based bodies has increased due to the trust in international institutions as much as due to the advocacy efforts in the last several decades. Nonetheless there are still concerns as to whether the views of the relevant UN treaty-based bodies are implemented efficiently and effectively at national level and whether the needs of the end-users of such complaints procedures are actually met. As it has been pointed out, the UN bodies face challenges as "the domestic legal status of 'views' in each country depends on the domestic legal framework, judicial interpretation by courts and the executive branch. While there have been important clarifications in this regard in some countries, more work needs to be done to ensure that states provide individual reparations for victims and take measures so similar violations do not reoccur".[130]

Access to international justice may be a fundamental entitlement for all persons, yet the way that the UN treaty-based human rights protection system works, is not entirely in sync with the reality that individuals experience in different geographic regions. For example, they may not know how or if they should access the complaints procedure. The individual complaints procedure may be overwhelmed by the backlog of complaints or it may be found to lack a victims-centered perspective. On the other hand, the inter-state complaints procedure is fraught with political tensions and diplomatic hurdles too.

The international community, during the past seven decades, has experienced a normative and institutional evolution that may not have resolved all human rights problems but has certainly changed the behaviour of many states across the globe. Furthermore, despite the yawning gap between human rights norms on paper and law in

Cyprus", 29 Hague Yearbook of International Law, pp. 55-102.

[130] Alexandre Skander Galand and Basak Cali, "Human Rights Victims' Complaints to UN not Treated Effectively", Open Global Rights, 20/3/2020, https://www.openglobalrights.org/human-rights-victims-complaints-to-un-not-treated-effectively/

action and the fact that there human rights violations all over the world, we should not dismiss the positive changes that have taken place in the form of the internationally organised efforts to protect human rights- alas, one should bear in mind that human rights are expansive entitlements themselves. The more human rights expand[131] (i.e new rights are recognised gradually at UN and other international organisations level), the more human rights violations will be documented. At the same time, as long as human rights expand, the more pressure will be generated on States by civil society actors to remain within the human rights governance structure set by the UN.

[131] See generally Kalliopi Chainoglou, Andreas Wiesand, Anna Sledzinska-Simon, Yvonne Donders, Culture and Human Rights-The Wroclaw Commentaries (De Gruyter, Berlin, 2017).

- **Important points to remember about "UN Human Rights Protection System: Treaty-based bodies, Institutions, Mechanisms and Processes"**

When studying the "UN Human Rights Protection System: Treaty-based bodies, Institutions, Mechanisms, and Processes," it is crucial for students to keep in mind the following important points:

1. Treaty-Based Bodies: The United Nations has established various treaty-based bodies to monitor the implementation of international human rights treaties. These bodies, such as the Human Rights Council, treaty-based committees, and special rapporteurs, play a crucial role in examining State compliance with treaty obligations and making recommendations for improvement.
2. Universal Declaration of Human Rights (UDHR): The UDHR is a foundational document that outlines the fundamental rights and freedoms to which all individuals are entitled. It serves as a guiding framework for the development and implementation of human rights standards, globally.
3. International Human Rights Treaties: The UN has developed several international human rights treaties that provide legal frameworks for the protection and promotion of specific rights. Examples include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
4. Reporting and State Obligations: States that have ratified human rights treaties are required to submit regular reports to treaty bodies, detailing the measures taken to implement treaty provisions. Treaty bodies review these reports, provide recommendations, and engage in a dialogue with States to promote compliance.
5. Individual Complaint Mechanisms: Some treaty bodies have established individual complaint mechanisms that allow individuals or groups to submit complaints regarding alleged human rights violations. Examples include the Human Righ's Committee's Optional Protocol to the ICCPR and the Committee on the Elimination of Discrimination a'ainst Women's Optional Protocol.
6. Special Procedures and Rapporteurs: The UN appoints special rapporteurs, independent experts, or working groups to address specific human rights issues or country situations. They conduct research, issue reports, and make recommendations to address human rights violations or gaps in protection.

7. Universal Periodic Review (UPR): The UPR is a unique mechanism under the Human Rights Council that involves a review of the human rights records of all UN Member States. It provides an opportunity for States to present their progress, receive feedback, and make commitments for improving human rights situations.
8. Non-Governmental Organizations (NGOs): NGOs play a vital role in the UN human rights protection system. They provide expertise, monitor human rights situations, raise awareness, and advocate for policy changes. NGOs often engage with treaty bodies, participate in consultations, and contribute to the implementation of human rights standards.
9. Regional Human Rights Systems: In addition to the UN system, regional organizations have developed their own human rights protection mechanisms and institutions. Examples include the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human'and Peoples' Rights.
10. Follow-up and Implementation: The effectiveness of the UN human rights protection system relies on the follow-up and implementation of recommendations and decisions. States have a responsibility to act on the recommendations and integrate them into domestic policies, legislation, and practices.

It is important for students to engage with case studies, examine the practical application of these mechanisms and processes, and understand the challenges and limitations faced by the UN human rights protection system in order to gain a comprehensive understanding of its functioning and impact.

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Test your knowledge

1. **How does the Universal Periodic Review contribute to the protection of human rights?**

Answer: The Universal Periodic Review is an interstate cooperative and assessment mechanism that is based on an interactive dialogue between the State under review, the civil society and the Member States of the Human Rights Council. This institutionalized process and the UN treaty-based bodies complement each other.

2. **Are all States Parties to UN human rights treaties?**

Answer:Only the States that have expressed their consent to be bound by the treaty, through an act of ratification, acceptance, approval or accession, will be considered as parties to the treaties.

3. **Which UN treaty-based body has not examined an individual complaint yet?**

Answer:The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. Once 10 State Parties have made the required declaration under Art. 76 (individual complaints) or Art. 77 (inter-state complaints) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, then the relevant complaint procedure will become operative.

4. **Where can I find online quizzes on human rights?**

Answer:Here you can find some interesting quizzes:
UNAI Quiz: https://www.un.org/en/academic-impact/unai-quiz-human-rights
WHO Quiz: https://www.who.int/reproductivehealth/quiz-hr/en

Some interesting podcasts to listen to:

On Human Rights: The Raoul Wallenberg Institute of Human Rights and Humanitarian Law, https://podcasts.apple.com/us/podcast/on-human-rights/id1061926459
Defending Human Rights: More Just, https://podcasts.apple.com/us/podcast/defending-human-rights/id1601318587?i=1000570840275
The Human Rights Podcast: Irish Centre for Human Rights, https://podcasts.apple.com/us/podcast/the-human-rights-podcast/id1480656403

Documentaries to watch

Here are some documentaries that provide insights into the UN Human Rights Protection System, including treaty-based bodies, institutions, mechanisms, and processes:

1. *The Human Rights Council* (2013) - This documentary provides an overview of the UN Human Rights Council, its functions, and its role in promoting and protecting human rights globally.
2. *Breaking the Silence: Truth and Justice in Guatem–la* (2012) - This film explores the work of the UN-sponsored International Commission against Impunity in Guatemala (CICIG) and its efforts to combat corruption and human rights abuses in the country.
3. *The Uncondemned* (2015) - This documentary tells the story of the first-ever conviction for rape as a war crime, which took place at the International Criminal Tribunal for Rwanda. It highlights the role of international tribunals in prosecuting human rights violations.
4. *The Prosecuters* (2018) - This series follows the work of prosecutors at the International Criminal Court (ICC) as they investigate and prosecute individuals responsible for crimes against humanity, war crimes, and genocide.
5. *On Her Shoulders* (2018) - This documentary focuses on Nobel Peace Prize laureate Nadia Murad and her efforts to raise awareness about the genocide perpetrated by ISIS against the Yazidi community. It sheds lig't on the UN's response to human rights violations.
6. *The Invisible War* (2012)- While not directly related to the UN Human Rights Protection System, this documentary sheds light on the issue of sexual assault in the U.S. military and highlights the importance of human rights advocacy and accountability.
7. *The Peacekeepers* (2017) - This film examines the challenges faced by UN peacekeepers in maintaining peace and protecting human rights in conflict zones. It offers insights'into the UN's peacekeeping efforts and the impact on local communities.
8. *Call Me Kuchu* (2012) - Focusing on the struggles of the LGBTQI+ community in Uganda, this documentary highlights human rights violations, including persecution and discrimination, and the efforts of activists to bring about change.

   These documentaries provide valuable perspectives on the UN Human Rights Protection System, its various mechanisms, and the challenges faced in promoting and protecting human rights worldwide.

Chapter 5 Regional Approaches across Europe, Americas, Africa and Asia

Abstract

How do human rights apply at regional level? What are the regional protection systems and how do they contribute to the human rights governance system? Regional human rights protection systems can be found all over the world. Various regional intergovernmental organizations have set up bodies monitoring the human rights situation of their Member States and courts or quasi-judicial bodies examining cases on human rights violations against States. In some regions, where it has not been possible to set up formalized processes of human rights monitoring yet, there are informal mechanisms which contribute to raising awareness about human rights issues and possibly violations that are occurring in particular countries. Civil society plays an important role in the regional human rights systems. Synergies between bodies of regional human rights systems and UN bodies are encouraged and facilitated by the UN and its agencies.

Required Prior Knowledge

International Organisations.

A.5.1 Regional Human Rights Systems

Regional human rights systems set their own pace of monitoring the implementation of regional human rights. Systemic problems that hinder the functioning of regional intergovernmental organizations (for example, does the regional organization upon which the regional human rights system has developed suffer from an existential or identity crisis? can it fulfill its original mandate?), bureaucratic-oriented attitudes within the organizations, as well as external factors that may relate *inter alia* to the economic stability of their Member States, the uprising of extreme right-wing and left-wing political ideologies, populism or extremism and radicalization, corruption, and even the existence of (international and non-international) armed conflicts in the region, may threaten the functioning of regional human rights systems or impact the meaning and application of human rights in the regional context.

Even though human rights are deemed to be rooted in universal acknowledgments asserting the supreme value of the individual and of human dignity, at the same time, human rights are developed and practiced in a manner that shows that they are sensitive to the local context of a particular country or region. Furthermore, the shared language of human rights across states and regions does not necessarily preclude different understandings and interpretations of human rights. This can be due to the different national constitutional approaches (i.e. in terms of the wording used), the unbalanced

relationship between national courts and the legislature, or even due to the political situation in a given country which can engulf political processes and hinder or derail human rights protection.

This is not to say that human rights are not protected or practiced at all; after the establishment of the United Nations, all Member States of the international community - whether established democracies, autocratic governments or dictatorial regimes- are in one way or another engaged with human rights protection processes (especially those of the UN). Such an example is best served by looking into how regional human rights instruments feature into the UN human rights protections processes, and in particular the Universal Periodic Review. The historical process since 1945, affirms the increased attention given to human rights and international law-making as tools of global governance. Numerous UN human rights treaties have been signed and ratified even by states that would not necessarily be deemed *democratic* or *peace-loving* states (as envisaged by Article 3 of the UN Charter). After all, the Member States' delegates at the San Francisco Conference of 1945 were intent on creating an organization that would be predestined to maintain the autonomy and preserve the sovereignty of its Mmember States, while providing some limited room for persuasion and the exercise of soft power. What has changed since the creation of the UN and other regional organisations is a gradual shift from states' values and interests to human values and human rights. In the aftermath of the WW2, for some states the agenda of human rights coincides with universal peace. This was reflected in the UN Charter according to which States are obliged to promote human rights (Articles 55 and 56). At the same time, some states believe in categorical imperatives, i.e. genocide should be prohibited; war crimes and crimes against humanity must be prosecuted and impunity should end; self-determination must be guaranteed, which they project from a national to the international level. Other states believe human rights can serve as ammunition against communism, fascism, or other conflicting ideologies. It is also the case that some states needed to side with the major Western states that championed the human rights agenda (even though Communist states had developed their own human rights agenda pertaining to social, economic and cultural rights). For other states, the quest to avoid the pressure of *shaming* at international level, was also a reason to become human rights proponents. This is also evident in the fact that the majority of states rushes to sign loosely worded human rights treaties between the 1950s-1980s and become members of regional organisations that follow similar (yet distinctive) to the UN patterns in Europe, the Americas and Africa. From all aspects, human rights become a prominent feature of international relations in the post-WW2 order and human rights are deemed an integral part of global and regional governance.

The three well-established regional human rights systems in Europe, the Americas and Africa have developed in very different socio-political contexts. The regional organizations under which these systems have developed, differ significantly. One of the distinguishing features is the degree of integration achieved under these regional organizations, i.e. states in Europe have been trained to the mentality of transferring competences to supranational EU institutions and upholding principles of the rule of law and human rights. On the other hand, states in other continents have been hesitant to

transfer competences to common institutions and have been willing to engage themselves in policy-cooperation in particular thematic issues. Moreover, in Europe there are regional organizations that are targeting *ad hoc* the protection of human rights and the rule of law, such as the Council of Europe and the OSCE, while in other continents regional organizations and informal processes (i.e. in Asia) are rather multi-tasking, treating thus the protection of human rights as one of the many policy sectors subject to multi-lateral regulation or co-operation. Furthermore, in Europe, supranational and international courts enjoy assertiveness; no member State of the EU or the Council of Europe can withdraw from the jurisdiction of the Court of Justice of the European Union or the ECtHR without effectively leaving the respective regional organization. On the other hand, a sizeable number of the Member States of the African Union do not accept the jurisdiction of its Court.

Notwithstanding these differences, these regional human rights systems albeit at different pace, contribute largely to human rights standard-setting and jurisprudence. Each regional human rights system is based on its own human rights conventions that were adopted according to the needs of each region and has had its own evolution. All of the human rights conventions are living instruments, in the sense that, they remain valid owing to the interpretation offered by each one of the regional courts. All in all, these three regional human rights protection systems, because they benefit from their regional courts, they have been able to reduce the violations of human rights in their Member States; they have enforced accountability; they have offered a normative yardstick to the national courts, authorities and policy-makers of the Members States, and they have strengthened human rights standards. Most importantly, they have affirmed the responsibility of their Member States to investigate, punish, and make reparations for human rights violations. As of 2021, regional human rights courts and quasi-judicial bodies have produced rich interpretations on human rights issues and they have even taken upon the role of *social engineers*, in the sense that, they have produced jurisprudence which pays close attention to societal changes and have triggered changes across the societies of their Member States because of their judicial decisions. Perhaps, twenty years ago, one would come across concerns over the alleged contribution of regional human rights courts to international human rights law fragmentation. However, these concerns are not that prominent nowadays. Regional courts, acting on the principle of the universality of human rights, benefit now from a semi-institutionalised relationship between them and they present well-respected sources of inspiration for each other; there is a stellar increase in the cross-references to each other's jurisprudence and there is a normative and institutional impact of the European system on the American and African systems and vice versa. Case law by different regional courts, for example by the Court of Justice of the European Union and the ECtHR on the principle of gender equality, has been mutually

reinforcing.[132] Case law on gender equality and the principle of non-discrimination is now extended to protect women's rights but has also been extended to LGBTQI+rights.[133] Furthermore, the jurisprudence of these regional courts has affirmed the intersectional dimension of discrimination; human rights are better understood nowadays because courts call for States to take into consideration other grounds and socio-economic factors that may contribute to the vulnerability of persons already belonging to vulnerable groups[134], for example girls with HIV, living in poverty and being denied access to education, or Indigenous women or refugee women with disabilities and being victims of domestic violence, etc.

Having said this, this does not mean that fundamental human rights have ceased from being put to the test in every single geographic region. After all, all three regional human rights systems face similar issues i.e. global threats (such as terrorism and pandemics), non-compliance with human rights standards and repressive governments, non-execution of the judgments of their regional courts or even blatant opposition to international human rights law by certain Member States. It is in this context, therefore, that synergies between regional human rights systems, as well as the UN system are developed in order to enhance trans-regional cooperation and strengthen the judicial dialogue between international courts.

This chapter presents the principal institutional, normative and jurisprudential developments at regional intergovernmental level and also discusses how regional human rights courts and other international courts are, in essence, speaking to each other through their case-law, and as a consequence, they validate, in a complementary way, the "human rights project".

A.5.2 European Human Rights Protection System

The European regional human rights system which has developed under the auspices of the Council of Europe is deemed the most complete out of all regional human rights systems. The main reason for this observation is that, the Council of Europe itself is a regional inter-governmental organization consisting of 46 Member States with the sole mandate for the realization of human rights and fundamental freedoms.[135]

[132] CJEU, judgments *Defrenne I*, 25 May 1971 (80/70, EU:C:1971:55), *Defrenne II*, 8 April 1976 (43/75, EU:C:1976:56), and Defrenne III, 15 June 1978 (149/77, EU:C:1978:130); ECHR, decision of 12 November 2019, *Zevnik and Others v. Slovenia* (CE:ECHR:2019:1112DEC005489318, §34).
[133] ECHR, judgment of 11 July 2002, *Goodwin v. the United Kingdom* (CE:ECHR: 2002:0711JUD002895795, §100); CJEU, judgment of 17 February 1998, Grant (C 249/96, EU:C:1998:63, §§36 and 48);
[134] Bond, Johanna, 'Intersectionality and Human Rights within Regional Human Rights Systems', Global Intersectionality and Contemporary Human Rights (Oxford, 2021; online edn, Oxford Academic, 23 Sept. 2021), https://doi.org/10.1093/oso/9780198868835.003.0005, accessed 4 Oct. 2022.
[135] see Statute of the Council of Europe, Article 1.

The crown jewel of the Council of Europe is the ECHR. Any State wishing to join the Council of Europe must sign and ratify the ECHR. The ECHR is complemented by 16 additional Protocols. The ECHR essentially protects only civil and political rights; however, over the decades, the ECtHR has interpreted the ECHR provisions in light of economic, social and cultural rights too. It should be noted that, the ECtHR has adopted an integrated approach in its interpretation of the ECHR. This means, the ECtHR has consistently tried to avoid the exclusion of social, economic and cultural rights from the scope of the ECHR. In the Court's 1979 dictum it is clarified that:

> the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[136]

This approach is consistent with the UN human rights bodies that have affirmed again and again the indivisibility of human rights; in the UN human rights jurisprudence there is no water-tight division between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand.

Except for the ECHR, the European Social Charter is an outstanding human rights instrument which was adopted in the 1960s. It is the first comprehensive instrument that introduces very clear and specific standards on the protection of wider socio-economic rights, including *inter alia* labour rights, the rights of persons with disabilities, children, older persons, etc. As it has been previously pointed out:

> The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights.[137]

Even though the European Social Charter has not occupied the same space in literature and in practice as the ECHR has done, it nonetheless benefits from strengths and potentials that are more than relevant in the contemporary European societies which have been tarnished by socioeconomic turbulence (largely owed to the EU integration process), the migration crisis after 2015 and the pandemic crisis.

Having said this, one cannot ignore the impact of the European Social Charter on the EU law and specifically the EU Charter on Fundamental Rights and Freedoms. [138]

[136] *Airey v. Ireland*, 9 October 1979, para. 26.
[137] Para. 27.
[138] See https://www.coe.int/en/web/european-social-charter/european-social-charter-and-european-union-law

The Council of Europe has so far adopted 224 international legal instruments regulating inter alia human rights, democracy, the rule of law, culture, education, medical issues, processing data, cultural heritage, etc.[139] These instruments are essentially introducing legal standards into various areas that contribute to the legal, social and cultural cohesion across European societies. Because it is a regional intergovernmental organization it is expected that the treaties adopted under the Council of Europe are open only to its 47 Member States; however, the Council of Europe has extended an invitation to many non-member states from various geographic regions (i.e. Benin, Burkina Faso, Tunisia, Kuwait, Liberia, Congo, Guatemala, Kazakhstan, Niger, Nigeria, New Zealand) to ratify the Council of Europe treaties. The two most prominent treaties that have been open for ratification by non-member states are the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) and the Convention on Cybercrime (CETS No. 185).

Table of Human Rights Instruments (non-exhaustive list)

Legal Instruments	Date of Adoption	Date of Entry into Force
European Convention on the Protection of Human Rights and Fundamental Freedoms	04/11/1950	03/09/1953
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms	20/03/1952	18/05/1954
European Social Charter	18/10/1961	26/02/1965
Additional Protocol to the European Social Charter	05/05/1988	04/09/1992
Additional Protocol to the European Social Charter Providing for a System of Collective Complaints	09/11/1995	01/07/1998
European Social Charter (revised)	03/05/1996	01/07/1999

[139] The most recent treaty was the Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence which was adopted on 12/5/2022.

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data	28/01/1981	01/10/1985
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	26/11/1987	01/02/1989
Protocol amending the European Social Charter	21/10/1991	-
European Charter for Regional or Minority Languages	05/11/1992	01/03/1998
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*)	04/11/1993	01/03/2002
Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	04/11/1993	01/03/2002
Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine	04/04/1997	01/12/1999
Convention on Cybercrime	23/11/2001	01/07/2004
Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin	24/01/2002	01/05/2006

Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems	28/01/2003	01/03/2006
Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research	25/01/2005	01/09/2007
Council of Europe Convention on Action against Trafficking in Human Beings	16/05/2005	01/02/2008
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	25/10/2007	01/07/2010
Council of Europe Convention on preventing and combating violence against women and domestic violence	11/05/2011	01/08/2014
Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes	27/11/2008	01/07/2018
Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health	28/10/2011	01/01/2016
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms	24/06/2013	01/08/2021
Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms	02/10/2013	01/08/2018
Protocol amending the Convention for the Protection of Individuals with regard to	10/10/2018	-

Automatic Processing of Personal Data		
Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence	12/5/2022	-

The Council of Europe human rights treaties are often cited in the UN Universal Periodic Review Recommendations, especially the European Convention on Human Rights and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The UN Human Rights Council usually encourages States to report on their international obligations arising under the regional human rights instruments to which a State is party; this shows, on the one hand, that the UN UPR seems to have a good grasp of the Council of Europe human rights treaties and, on the other hand, that the UPR offers considerable validation to the ECtHR as it calls through the UPR Recommendations for the execution of the judgments by the Council of Europe Member States.

A.5.2.1 European Court of Human Rights

There are two prominent human rights mechanisms within the Council of Europe: the European Court of Human Rights (ECtHR) and the European Committee of Social Rights.

The ECtHR, originally set up in 1959, is the main instigator behind the dynamic protection of human rights within the legal orders of the Member States of the Council of Europe. It is reminded that the primary obligation for the implementation of the ECHR rests with the States while the ECtHR intervenes only when the States have failed to do so.[140]This is a Court that has examined more than a million cases and has obliged States to amend their legislation and practices even when dealing with sensitive or politicized issues, such as abortion, LGBTQI+rights, protection of personal data, domestic violence, femicides, etc. The Court also enjoys recognition by other international and regional courts (see discussion below). It has also overcome many of the struggles it eventually faced throughout its lifespan, i.e. the preposterous backlog of cases during the 1980s and 1990s, by reforming its working methods. States have adopted a number of protocols in order to meet these challenges and improve the efficiency of the Court.

Protocol No. 15, which entered into force on 1 August 2021, amends the ECHR in view of improving the effectiveness of the ECtHR and also adding a reference to the

[140] See ECtHR, *Practical Guide on* Admissibility *Criteria*, 31/08/2022, https://www.echr.coe.int/documents/admissibility_guide_eng.pdf

principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of ECHR.

Protocol No. 16 entered into force in 2018 and is considered to be a novelty in the European human rights protection system as it instrumentalises the ECtHR to the benefit of national courts, i.e. domestic highest courts and tribunals may ask for advisory opinions from the ECtHR only in the context of pending cases before them on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The expectations behind this new procedure are that the ECtHR will be offering its opinion on sensitive issues and to the point within a short period of time; advisory opinions will give reasons and will not be binding. This provision is in line with the subsidiarity principle as it allows for the national courts to decide whether they will make use of the offered opinions. This development will breathe some fresh air into the legal order of the Council of Europe and its Member States as it is a stepping effort for advancing dialogue and complementarity and strengthening the constitutional role of the ECtHR, enhancing thus a healthy interaction between the ECtHR and national courts. It should be noted, though, that only a few Member States have ratified Protocol No. 16.

Furthermore, the Court can prioritize over emergency cases. The effective execution of the ECtHR judgments, as well as the payment of sums awarded by way of just satisfaction is monitored by the Committee of Ministers of the Council of Europe.[141] The Committee of Ministers holds a Human Rights meeting and reviews the implementation of judgments from the ECtHR.

The ECtHR can examine both individual (individual *v.* State) and interstate (State *v.* State) applications. Interstate applications rarely occur before human rights courts and they are usually filed as a last resort tool, for example when other diplomatic means have failed against the State in question, because such interstate applications have wider political ramifications.[142] As opposed to the high number of individual applications, the ECtHR has only received only 20 interstate applications so far, the majority of which are related to human rights abuses in situations of armed conflict.[143] It is often the case that interstate applications are chronologically preceded with individual applications against the State allegedly responsible for human rights violations. For example, one of the emblematic interstate cases has been *Cyprus v. Turkey* which had been preceded with

[141] Despite the Committee of Ministers being a political body, it is also mandated to intervene in the last stage of the reporting/monitoring system of the other human rights and treaty-based bodies of the Council of Europe. Accordingly, the Committee of Ministers adopts a Resolution closing the reporting cycle and may introduce recommendations to the State Parties concerned.

[142] See G. Ulfstein and I. Risini, "Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges", *EJIL: Talk!*, 24/1/2020, https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/

[143] See ECtHR, Q& A on Inter-State Cases, October 2022, https://www.echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf

individual cases such as *Loizidou v. Turkey*, *Varnava and Others*, *Karefyllides and Others v. Turkey* ((dec.), no. 45503/99, 1 December 2009, whereby the ECtHR had found that Turkey had effective control over the occupied territory of the northern part of Cyprus and thus the human rights violations could be attributed to Turkey rather than the illegal entity of *TRNC*. In *Cyprus v. Turkey*[144] the ECtHR awarded the Cypriot Government damages for the human rights violations committed by Turkey, and specifically awarded the aggregate sums of EUR 30,000,000 for non-pecuniary damage suffered by the surviving relatives of the 1,456 missing persons, and EUR 60,000,000 for non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula.

The ECtHR's approach is to examine domestic law and State practice concerning the application of the provisions of the ECHR. It also takes into consideration other relevant treaties and soft law of the Council of Europe, as well as legal instruments and soft law (i.e. General Comments or Recommendations, Conclusions/Findings/Opinions, Resolutions) of the UN bodies and other intergovernmental organizations, i.e. the EU.[145] The ECtHR may also look into the judgments of other international courts. For example, the ECtHR has been making references to caselaw from the I/A Court of HR on issues such as the death penalty,[146] enforced disappearances,[147] torture,[148] the compulsory character of interim measures,[149] and more recently, amnesties in respect of grave breaches of human rights,[150] procedural safeguards in cases of removal of judges,[151] and the right of access to information,[152] as well as Inter-American legal instruments.[153]

The ECHR's legacy as a *living instrument* is affirmed by the numerous cases that have been examined by the ECtHR in the light of present-day conditions; the impact of such rich jurisprudence has had a transformative effect on the national legal orders of the states and, hence, has paved the way for changes to the European societies on various issues, including *inter alia* surrogacy arrangements. This is perhaps best illustrated with the case of *Mennesson v. France*.

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[144] Application no. 25781/94, 12 May 2014.

[145] See https://www.corteidh.or.cr/tablas/r26759.pdf; https://www.coe.int/en/web/help/article-echr-case-law

[146] ECtHR, *Öcalan v. Turkey* [GC], no. 46221/99, §166, 12 May 2005.

[147] ECtHR, *Varnava and Others v. Turkey* [GC], no. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90,6071/90, 16072/90 and 16073/90), §147, 18 September 2009.

[148] ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, §108, 1 June 2010.

[149] ECtHR, *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, §§112-113 and 124, 4 February 2005.

[150] ECtHR, *Marguš v. Croatia* [GC], no. 4455/10, §§131 and 138, 27 May 2014.

[151] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, §§114, 121 and 172, 23 June 2016.

[152] ECtHR, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §146, 8 November 2016.

[153] See ECtHR, The European Convention on Human Rights: living instrument at 70, 31/1/2020, https://echr.coe.int/Documents/Dialogue_2020_ENG.pdf See ECtHR, *References to the Inter-American Court of Human Rights and Inter-American Instruments in the Case Law of the European Court of Human Rights*, 2016, https://www.echr.coe.int/documents/research_report_inter_american_court_eng.pdf

The facts of the case concerned a French married couple, Mr and Mrs Menneson, who had concluded a gestational surrogacy arrangement with a third person in California, using the gametes of Mr Mennesson and the egg of a third-party donor (not Mrs. Menneson's due to fertility problems). Following the birth of the children and a decision by the Supreme Court of California, according to which Mr and Mrs. Menneson were recognized as the genetic father and legal mother respectively of the children, they sought to transcribe the American-issued birth certificates to the French civil registry but their request was denied as surrogate motherhood was not recognized in France.[154] In this case, the ECtHR found that there had been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life, but that there had, however, been a violation of that provision with regard to the children's right to respect for their private life. In the wake of this judgment, France proceeded with changes within its national legal order and was found by the Committee of Ministers of the Council of Europe to have successfully executed the ECtHR's judgment (see resolution adopted on 21 September 2017 (CM/ResDH(2017)286). Accordingly, "[r]egistration of the details of the birth certificate of a child born through surrogacy abroad was now possible in so far as the certificate designated the intended father as the child's father where he was the biological father. It continued to be impossible with regard to the intended mother. Where the intended mother was married to the father, however, she now had the option of adopting the child if the statutory conditions were met and the adoption was in the child's interests; this resulted in the creation of a legal mother-child relationship. French law also facilitated adoption by one spouse of the other spouse's child".[155] However, the matter resurfaced in

[154] See case of *Mennesson v France*. Application no. 65192/11. 26 June 2014, Final Judgment 26 September 2014. In particular the Court noted in paras. 97 and 97 that "Respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned ... As domestic law currently stands, the third and fourth applicants are in a position of legal uncertainty. While it is true that a legal parent-child relationship with the first and second applicants is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society. Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person's identity …. As the Court has already pointed out, although their biological father is French the third and fourth applicants face a worrying uncertainty as to the possibility of obtaining recognition of French nationality under Article 18 of the Civil Code ... That uncertainty is liable to have negative repercussions on the definition of their personal identity."

[155] Advisory Opionion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Requested by the French Court of Cassation, (Request no. P16-2018-001), 10 April 2019, para. 14.

2018 when the Court of Cassation[156], the highest court in the French judiciary, was the first domestic court under Protocol No. 16 to request from ECtHR its advisory opinion on the "the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother". The following questions were submitted to the ECtHR: (1)By refusing to enter, in the civil register of births, the birth of a child born abroad to a surrogate mother, in so far as the foreign birth certificate designates the child's "intended mother" as its "legal mother", whereas the registration is accepted in so far as it designates the "intended father", who is also the child's biological father, will a State party be overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn as to whether or not the child was conceived using the eggs of the "intended mother"?

(2) In the event of an answer in the affirmative to one of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?[157]

The ECtHR heavily relied on the principle of the child's best interests as it had already in the *Mennesson v. France* in the past, but also took into consideration the practice of other Member States of the Council of Europe.

> Accordingly, as to the first question, the Court found that "the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case."[158] And "the States' margin of appreciation will vary according to the circumstances, the

[156] "The Court of Cassation is not a court of third instance after the appeal courts and other courts. Its purpose is essentially not to rule on the merits, but to State whether the law has been correctly applied on the basis of the facts already definitively assessed in the decisions referred to it. This is why the Court of Cassation does not, strictly speaking, rule on the disputes resulting in the decisions referred to it, but on those decisions themselves. In reality, it judges the decisions of other courts: its role is to State whether those courts have correctly applied the law in light of the facts, determined by them alone, of the case brought before them and of the questions put to them. The purpose of each appeal is thus to impugn a judicial decision, the task of the Court of Cassation being to State whether the law has been applied correctly, or indeed incorrectly. It is at this stage that the ultimate fate of the case is decided, what is quashed being set aside and save in exceptional cases where the ruling to quash the judgment is without appeal, the case has to be heard again in light of the ruling by the Court of Cassation". https://www.courdecassation.fr/IMG/File/About%20the%20court_mars09.pdf

[157] Advisory Opionion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Requested by the French Court of Cassation, (Request no. P16-2018-001), 10 April 2019.

[158] Para. 42.

subject matter and the context... where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation will be wide... where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. It inferred from this that the margin of appreciation afforded to the respondent State needed to be reduced".[159] With regard to the second question, the Court found that, "the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests." And stressed out that, "Article 8 of the Convention does not impose a general obligation on States to recognise *ab initio* a parent-child relationship between the child and the intended mother. What the child's best interests – which must be assessed primarily *in concreto* rather than *in abstracto* – require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality. It is in principle not for the Court but first and foremost for the national authorities to assess whether and when, in the concrete circumstances of the case, the said relationship has become a practical reality".[160]

In the end, France proceeded with having foreign birth certificates registered in France in order to establish the parent-child relationship between such children and their intended mothers.

The ECtHR may also issue interim measures under Article 39 of the Rules of Court where there is an imminent risk of irreparable harm;[161] in such cases, the Committee of Ministers is informed immediately. It is reported that during the pandemic, the ECtHR received a considerable number of requests from persons with medical conditions detained in psychiatric institutions, persons detained in prison and persons, including unaccompanied minors, kept in reception and/or detention centres for asylum seekers

[159] Paras. 43-44.

[160] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Requested by the French Court of Cassation, (Request no. P16-2018-001), 10 April 2019, para. 52.

[161] See ECtHR, *Factsheet-Interim Measures*, November 2022, https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

and migrants. The requests were for interim measures to remove such vulnerable persons from their place of detention and to indicate measures to protect their health against the risk of being infected by Covid-19.[162] The Court either rejected or communicated the applications to the governments, requesting further information.

A.5.2.1.1 Pandemic Highlight

Following the declaration of the pandemic by the World Health Organisation in March 2020, the Member States of the Council of Europe had to declare a State of emergency and proceed with declarations of derogations from their obligations arising under the ECHR, pursuant to Article 15 of ECHR.[163] For example, Estonia was one of the Member States to invoke Article 15 of ECHR and produced through its *note verbale* the list of emergency measures along with justifications as to why they were chosen in that particular moment. The measures taken were required by the emergency of the situation and were justified as not being inconsistent with States' other obligations under international law. Even though the right to education is not protected under the ECHR, Estonia nonetheless informed the Council of Europe with regard to the suspension of physical classes and the decision to switch over to remote and home studying. A couple of months later, Estonia suspended the emergency measures and withdrew the derogation related to its obligations under the ECHR.

Even though the right to health is not one of the rights guaranteed under the ECHR and its protocols, the ECtHR has, nonetheless, read this right under other provisions of the ECHR, such as the right to life (Art. 2) and the freedom from torture and inhumane treatment(Art. 3). For example, in *Cyprus v. Turkey* the ECtHR affirmed that "[a]n issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally… Article 2 §1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".[164] Furthermore, the ECtHR has found that inadequate health-care or lack, thereof, may amount to inhumane treatment under Art.3 of ECHR, provided that there are compelling humanitarian grounds which do not justify the deportation of an individual from the territory of a Member State. [165]

Within months after the outbreak of the pandemic, the ECtHR has received a considerable number of complaints that concern the impact of the pandemic and the

[162] See ECtHR, Judicial Seminar 2022, *Human Rights Protection in the Time of the Pandemic: New Challenges and New Perspectives*, 17 May 2022, https://www.echr.coe.int/Documents/Seminar_background_paper_2022_ENG_01.pdf

[163] See CoE, *Derogations COVID-19*, https://www.coe.int/en/web/conventions/derogations-covid-19

[164] *Cyprus v. Turkey*, 10 May 2001, Application no. 25781/94, §219.

[165] *D. v. the United Kingdom*, 2 May 1997, §53; *N. v. the United Kingdom*, 27 May 2008, §34.

States' obligations vis-à-vis the right to life, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of religion, freedom of expression, freedom of reunion, the protection of property and freedom of movement.166 In *Feilazoo v. Malta* (11 March 2021)167 the Court found that the detention conditions of a Nigerian national, who was placed in COVID-19 quarantine that lasted almost 7 weeks inside a container without access to natural light or air, amounted to a violation of Article 3 of ECHR (prohibition of inhuman or degrading treatment).

A.5.2.2 European Committee of Social Rights

The European Committee of Social Rights is the monitoring mechanism of the European Social Charter; its mandate includes the reviewing of the national reports regularly submitted by the State Parties to the European Social Charter, as well as the communication of *Conclusions*. State Parties regularly submit reports under four thematic groups: 1)Employment, training and equal opportunities; 2) Health, social security and social protection; 3) Labour rights; 4) Children, families, migrants. State Parties that have accepted the collective complaints procedure, are allowed to submit a simplified version of the report every two years. This applies to 15 Member States of the Council of Europe who are divided in two groups, Group A: France, Greece, Portugal, Italy, Belgium, Bulgaria, Ireland, Finland, and, Group B: the Netherlands, Sweden, Croatia, Norway, Slovenia, Cyprus, and the Czech Republic. This reporting system has not always been deemed to be satisfactory. Some of the criticisms voiced are that, the reporting system risks of being bureaucratic and a rudimentary exercise for the States; and it may not timely identify the challenges in a State.

Apart from the State reporting system, the European Committee of Social Rights may receive and examine collective complaints under the Additional Protocol, providing for a system of collective complaints adopted in 1995. This procedure is quite different to the standardized human rights complaints procedure of the UN and the ECHR as 1) there is no need to exhaust all national domestic remedies to file a complaint, and 2) complaints cannot be submitted by individuals against the State concerned. This means that the authors of the complaint can be the European social partners, international non-governmental organizations[168] that have been accredited by the Governmental Committee of the European Social Charter and the European Code of Social Security,[169] and

[166] ECtHR, *COVID-19 Health Crisis*, October 2022, https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf

[167] Application No. 6865/19, Judgment 11/3/2021.

[168] Ngos, for example Alzheimer Europe, renew their registration on the list of International Nong-Govenmenrtal Organisations and they hold participatory status within the Council of Europe.

[169] The most recent list of international non-governmental organization allowed to lodge a collective complaint was compiled on 1 July 2021, and will be valid for a period of four years. See

employers' organizations and trade unions set up in the State concerned. This particularity of the process essentially allows for the author of the complaint not to have been the victim of a violation under the European Social Charter. Furthermore, due to the collective nature of the complaints, this means that the basis upon which the complaint is formulated concerns the alleged non-compliance of the concerned state's law and practice with one of the provisions of the European Charter (instead of looking into an individual's actual facts).[170] It should be noted, though, that the procedure also allows for emergency measures to be adopted by the European Committee of Social Rights.

The European Committee of Social Rights publishes its findings every year. For example, the 2020 findings concern the follow-up to cases against Belgium, Bulgaria, Finland, France, Ireland, Italy, Greece and Portugal. The State concerned is expected to notify the Committee of Ministers with regard to the measures it has taken or is about to take in order to be in conformity with the said provision of the European Charter. The Committee of Ministers accordingly issues Resolutions or Recommendations against the State concerned. In doing so, the Committee of Ministers will have reviewed the findings of the European Committee of Social Rights. It is usually the case that the Committee of Ministers tends to adopt Resolutions rather than Recommendations. In the case of Resolutions, a majority voting is required while in the latter case, a two-thirds majority voting is required (all voting States must be parties to the European Social Charter).Thus, Recommendations are adopted in cases where the State concerned is not willing to take concrete action to bring the situation in conformity with the said provision of the European Social Charter.[171]

The European Committee of Social Rights has often used as a point of reference in its case-law not only the Council of Europe legal instruments, but also the UN instruments and human rights mechanisms. For example, the UN Convention on the Rights of Persons with Disabilities is a point of reference in the caselaw of the ECtHR and the European Committee of Social Rights.[172]

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https://rm.coe.int/gc-2021-11-bil-list-ingos-01-07-2021/1680a302bf

[170] On the admissibility of the complaints, see https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure1

[171] See for example, Recommendation CM/RecChS(2021)15 concerning the follow-up of the decision on the merits adopted on 20 October 2020 by the European Committee on Social Rights in the case International Commission of Jurists (ICJ) v. Czech Republic, Complaint No. 148/2017; Recommendation CM/RecChS(2021)16, concerning the follow-up of the decision on the merits adopted on 17 June 2020 by the European Committee on Social Rights in the case European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic, Complaint No. 157/2017; Recommendation CM/RecChS(2021)17, concerning the follow-up of the decision on the merits adopted on 9 September 2020 by the European Committee on Social Rights in the case Confederazione Generale Sindacale (CGS) v. Italy, Complaint No. 144/2017; Recommendation CM/RecChS(2021)18, concerning the follow-up of the decision on the merits adopted on 7 July 2020 by the European Committee on Social Rights in the case Associazione Professionale e Sindacale (ANIEF) v. Italy, Complaint No. 146/2017.

[172] Goldschmidt, J. E. (2019) "The Implementation of the CRPD in the ECHR: Challenges and Opportunities," in Koen Lemmens, Stephan Parmentier, Louise Reyntjens (eds.). *Human rights with a*

The European Committee of Social Rights has engaged with issues that go beyond classic social rights issues, such as health or education; some of the decisions have addressed also the civil and political dimensions of the provisions of the European Social Charter affirming, thus, the indivisibility of social, political, economic, cultural and civil rights- that has been true, for example, in cases that related to children's rights. The European Committee of Social Rights has also addressed the rights of persons that do not appear to be covered by the European Charter and therefore their rights could arguably not be guaranteed by the Charter. Such has been the case of *FIDH v. France*[173] where the Committee sought the expansion of the scope of Art. 13 of the European Social Charter to undocumented migrants who are not legally resident in the territory of the State concerned, despite the Appendix to which it reads:

> 1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties. [174]

In this case, the European Committee of Social Rights found that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter"[175].

In a more recent case, the European Committee of Social Rights engaged, for the first time, with unaccompanied minors, refugee, asylum-seeking and migrant children's rights on the Greek mainland and on the Greek Aegean islands of Lesvos, Kos, Samos, Chios and Leros, in the context of the European Social Charter.[176] In the decision on the merits, the European Committee of Social Rights found that the state's policy and practice was not in conformity with a number of provisions of the European Social Charter due to:

> the failure to provide adequate accommodation to refugee and asylum-seeking children on the islands; the lack of sufficient long-term accommodation for unaccompanied refugee and asylum-seeking children on the mainland (Article 31§1 of the European Social Charter); the inappropriate accommodation of accompanied and unaccompanied migrant children on the islands; the lack of provision of a shelter to unaccompanied migrant children on the mainland (Article

human touch: Liber amicorum Paul Lemmens, (Cambridge; Antwerp; Chicago : Intersentia, 2019).

[173] Complaint No. 14/2003, 8/9/2004.

[174] para. 15.

[175] paras. 32.

[176] *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, 26/1/2021.

> 31§2 of the European Social Charter); the inadequate accommodation situation of accompanied and unaccompanied migrant children; the lack of an effective guardianship system for unaccompanied and separated migrant children; the detention of unaccompanied migrant children under the protective custody scheme (Article 17§1 of the European Social Charter); the failure to take the necessary measures to guarantee accompanied and unaccompanied migrant children the special protection against physical and moral dangers (Article 7§10 of the European Social Charter); the lack of access to education for accompanied and unaccompanied migrant children on the islands (Article 17§2 of the European Social Charter); the failure to provide appropriate accommodation and sufficient health care to accompanied and unaccompanied migrant children on the islands; the failure to provide appropriate shelter to unaccompanied migrant children on the mainland (Article 11§§1 and 3 of the European Social Charter).[177]

A.5.2.2.1 Pandemic Highlight

The European Committee of Social Rights has laid a bridge between the two human rights instruments of the Council of Europe and has observed that the right to health under the Charter complements the fundamental rights enshrined under the ECHR:

> Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.[178]

In April 2020, the European Committee of Social Rights issued a statement on the interpretation of the right to health in the times of the pandemic whereby it reaffirmed the indivisibility of human rights and called states not to compromise the Charter's rights in their responses to COVID 19. The European Committee of Social Rights drew attention to "the right to safe and healthy working conditions (Article 3); the right of children to protection from physical and moral hazards (Article 7§10); the right to social security (Article 12); the right to social and medical assistance (Article 13); the rights of persons with disabilities (Article 15); the right of families and children to social, legal and economic protection, including education (Articles 16 and 17) and the rights of the elderly (Article 23)", and labour rights as the rights directly under threat due to the pandemic measures.

[177] CoE News, *The decision on the merits in International Commission of Jurists and European Council for Refugees and Exiles (ECRE) v Greece, Complaint No. 173/2018, is now public*, https://www.coe.int/en/web/european-social-charter/-/the-decision-on-the-merits-in-international-commission-of-jurists-icj-and-european-council-for-refugees-and-exiles-ecre-v-greece-complaint-no-173-2018

[178] International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 3 November 2004, §31.

Furthermore, the European Committee of Social Rights also noted that where national efforts have been minimal or mediocre for example, with regard to the right to housing or freedom from poverty, this might be another reason for exacerbating the vulnerability of certain groups. It is noteworthy that, the European Committee of Social Rights has warned Member States that for the 2021 reviewing of national reports it will be focusing on States' responses with regard to the right to protection of health, including their epidemiological readiness and immunisation measures.

A.5.2.3 Advisory Committee on the Framework Convention for the Protection of National Minorities

Except for these judicial bodies, there are other mechanisms established by other human rights treaties of the Council of Europe which are tasked with monitoring the effective implementation of the provisions by the respective State Parties. It should be noted that not all Member States of the Council of Europe have ratified all treaties of the Council of Europe; this is evidenced in the pace at which such treaties are ratified. Hence, even today, there are human rights instruments of the Council of Europe that have received limited support by the Member States, see i.e. the European Charter for Regional or Minority Languages.

The Advisory Committee on the Framework Convention for the Protection of National Minorities is an independent body which examines State reports and adopts detailed country-specific opinions. The overall process is embedded in the monitoring of national measures and the holding of meetings with governmental interlocutors, national minority representatives and other stakeholders. The monitoring process is thus culminated in the adoption of the Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Comments of the Governments and the final Resolutions adopted by the Committee of Ministers.[179]

> Although the definition of nationals minorities is left at the discretion of State Parties and, thus, it is up to the States to determine the national minorities to which the Framework Convention shall apply, the Convention also guarantees the right of persons to self-identify themselves as members of a national minority based on objective criteria such as language, cultural traditions, etc. The term "national minorities" within the meaning of the Framework Convention is understood to designate for the Republic of Cyprus: the Armenian, Maronite and Latin (Roman Catholic) religious groups composed of citizens of the Republic of Cyprus who at the time of establishment of the Republic of Cyprus in 1960 opted in accordance with its Constitution to be part of the Greek Community. The Constitution of the Republic of Cyprus recognizes the two communities of the Republic of Cyprus: Greek Cypriot and

[179] See https://rm.coe.int/fcnm-leaflet-2020-en-final/1680a0bacc; Note to the reader: https://hudoc.fcnm.coe.int/eng#{%22sort%22:[%22FCNMAdoptionDate%20Descending,FCNMPublicationDate%20Descending,FCNMSectionNumber%20Ascending%22]}

Turkish Cypriot. The Roma of Cyprus are deemed to be members of the Turkish Cypriot Community. In the context of Cyprus, the term Cyprus Roma as used in the national report is considered more appropriate.

Document ACFC/OP/V(2019)002, adopted on 7 November 2019, https://rm.coe.int/5th-com-cyprus-en/16809e755c

Some of the key issues that are addressed by the Framework Convention are language rights for national minorities (the right to speak and the obligation of the States to facilitate the teaching of minority languages at schools), the right to participate in cultural life, their right to participate in decision-making, etc. Given the persistent discrimination against Roma and Travelers[180] across Europe, the Advisory Committee has feverously been raising awareness about the need to combat anti-gypsyism and anti-nomadism across Member States.

A.5.2.3.1 Pandemic Highlight

Given the fact that minorities are often subjected to exclusion, discrimination and violence across European societies, the pandemic and the emergency measures taken by states offered a fertile ground for the multiplication of violation of minorities' rights; for example, minorities not having access to health-related COVID 19 information in their speaking language. In a statement in May 2020, the Advisory Committee on the Framework Convention for the Protection of National Minorities referred to the eventual deterioration of minorities' human rights situation, especially with regard to their right to freedom of assembly or freedom of religion. The Advisory Committee on the Framework Convention for the Protection of National Minorities also stressed out the danger of minority children being left out from educational environments, i.e. due to lack of technical equipment, or because they are "not proficient enough in the official languages to be provided with appropriate educational content". Moreover, the Advisory Committee on the Framework Convention for the Protection of National Minorities brought to the attention of states the vulnerability of Roma and Travellers communities, because of their limited access to sanitary necessities and services such as clean water and sewage and significant losses of income for the most vulnerable groups.

[180] The term "Roma and Travellers" is used at the Council of Europe to encompass the wide diversity of the groups covered by the work of the Council of Europe in this field: on the one hand a) Roma, Sinti/Manush, Calé, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); and, on the other hand, groups such as Travellers, Yenish, and the populations designated under the administrative term "Gens du voyage", as well as persons who identify themselves as Gypsies. The present is an explanatory footnote, not a definition of Roma and/or Travellers, and is found in a number of Council of Europe documents.

A.5.2.4 Committee of Experts of the European Charter for Regional or Minority Languages

The Committee of Experts of the European Charter for Regional or Minority Languages Committee of Experts is the monitoring body of the European Charter for Regional or Minority Languages, a human rights instrument aimed at protecting linguistic diversity and the historical languages still spoken by the nationals of states (rather than the languages by immigrants). Language varieties of the official national language(s) and dialects are excluded from the protection scheme of the European Charter for Regional or Minority Languages. Furthermore, once a State has identified a language to be protected as a minority language, then it cannot reverse its decision; downgrading a protected language to a dialect is also prohibited.

The European Charter for Regional or Minority Languages has been ratified by 25 member States of the Council of Europe; the relatively small number of ratifying States has to do with the fact that language rights remain a highly controversial issue for the purposes of domestic politics. The States that have not ratified the Charter are some of the European States with the highest number of regional and minority spoken languages. Hence, States like France, Italy, Ireland, Malta, Belarus, the Baltic States and Russia have refrained from proceeding with the ratification of this treaty. Furthermore, even if these countries eventually ratify the Charter, there are concerns that the implementation of the Charter provisions at national level will be met with opposition by local and national actors. In the meantime, the Council of Europe has been promoting the ratification of the European Charter to a number of non-state parties. Through collaboration, efforts between the Council of Europe and the national authorities of France, Georgia[181], Russia, Albania, Belarus, Moldova, there has been a significant development in identifying how the provisions of the European Charter could eventually find their place in domestic legislation.

The monitoring process by the Committee of Experts of the European Charter for Regional or Minority Languages entails the consideration of the national periodic report[182] by the State and the visit by members of the Committee of Experts to the country, in order to evaluate the measures taken. The process is built on the premise of liaising with minority language non-governmental organisations (NGOs) and the government authorities. Should the State not opt in for a confidential dialogue with the Committee of Experts of the European Charter for Regional or Minority Languages, then the outcome of the evaluation report, together with any comments received from the Party, will be published on this website upon expiration of the two-month deadline where the Party does not submit comments, or upon receipt of the Party's comments. The monitoring process is complemented by two more steps: 1) the Secretary General of the Council of

[181] See https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680470065

[182] See https://rm.coe.int/cm-2019-69-outlines-2019-en/168094521a

Europe presenting a detailed report to the Parliamentary Assembly on the application of the Charter every two years, and 2) the Committee of Ministers of the Council of Europe adopting and publishing recommendations, relating to the respective evaluation reports of the Committee of Experts of the European Charter for Regional or Minority Languages.

A.5.2.4.1 Pandemic Highlight

In July 2020, the Committee of Experts of the European Charter for Regional or Minority Languages adopted a declaration on regional or minority languages and e-learning in the context of the COVID-19 pandemic, whereby, it stressed out that students must have access to education in their own language during the epidemic, and called upon States to develop "comprehensive strategies for distance education, to complement physical courses in and of regional or minority languages, especially for children and young people at the age of compulsory education" and to secure "public financing of the development of quality open access textbooks in all languages protected under the Charter" so they are accessible online by the use of pupils, students, teachers and the larger public.[183]

A.5.2.5 GREVIO

The Group of Experts on Action against Violence against Women and Domestic Violence (*GREVIO*) is the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The latter is an instrument that has stirred debates among certain Member States, i.e. Turkey and Bulgaria. The Convention is premised on four pillars: prevention, protection, prosecution and coordinated policies.

GREVIO runs a country-by-country evaluation procedure but it has "borrowed" some additional procedures off the UN human rights mechanisms. Hence, GREVIO has a special inquiry procedure which is activated once there is credible information that there is a likelihood of breach of the Convention[184]. Information is collected not only from governmental authorities but also from other Council of Europe bodies, UN human rights bodies, civil society actors and other stakeholders. The overall aim of the special inquiry procedure is to prevent a serious, massive or persistent pattern of any acts of violence covered by the Convention; therefore, there is a variety of steps that may be taken by GREVIO in order to avert the escalating human rights situation. Ultimately, GREVIO will communicate the findings of the special inquiry to the State concerned and, if it is deemed necessary, to two political bodies of the Council of Europe: the Committee of the Parties of the Convention and the Committee of Ministers of the Council of Europe, together with

[183] See https://pace.coe.int/en/files/29185/html

[184] Seehttps://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680462547

any comments and recommendations. It is noteworthy that, the monitoring of GREVIO is complemented by inviting national parliaments to submit their own reports with regard to the implementation measures.

The impact of the pandemic has had a disproportionate effect on women and their dependants. Not only it harmed women economically and consequently jeopardized their financial independence, but acts of domestic violence were increased along with the number of women seeking refuge in women's shelters. GREVIO, along with other Council of Europe institutions, joined forces with UN human rights institutions in order to raise awareness as early as March 2020, about the devastating and disproportionate impact of COVID 19 and states' responses on women.

A.5.2.5.1 Pandemic Highlight

The Committee of the Parties of the Convention issued, in April 2020, a Declaration whereby it reaffirmed that the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence "apply at all times" and underlining "the obligation of states party to the Istanbul Convention to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered therein, in accordance with their obligations under the European Convention on Human Rights". The said Declaration was accompanied with a selection of the Conventions' provisions along with examples of possible action and measures to take while dealing with the repercussions of the pandemic.

A.5.2.6 GRETA

GRETA, the Group of Experts on Action against Trafficking in Human Beings**,** has been set up pursuant to the Convention on Action against Trafficking in Human Beings and it is responsible for monitoring the implementation of the provisions of the said Convention. This is an important treaty of the Council of Europe which is a regional spin-off the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the so-called *the Palermo Protocol*). This Convention has a strong human right angle as it considers all acts of trafficking and exploitation, whether national or transnational, and irrespective of whether they are linked to transnational organized crime, as a human rights violation. The Convention prohibits inter alia slavery-like practices, forced labour, sexual trafficking, and human organs' trafficking. Moreover, the Convention introduces in Art. 26 the principle of non-punishment for victims of trafficking, preventing thus their revictimisation.[185] The Convention is deemed a successful human

[185] See also UN Rapporteur on Trafficking in Persons, especially Women and Children, The importance of implementing the non-punishment provision: the obligation to protect victims, 30/7/2020, https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf

rights treaty as it has been ratified by all Member States of the Council of Europe, except for Russia; two non-members of the Council of Europe: Belarus and Israel, have acceded to it, too.

Under the Convention, State Parties have to provide for the prevention of trafficking along with victim protection; it is the States' duty to adopt the appropriate legislative framework for the classification of trafficking-related acts as a criminal offence. Furthermore, States' duties include the effective investigation of any act resulting in trafficking of persons and prosecution.[186] Within this context, the ECtHR has noted that where "an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention",[187] it is the duty of the States within the scope of their powers to remove the individual from that situation or risk.[188] The judgment in *VCL and AN v. UK,*[189] where GRETA made a third-party submission to the ECtHR, is a positive step forward for victims of modern slavery. This is the first case that the ECtHR examined whether the prosecution of victim or a potential victim of trafficking (see Art. 26 of the Anti-Trafficking Convention) falls within the scope of Art. 4 of ECHR. The Court recognised that Art. 26 does not necessarily preclude the prosecution of a child trafficking victim. But it noted that, it is of utmost importance for the States to properly identify victims of trafficking in a timely manner, especially when these victims can be children. The ECtHR acknowledged that "the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked". And stated that States' duty under Art. 4 of ECHR included the duty to "protect the victim of trafficking from further harm; and to facilitate his or her recovery".[190] In the view of the Court, the prosecution could potentially increase the risk of the victims being retrafficked in the future and lead to their revictimisation. The ECtHR emphasised that the prosecution of victims of trafficking can be an impediment to the victims' integration into society as much as to their access to the "support and services that were envisaged by the Anti-Trafficking Convention".[191]

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[186] *Chowdury and Others v. Greece*, no. 21884/15, 30 March 2017, para. 104. S.M. v. Croatia [GC], Application No. 60561/14, para. 296, 25/6/2020.

[187] *Rantsev v. Cyprus and Russia*, Application No. 25965/04, para 288.

[188] *Rantsev v. Cyprus and Russia*, Application No. 25965/04, para. 286; *VCL and AN v the UK*, Applications Nos. 77587/12 and 74603/12, 16 February 2021, Final Judgment 5/7/2021, para. 152.

[189] *VCL and AN v the UK*, Applications Nos. 77587/12 and 74603/12, 16 February 2021.

[190] para. 159. See also Trajer J., *PROSECUTORS BEHAVING BADLY: REVISITING THE OPERATIONAL DUTY TO PROTECT TRAFFICKED PERSONS IN V.C.L. AND A.N. V. THE UNITED KINGDOM*, 15/3/2021, https://strasbourgobservers.com/2021/03/15/prosecutors-behaving-badly-revisiting-the-operational-duty-to-protect-trafficked-persons-in-v-c-l-and-a-n-v-the-united-kingdom/#more-5213

[191] para. 159. See Note to the GRETA reader: https://hudoc.greta.coe.int/eng#{%22sort%22:[%22GRETAPublicationDate%20Descending,GRETALanguage%20Ascending,GRETASectionNumber%2

A.5.2.6.1 Pandemic Highlight

In April 2020, GRETA issued a Statement in an effort to draw further attention to the exacerbated vulnerability of victims of human trafficking due to the lockdown and other emergency measures (i.e. suspension of trials and criminal proceedings, limited access to health care and protective medical equipment). GRETA mentioned *inter alia* the difficulty of frontline organizations in identifying victims of trafficking and their inability in offering support services to them, including accommodation and hygiene facilities, because of COVID 19, thus, putting victims of trafficking at risk of homelessness and revictimisation.

A.5.2.7 Lanzarotte Committee

The Lanzarotte Committee is the monitoring body of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse. This Convention has been ratified by all Member States of the Council of Europe and has attracted the interest of other states from other geographical regions; as of 2021, Tunisia has acceded to the Convention and Morocco's instrument of accession is still pending.

The monitoring process is based on the reviewing of all national reports, at the same time, on a particular singled-out aspect of the provisions of the Convention; even though this pattern of monitoring may look more like a comparative academic exercise, it is structured upon the expectation that the Lanzarotte Committee will be able to detect inadequacies while, at the same time, it will circulate and foster exchange of good practices among the States.

A.5.2.7.1 Pandemic Highlight

With children being the most vulnerable group, whether in peacetime or during conflict, it became evident very quickly that their vulnerability would be exacerbated during the pandemic. That also related to the fact that within children's group there are also sub-groups with additional features whose human rights situation is already compromised and adds to their vulnerability, i.e. girls, children with disabilities, unaccompanied children, refugee children, Indigenous children, homeless children, children living in poverty, etc. One of the first measures taken across countries was the closing down of schools. The restriction of movement and other emergency measures to contain the spread of COVID 19 increased the risk of children being exposed to abuse, neglect, exploitation and violence. GREVIO, as well as other Council of Europe and UN human rights bodies, made an effort in raising awareness among States about the potential or actual harm inflicted upon children due to the emergency measures and called States to provide human resources and funding for the continuation of assistance and support services to children. Perhaps, mental health and psychological support to children were deemed the top

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priority for human rights bodies. With education moving over to the Internet and with children becoming more reliant on social media during the lockdown measures, the risk of children being groomed, sexually abused or cyber-bullied increased at an accelerated pace. GREVIO issued a statement in April 2020 calling on States "to continue upholding children's rights in line with the convention [Convention on Protection of Children against Sexual Exploitation and Sexual Abuse], which requires them to take specific measures to protect all children and to prevent and respond to sexual abuse and exploitation at all times, everywhere. As more and more countries are locked down, it is a tragic fact that many children, notably children in a vulnerable situation because of a mental or physical disability or a situation of dependence, are trapped with their offenders, be it at home, in out-of-home care, in makeshift refugee camps or facilities where they are deprived of liberty. State Parties must ensure that all children are confined in safe environments."

A.5.2.8 European Committee for the Prevention of Torture

The CPT (European Committee for the Prevention of Torture)[192] is a mechanism established under the Council of Europe's "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", a treaty that has been ratified by all Member States. Unlike the other mechanisms of the Council of Europe treaties, this is solely a preventive mechanism aiming at the prevention of ill-treatment through objective findings and adequate recommendations (i.e. standards in prisons). The CPT does not serve as an investigative body and it does not have a quasi-judicial function as it does not review complaints by individuals against the States (this competence lies solely with the ECtHR). Having said that, the CPT encourages States to set in place complaints mechanisms as they constitute a fundamental safeguard against torture and inhuman or degrading treatment of persons deprived of their liberty by a public authority. Throughout CPT's experience with national authorities, it has become evident that national complaint systems were either non-existent or suffering from serious systemic problems, i.e. delays in handling complaints, lack of information regarding the availability of complaints procedures, or even the hesitance on the part of the individual of initiating a complaint procedure out of fear of reprisals.[193]

The CPT fulfills its mandate by exclusively conducting visits in places where people are deprived of their liberty, i.e. prisons, police detention facilities, psychiatric hospitals, places of care for elderly or persons with disabilities, immigration detention centres, etc. There is unlimited access to all places for the CPT and private interviews can be conducted with detainees and staff. The visits are conducted based on the principles of co-operation and

[192] Note to the CPT reader: https://hudoc.cpt.coe.int/eng#{%22sort%22:[%22CPTDocumentDate%20Descending,CPTDocumentID%20Ascending,CPTSectionNumber%20Ascending%22]}

[193] European Committee for the Prevention of Torture, Complaints Mechanism, Extract from the 27th General Report of the CPT, (2018), CPT/Inf(2018)4-part.

confidentiality. This means that all visit reports as well as the governments' responses remain confidential; it is up to the States to decide whether the reports can be published. Furthermore, should the national authorities be *hesitant* or not co-operate with the CPT, then a *Public Statement* can be issued (Art. 10 §2).

A.5.2.8.1 Pandemic Highlight

During the pandemic, the CPT issued a statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease whereby it primarily affirmed the need to protect the health of all persons deprived of their liberty, as well as of the staff. With these in view, the CPT stated that the fundamental rights of detained persons must be fully respected even during the pandemic and referred, in particular, "to the right to maintain adequate personal hygiene (including access to hot water and soap) and the right of daily access to the open air (of at least one hour)". For the CPT, any measures taken to deal with the pandemic should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time.

The CPT also considered the matter of restrictions on contact with the outside world for the detained persons and requested for increased access to alternative means of communication. Due to the contagious nature of coronavirus and the need for quarantine measures in place, the CPT also called for detained persons to be "provided with meaningful human contact every day".

A.5.2.9 European Commission against Racism and Intolerance

The European Commission against Racism and Intolerance (ECRI)[194], unlike other human rights mechanisms of the Council of Europe, was set up by the first summit of Heads of States and Governments. This is a human rights mechanism that does not supervise the implementation of a particular human rights treaty but it monitors how State Members of the Council of Europe tackle racism, xenophobia and intolerance at national level. The work of ECRI is very much reliant on the process of confidential dialogue with the Member States (for example,) and the rapport with civil society actors. ECRI occasionally issues General Policy Recommendations which are not binding on States yet their aim is to influence government interlocutors and policy-makers when devising national strategies and action plans.[195] The most recent General Policy Recommendations have drawn the

[194] Note to the ECRI reader:
https://hudoc.ecri.coe.int/eng#{%22sort%22:[%22ECRIPublicationDate%20Descending%22]}

[195] See *inter alia* General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Anti-Semitism and Intolerance (1994); General Policy Recommendation No. 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998); General Policy Recommendation No.8 on Combating Racism while Fighting Terrorism (2008); ECRI's General Policy Recommendation No.13 on combating antigypsyism and discrimination against Roma (2011) and amended in 2020.

attention to hate speech and to irregular migrants' facing discrimination across European societies.

A.5.2.9.1 Pandemic Highlight

ECRI has reviewed the impact of COVID 19 on groups of concern to ECRI, i.e. ROMA, immigrants and asylum-seekers, persons of Asian origin, and LGBT, in its 2020 annual report.[196] Perhaps one of the most important issues raised in this report has to do with the handling (processing and storage) of personal data in COVID19-related tracing applications. ECRI has called States to refrain from the use of such data "beyond what is necessary for legitimate and targeted disease surveillance measures" and to ensure that the collection of data should in any case "fully comply with the principles of confidentiality, informed consent and voluntary self-identification of persons, as reaffirmed by its General Policy Recommendations Nos. 1 and 4".[197]

A.5.2.10 Other Bodies

There are also bodies established by the Council of Europe's other treaties which monitor the implementation of the said provisions of these treaties and which may also deal with human rights issues that may emerge in their field of protection. See for example, Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Conference of the Parties under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, the Group of States against corruption (GRECO)[198] etc.

A.5.2.11 The Relationship between EU and CoE

The protection of human rights has been one of the founding values of the EU and is guaranteed in a number of provisions of the Treaty of the EU (see for example Arts. 2, 3, 6, 21 TEU and the European Charter of Fundamental Rights). EU values also include respect for democracy, the rule of law, human dignity, equality and the protection of minorities. The EU has been quite innovative in establishing procedures to ensure the protection of human rights. For example, Art. 7 (1) TEU provides for the *preventive* procedure according to which one third of Member States, the European Parliament and the Commission to initiate a procedure whereby the Council can determine, by a four-fifths majority, the existence of a "clear risk of a serious breach" in a Member State; in two recent cases where the procedure was initiated against Hungary and Poland, the Council eventually

[196] ECRI, Annual Report on ECRI's Activities covering the period from 1 January to 30 December 2020, Strabourg, March 2021, https://rm.coe.int/annual-report-on-ecri-s-activities-for-2020/1680a1cd59
[197] Ibid, para. 21.
[198] Note to the GRECO reader: https://hudoc.greco.coe.int/eng#{%22sort%22:[%22GRECODocumentID%20Ascending,GRECOPublicationDate%20Descending%22]}

blocked the process. Furthermore, Art. 7 (2) and (3) provide for a sanctioning mechanism. In case there is "a serious and persistent breach" of EU values, and upon receiving its observations for the Member State in question, the Commission or one third of Member States (not Parliament) can activate the *sanctioning mechanism*, resulting eventually in the Council deciding on the type and scope of sanction (i.e. suspension of voting rights for the Member State concerned, etc). The overall effectiveness of such a mechanism is highly questionable though.[199]

The EU has not acceded to the ECHR yet despite Article 6 (2) TEU being in place; however, there have been undergoing negotiations over the decades which culminated in the draft Accession Agreement of the EU to ECHR, in 2013. Even though the EU bodies have expressed their commitment to the accession, as part of the European integration process, concerns have been voiced by the Court of Justice of the European Union (see for example Opinion 2/13)[200] following a request by the EU Commission on the compatibility of the EU and FEU treaties with the draft Accession Agreement. At the time, the Court raised the issue of maintaining the autonomy of EU law without adversely affecting the competences of the EU and the powers of the Court of Justice of the European Union. The Court referred *inter alia* to the matter of the CFEU preliminary ruling procedure under Article 267 TFEU and the impact of Protocol 16 to ECHR on it as the draft Accession Agreement excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law. As of 2022, the negotiations are continuing between the two intergovernmental organisations. In the meantime, the ECtHR has already examined cases that concerned the application of the EU law *vis-a-vis* the human rights of the petitioners as guaranteed under the ECHR.

Case-study from the ECtHR Factsheet Caselaw Concerning the EU[201]

Sanofi Pasteur v. France[202]: This case concerned the liability of the applicant company to an individual, a trainee nurse who was vaccinated against hepatitis B and subsequently contracted various illnesses, and the court order against the applicant company to pay damages. The applicant company complained in particular about the fact that the French Court of Cassation had dismissed, without providing reasons, its request for preliminary rulings from the Court of Justice of the European Union concerning Article 4 of Directive 85/374, which lays down that the victim must prove the damage, the defect and the causal relationship between defect and damage. The Court held that there had been a violation of Article 6 §1

[199] European Parliament, Factsheet The Protection of Article 2 TEU Values in the EU, https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-article-2-teu-values-in-the-eu

[200] EU, Court of Justice, Opinion of the Court (Full Court) of 18 December 2014.

[201] European Court of Human Rights, Factsheet Case law Concerning the EU, March 2021, https://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf?

[202] Application No. 25137/16, 13/2/2020.

(right to a fair trial) of the Convention, on account of the failure to provide reasons for the decision to refuse the applicant company's request that questions be referred to the Court of Justice of the European Union for a preliminary ruling. The Court reiterated in particular that the Convention did not guarantee, as such, any right to have a case referred by a domestic court to the Court of Justice for a preliminary ruling. However, Article 6 §1 required the domestic courts to give reasons for any decision refusing to refer a question for a preliminary ruling, especially where the applicable law allowed for such a refusal only on an exceptional basis. The Court further emphasised that the circumstances of the case and what was at stake in the proceedings for the applicant company, had required a particularly clear explanation for the decision not to refer that company's questions to the CJEU for a preliminary ruling.

A considerable number of cases submitted before the ECtHR, concerned complaints regarding the Dublin Regulation system, according to which the first EU Member State that serves as an entry point for asylum seekers is responsible for the handling of asylum applications. Usually, first entry point States are Bulgaria, Italy and Greece. Such complaints were brought by applicants who had, eventually, made their way into the territory of other EU Member States, i.e. the UK (before Brexit), Austria, Germany, and Switzerland, and did not wish to be returned to the first entry point States which were entitled under the Dublin Regulation system to handle their asylum applications. The complaints were based, primarily, on Article 3 (prohibition of torture or inhuman or degrading treatment) of ECHR; some of them also relied on Article 13 of ECHR (right to an effective remedy) and Article 4 of Protocol No. 4 to the Convention on account of the lack of access to the asylum procedure or to any other remedy in the first entry point States. For the record, it should be noted that many of these complaints were declared inadmissible.[203]

Case-study from the ECtHR Factsheet Caselaw "Dublin Cases"

Tarakhel v. Switzerland Judgment[204]: The applicants were an Afghan couple and their five children. The Swiss authorities had rejected their application for asylum and ordered their deportation to Italy, where they had been registered in the "EURODAC system" in July 2001. The applicants alleged, in particular that if they were returned to Italy "in the absence of individual guarantees concerning their care", they would be subjected to inhuman and degrading

[203] European Court of Human Rights, Factsheet Case law "Dublin Cases", March 2021, [https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf;European Court of Human Rights, Factsheet Case law Collective Exclusion of Aliens, June 2022, https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf

[204] Application no. 29217/12, Grand Chamber, 4/11/2014.

treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum seekers in Italy. They also submitted that the Swiss authorities had not given sufficient consideration to their personal circumstances and had not taken into account their situation as a family. The Court held that there would be a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention if the Swiss authorities were to send the applicants back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together. The Court found that in view of the current situation regarding the reception system in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. The Court further considered that the applicants had had available to them an effective remedy in respect of their complaint under Article 3 of the Convention. Accordingly, it rejected their complaint under Article 13 (right to an effective remedy) of the Convention taken in conjunction with Article 3 as manifestly ill-founded.[205]

A.5.3 American Human Rights Protection System

The Inter-American human rights protection system operates within the framework of the Organisation of American States (OAS). The Inter-American Commission on Human Rights (I/A Commission on HR) and the Inter-American Court on Human Rights[206] (I/A Court of HR) are charged with interpreting and applying a rich weaponry of regional human rights instruments, which include the: American Declaration of the Rights and Duties of Man; American Convention on Human Rights; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"; Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on Forced Disappearance of Persons; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará"; Inter-American Convention on the Elimination of All Forms of

[205] European Court of Human Rights, Factsheet Case law Concerning the EU, March 2021, https://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf?

[206] García Ramírez, Sergio (2015) "The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions," *Notre Dame Journal of International & Comparative Law*: Vol. 5: Iss. 1, Article 5, https://www.corteidh.or.cr/tablas/r35062.pdf

Discrimination Against Persons with Disabilities; Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance; Inter-American Convention Against All Forms of Discrimination and Intolerance; Inter-American Convention on Protecting the Human Rights of Older Persons. When interpreting the above instruments, the I/A Commission on HR and the I/A Court of HR take into consideration the Charter of the Organization of American States; Declaration of Principles on Freedom of Expression; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; Inter-American Democratic Charter.

A.5.3.1 Inter-American Commission on Human Rights

The I/A Commission on HR overviews thematic areas of particular concern for the region through the establishment of rapporteurships. There is a number of Rapporteurs who monitor, promote, evaluate and provide opinions on a variety of thematic areas, such as the Rapporteur on the Rights of Older Persons (2017), the Rapporteur on Memory, Truth and Justice (2017), the Rapporteur on the Rights of Indigenous Peoples (1990), the Rapporteur on the Rights of Women (1994), the Rapporteur on the Rights of the Child (1998), the Rapporteur on the Rights of Migrants (1996), the Rapporteur on the Rights of LGBTI (2011), the Rapporteur on the Rights of Persons of African Descent and against Racial Discrimination (2005), the Rapporteur on the Rights of Persons Deprived of Liberty (2004), the Rapporteur on Human Rights Defenders (2001), the Special Rapporteur for Freedom of Expression (1997), the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (2012).

The I/A Commission's mandate is to promote human rights in the Americas. Its functions are as much judicial as political ones. The I/A Commission on HR carries out visits to the States, issues reports on the human rights situations in the States, makes recommendations to the States, and even adopts precautionary measures. The I/A Commission on HR can hear complaints from individuals and NGOs against all States that are parties to the American Convention on Human Rights. The I/A Commission on HR can also examine inter-state complaints as long as both States have accepted the competence of the Commission to receive such communications.[207] In addition, the I/A Commission on HR can request advisory opinions from the I/A Court of HR and provisional measures from the Court where there is an imminent danger to a person. The Court can order such measures even when a case has not yet been submitted to the Court.

It is within the I/A Commission's mandate to promote friendly settlement proceedings, whereby the I/A Commission on HR plays the role of the facilitator of negotiations between the parties in questions.[208] The I/A Commission monitors the compliance of the States with the friendly settlements agreements.

[207] Article 45 of the American Convention on Human Rights.

208 See Françoise Hampson, Claudia Martin, Frans Viljoen, "Inaccessible apexes: Comparing access to

Where the State is not complying with the I/A Commission's recommendations, the I/A Commission on HR can refer such cases to the Court upon the condition that the States in question have accepted the Court's jurisdiction.

A.5.3.2 Inter-American Court of Human Rights

The I/A Commission on HR and States can refer contentious cases to the I/A Court of HR. The I/A Court of HR can also issue advisory opinions. For example, upon the request of Colombia, the I/A Court of HR delivered a promising advisory opinion on the environment and human rights in 2017:

> [a]s an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitution1, to recognize legal personality and, consequently, rights to nature.[209]

The I/A Court of HR has produced significant jurisprudence on a string of human rights issues, including inter alia the right to education, LGBTI rights, indigenous and tribal rights.[210] For example, in *Saramaka People v Suriname*,[211] the I/A Court examined the claim brought by the Saramaka people, one of the six distinct Maroon groups in Suriname who

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regional human rights courts and commissions in Europe, the Americas, and Africa", *International Journal of Constitutional Law*, Volume 16, Issue 1, January 2018, pp. 161–186, https://doi.org/10.1093/icon/moy007: "Depending on the different composition of the IACHR, the process of friendly settlements has been more or less instigated as a concerted effort to finalize pending cases. It has become very clear in the last few years that states care very much about the friendly settlement proceeding and expect the IACHR to assume a more central and active role in advocating for the amicable resolution of pending cases. If well implemented, the IACHR's practice of friendly settlement shows that the resolution of a case through that mechanism may ensure effective access to justice and reparations for human rights victims".

[209] Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights, 15 November 2017, available at: https://www.refworld.org/cases,IACRTHR,5e67c7744.html [accessed 8 October 2022], para. 62

[210] See for example, Case of Mowiana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15/6/2005, Series C. No. 124; Case of The Indigenous Community Sawhoyyamaxa v Paraguay, Merits, Reparations and Costs, Judgment of 29/3/2006, Series C No. 146; Case of the Indigenous Community Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment of 17/6/2005, Series C No. 125.

[211] Cases of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28/11/2007, Series C. No. 172.

were brought there during the colonisation period. They are a group organised in matrilineal clans. They are not indigenous to the area, yet, since the 17th century they have displayed a strong spiritual relationship with the land they have resided in. Their relationship to the land has been described as "a necessary source for the continuation of the life and cultural identity of the Saramaka people".[212] TheI/A Court of HR held that:

> the members of the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.[213]

Based on the I/A Court's ruling, the Saramaka people, being a tribal community, should be treated as equivalent to Indigenous Peoples in international law and should enjoy the rights proclaimed in the United Nations Declaration on the Rights of Indigenous Peoples. The reasoning of the I/A Court of HR was that much alike the Indigenous people, the Saramaka as a tribal community, "share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival".[214]The value of this case is that, it recognised the collective right of the Saramaka people to their traditional territory. Hence, the I/A Court of HR found that Suriname had violated the right to property, the right to juridical personality, and the right to judicial protection and requested *inter alia* from the Suriname to demarcate and grant collective title over the territory of the members of the Saramaka people, with due consideration to their customary laws and traditions, and to abstain from any acts that would affect the "existence, value, use or enjoyment" of their land. It should be noted that this judgment was considered to be a form of reparation by the Court.[215]

The I/A Court of HR has consistently maintained in its jurisprudence that Indigenous and Tribal people are "collective subjects of international law" and therefore "some of the rights recognised by the American Convention on Human rights on a collective basis….should be understood from that collective perspective".[216]

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[212] Professor Richard Price, "Report in Support of Provisional Measures, 15/10/2003, (case file of appendices to the application and Appendix 1, appendix 2, folio 15), cited in Case of the *Saramaka People v. Suriname*, op. cit. para. 82.

[213] para. 84.

[214] para. 86.

[215] See also Jeanice L. Koorndijk (2019) "Judgements of the Inter-American Court of Human Rights concerning indigenous and tribal land rights in Suriname: new approaches to stimulating full compliance", *The International Journal of Human Rights*, 23:10, 1615-1647, http://doi.org/10.1080/13642987.2019.1624536

[216] Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment of 27/6/2012, Series C. No. 245, para. 231.

The I/A Court of HR considers the execution of the judgments as the victims' right to international justice. Failure of the State to comply with its obligations under the American Convention on Human Rights and to execute the judgments of the I/A Court of HR incurs international responsibility, in other words, it is considered to be an internationally wrongful act.[217] As with every single regional human rights system, the issue of the execution of the judgments is a challenging one because it very much depends on the political will of the government of the State in question. With every judgment of the I/A Court of HR, the ultimate question is as to whether it will achieve the desired local effects and whether it will be translated from an abstract legal victory into the desired concrete benefits to the victims of the human rights violations. Most of the judgments are not fully complied with; the I/A Commission on HR, the Permanent Council of American States and the General Assembly all participate in the procedure concerning the execution of the judgments. The OAS General Assembly is informed on the progress of the execution of the judgments by the States in question based on an annual report submitted by the Court. Yet, there is an overall feeling that the political and judicial mechanisms of the OAS are not sufficient in stimulating full and swift implementation of the judgments

Throughout the years, the I/A Court of HR has entered into a judicial dialogue with the international courts of other regional organizations, especially the ECtHR. Through many cases for example on domestic violence the right to freedom of expression, the right not to be subject to inhumane or degrading treatment, fair trial rights, the right to an effective remedy, the I/A Court of HR has referred to the ECtHR's dicta to elucidate the scope and application of human rights:

> This normative and institutional impact has been reflected in the case law of the Inter-American Court from the start. In its first advisory opinions and contentious cases, the San José Court, in its task of interpreting the American Convention, frequently used the precedents of the European Court. The similarity in the wording of the rights and freedoms in the European and American Conventions, in the development of admissibility criteria and interpretation principles, as well as the increasing similarity of the issues brought before the courts in Strasbourg and San José, have internalized the dialogue with European case law in our work up until the present day. Currently, no decision is adopted by the Inter-American

[217] This has been acknowledged by the I/A Court of HR in the case *Velasquez-Rodriguez v Honduras*, Merits, Judgment 29/7/1998, para. 172, where the Court found that "any violation of rights recognized by the Convention [American Convention on Human Rights] carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".

Court until it has previously studied the relevant Strasbourg precedents.[218]

A.5.3.3 Other human rights bodies

The Inter-American Commission of Women, is a specialized organization, which predates the existence of the OAS. It advises the OAS on matters relating to women's rights and gender equality and supports States, upon their request, to comply with their international and regional obligations on women's rights and gender equality.

The Working Group on the Protocol of San Salvador monitors the implementation of the Protocol of San Salvador on economic, social and cultural rights, and examines the periodic reports of the States Parties to the Protocol.

The Follow-up Mechanism to the Belém do Pará Convention (MESECVI) is the monitoring body of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention). The work of MESECVI is based on a multilateral evaluation methodology and the exchange and technical cooperation between the States Parties to the Convention and a Committee of Experts. The Mechanism not only overviews and assists the member States with their implementation efforts of the said Convention, but also prepare hemispheric reports and recommendations on the subject area.

A.5.4 African Human Rights Protection System

Despite being the youngest of the three regional human rights systems, the African regional human rights system has distinctive features that point out its successes and failures. The African regional human rights system has sprung out of its colonial and post-colonial roots, tarnished originally by African states' concerns over sovereignty and non-interference with the domestic affairs. By having human rights elevated to the agenda of the political decision-making bodies of the African Union (AU),[219] the African regional human rights system benefits from an ever-expanding normative and supervisory framework. Numerous human rights instruments have been adopted and a wide-range of mechanisms supports the construct of the African regional human rights system.

AU has adopted a number of human rights instruments, such as the African Charter on Human and Peoples' Rights (Banjul Charter), the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Union Convention for the Protection and Assistance of Internally Displaced Persons

[218] Inter-American Court of Human Rights, *Dialogue Between Regional Human Rights Courts*, 2020 https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf

[219] Formerly known as Organisation of African Unity.

in Africa, the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons, the African Youth Charter, the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa, etc.

There are three prominent human rights bodies within the African Union: the African Commission on Human and Peoples' Rights (African Commission); the African Committee of Experts on the Rights and Welfare of the Child; and the African Court on Human and Peoples' Rights (African Court).[220]

Furthermore, the incorporation of human rights in the agendas of the regional economic organizations, such as the Southern African Development Community (SADC), the Economic Community of Central African States (ECCAS), etc, has added a new layer of international (albeit sub-regional) protection of human rights in the African continent. These intergovernmental sub-regional economic organisations have set up courts which have offered some jurisprudence on human rights issues,[221] for example, the SADC Tribunal, the East African Court of Justice, the ECOWAS Community of West African States. Even though the courts have been established by these regional organisations for the sole purpose of economic integration, they have, nonetheless, exercised jurisdiction over the States' human rights commitments under the relevant treaties establishing each regional organisation. This has been a welcome development in a geographic region where it is felt that individual access to justice is much needed in order to enhance regional confidence in human rights and the rule of law. Regrettably, the SADC Tribunal has suspended its operation since 2012 due to political backlash concerning a string of judgments against Zimbabwe. A new Protocol to the Tribunal was signed in 2014 in order to amend the jurisdiction of the SADC tribunal and allow only for inter-state complaints. This effectively means that, individuals will be deprived of access to the Tribunal for human rights violations complaints.[222] In 2018, the Pretoria High Court declared the involvement of South Africa in shutting down the SADC tribunal and subsequently signing the new Protocol as being unlawful and unconstitutional.[223]

[220] Ayeni, V. O. (2019). "The African Human Rights Architecture: Reflections on the Instruments and Mechanisms within the African Human Rights System". *Beijing Law Review*, 10, 302-316. https://doi.org/10.4236/blr.2019.102019

[221] See for example, Cimexpan v. Tanzania, Case No. SADC (T) 01/2009, Main Decision of 11 June 2010.

[222] Shivamba A., "The Demise of a Legitimate Southern African Regional Court", *SALC Policy Brief*, No. 6, 2019, https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/11/The-Demise-of-a-Legitimate-Southern-African-Regional-Court.pdf

[223] The Pretoria High Court found that "any act which detracted from the SADC Tribunal's exercise of its human rights jurisdiction at the instance of individuals, was inconsistent with the SADC Treaty itself and violated the rule of law", Judgment on SADC Tribunal offers new hope for access to justice for human rights in Southern Africa, 5/3/2018, https://www.icj.org/judgment-on-sadc-tribunal-offers-new-hope-for-access-to-justice-for-human-rights-in-southern-africa/. The Court order the President to withdraw his signature from the new Protocol; South African announced its withdrawal at the SADC Summit of Heads of States and Governments in 2019.

A.5.4.1 African Commission on Human and People's Rights

The African Commission on Human and People's Rights was established under Article 30 of the African Charter in 1987; it is the most seasoned human rights mechanism of the African human rights system. The African Commission on Human and People's Rights is supported by subsidiary bodies, such as the special mechanisms in the form of Special Rapporteurs (i.e. Special Rapporteur On Human Rights Defenders And Focal Point On Reprisals In Africa, established in 2004) and Working groups (i.e. Committee On The Protection Of The Rights Of People Living With HIV (PLHIV) And Those At Risk, Vulnerable To And Affected By HIV, established in 2010) and internal special mechanisms that address administrative and other internal issues related to the work of the African Commission on Human and People's Rights (i.e, Committee on Resolutions, established in 2016).

The African Commission on Human and People's Rights is mandated to examine interstate complaints on alleged violations of human rights. As of 2022, the African Commission on Human and People's Rights has only heard 3 interstate complaints: *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*[224] , *Sudan v. South Sudan*[225], and *Djibouti v. Eritrea*[226]. A common characteristic in all three cases has been the significant delay of the Commission before reaching its decisions.[227] For example, while the decision in *Djibouti v. Eritrea* case is still to be released, the States had, in the meantime, brought the matter before the International Court of Justice.

The African Commission on Human and People's Rights can also hear complaints from individuals and NGOs (communications procedure). The petitioners do not have to be victims of the violations.[228] The African Commission on Human and People's Rights has issued many interesting decisions, including ones on Indigenous rights. In *Serac v. Nigeria,*[229] the Commission found that Nigeria had caused environmental damage to the Ogoni people, an Indigenous population. The oil exploration activities, that were carried out, resulted in the contamination of land and water resources, thereby making farming

[224] Communication 227/99.
[225] Communication 422/12.
[226] Communication 478/14.
[227] See Frans Viljoen, "A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System", *V*ölkerrechtsblog, 27/04/2021, http://doi.org/10.17176/20210427-221127-0 "the small number of inter-State cases in the African human rights system relates to the nature of disputes arising between States. These disputes may relate to issues such as contestation over borders, access to water, and use of force. While States may not consider a human rights court to be an appropriate forum to resolve such disputes, they may be more inclined to submit inter-State cases arising from such circumstances to a court with a more general international law competence. Such a court is provided for in a revised legal framework establishing an 'African Court of Justice and Human Rights', which is however not yet in force."
[228] *Malawi African Association v. Mauritania*, No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98) [2000] ACHPR 19, para 78.
[229] (2001) AHRLR 60 (ACHPR 2001).

and fishing (the two principal means of livelihood of the Ogoni) impossible. The African Commission on Human and People's Rights affirmed that despite of an explicit reference to the right to housing in the African Charter, a combination of other rights protected therein guanantee the right to housing:

> the right to ... health, the right to property, and the protection accorded to the family forbids wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected ... [T]he combined effect of articles 14, 16 and 18 reads into the Charter a right to shelter or housing.[230]

The same reasoning was followed by the African Commission on Human and People's Rights with regard to the right to food which is also based in the African Charter:

> The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.
>
> The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.[231]

As of 2023, the African Commission on Human and People's Rights has adopted 7 general comments on various thematic areas including the right to self-protection and the right to be protected from HIV and sexually transmitted infections; Women's rights to sexual and reproductive health; The Right To Life; The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment; The Right to Freedom of Movement and Residence; the Protocol To The African Charter On Human And Peoples Right On The Rights Of Women In Africa (Maputo Protocol): The Right To Property During Separation, Divorce Or Annulment Of Marriage; and State. Furthermore, the

[230] para. 60.
[231] paras. 65-66.

African Commission on Human and People's Rights has adopted interpretative guidelines concerning contemporary challenges that African societies and States face, such as the Guidelines on the Right to Water in Africa (2019),[232] the Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights[233] and the Guidelines on Adhering to Human and Peoples' Rights under the African Charter in the Context of States of Emergency or Disaster (2023).

A.5.4.2 African Committee of Experts on the Rights and Welfare of the Child

The mandate of the African Committee of Experts on the Rights and Welfare of the Child derives from the African Charter on the Rights and Welfare of the Child. The mandate includes *inter alia* reviewing reports by States and civil society organizations concerning States Parties' implementation of the African Charter on the Rights and Welfare of the Child, reviewing complaints that allege violations of the African Charter on the Rights and Welfare of the Child by States Parties, issuing recommendations, and setting up guidelines for States to comply with their obligations arising under the African Charter on the Rights and Welfare of the Child. The Committee examines individual complaints which may be lodged by individuals (including children), group or NGO recognized by the African Union, a Member State or by the UN.

The African Committee has contributed to the interpretation of the African Charter on the Rights and Welfare of the Child through the adoption of General Comments, much like the UN Committees. The Comments cover a broad spectrum of themes including inter alia child marriages, the Responsibilities of the child, children of imprisoned parents, birth

[232] The Guidelines go as far as mentioning how "water for menstrual hygiene management is a necessary precondition for the right to education of women and girls". See https://www.achpr.org/resources

[233] It is noteworthy that the Guidelines include a nuanced definition of vulnerable groups (para. 1 (e)): "people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS, and other persons with terminal illnesses, persons with persistent medical problems, child and female-headed households and victims of natural disasters, indigenous populations/communities, persons with disabilities, victims of sexual and economic exploitation, detainees, lesbian, gay, bisexual, transgendered and intersex people, victims of natural disasters and armed conflict, refugees and asylum seekers, internally displaced populations, legal or illegal migrant workers, slum dwellers, landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture, persons living in informal settlements and workers in irregular forms of employment such as home-based workers, casual and seasonal workers" . Furthermore, the Guidelines clarify that the right to take part in cultural life, includes the dimensions of the protection of tangible and intangible heritage, including traditional knowledge systems, as well as the protection of "positive African values consistent with international human rights standards", implying "an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights", para. 75.

registration, name and nationality, and prevention of statelessness, as well as children affected by armed conflict. The Comments use a child-rights approach aimed at preventing children's rights violations and refer to UN and regional instruments in their analysis. Such is the case with the Joint Comment of the African Committee and the African Commission on Human and People's Rights on ending child marriage. It is noteworthy that, the General Comment on children and armed conflict can be used also in instances of crises, emergencies and national disasters where the rights of children may be violated.

A.5.4.3 African Court on Human and People's Rights

The African Court was set up only in 2004 pursuant to the entry into force of a Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights. The Court can examine individual and inter-state complaints. The acceptance of interstate communications is automatic under the African Charter. No interstate complaints have been submitted yet.[234] The Court complements the function of the African Commission on Human and People's Rights. Only 8 out of the 33 States that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, have accepted the competence of the Court to hear complaints from individuals and NGOs.[235]

The African Court has produced considerable caselaw on the interpretation of the provisions of the African Charter, including Indigenous rights. The *African Commission on Human and People's Rights v. Republic Kenya*[236] is a case which concerned the rights of the Ogiek, an Indigenous population whose particular status required special protection. The Ogiek had been evicted from their ancestral lands, which adversely impacted the Ogiek's economic, social, and cultural development, and had experienced human rights violations over a period of time. The Court ordered Kenya to guarantee the rights of the Ogiek as an Indigenous people by taking all legal, administrative and other measures towards this end. The Court requested *inter alia* the recognition of the Ogiek language and the Ogiek cultural and religious practices, restitution of the Ogiek ancestral lands and the establishment of mechanisms facilitating dialogue with the Ogiek on matters affecting

[234] Frans Viljoen, "A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System", *Völkerrechtsblog*, 27.04.2021, http://doi.org/10.17176/20210427-221127-0

[235] Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger and Tunisia. Since 2016, 4 States, Rwanda, Tanzania, Cote d'Ivoire and Benin have withdrawn their acceptance of the jurisdiction of the African Court on Human and People's Rights. The Declaration of Rwanda is of particular interest; therein, Rwanda expresses her disagreement to individual complaints being brought by Genocide convicts. See Republic of Rwanda, Ministry of Foreign Affairs and Cooperation, Withdrawal for Review by the Republic of Rwanda from the Declaration Made Under Article 34 (6) of the Protocol to the African Charter on Human and People's Rights on the Establishments of an African Court on Human and People's Rights, No. 000164, 24/2/2016, https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Rwanda.pdf

[236] Application No. 006/2012, Judgment (Reparations) 23 June 2022.

them and the setting up of a Fund in order to support the well-being of the Ogiek in various areas, such as health, education, food security, natural resource management, etc. It should be noted that, the Court issued the judgment on its merits in 2017 whereby it affirmed the violations of the rights of the Ogiek and the judgment on reparations in 2022.

One has to bear in mind that, the execution of judgments is of utmost importance to any human rights protection system (whether regional or universal). Regional human rights bodies usually struggle to uphold rights because of political headwinds. Non-execution of judgements is a matter beyond the judicial sphere; within the regional human rights protection system it is the responsibility of the political organs of the regional inter-governmental organisations, in this case the Assembly of Heads of States and Governments and the Executive Council of the African Union to uphold their role for the implementation of the Courts judgments.

A.5.5 Asian efforts for human rights protection

Asia lacks a regional human rights system. Even though there has been pressure by civil society actors to set up an equivalent to the European, American or African human rights system, the overall slow pace of setting up inter-governmental organisations in the region and the lack of willingness of the governments to agree either on a human rights monitoring body or a human rights convention covering the whole region, are obvious obstacles to the gestation of a regional human rights system. Some scholars refer to the broad geographical and cultural boundaries of Asia which are undefined; given the fact that the region has many sub-regional divisions where there is a multitude of religions, cultures and ethnicities, these scholars question whether it is feasible to identify "a collective identity and a common approach to human rights".[237]

On the other hand, institutional developments in Southeast Asia may reveal that there is an emerging sub-regional human rights system revealing the Asian approach and understanding of how human rights can be protected in a different manner to other regions, such as Europe, Africa or America. For example, in the case of the Association of Southeast Asian Nations (ASEAN), we observe the creation of consultative bodies, such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN

[237] Mayer, B 2013, "Review of Emerging Regional Human Rights Systems in Asia by Tae-Ung Baik", *Journal of East Asia and International Law*, vol. 6, no. 1, pp. 315–317, 315-316; Debra L. DeLaet, "An emerging Asian human rights regime as a tool for protecting the vulnerable in Asia? Lessons from the UN human rights system and other regional human rights regimes", in Fernand de Varennes and Christie M. Gardiner (eds.) *Routledge Handbook of Human Rights in Asia* (Abingdon: Routledge, 11 Dec 2018), accessed 07 Oct 2022 , Routledge Handbooks Online; Renshaw Catherine Michelle (2021) "Southeast Asia's human rights institutions and the inconsistent power of human rights", *Journal of Human Rights*, 20:2, 176-193, http://doi.org/10.1080/14754835.2020.1841611; Ahdanisa, D.S., Rothman, S.B. Revisiting international human rights treaties: comparing Asian and Western efforts to improve human rights. *SN Soc Sci* 1, 16 (2021). https://doi.org/10.1007/s43545-020-00018-0

Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), that lack investigative and enforcement competence over the Member States. Even though the general idea is that the bodies will report to the ASEAN Ministers of Foreign Affairs, this is a loose structure of overviewing the States' progress with regard to the advancement of human rights in the region.[238] However, it is noted that the ASEAN has also produced human rights soft law instruments, such as the ASEAN Human Rights Declaration, which are devoid of legal obligations for the member States.

The limited number of such soft law instruments and the lack of legally binding human rights instruments indicate that the ASEAN member States are still hesitant, if not unwilling, to adopt the monitoring scheme of human rights compliance that the rest of the world has adopted. From a political perspective, this also indicates that States in the region do not see themselves as norm entrepreneurs within the structure of intergovernmental organisations as the Western and African States tend to do within the UN or the regional organisations. However, that does not mean that the region does not generate human rights norms or that it does not leave its imprint on the global *human rights project*.

A.5.6 Conclusion

Regional systems, albeit at different pace, contribute largely to human rights standard-setting and jurisprudence. Regional courts and quasi-judicial bodies, despite their different socio-political contexts, have encountered similar challenges and have produced rich interpretations of human rights issues. Efforts to institutionalise judicial dialogue between the three regional courts have been undergoing the past few years. This is a positive development for enhancing knowledge on the protection of human rights, swiftly dispensing justice to victims of human rights violations, and sharing experiences on the execution of judgments.

Even where there are regional human rights systems in place, there are questions as to whether they serve justice and accountability, given the fact that there are concerns as to whether the states are committed to the full execution of the judgments of the Courts. Other concerns may relate to the fact that certain regional human rights systems are not user-friendly or are not easily accessible; victims of human rights violations may lack the resources or even knowledge on how to use the regional human rights system to prevent abuses from occurring or to remedy the human rights violations that have taken place. It is often the case that the inefficiency of the national legal system sends the wrong message

[238] Yakushiji, K. (2018) "Developments in the Acceptance and Implementation of Obligations Defined in Core UN Human Rights Conventions by East Asian and Southeast Asian Countries," *The Japanese yearbook of international law*, Vol. 60 (2017), pp. 261-313.

to the individuals who may be demotivated from using the regional human rights system to protect their human rights. Cultural, social and even language limitations may also disengage the victims of human rights violations from seeking justice.[239]

This chapter presented the principal institutional, normative and jurisprudential developments at regional intergovernmental level and also discussed how regional human rights courts and other international courts, in essence, speak to each other through their case-law, and as a consequence, they validate the human rights project in a complementary way. What remains to be seen is the Asian effort to set a regional human rights system; one may only speculate how poor the international human rights system without the Asian input is. Furthermore, there are efforts in the Arab world to raise appreciation on accountability for human rights violations[240.] In other sub-regions, such as the Arctic or the Pacific, there is a growing awareness on thematic issues that intersect with international human rights law. If any lesson has been taught by the three existing regional human rights systems is that the regional human rights systems that will emerge need to have strong institutions to anchor their norms and axiomatic values.

[239] Women Enabled International, *Accountability: African Regional Human Rights System Advocacy Guide*, 2021, https://womenenabled.org/wp-content/uploads/2021/09/Women-Enabled-International-accountABILITY-toolkit-African-Regional-Human-Rights-System-Advocacy-Guide-ENGLISH.pdf

[240] International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court*, 2015, https://www.icj.org/wp-content/uploads/2015/04/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf

▪ Important points to remember about "Regional Approaches across Europe, the Americas, Africa and Asia"

When studying the "Regional Approaches across Europe, Americas, Africa, and Asia," it is crucial for students to keep in mind the following important points:

1. Regional Human Rights Systems: Each region has developed its own human rights mechanisms and institutions to address the specific human rights challenges and contexts within that region. These regional systems complement the global human rights framework established by the United Nations.
2. European System: The Council of Europe is responsible for the European human rights system, which includes the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR). The ECHR protects a broad range of civil, political, economic, social, and cultural rights for individuals within the Member States.
3. Inter-American System: The Organization of American States (OAS) oversees the Inter-American human rights system, which includes the American Convention on Human Rights (ACHR) and the Inter-American Commission on Human Rights (I/A Commision on HR). The ACHR protects human rights in the Americas, and the IACHR monitors compliance and investigates human rights violations.
4. African System: The African human rights system is established under the African Union (AU) and includes the African Charter on Human and Peoples' Rights (ACHPR) and the African Commission on Human and Peoples' Rights (ACHPR). The ACHPR protects and promotes human and peoples' rights in Africa, and the ACHPR monitors implementation and investigates violations.
5. Asian System: The Asian human rights system is still in the process of development, with various regional organizations and initiatives working toward the promotion and protection of human rights in Asia. The Association of Southeast Asian Nations (ASEAN) has a human rights body known as the ASEAN Intergovernmental Commission on Human Rights (AICHR).
6. Regional Court and Commissions: Regional human rights systems often include judicial bodies and commissions responsible for interpreting regional human rights instruments, receiving individual complaints, conducting investigations, and making recommendations for remedial actions.

7. Compliance and Implementation: Member States of regional systems have the responsibility to comply with the regional human rights instruments, implement their provisions at the national level, and ensure effective remedies for human rights violations. Monitoring and reporting mechanisms are in place to assess compliance and address challenges.
8. Regional Context and Specificities: Regional approaches take into account the unique historical, cultural, social, and political contexts of each region. Human rights frameworks within regions may reflect regional values, priorities, and challenges, while still being consistent with international human rights standards.
9. Interplay with Global Human Rights Framework: Regional human rights systems interact with the global human rights framework established by the United Nations. They complement and reinforce each other, sharing common principles and objectives of promoting and protecting human rights.
10. Collaboration and Exchange: Regional human rights systems facilitate collaboration and exchange of best practices among Member States, allowing for mutual learning, cooperation, and the development of regional human rights norms and standards.

It is important for students to examine specific cases, landmark decisions and regional initiatives within each regional human rights system to gain a comprehensive understanding of the unique approaches, challenges, and achievements in promoting and protecting human rights at the regional level.

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Test your knowledge

1. **Are there non-member states of the Council that have acceded to the Council of Europe Convention on Action against Trafficking in Human Beings?**

Answer: Yes, Israel. There are other Conventions of the Council of Europe that can be acceded to by non-member states of the Council of Europe. For example, Mexico and the Russian Federation have acceded to the Council of Europe Convention on Offences relating to Cultural Property (CETS No. 221, entry into force 1/4/2022).

2. **Did Member States of the Council of Europe send out notifications regarding the emergency measures they had to implement during the pandemic in order to protect the public health and deal with the impact of COVID-19?**

Answer: Yes. Some of the measures restricted freedom of movement and freedom of assembly. In a particular case, the de facto isolation of a Nigerian national and his detention conditions in Malta were found to be a violation of Art. 3 of ECHR. See https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf

3. **Which State Party to** Convention on preventing and combating violence against women and domestic violence **decided to withdraw from said Convention?**

Answer: On 20 March 2021, Turkey announced its withdrawal from the Convention on preventing and combating violence against women and domestic violence despite the Convention being open for signature in Istanbul and having unanimously been ratified by the Turkish parliament in 2014. A number of UN Rapporteurs condemned Turkey's decision where the risk of violence against women, particularly domestic violence, is particularly high and it has been multiplied in the context of the COVID-19 restrictive measures in Turkey, with a particular impact on women and girls with disabilities and older women.
[https://www.coe.int/en/web/commissioner/-/turkey-s-announced-withdrawal-from-the-istanbul-convention-endangers-women-s-rights];
[https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26936&LangID=E]

4. **Following the Russian aggression in 2022, the** Committee of Ministers **and the Parliamentary Assembly initiated, on 15/3/2022, the procedure of expulsion of the Russian Federation from the Council of Europe. Does this mean that the Russian Federation will not face complaints for the human rights violations committed by its armed forces in Ukraine? What does the expulsion mean for the Russian population?**

Answer: The Russian Federation ceased to be a High Contracting Party to ECHR on 16 September 2022. This means that Russia can be held accountable for any human rights violations committed until 16/9/2022. Regrettably, Russians are deprived of the human rights protection guaranteed under ECHR as of 17/9/2022.

https://www.coe.int/en/web/portal/-/secretary-general-millions-of-russians-no-longer-protected-by-the-european-convention-on-human-rights

5. **Is there an online quiz on the Council of Europe?**

Asnwer: Yes, see here: https://www.coe.int/en/web/about-us/quiz

6. **Within which international organization does the Inter-American human rights protection system operate?**

Answer: The Organisation of American States.

7. **Does the** Inter-American Commission on Human Rights **promote** friendly settlement**?**

Answer: Yes. It is carried out on the basis of the consent of the parties. It can be initiated at any stage of the proceedings before the Inter-American Commission on Human Rights. The procedure of friendly settlement is considered to have a positive impact on specific groups, like Indigenous people or women. The friendly settlements have resulted in having States changing their public policies to ensure the human rights of such groups. The Inter-American Commission on Human Rights carries out a follow-up of the friendly settlement outcome and it includes it in its annual report.

8. **Do State Parties to the** American Convention on Human Rights **incur international responsibility for their acts or omissions?**

Answer: When States ratify the American Convention on Human Rights, they assume responsibilities to the entire American community. States that do not comply with their obligations under the American Convention on Human Rights and the judgment of the I/A Court of HR, essentially incur international responsibility for their acts or omissions. See the *Case of Velasquez-Rodriguez v. Honduras*, Judgment 29/7/1988.

9. **Does the right to education under Article 17 of the** African Charter, **entail the physical safety of children going to school back and forth?**

Answer: The violent abduction of children going to school is a persistent problem and a human rights violation in Africa. The African Commission has repeated incidents of attacks on schools and the abduction of children by non-state armed groups who are later either conscripted or subjected to sexual violence in Nigeria.
https://www.achpr.org/pressrelease/detail?id=581

10. **Do mining activities have a negative impact on the enjoyment of human rights?**

Answer: Mining activities may result in the forceful expulsion of local communities, and thus result in the violation of their human rights, including their cultural rights and their right to free disposal of their wealth and natural resources, and their right to a satisfactory environment for development. See the States' reporting and Working Group on Extractive Industries, Human Rights and the Environment under the principles underlying the rights

guaranteed under Articles 21 and 24 of the African Charter https://www.achpr.org/pressrelease/detail?id=577

11. **How successful is the Protocol on Persons with Disabilities in Africa?**

Answer: Not a single African Member State of the African Union has yet ratified the Protocol on Persons with Disabilities in Africa (as of 4 June 2021). https://reliefweb.int/report/world/state-african-regional-human-rights-bodies-and-mechanisms-2019-2020

12. **Are there any African states that have decided to withdraw the right of individuals and NGOs to directly file cases before the African Court on Human and Peoples' Rights?**

Answer: Yes. For example, Benin, Côte d'Ivoire and Tanzania have decided to withdraw the right of individuals and NGOs to directly file cases before the African Court on Human and Peoples' Rights, thus compromising the enforcement of human rights in their countries. See for example, https://reliefweb.int/report/world/state-african-regional-human-rights-bodies-and-mechanisms-2019-2020; https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/

Documentaries to watch

Here are some documentaries that explore regional approaches to human rights across different continents:

1. *The European Court of Human Rights: Justice for All* (2015) - This documentary delves into the workings of the European Court of Human Rights (ECtHR) and its role in protecting human rights in Europe. It examines significant cases and the impact of the Court's decisions.
2. *In the Name of Democracy* (2016) - This film focuses on the Inter-American Court of Human Rights and its efforts to address human rights violations in the Americas. It explores landmark cases and the court's influence on promoting justice and accountability.
3. *A Common Purpose: The African Human Rights System* (2017) - This documentary examines the African human rights system, including the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. It highlights the challenges and achievements of human rights protection in Africa.
4. *Fireflies in the Abyss* (2015) - This documentary sheds light on the plight of child laborers in the rat-hole mines of Northeast India. It explores the intersection of human rights and labor rights in the region and the challenges faced in addressing exploitation and promoting social justice.
5. *Burma VJ: Reporting from a Closed Country* (2008) - This film documents the struggles of citizen journalists in Myanmar (Burma) who risk their lives to report on human rights abuses and pro-democracy movements. It provides insights into the challenges of human rights activism in Asia.
6. *Law of the Jungle* (2012) - Focusing on Indigenous communities in various parts of the world, including the Amazon rainforest and Papua New Guinea, this documentary highlights the threats they face and their efforts to protect their rights and environment.

Part B

Chapter 1 Right to Life; Abortion; Death Penalty; Right to Die.

Abstract

The Right to Life is one of the most important human rights, since without the right to life it is impossible to enjoy the other rights. The cases that this chapter will discuss are:

Abortion: The UN Human Rights Committee asserts that access to abortion and prevention of maternal mortality are human rights. Comprehensive reproductive health services, including abortion, are necessary to guarantee the right to life, health, privacy, and non-discrimination for women and girls. This human rights issue will be examined from a pro-life and pro-choice perspective in order to illustrate the conflicts of rights-based claims, and the ways that the anthropocentric law order values and prices the value of the individual, autonomy, privacy, the right to health and so on and so forth.

Death Penalty: The death penalty violates human rights, like the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment. Both rights are protected under the Universal Declaration of Human Rights, adopted by the UN in 1948, and by the International Bill of Human Rights. This chapter will examine the arguments for and against the death penalty, and will outline the ways this ancient practice is illegal, and in breach of human rights. Furthermore, a comparative analysis of the legal treatment of this area will be offered, by focusing on the legal language used in ECHR and in the UN's relevant legal instruments.

The Right to Die- The Right to Euthanasia: This section will ask whether there should be a legal right to die. In doing so, it will offer a comparative analysis of relevant case law, and will test the conflict of the right to life v. *the right to die. The right to die is a concept based on the idea that human beings are entitled to end their life as autonomous agents or should be free to choose to undergo voluntary euthanasia*.

Required Prior Knowledge

Human rights, reproductive rights, women's rights, right to life, abortion, death penalty, right to die.

B.1.1 The right to life: A look on the case of Abortion and of the death penalty.

Article 2 of ECHR reads:

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

α) in defence of any person from unlawful violence;

β) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

γ) in action lawfully taken for the purpose of quelling a riot or insurrection.

The Interpretation of Article 2 of ECHR (Download and study this recently updated Guide on Article 2 of the European Convention on Human Rights Right to life, Updated on 31 August 2022) by the Court, is directed by the need to protect any individual human being that requires their right to life to be protected and acknowledged. Article 2 protects the essential right to life of the individual and the interpretation of this area of human rights is in special need of ensuring that its safeguards are practical and at the same time effective, see for example the following case where the need of the safeguards of Article 2 to be practical and effective is being discussed: *McCann and Others v. the United Kingdom*, §146.

Article 2 of ECHR is recognised and acknowledged as one of the most important human rights as far as legal hierarchical thinking is concerned, and it entails fundamental provisions in the Convention. As a result of the recognition of its importance, it allows no derogation under Article 15 of ECHR . In order to understand why it is recognized as an inderogable human right, it is useful to consider the fact that just like Article 3 of ECHR, it protects one of the most valuable goods in any democratic society that are part of the Council of Europe, see for example the following case where this is discussed in more depth: *Giuliani and Gaggio v. Italy [GC]*.

Consequently, its rules must be firmly interpreted, just like it was discussed in the above mentioned case of: *McCann and Others v. the United Kingdom.*

The State obligations under Article 2 include the general obligation to protect, by law, the right to life and the prohibition of intentional deprivation of life, delimited by a list of exceptions as it was ruled in the case of *Boso v. Italy.*

The case of abortion and its relation to the right to life, is a very interesting one. On the one hand, access to safe and legal abortion is a matter of human rights. This is because of various reasons that are worthy of listing. For example, according to essential rules of the human rights doctrine, the responsibility to protect, safeguard and provide the human rights of every citizen, falls upon the shoulders of the States and their governments. Access to abortion can be better framed if viewed from a right to health perspective, although it would surely be easier to formulate strong arguments for advocating for the right to abortion from a feminist perspective, at this chapter our priority is to look at the issues at stake from a human rights standpoint. This area of the human rights doctrine can be examined by asking a variety of questions which, although they might seem at first glance as interconnected, at a second and deeper look they are very much independent in their essential impact and rights protection.

To illustrate this, consider ,for example, examining and analyzing the right to life and its relationship with the following:

- Right to life and abortion;
- Right to life and liberty;
- Right to life and the death penalty;
- Right to life and euthanasia;
- Fetus right to life;
- Right to life in the ECHR;
- Right to life and the UN;
- Right to life and dignity;
- Right to life in international, regional, and national legal systems

This is, by no means, an extensive list of issues or approaches to the complications of ensuring that the right to life is protected in every situation or case, but it is a good demonstration of the most important debates and issues in this area of human rights. On the other hand, it is worth mentioning the new challenges that bio ethics and new technologies bring into this field, like the discussion about the right to life of artificial intelligence machines and robots which are so human=like that they can feel and experience emotions like human beings. This is a very interesting field that is developing rapidly, and it could benefit the student of human rights and the right to life in particular, to have some basic understanding of the new challenges that are being introduced to the relevant debates for the right to life, and to whom and under which circumstances can be extended. To learn more about these debates read this online article.

The right to life is one of the most contested rights even if it is a fundamental one. One of the problems, according to Smith (2013, 217), is that there does not seem to be an agreement on how to define the beginning and end of life. When ideologies and worldviews disagree, there is often no consensus both inside and across states. There are times when a country's laws clash with a particular religion's principles. For instance, whether individuals are allowed to make autonomous choices regarding the beginning and end of life, and whether medical technology is allowed to function as it is capable of functioning.

Everyone has the right to life, liberty, and personal security of person, according to the Universal Declaration of Human Rights (UDHR), which was adopted by the UN in 1948. This item is relatively brief and comes after Articles 1 and 2, which both assert that everyone has the right to each and every one of the rights outlined in the declaration, without limitations. Subsequent articles discuss potential violations of the right to life, such as those caused by slavery, torture, or inhumane treatment. However, the UDHR makes no mention of the death punishment. Later declarations of human rights, expand upon and provide more complexity.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which was approved by the United Nations General Assembly in 1966, addresses the right to life: "Every human person has an inherent right to life. The legislation will safeguard this right. Nobody may be unilaterally denied his life." This agreement criticizes the death penalty but refrains from outlawing it. In its place, it is stated that the death sentence "may only be carried out in accordance with a definitive court judgment" and that it "shall not be imposed for crimes committed by those under the age of eighteen and shall not be carried out on pregnant women" (art. 6).

Article 4 of the American Convention on Human Rights from 1969 mentions the right to life: "Everyone has the right to have his life respected. This right should be safeguarded by the law and, generally speaking, from the time of conception. No one may be robbed of his life arbitrarily." Regarding the legitimacy of the right to life, this norm further makes reference to the *moment of conception*. Even if the remarks on the death penalty are rather negative (art. 4,3: "must not be reinstated in states that have abolished it"), there is no unambiguous prohibition. Instead, it is proposed that this punishment be reserved for the most heinous of offenses and that the verdict be given by a court of competent jurisdiction. The death penalty may not be imposed for political offenses or associated common crimes (Articles 4,4), nor may it be imposed on minors, the elderly, or pregnant women.

Given that the majority of Arab countries are Muslim, their position is rather curious. Article 5 of the Arab Charter on Human Rights (2004) reads, "Every person has an unalienable right to life, which must be protected by law… No one may be arbitrarily deprived of his life." The agreement allows exceptions in emergency situations, but the charter's rights cannot be suspended. A further differentiation is made on the basis of gender. "Men and women are equal with respect to human dignity, rights, and obligations within the framework of positive discrimination provided in favor of women by the Islamic Shariah, other divine laws, and related laws and legal instruments", declares Article 3. Consequently, each State Party commits to take all necessary measures to "promote equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter." Article 6 allows the death penalty "only for the most egregious acts in accordance with the laws in existence at the time the crime was committed and after a final court ruling." The death sentence "shall not be imposed on anybody under the age of 18" (Article 7) or "on a pregnant woman prior to her delivery or on a nursing mother within two years of her delivery; in such cases, the best interests of the baby should be the primary consideration" (Article 7). This paper remains unclear. It is possible to challenge the adequacy of the term *positive discrimination* in the context of human rights, as well as the apparent hierarchy between human rights declarations and the Islamic Shariah, divine principles, appropriate laws, and legal instruments. These sentences are susceptible to several interpretations and exceptions.

The Banjul Charter was adopted in 1987 to promote and preserve human rights and fundamental freedoms on the African continent. Human beings are inviolable, according to Article 4. "Every individual has the right to respect for his life and personhood. No one may be unilaterally deprived of this right," followed by Article 5: "Everyone has the right to

the respect of the inherent dignity of the human person and to the recognition of his legal status". "All kinds of exploitation and humiliating treatment of the human being, in particular slavery, the slave trade, torture, and harsh, inhuman, or degrading punishment and treatment, are forbidden".

The Banjul Charter is hesitant to condemn abuses of personal integrity, notably the death penalty.

Article 2 of ECHR states that, "The right to life should be respected by legislation." "No one shall be purposefully deprived of his life unless in the execution of a court sentence after conviction for a crime for which the death penalty is prescribed by law." Regarding the right to life, the State has both negative and positive duties. 1. On the one hand, the State must protect all individuals against violent actions committed by others. A condition is that the government is aware of it and fails to prevent it. It is insufficient for the State to just declare its objective; it must act successfully. The State must also safeguard individuals from self-harm, such as when it is clear that prisoners pose a suicide risk. The State must also protect people who reside near dangerous industrial sites, as well as everyone who faces a predictable natural calamity. In contrast, the State may use fatal force in extremely limited circumstances. These instances include defending someone from illegal aggression, effecting a legitimate arrest or preventing the escape of a legally detained individual, and taking authorized action to suppress a riot or uprising. The Council of Europe refers to these situations as *exhaustive exceptions* and makes the following provision: "Before resorting to lethal force, the State must satisfy a very stringent test: it must be no more than strictly necessary to achieve one or more of the authorized purposes and strictly proportional to that purpose. It is not sufficient to reconcile individual rights and public interests." 2. In this sense, the right to life is presently being debated since it must be determined whether persons who have fled to Europe may be repatriated to their perilous home countries. Regarding the death sentence, European nations have undergone a significant transformation. Protocol No. 13 (2002) abolishes the death penalty under all circumstances, but Protocol No. 6 (1983) authorizes governments to impose the death sentence in times of conflict or in times of war. Belarus is the only nation in Europe with a statute permitting the use of the death sentence.

The texts to which we refer, do not expressly address the problems of abortion and euthanasia, as they do not address a large number of other situations that influence the right to life. The application of the right to life, to abortion and to euthanasia was left for human rights organizations, according to Smith (2013, 220). When it is declared that pregnant women should not be executed, however, the unborn child's life is taken into consideration. However, when the right to life is being discussed at the level of the nation-state, both abortion and euthanasia are major issues. There are significant variations of opinion in a number of nations over whether, and under what circumstances, abortion and euthanasia should be banned. Others feel that no one should be permitted to make decisions about his or her own life or the life of another human being. Religions place a great deal of emphasis on the subject of who has the authority to dispose of life.

B.1.1.1 Abortion

“Every human being has the intrinsic right to life”, reads the opening phrase of Article 6 (1) of the International Covenant on Civil and Political Rights of 1966. Concerning abortion, the issue of whether or not the unborn child is considered part of *every human being*, naturally arises. Does the unborn child have any protection under the law?

Not until the Soviet Union legalized abortion in the 1950s, did countries in the Soviet bloc pass more permissive abortion laws. The 1967 Abortion Act of the United Kingdom legalized abortion for the first time in the Western world, establishing a precedent that was subsequently adopted by other countries. In the United Kingdom, abortions are prohibited beyond 24 weeks of pregnancy unless the mother's life is in danger, she or her other children's health will be affected, or the unborn child has a serious defect that would significantly impair their quality of life. Abortion beyond this time is equivalent to murder since the infant may live outside the womb (Brown 2007, 249; Brugger 2014, 135). Numerous communist countries in Europe and Asia legalized abortion in the second part of the twentieth century, following the United Kingdom and the United States; now, an estimated 50 million abortions are done yearly worldwide (Hostetler and Coulter 2007, 1).

The Medical Termination of Pregnancy Act of 1971 legalized abortion in India. 11 Up to the 20th week of pregnancy, doctors may terminate a pregnancy if they have good cause to do so, such as when the mother's life or mental health is in danger, when she is a minor or of an unsound mind, when the child's life is in danger, or when the pregnancy is the consequence of rape. After modifications, the list of reasons for termination of the pregnancy is so broad that India is one of the six nations that enables abortion on all grounds, but not on request (meaning endorsement by a doctor is still required). It is possible to get a sense of the scope of the abortion problem by looking at data compiled by the World Health Organization (Sedgh et al., 2016): between 2010 and 2014, it is estimated that around 35 abortions occurred per 1000 women aged 15 to 44, globally. Official abortion rates in India are rather low. According to the data provided by the Indian Council of Medical Research, there are 6.1 abortions for every 1,000 women in the age range of 15 to 44, annually. However, it is believed that around two thirds of abortions occur outside of formal health care facilities (WHO 2011, 22; George et al. 2017, 532). Abortion of female foetuses is commonplace in India because to the country's patriarchal culture, where having a daughter is often considered as a financial burden due to the tradition of dowry. This is why numerous states in India have banned prenatal sex testing. However, the Indian State seems to be complicit in unlawful abortion, leading to the termination of female foetuses, despite the fact that this contributes to the issue of population expansion (Menski 2007, 36f; Wujastyk 2012, 637). The birthrate clearly reflects the prevalence of sex-selective abortion. Since the 1980s, India has had alarming sex ratio data, with a disproportionately larger number of births of males. There is a natural tendency toward a preponderance of male offspring, although not to the level found in certain regions of India. Especially in the western region of the nation, from Punjab to Maharashtra, there are 136 males born for every 100 girls in certain places. In India, there were 109.1 males born for every 100 girls in 2011. (i.e. 917 girls for 1000

boys). Not surprisingly, there is a correlation between religious affiliation and the male-to-female birth ratio, with Sikhs having the highest (129.8 boys to 100 girls) and Jains having the lowest (118.0 boys to 100 girls) excesses in 2001, followed by Hindus (110.9), Muslims (107.4), and Christians (103.8). (Guilmoto 2007, 8; Hvistendahl 2011, 5ff). Given these variations, a cross-religious examination of how religious beliefs and practices shape perspectives on abortion, is timely.

In reference to section 299 of the Indian Penal Code, which deals with murder, it is made clear that " the causing death of a child in the mother's womb is not homicide". However, if any part of a living child has been brought into the world, even if it hasn't yet breathed or been born completely, the death of that child may be considered murder. The murder of an unborn child is a particularly heinous crime" (IPC 316).

Permitting legal exceptions to the legislation against killing, as in the circumstances of euthanasia and abortion, is seen to be a slippery slope. "When a community determines that some types of killing are moral, there is an ever-increasing likelihood that it will provide permission for even more killing" (Kelly 1994, 351).

Allowing exceptions to the law prohibiting killing, as in the cases of euthanasia and abortion, is seen as a dangerous precedent. As a society accepts the legitimacy of some forms of murder, it is more likely to sanction other forms (Kelly 1994, 351).

However, there are competing viewpoints that argue that, once a person's dignity is stripped away, their existence is no longer worthy of being called human. In other words, a patient or observers may decide that a life of excruciating agony with no hope of rehabilitation is not worth living. The same is at risk when a pregnancy is the consequence of rape or incest, or when doctors predict substantial danger to the mother and/or a major deformity in the unborn. Several nations (listed above) have voted abortion and euthanasia legislation, and others have kept or reinstated the death sentence, due to these kinds of concerns.

This begs the question, whose life is it that it may be disposed of? Does the person have any claim to his or her own life? Is there a way for the public to weigh in on the question of who gets to decide who gets to live and who doesn't? When it comes to deciding what happens to another person's or one's own life, do humans have any business making such decisions? Once again, there may be several valid ways to respond to these questions. Some maintain the absolute non-disposability of life by appealing to the categorical principles of Immanuel Kant (1785), while others show concern for quality of life by emphasizing the notion of autonomy espoused by John Stuart Mill (1859; 1998).

To best defend the autonomy of every female citizen and maternal health, it is the obligation of the State to make abortion available in a democratic society where human rights are acknowledged, protected, and maintained. It is ironic that, in this day and age, we still have to defend and explain why a woman's right to bodily autonomy supersedes an embryo's dubious right to life.

Abortion is a human right, and it should be protected by law. Restricting abortion rights is discriminatory and violates a number of women's human rights. Human rights treaty bodies at the United Nations have repeatedly urged governments to decriminalize

abortion in all circumstances and to guarantee access to safe, legal abortion in at least some situations, including those involving a teen pregnancy caused by rape or other forms of violence, or a serious medical emergency. As we can see, patriarchy is deeply ingrained in the world's binary legal systems, and to this day, legislators refuse to recognize that the right to autonomy necessitates preventing the legal treatment of the female body as a vessel for bringing new life. As a vessel and not as an autonomous human being with the sovereignty to decide on her own body.

By making abortion illegal, many basic human and women's rights are trampled upon. Human rights legislation, on the one hand, states that all nations are obligated to provide all citizens' rights to physical and mental well-being, including the right to sexual and reproductive autonomy. Human rights to freedom from discrimination and equality; to life, health, and information; to freedom from torture and cruel, inhuman, and degrading treatment; to privacy and bodily autonomy and integrity; to determine the number and spacing of children; to freedom; to enjoy the benefits of scientific progress; and to freedom may all be at risk in countries where safe and legal abortion services are unreasonably restricted or not fully available.

The Universal Declaration of Human Rights establishes and guarantees these rights, as do numerous international treaties such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (UN CRC), as well as numerous regional treaties.

Legal limitations on abortion typically lead to more illicit abortions, which may be dangerous and may generate increased maternal mortality and morbidity, putting the right to life in jeopardy. Thus, pregnant people's lives are at jeopardy when they do not have access to safe and legal abortion.

According to the World Health Organization (WHO), pregnancy-related complications are the leading cause of mortality among teenage girls worldwide, and the risk of health difficulties and death from pregnancy is greater among adolescents ages 10 to 14 than it is among adults. The World Health Organization has determined that fewer abortion bans lead to lower rates of maternal death.

Abortion legislation and the safety of women and girls have been linked by the UN Human Rights Committee (HRC), which oversees governments' adherence to the ICCPR. To protect their right to life and pregnant women's health, States Parties cannot control access to abortion, if doing so, would lead to individuals resorting to unsafe and illegal abortions. Consequently, States must ensure safe access to abortion. It is the responsibility of the State to protect pregnant women from harm, particularly if the pregnancy is the consequence of rape or incest, as noted above.

The UN Human Rights Committee has categorically ruled that restricting access to abortion is a violation of the principle of nondiscrimination against women. Both the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) have stated on multiple occasions that restricting abortion leads to a cascade of human rights violations and puts citizens at risk of harm and suffering as a result of illegal and unsafe abortions.

Furthermore, the Committee on Economic, Social, and Cultural Rights has stated that "[a] wide range of laws, policies, and practices undermine the autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health," such as the criminalization of abortion or restrictive abortion laws.

In a 2015 press release, United Nations experts noted that "the entire prohibition on abortion disproportionately impacts impoverished women in El Salvador".

In light of the complete fulfillment of sexual and reproductive rights, which includes access to safe, legal abortion, it has been repeatedly emphasized by UN human rights treaty authorities that abortion should be decriminalized.

The following are some examples of remarks made by various international mechanisms that are pertinent to the human rights infrastructure:

Compliance with CEDAW is monitored by the CEDAW Committee, which made the following statement:

Abortion that is not properly supervised is a primary cause of maternal death and disability. States Parties should ensure that women have access to quality post-abortion care, particularly in the event of complications resulting from unsafe abortions, and legalize abortion at the very least in the cases of rape, incest, threats to the life and/or health of the mother, or severe fetal impairment. Abortion-related criminal penalties should likewise be eliminated from all parties' legal systems.

Upon reviewing their compliance with the pact, the committee has offered similar suggestions to several nations. Recommendations like these often urge governments to make abortion accessible to all people, legalize abortion in the aforementioned instances, and remove all criminal penalties.

The Human Rights Committee, which ensures the ICCPR is upheld, has defined the extent of States' duty to defend the right to life of women and girls in light of restrictive abortion legislation. "restrictions on the capacity of women or girls to seek abortion must not, et alia, risk their lives," the resolution reads. The committee has often voiced its displeasure with the prohibition of abortion and pushed for greater access to the procedure.

The Human Rights Committee, the Committee on Economic, Social, and Cultural Rights (which monitors the International Covenant on Economic, Social, and Cultural Rights), and the Committee against Torture (which monitors the Convention against

Torture) have all made similar recommendations as the CEDAW Committee, including that abortion be decriminalized and that women have access to safe, legal abortion. Risks to mental health, such as acute suffering and suicide risk, have been linked to the absence of safe abortion options. The United Nations Committee Against Torture has found that criminalizing and making abortion inaccessible can be incompatible with a government's duty to uphold the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment, highlighting the clear link between mental health and restrictions in access to reproductive health.

The United Nations Committee on the Rights of the Child has made similar recommendations, stating that governments should "decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents, and ensure that their views are always heard and respected in abortion-related decisions." The committee has often demanded that abortion be decriminalized *in all situations* in its concluding findings after evaluations of treaty conformity by individual states.

According to the United Nations special rapporteur on the right to health, criminal laws that punish or prohibit induced abortion are "impermissible impediments to the implementation of women's right to health and must be repealed".

Considering abortion as a right necessitates a closer examination of the *Roe v. Wade* case from the USA. The U.S. Supreme Court issued a landmark decision in an abortion-related case on January 22, 1973, ruling by a majority of 7-2 that overly strong State control of abortion is unconstitutional.

The Court held that a set of Texas statutes criminalizing abortion in most cases violated a woman's constitutional right to privacy, which it found to be implicit in the liberty guarantee of the Fourteenth Amendment's due process clause ("...nor shall any State deprive any person of life, liberty, or property, without due process of law").

Norma McCorvey (1947-2017), the plaintiff, filed a federal lawsuit against Henry Wade, the district attorney of Dallas county, Texas, where Roe lived, in 1970 using the fictitious name *Jane Roe* to hide her identity. The Supreme Court made an effort to strike a balance between a woman's right to privacy and a state's interest in restricting abortion after rejecting Roe's statement of an unrestricted right to end a pregnancy in any form and at any time. Blackmun stated that lawmakers must draft legislation carefully "to represent solely the genuine State interests at stake" because only a *compelling State interest* may justify restrictions on *basic rights* like privacy.

The Court then endeavored to weigh the State's different compelling interests in pregnant women's health and fetuses' future life. It set the moment at which a State's compelling interest in the health of a pregnant woman would allow it to restrict abortion at "about the end of the first trimester" of pregnancy. In terms of the fetus, the Court determined that moment to be the "capability of meaningful existence outside the mother's womb," or viability, which occurs at 24 weeks of pregnancy.

In 2022 however, the United States Supreme Court repealed the constitutional right to abortion. In June 2022, the United States Supreme Court abandoned its responsibility to preserve basic rights and reversed *Roe v. Wade*, concluding that there is no constitutional right to abortion. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overturns over 50 years of precedent and is the first time in history that the Court has taken away a basic right.

The Court's ruling will almost certainly result in half of the United States taking immediate steps to outright outlaw abortion, requiring individuals to travel hundreds or thousands of miles to seek abortion treatment or to carry pregnancies against their choice, a terrible violation of their human rights.

B.1.1.2 Death Penalty

In 1965, the United Kingdom abolished the death sentence for most murders. The abolition was not total, though. Rather, the death sentence was established for treason, piracy with violence, and other military offenses under the same legislation. It is not well known that the death penalty was just abolished in the UK for these types of crimes less than 10 years ago. The Human Rights Act of 1998 was the well- named law that finally put an end to the last of the death sentence. The fact that the abolition of the death penalty has not put an end to public discussion in this area, is significant in today's rapidly developing globe. Such discussion periodically resurfaces; for instance, a top judge in the Republic of Ireland recently resigned after making contentious statements about *gangland* murders. It is an undeniable reality that proposals to reinstate the death penalty as punishment for the most terrible of crimes regularly appear, whether they be reasonable, moderate, or otherwise. Such discussions now attract a wider audience and have more well-informed participants and contributors than ever before, thanks to the widespread availability of information online.

The right to life must always be critically examined in any discussion about capital punishment. Before discussing the modern safeguards, we shall provide a few words on the common law and parliamentary legislation's historical safeguards. The common law has always acknowledged the inviolability of human life. Blackstone, writing in the seventeenth century, called life “the direct gift of God, a right inherent by nature in every person”. 10 Blackstone also pointed out that killing someone is never justified if it is done to protect one's own life, but that killing someone else in self-defense is an exception to this rule. Life's legal beginning is still a hotly contested issue that deserves its own discussion. Clarity has emerged around the time at which a person's life is considered to be over according to the law, with *brain stem death* being widely regarded as the accepted term. The law has also historically established a variety of safeguards for the unborn child. The Offenses Against the Person Act of 1861 is a great example; it made abortion (the purposeful producing of a miscarriage of a child capable of being delivered alive) illegal. And under the Infant Life (Preservation) Act of 1929, it is illegal to endanger the life of a newborn who has a chance of surviving the delivery. Abortions have been legal in the

United Kingdom since the passage of the Abortion Act in 1967, which legalizes the termination of a pregnancy under certain circumstances. Last but not least, euthanasia or *mercy killing* is, in starkly basic terms, the murder of another human being; and, for the time being at least, it remains illegal. This is because the law has traditionally sought to protect the most vulnerable members of society.

Constitutions and international treaties all across the globe include language protecting the right to life. Neither the right to life nor the right to be free from cruel and unusual punishment were originally intended to be guaranteed by the United States Constitution (in 1787). During the two centuries that followed, the first of these two rights, the due process clause, gradually became the centerpiece of human rights protection thanks to an amendment: the Eighth Amendment, which bolstered and expanded the Fifth Amendment, which most commentators consistently link with Magna Carta 1215 and is known as the due process clause. Capital punishment has been deemed illegal, on occasion, by the US Supreme Court due to its status as a harsh and unusual punishment. 14 In a landmark judgment from 1878, the Court determined that execution by firing squad did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. However, the Supreme Court has recently emphasized the need of interpreting the Eighth Amendment in light of “the developing norms of decency that signify development in a mature community”. In another instance, the Supreme Court ruled that North Carolina's death penalty statutes violated the Eighth Amendment because they did not allow for judges to make case-by-case decisions.

Everyone has the right to life, liberty, and security of person; this is a fundamental principle enshrined in the Universal Declaration of Human Rights, which was approved by the United Nations General Assembly in 1948 and has become a cornerstone of international law.

As a matter of significance, the right to life is not given the highest priority in this document. Article 3 is where it finally shows up. Each individual is endowed by their creator with inherent worth and a set of unalienable rights, as stated in Article 1 of the Declaration of Human Rights. They have the ability to think for themselves and make moral decisions, therefore they should treat one another with compassion.

Article 2 guarantees everyone the same opportunity to enjoy all of the rights and freedoms proclaimed in the Declaration. The United Nations declared December 10 to be International Human Rights Day in honor of the proclamation. While the UN Declaration seems to recognize the right to life without qualification, it is worth pausing to note that, this has been an uncommon occurrence throughout the history of the concept. Article 2(2) of ECHR, to name just one prominent example, expressly permits the intentional deprivation of life where it results from the use of force which is no more than is necessary in any of the following three situations:

a. In defence of any person from unlawful violence;
b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. In action lawfully taken for the purpose of quelling a riot or insurrection.

As the European jurisprudence makes abundantly apparent, these exemptions are extensive and need a strict interpretation.

Even more notably, the ECHR's initial version included death punishment as an exception to the right to life. Given that the Convention was drafted in the early aftermath of World War II, when the death sentence was still part of the domestic legislation of most of the putative States Parties, this was inevitable. Over the course of the last sixty years, this has become the unusual case rather than the norm. Furthermore, the ECHR itself has developed: the Sixth Protocol entered into force on 1 March 1985 (and was ratified by the UK on 27 January 1999), making the death sentence illegal even during times of peace. This Protocol cannot be modified in any way, and no exceptions may be made to it. 20 Members of the Council of Europe who ratified the Sixth Protocol had either already abolished the death penalty or were legally obligated to do so. An important takeaway is that, extradition to a nation where there is a substantial possibility of exposure to the death sentence, is prohibited under the Sixth Protocol.

The year 1948 was a pivotal one in the annals of contemporary history. It was highlighted by the United Nations Declaration on Human Rights and the American Declaration on the Rights and Duties of Man, the Final Act of the Ninth International Conference of American Governments held in Columbia, which was promulgated by a number of Latin American States. However, this is not a legally binding agreement on a global scale. As a further drawback, most of the governments who signed on to it were, and still are, mired in a web of inconsistencies when it comes to protecting human rights. Each individual has the inherent right to life, liberty, and the security of his or her person, as stated in Article 1.

There is one factor, in particular, that makes the example of this Declaration, particularly interesting. In the first chapter, it enumerates many protections that the reader is afforded. In contrast, a list of individual responsibilities is outlined in Chapter 2. This Declaration constituted the foundation for the far more robust model developed by the American Convention on Human Rights, notwithstanding its inherent weakness as a human rights protection mechanism (1969).

When the American Convention on Human Rights was ratified in 1969, it marked a turning point in the defense of human rights and a significant strengthening of existing protections. This set up the Organization of American States' human rights protection system, including the I/A Court of HR 22 and the Inter-American Commission on Human Rights. As a signatory to the Convention, the United States has unfortunately never ratified it. Twenty-one countries have officially acknowledged the Court. Notably, Trinidad and Tobago put off ratification on May 26, 1998, due to debate about the death sentence. 23 Surprisingly, the American Convention on Human Rights treats the right to life and the death sentence as if they were synonymous:

1. Everyone has the right to have his life treated with dignity and respect. This is a fundamental human right that should be guaranteed by law and generally

recognized as of the moment of conception. Nobody's life may be taken away from him without a good reason.

2. In countries that have not abolished capital punishment, executions are carried out only in cases of the gravest of crimes, following a final judgment from a court of competent jurisdiction, and in accordance with a law establishing such punishment that was in place before the commission of the crime. No new offenses, for which this penalty does not already exist, will be added.
3. States that have abolished the death penalty must not reinstate it.
4. There must be no executions for political offenses or ordinary crimes including political offenses under any circumstances.
5. No one who is under the age of eighteen or above the age of seventy at the time of the crime will be subject to the death penalty; nor may it be applied to pregnant women.

Amnesty, pardon, or commuting of sentence may be given in all situations to those who have been sentenced to death, per paragraph (6). While such a petition is awaiting a judgment by the relevant authorities, the death penalty must not be carried out.

When it comes to the connected topics of the right to life and the death sentence, this is perhaps the best advice you can get. The murder of 15 Peruvians by the state-sponsored *Colina Group*, a killing squad which included active-duty troops, illustrates the effectiveness of this international protection framework for human rights. The Court's remedies included monetary reparations, the overturning of contentious amnesty statutes, and the creation of a new crime of *extra judicial killing* under Peruvian law.

For a model similar to the United States' own Convention on Human Rights, look no farther than the International Covenant on Civil and Political Rights (1966) (or 'ICCPR'). Every person has the right to life as stated in Article 6(i). This privilege will be safeguarded by the state. An important question at stake in No one shall v. Uruguay, was whether or not the decedent's life had been taken from him without due process.

This, however, is followed by a series of clauses that prescribe the death punishment in great detail. This penalty is legal, but only for “the most heinous offences” and “pursuant to a definitive decision delivered by a competent court”: per paragraph (2). Furthermore, the ability to petition for clemency or commutation of sentence must be triggered for each death sentence: per paragraph (4). All persons under the age of eighteen and all pregnant women are excluded from the death penalty unless they are in jail and have committed suicide. The Committee was unable to reach a final determination about the cause of death. However, it determined that the Uruguayan authorities were at fault for failing to take necessary efforts to safeguard his life, as required by Article 6. (1).

A large portion of the instances reviewed by the Committee have concerned either the killing or disappearance of individuals who were in the custody of the state. According to Herrera Rubio v. Columbia29, the complainant's parents were forcibly taken from the

country by State officials. They weren't discovered until a week later, dead. The circumstances and cause of their death were not determined with any certainty. Nonetheless, the Committee decided that Article 6 had been violated (1).

It said: The State Parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

The United Kingdom joined the growing list of countries that have ratified the ICCPR's Second Optional Protocol after its entry into effect on March 23, 1976. (from 10 March 2000). According to Article 1(1) of the Protocol, no person inside the territory of a State Party to the present Protocol shall be subject to execution.

In contrast to the European Convention on Human Rights' Sixth Protocol, this one is not limited to times of peace. The ICCPR created the UN Human Rights Committee as its enforcement and supervisory mechanism. Specifically, it has emphasized the need of taking steps to eradicate starvation and epidemics, as well as reducing infant mortality and increasing life expectancy, as required by Article 6(1).

B.1.1.3 Right to die

As human societies progress around the world they gradually enter into debates around the concept of human beings being entitled to end their life. This chapter examines the issue of euthanasia and medically-assisted suicide, which is effectively the ending of a person's life at his/her explicit request.[241] Euthanasia is the act of intentionally ending the

[241] The chapter does not address the issue of the withdrawal or withholding of life support. See for example Manchester University NHS Foundation Trust v Fixsler (No. 2),[2021] EWHC 2664 (fam), https://www.judiciary.uk/wp-content/uploads/2021/10/Manchester-University-NHS-Foundation-Trust-v-Fixsler-No.2.pdf This case makes an interesting read as it affirms that what is best for a child does not necessarily equate to prolonging the child's life. Furthermore, it affirms that children's best interests tramp the parents' religious beliefs and convictions (here, the hospital had reached the decision that it was in the child's best interests to have her life-support withdrawn and the Jewish parents were against this decision due to their profound religious beliefs in sanctity of life). See also Prince v Massachusetts (1944) 321 US 158, which was cited in this case too: "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the State as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor [sic] and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death … [T]he State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction …", para. 16. High profile cases such as the Alfie Evans, the Charlie Gard or Archie cases have illustrated the conflict between healthcare professionals and parents whose views on prolonging a sick child's life may be completely different, with the parents filing complaints before UK courts in order to enforce their choice of treatment over the

life of a person to relieve suffering by someone other than the person concerned at the latter's request- for example a lethal injection administered by a doctor. Medically-assisted euthanasia (or voluntary assisted death) is the act that is undertaken by the person him/herself with the help of authorized-by-the State appropriate personnel- for example, a doctor or a nurse.

Euthanasia is a highly divisive matter. Professional associations, civil society actors, religious institutions, policy-makers, national parliaments and courts have embarked on a dialogue that cuts across legal, bio-ethical, religious, cultural and even health and economic-related aspects of the right to die. As a practice, it is a criminal offence in most of the countries around the world. Euthanasia and/or medically-assisted death can be legally practiced in the Netherlands[242], Belgium[243], Luxembourg[244], Colombia[245], Spain[246], New Zealand[247] and Canada[248]. Medically-assisted death, excluding euthanasia, is legal in US States (Oregon[249], Washington[250], Montana[251], Vermont[252], California[253], Colorado[254], Washington D.C.[255], Hawaii[256], New Jersey[257], Maine[258], New Mexico[259]), all Australian

healthcare professionals' suggested treatment. See Hollie Dance & Paul Battersbee v Barts NHS Foundation Trust & Archie Battersbee [2022] EWCA Civ 1055, 25 July 22; *Evans v. the United Kingdom* (application no. 18770/18), 23/4/2018, Great Ormond Street Hospital v Yates & Ors [2017] EWHC 972 (Fam) (11 April 2017). Wilkinson D, Savulescu J. "Ethics, conflict and medical treatment for children: From disagreement to dissensus [Internet]". London (UK): Elsevier; 2018 Sep 4. Chapter 1, The Charlie Gard case. Available from: https://www.ncbi.nlm.nih.gov/books/NBK537990/; Wilkinson D, Savulescu J "Hard lessons: learning from the Charlie Gard case" Journal of Medical Ethics 2018;44:438-44; Linney M, Hain RDW, Wilkinson D, et al, "Achieving consensus advice for paediatricians and other health professionals: on prevention, recognition and management of conflict in paediatric practice", Archives of Disease in Childhood 2019;104:413-416; Pruski M, Gamble NK. "Reasonable Parental and Medical Obligation"s in Pediatric Extraordinary Therapy. Linacre Q. 2019 May;86(2-3):198-206. http://doi.org/10.1177/0024363919849258. Epub 2019 Jun 24. PMID: 32431410; PMCID: PMC6699046.

[242] Effective as of 12/4/2001.

[243] Effective as of 2/5/ 2002.

[244] Effective as of 18 /12/2009.

[245] Effective as of 1997. Colombia's Constitutional Court backed physician-assisted suicide in 2022. Taylor L., "Colombia becomes first Latin American country to decriminalise assisted suicide", BMJ 2022; 377. https://doi.org/10.1136/bmj.o1219

[246] Effective as of 25/6/2021.

[247] Effective as of 7/11/2021.

[248] Quebec since 2014, nationally as of June 2016.

[249] Effective as of 27/10/1997.

[250] Effective as of 5/3/2009.

[251] Effective as of 31/12/2009 (The only states that has legal physician-assisted suicide via a court ruling, Baxter v Montana).

[252] Effective as of 20/5/2013.

[253] Effective as of 9/6/2016.

[254] Effective as of 16/12/2016.

[255] Effective as of 18/2/2017.

[256] Effective as of 1/1/2019.

[257] Effective as of 1/8/2019.

[258] Effective as of 19/9/2019.

[259] Effective as of 20/6/2021.

States[260] (Victoria, Western Australia, Tasmania[261], South Australia[262], Queensland[263], New South Wales[264]) and Switzerland.

B.1.1.3.1 Absence of the "Right to die" under human rights law

The existing international human rights instruments at global and regional level do not contain an explicit reference to the right to die. UN human rights bodies and regional human rights bodies have consistently refrained from recognizing a right to die under human rights law which is quite understandable given the fact that the concept of ending one's life flies against the fundamental principle of the right to life and the value of human life.

Even though the right to die is not stipulated in any of the international human rights instruments, this does not mean that they do not offer ample space for deliberation as to the scope and the meaning of the rights that are guaranteed therein and their connection to the right to die. For the euthanasia-proponents, the right to die should be viewed as an integral element of the principle of human dignity,[265] autonomy and the right to private life.[266] The right to private life encompasses the notion of personal autonomy. *Ab initio* human rights confer, to all persons, the freedom to choose how they live their lives; hence, "the right of every person to make life-ending decisions in order to avoid an undignified and distressing end to life"[is] "a right that follows from the right to respect for private life".[267] Soft-law has also been employed by scholars in order to justify a right to die by reference for example to the UNESCO Universal Declaration on Bioethics and Human Rights.268

The right to die can also be seen as an extension of the right to life as a dignified death is on the spectrum of the normative context of the right to life. This is nicely summed up in a Canadian Supreme Court case:

> Some argue that the right to life is not restricted to the preservation of life, but protects quality of life and therefore a right to die with dignity. Others argue that

[260] It should be noted that voluntary assisted dying is not legal in the Northern Territory and Australian Capital Territory due to Commonwealth Law limitations.
[261] Voluntary assisted dying will become effective in Tasmania on 23 October 20222
[262] Voluntary assisted dying will become effective in in South Australia on 31 January 2023
[263] Voluntary assisted dying will become effective in Queensland on 1 January 2023.
[264] Voluntary assisted dying will become effective in New South Wales on 28 November 2023.
[265] Baumann, Holger, and Peter Schaber, 'Human Dignity and the Right to Assisted Suicide', in Sebastian Muders (ed.), Human Dignity and Assisted Death (New York, 2017; online edn, Oxford Academic, 19 Oct. 2017), https://doi.org/10.1093/oso/9780190675967.003.0013 (accessed 15 Sept. 2022).
[266] See Belgian Constitutional Court, para. B. 26.
[267] *Ibid*.
[268] Article 5: "The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. For persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests.", Article 10: "The fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably."

> the right to life protects personal autonomy and fundamental notions of self-determination and dignity, and therefore includes the right to determine whether to take one's own life.[269]

The right to life entails both positive and negative obligations for States. Accordingly, States must take positive measures to protect and guarantee the right to life of individuals and refrain from actions that violate the right to life, for example the lack of timely health care.[270] Yet the right of autonomy and to private life may conflict with the right to life and even the freedom from torture in the context of dignified death. For example, medicinal and technological advancement may disproportionately extend a person's life and thus his/her suffering. On this basis, a state's negative duty not to infringe on a person's autonomy and private life has to be weighed against a state's positive obligation to take reasonable measures to preserve that person's life under the right to life. However, there is no positive obligation for a State to prolong an individual's life.[271] For example, the practice of withdrawing life-prolonging medical treatment is considered to be legal and compatible with human rights law. Also, medical associations and national courts around the world have accepted the rights of patients to reject life-sustaining medical treatments, even if the withdrawal may result in death. For example, in the case of *Rodriquez v. British Columbia*, it was stated that there is "…a common law right of patients to refuse to consent to medical treatment or to demand that the treatment, once commenced, be withdrawn or discontinued. This right has been specially recognized to exist even if the withdrawal from or refusal of treatment may result in death".[272]

What is rather expected from States is to strike balance between the sanctity of life and the individual autonomy (with reference to quality of life) of the person concerned. In *Lambert and others v. France*[273] the decision of the doctors to withdraw artificial nutrition and hydration of Mr. Lambert, who was tetraplegic and with permanent brain damage, was found to be compatible with France's positive obligations under Article 2 of ECHR ("to take appropriate steps to safeguard the lives of those within its jurisdiction").

Furthermore, even though there is a right to life, it does not mean that there is a correlative duty to live; the Canadian Supreme Court has stated:

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[269] *Carter v. Canada (Attorney General)*, para. 59.

[270] *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, [2005] 1 S.C.R. 791, paras. 38, 50.

[271] See *Airedale N.H.S. Trust v. Bland*, [1993] 2 W.L.R. 316 where the House of Lords stated that the sanctity of life is not absolute one.

272 *Rodriguez v. British Columbia* (Attorney General), Case No. 23476, [1993] 3 SCR 519, 30/9/1993, citing also *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119, *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. S.C.); and *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do See also *K.S. Puttaswamy and another v Union of India and Others*, (2017) 10 SCC 1.

[273] Application No. 46043/14, [2015] ECHR 185.

> [w]e do not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect.[274]

The Indian Supreme Court has also dealt with the human right aspect of ending-life practices and through its recent judgments it has reset the paradigm on the right to die In *Gian Kaur v. State of Punja*b,[275] the Supreme Court moved from the question of whether there is right to die to whether there is right to die with dignity. The Court acknowledged that the constitutional right to life does not include a right to die, yet the right to live with dignity encompasses a right to die with dignity:

> 24… The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life.
>
> 25. A question may arise, in the context of a dying man who is terminally ill or in a persistent vegetative State that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the "right to die" with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician-assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to

[274] *Carter v. Canada (Attorney General)*, para. 63.
[275] (1996) 2 SCC 648.

interpret Article 21 to include therein the right to curtail the natural span of life.[276]

In a more recent judgment, the Indian Supreme Court affirmed that the *right to die with dignity* is a fundamental human right. It is encompassed in the fundamental right to *live with dignity* under Article 21 of the Indian Constitution and that principle of autonomy (self-determination) should override the states' interest when a competent adult person refuses medical treatment even if such a decision entails the risk of death.[277]:

> (ix) Right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and liberty. (x) It has to be stated without any trace of doubt that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery. (xi) A failure to legally recognize advance medical directives may amount to non-facilitation of the right to smoothen the dying process and the right to live with dignity…[278]

With this case, the Indian Supreme Court legalized passive euthanasia but it shied away from allowing for active euthanasia that is the overt, affirmative act to end a person's life.

Public support for euthanasia has been increasing in Western countries despite euthanasia or physician-assisted dying remaining a criminal offence. Public support has a relative decline in Eastern Europe.[279] The complexity surrounding euthanasia practices is also amplified when these practices involve persons with psychiatric illnesses or disorders: the majority of the above countries make the practices accessible only to persons with somatic diseases in a terminal phase, with only a few such as the Netherlands, Belgium and Luxembourg allowing for persons with psychiatric disorders to have access to end-of-life practices.[280] The request for a medical aid in dying by psychiatric patients, is a thorny issue too as it calls for a contextualization of such a request and for striking balance between suicide prevention and suicide assistance.[281]Furthermore, there is also division

[276] para. 24.
[277] *Common Cause v Union of India*, WP (C) 215/2005, https://www.scobserver.in/cases/common-cause-euthanasia-and-the-right-to-die-with-dignity-case-background/
[278] *Ibid*, pp. 189-19.
[279] Piili RP, Louhiala P, Vänskä J, Lehto JT. "Ambivalence toward euthanasia and physician-assisted suicide has decreased among physicians in Finland". *BMC Med Ethics*. 2022 Jul 11;23(1):71. http://doi.org/10.1186/s12910-022-00810-y PMID: 35820881; PMCID: PMC9275272.
[280] Grassi L, Folesani F, Marella M, Tiberto E, Riba MB, Bortolotti L, Toffanin T, Palagini L, Belvederi Murri M, Biancosino B, Ferrara M, Caruso R. "Debating Euthanasia and Physician-Assisted Death in People with Psychiatric Disorders". *Curr Psychiatry Rep*. 2022 Jun;24(6):325-335. http://doi.org/10.1007/s11920-022-01339-y Epub 2022 Jun 9. PMID: 35678920; PMCID: PMC9203391.
[281] Ibid. See also Dalfin W, Guymard M, Kieffer P, Kahn JP. "Droit à mourir et suicide assisté : état des

between medical practitioners who view end-life practices as a form of patient autonomy, while others address the many medical ethical issues that are being raised by the legalization of euthanasia or physician-assisted suicide.[282] What follows is that, even some medical practitioners do not wish to participate in providing assistance in dying.

National attitudinal surveys across countries have indicated that even when policy-makers have been hesitant in legalizing euthanasia, public support has been increasing for euthanasia and assisted dying for persons with debilitating or incurable diseases[283] and/or persons suffering from psychiatric disorders.[284] For example, a national survey on the public's attitude towards euthanasia or physician-assisted suicide of persons in South Korea, revealed that three in four participants (76.4%) expressed positive attitudes toward the legalization of euthanasia. The main reasons for those who were in favour of euthanasia were *meaninglessness of the rest of life* and *right to a good death*, while those who were against the legalization of euthanasia justified their opinion based on *respect for life*, *violation of the right to self-determination*, *risk of abuse or overuse*, and *violation of human rights*.[285] Civil society actors are divided too.

> Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying, as medical professionals assume that a disabled patient "leans towards death at a sharper angle than the acutely ill — but otherwise non-disabled — patient" (2012 BCSC 886, 287 C.C.C. (3d) 1, at para. 811). Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one's death respects, rather than threatens, their autonomy and dignity, and that the legalization of physician-assisted suicide will protect them

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lieux et analyse critique [The right to die and assisted suicide: Review and critical analysis]". *Encephale*. 2022 Apr;48(2):196-205. French. http://doi.org/10.1016/j.encep.2021.04.013 Epub 2021 Dec 11. PMID: 34906375.

[282] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015], para. 10.

[283] Mangino DR, Bernhard T, Wakim P, Kim SY. "Assessing Public's Attitudes Towards Euthanasia and Assisted Suicide of Persons With Dementia Based on Their Advance Request: An Experimental Survey of US Public". *Am J Geriatr Psychiatry*. 2021 Apr;29(4):384-394. http://doi.org/10.1016/j.jagp.2020.07.013 Epub 2020 Jul 30. PMID: 32807627; PMCID: PMC7854974. Borovecki A, et al. "Attitudes about withholding or withdrawing life-prolonging treatment, euthanasia, assisted suicide, and physician assisted suicide: a cross-sectional survey among the general public in Croatia". *BMC Med Ethics*. 2022 Feb 17;23(1):13. http://doi.org/10.1186/s12910-022-00751-6 PMID: 35172812; PMCID: PMC8851732. Emanuel EJ, Onwuteaka-Philipsen BD, Urwin JW, Cohen J. "Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe". *JAMA*. 2016 Jul 5;316(1):79-90. http://doi.org/10.1001/jama.2016.8499

[284] Evenblij K, Pasman HRW, van der Heide A, van Delden JJM, Onwuteaka-Philipsen BD. "Public and physicians' support for euthanasia in people suffering from psychiatric disorders: a cross-sectional survey study". *BMC Med Ethics*. 2019 Sep 11;20(1):62. http://doi.org/10.1186/s12910-019-0404-8 PMID: 31510976; PMCID: PMC6737595.

[285] Yun YH, Sim JA, Choi Y, Yoon H. "Attitudes toward the Legalization of Euthanasia or Physician-Assisted Suicide in South Korea: A Cross-Sectional Survey". *Int J Environ Res Public Health*. 2022 Apr 24;19(9):5183. http://doi.org/10.3390/ijerph19095183 PMID: 35564575; PMCID: PMC9105789.

> by establishing stronger safeguards and oversight for end-of-life medical care.[286]

UN human rights bodies and regional human rights bodies remain divided on the practice of euthanasia and medically-assisted suicide. As of today, there is no international human rights jurisprudence establishing that there is a human right to end one's life; even though decisions have been highly sensitive to the facts of each case, the overall outcome has been to reaffirm the right to live *vis-a-vis* the right to die.[287] Moreover, UN experts have also raised the alarm "when life-ending intervention is normalized outside the end stage of terminal illness", that is when euthanasia is accessible by persons who are not at the point of dying within a short period of time (such a period could be between six and twelve months). For the UN experts, it is worrisome to have States allowing for euthanasia practices to be carried out on persons with non-terminal illnesses because "persons with disabilities (and older persons with disabilities) may disproportionately feel for the need to end their lives".[288] At European level, given the absence of a European consensus on euthanasia, the ECtHR grants a considerable margin of appreciation to the States concerning the regulation of euthanasia.[289]

This hesitance of the international human rights courts and tribunals to proceed with the recognition of a right to die should not be viewed as a systemic weakness of the international human rights machinery but rather as an opportunity for the national parliaments and societies to form more solid opinions on the right to die and for the governments to show leadership and even decide whether there is need for legislation on matters pertaining to euthanasia. National judges have consistently expressed their determination not to pre-empt the legislative required process. For example, in Pretty Lord Steyn said:

> In our Parliamentary democracy, and I apprehend in many member states of the Council of Europe, such a fundamental change cannot be brought about by judicial creativity. If it is to be considered at all, it requires a detailed and effective regulatory proposal. In these circumstances it is difficult to see how a process of interpretation of Convention rights can yield a result with all the necessary inbuilt protections. Essentially, it must be a matter for democratic debate and decision-

[286] *Carter v. Canada (Attorney General)*, para 10.

[287] A. Fellmeth, Nourin Abourahma, "The Human Right to Suicide under International Law", *Human Rights Law Review*, Volume 21, Issue 3, September 2021, Pages 641–670, https://doi.org/10.1093/hrlr/ngab010

[288] UN experts who issued the joint statement are Gerard Quinn, Special Rapporteur on the rights of persons with disabilities; Olivier De Schutter, Special Rapporteur on extreme poverty and human rights; and Claudia Mahler, Independent Expert on the enjoyment of all human rights by older persons. See Joint Statement, 3 February 2021, OL CAN 2/2021, Palais des Nations, Geneva, Switzerland, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26002

[289] ECHR, 20 January 2011, *Haas v. Switzerland*, para.55; 19 July 2012, *Koch v. Germany*, para. 70.

making by legislatures.[290] Similarly, in Newby it was observed:

> In the context of repeated and recent parliamentary debate, where there is an absence of significant change in societal attitude expressed through Parliament, and where the courts lack legitimacy and expertise on moral (as opposed to legal) questions, in our judgment the courts are not the venue for arguments which have failed to convince Parliament […] In our judgment, there are some questions which, plainly and simply, cannot be 'resolved' by a court as no objective, single, correct answer can be said to exist. On issues such as the sanctity of life there is no consensus to be gleaned from evidence. The private views of judges on such moral and political questions are irrelevant, and spring from no identifiable legal principle. We struggle to see why any public conclusion judges might reach on matters beyond the resolution of evidence should carry more weight than those of any other adult citizen.[291]

B.1.1.3.2 Setting the standards for life-ending interventions

The countries that have legalized euthanasia and end-of-life practices, have done so either by legislation or by judicial interpretation. In these countries, consultation with medical, bioethicists and other professionals has taken place in order to establish conditions and eligibility criteria for the life-ending interventions, given the highly sensitive nature of the matter and voiced concerns for misuse and abuse of euthanasia practices[292] . From a human rights perspective, the regulation of euthanasia is mandatory given the fact that there is a recognized person's right to "measures aimed at preventing abuses in the performance of euthanasia, a right that follows from the right to life and physical integrity ".[293] The Human Rights Committee in its General Comment on Article 6 of ICCPR has taken the following position:

> States parties that allow medical professionals to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.[294]

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[290] *R (on the application of Pretty) v Director of Public Prosecutions* (2001) UHKL 61.

[291] *R (on the application of Newby) v The Secretary of State for Justice*[2019] EWHC 3118 (Admin), para.42.

[292] Evenblij, K., Pasman, H.R.W., van Delden, J.J.M. et al. "Physicians' experiences with euthanasia: a cross-sectional survey amongst a random sample of Dutch physicians to explore their concerns, feelings and pressure". BMC Fam Pract 20, 177 (2019). https://doi.org/10.1186/s12875-019-1067-8

[293] See Belgian Constitutional Court, para. B.26.

[294] UN Human Rights Committee, General Comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3

The eligibility criteria for euthanasia or medically-assisted suicide share common principles although there may be small deviations from one system to another. Being able to make an informed decision on the part of the patient is important as this would guarantee that the person could be equally competent to reverse his or her decision should they wish so, at any stage of the process. Furthermore, competence must be maintained until the time of the assisted death. One also needs to bear in mind that, every person's clinical situation is different; hence, individual circumstances are taken into consideration along with the prognosis of the deterioration of each case.

For example, for the Australian States: all persons must be 18 years of age or over, be an Australian citizen or permanent resident, have decision-making capacity for medically-assisted suicide; be acting voluntarily and without coercion; have an enduring request for VAD (i.e. their request is ongoing); and have a disease, illness or medical condition that is: advanced and will cause death. In all States, except Tasmania, it must also be progressive (i.e. the person experiences active deterioration), incurable (Victoria, South Australia and Tasmania only), and irreversible (Tasmania only), expected to cause death within six months, or 12 months for a person with a neurodegenerative disease, illness or medical condition. In Queensland, however, a person expected to die within 12 months may apply for VAD, and causing suffering that cannot be relieved in a manner that the person finds tolerable. The person's suffering may be physical or non-physical e.g. psychological, existential. A person will not be eligible for VAD based on having a disability or mental illness (or in New South Wales, dementia) alone – they must meet all of the criteria above to access VAD.[295]

For Spain, the person must: suffer a "serious or incurable illness" or a "chronic or incapacitating" condition that causes "intolerable suffering", be an adult Spanish national or a legal resident, be "fully aware and conscious" when they make the request, which has to be submitted twice in writing, 15 days apart. A doctor can reject the request if the requirements have not been met. It must be approved by a second medic and by an evaluation body.[296]

For New Zealand, all persons must be 18 years of age or over, a New Zealand citizen or permanent resident, assessed by two doctors, suffering from a terminal illness likely to end their life within six months, be experiencing *unbearable suffering that cannot be relieved*, be experiencing advanced stages of irreversible decline in their physical ability, be competent to make an informed decision.[297]

September 2019, para. 9.

[295] *End of Life Directions for Aged Care*, https://www.eldac.com.au/tabid/5757/Default.aspx

[296] *Spain passes law allowing euthanasia*, 18 March 2021, https://www.bbc.com/news/world-europe-56446631

[297] New Zealand, Ministry of Health, https://www.health.govt.nz/our-work/life-stages/assisted-dying-service/assisted-dying-information-public/assisted-dying-eligibility-and-access

Some of the countries have already reviewed or are currently in the process of reviewing the eligibility criteria (for example, Canada). The reviewing of the eligibility criteria is likely to amount to the extension of euthanasia to other groups, for example children or to persons with disabilities or people without life-threatening illnesses.

The debate about the legality and the morality of euthanasia is even fiercer when it concerns children. Should children have the right to die? Are they mature to understand the consequences of actions that hasten their lives? Can children qualify as autonomous on an equal basis with adults?[298] Given their vulnerability, children must be provided with protection by the State authorities and they are entitled to protection from grave types of interference with their physical or moral integrity.[299]Only a couple of the above countries, for example Colombia and the Netherlands, allow for minors to access the end-of-life procedure and that is subject to the consent of their legal guardians.[300] The Dutch regulatory framework allows for minors as young as 12 years old to request euthanasia, as well as for patients with dementia under the precondition that they make ad advance directive (living will).[301] The Dutch law also allows for euthanasia on newborn infants[302] and late-term abortion; however, it does not allow for euthanasia on children between the ages of one and twelve.[303] Since 2014, the Belgian law allows for minors, regardless of age, to request euthanasia as long as they fit specific criteria. The Belgian Constitutional Court has held:

> The circumstance that a minor does not in principle have the legal capacity to perform acts relating to his person and his property does not prevent the legislature, in the context of a legal framework for euthanasia, from partly derogating from that fundamental incapacity in order to take account of the

[298] Cohen-Almagor R. "Should the Euthanasia Act in Belgium Include Minors?" *Perspect Biol Med*. 2018;61(2):230-248. http://doi.org/ 10.1353/pbm.2018.0039 PMID: 30146521.

[299] See *Haas v.* Switzerland, ECtHR, 20 January 2011, para. 54; K.U. v Finland, ECtHR, 2 December 2008; RIP and DLP v Romania, ECtHR, 10 May 2012, para. 58.

[300] See Felipe E Vizcarrondo, American College of Pediatricians, *Assisted Suicide and Euthanasia in Pediatrics*, May 2021, https://acpeds.org/position-statements/assisted-suicide-and-euthanasia-in-pediatrics

[301] See Government of the Netherlands, https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request

[302] The following criteria must be met: "In the light of prevailing medical opinion, the child's suffering must be unbearable and with no prospect of improvement. This means that the decision to discontinue treatment is justified. There must be no doubt about the diagnosis and prognosis; Both the physician and the parents must be convinced that there is no reasonable alternative solution given the child's situation; The parents must have given their consent for the termination of life; The parents must have been fully informed of the diagnosis and prognosis; At least one other, independent physician must have examined the child and given a written opinion on compliance with the due care criteria listed above; The termination must be performed with all due care".

[303] This is likely to change post 2022 as the Dutch Ministry of Health has announced the intention to provide terminally sick children aged between one and twelve with access to euthanasia in limited circumstances.

> voluntary and well-considered choice of a minor who has the capacity for discernment and is in a condition of constant and unbearable suffering…
> B.35. … [t]he physician who performs euthanasia on a minor patient commits no criminal offence on condition that this patient has the "capacity for discernment".
> B.36.1. … [t]he term "capacity for discernment" relates to the ability of the minor to understand the real implications of his euthanasia request and its consequences.[304]

Despite witnessing the great advancement of human rights issues at UN and regional level, international organisations have not adopted a single instrument that would contain an explicit reference to the right to die with dignity. At best, it could be argued that the current State of law and the political intentions hinder the gestation of a right to die on its own merits. The removal of end-of-life criteria[305] or the inclusion of persons with disabilities in the euthanasia practices are reasons of as it was recently shown with the case of Canada. Canada has been one of the most liberal countries among the ones who have legalized euthanasia and on 17 March 2021 the new legislation on medical aid in dying, was passed.[306] The legislative draft was criticized by three UN experts and other disabilities NGOs for ableism and massively expanding the range of people with disabilities who are given access to euthanasia practices.[307]

However, in countries that have not legalized euthanasia or medically assisted-death, their nationals can still have access to life-ending interventions abroad (i.e. Switzerland). Would people, for example relatives, who accompany persons in traveling abroad to get access to euthanasia be prosecuted? Is their conduct a criminal offence? Is legal uncertainty surrounding euthanasia itself, an infringement of human rights law? A case from the British Supreme Court in 2009[308] is an example of how these matters need to be subjected to policy-regulation. The case concerned a patient who had multiple sclerosis and who wished to be accompanied by her husband to a euthanasia clinic in Switzerland. She argued that, due to the lack of clarity of law existing at the time, there

[304] See amended Euthanasia Act 2002, 2014. The Belgian Constitutional Court has observed that, para. B.28.2,B.35, 36.1 https://www.const-court.be/public/e/2015/2015-153e.pdf
[305] For example, Colombia allowed for euthanasia on people without a terminal disease. See "Colombia allows euthanasia of two people with non-terminal illness", *BMJ* 2022; 376 https://doi.org/10.1136/bmj.o67 (Published 11 January 2022).
[306] See House of Commons of Canada, Bill C-7, https://www.parl.ca/DocumentViewer/en/43-1/bill/C-7/first-reading
[307] Open Letter from the Council of Canadians with Disabilities (CCD) Concerning the Canadian Psychiatric Association Position Statement on Medical Aid in Dying (MAiD), 20 November 2021, http://www.ccdonline.ca/en/humanrights/endoflife/An-Open-Letter-from-the-Council-of-Canadians-with-Disabilities-%28CCD%29-Concerning-the-Canadian-Psychiatri
[308] *R (Purdy) v DPP* [2009] UKHL 45. This judgment led to the adoption of the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide on 25 February 2010 and which was updated on 16 October 2014.

was a substantial risk that that her husband's acts would give rise to a prosecution under S. 2 of the Suicide Act 1961. This lack of clarity of law constituted an interference with her right to respect for her private life under Art. 8 (1) and (2) of ECHR. The Supreme Court held that the law fell short of the tests of accessibility and foreseeability, meaning that the law in question was not sufficiently accessible to the person affected by it and that it was not precise enough to enable a person to understand its scope and foresee the consequences of their actions. Hence, the Supreme Court ordered for the Director of the Crown Prosecutions to issue an offence-specific policy listing the facts and circumstances that need to be taken into account.[309]

Pretty v. United Kingdom [2002] is a case in point.

One lady with a degenerative illness wanted to decide when and how she would die. She asked her husband to assist her in killing herself so that she would not have to suffer an untimely and humiliating death. She hoped for a guarantee that he wouldn't face charges, but the ECtHR ruled that one cannot exercise their "right to life" by opting for death. Essentially, it meant that no one had the legal right to die at the hands of another person or with the help of the state.

Human Rights, Human Lives: A Guide to the Human Rights Act for Public Authorities provides examples and legal case studies to illustrate how human rights operate in reality.

B.1.2 Conclusion

The right to life is the idea that all humans have the right to live, and that no one else has the right to take that life. The concept of a right to life arises in debates over issues like capital punishment, which some see as immoral, abortion, which some see as wrong because they believe an unborn foetus is alive and should not be terminated prematurely, euthanasia, which some see as wrong because it involves the intentional termination of a person's life outside of natural means, and killings by law enforcement, which some see as an infringement of a person's right to live. It is possible for people to have different opinions on which, in these scenarios, a right to life applies.

The right to life is at the category of human rights which are called inalienable rights as these are inherent to all human beings. By virtue of the right to life, each human being has all the other rights established and protected by the constitution and by the international agreements.

States are the only entities with the adequate resources to achieve the protection of this absolute right, a fact that requires governments to rethink the policies that have utility for the right to life, and implement efficient ways of protecting it. For example States can

[309] *R (Purdy) v DPP* [2009] UKHL 45.

have a positive impact in safeguarding this right by preventing and limiting any circumstances that might lead to the violation of the right to life. There is always the danger that a right like this can stay in the realm of theoretical wishes with little legal enforceability and actual protection if States fail to safeguard and protect its enjoyment. For example, in the matter of human rights, States must take measures to mitigate the negative impacts of climate change and guarantee that those most at risk, such as the poor and the marginalised, have access to appropriate remedies and methods of adaptation. The duty to take Climate Action burdens the States, and failing to take climate action is predicted to cause the death of millions of citizens, and hence violate their right to life. In the same train of thought, the same human rights argument fits well in the discussion for the rights of future generations, since their right to life is very much threatened by the climate inaction of States on a global scale.

▪ Important points to remember about the "Right to Life; Abortion; Death Penalty; Right to Die"

When studying the "Right to Life; Abortion; Death Penalty; Right to Die," it is crucial for students to keep in mind the following important points:

1. Right to Life: The right to life is a fundamental human right recognized in various international and regional human rights instruments. It protects the inherent value and dignity of every human being, ensuring their protection from arbitrary deprivation of life.
2. Abortion: Abortion is a complex and sensitive issue with varying legal and ethical perspectives worldwide. Different countries have different laws and regulations regarding access to abortion, ranging from complete prohibition to allowing it under certain circumstances. It is important to examine the legal frameworks, societal debates, and human rights implications surrounding abortion.
3. Death Penalty: The death penalty, or capital punishment, involves the state-sanctioned execution of individuals convicted of certain crimes. There is ongoing debate regarding the death penalty's compatibility with human rights, including the right to life and freedom from cruel, inhuman, or degrading treatment or punishment. It is important to explore arguments for and against the death penalty and examine evolving global trends and perspectives on its use.
4. Right to Die: The right to die, also known as the right to self-determination or right to assisted suicide, pertains to an individual's ability to make decisions regarding their own life and end-of-life choices. This topic raises ethical and legal questions regarding autonomy, dignity, and the balance between protecting life and respecting individual choices. Different jurisdictions have varying laws and regulations regarding end-of-life decisions.
5. Ethical and Moral Perspectives: The issues surrounding the right to life, abortion, the death penalty, and the right to die, often involve complex ethical and moral considerations. Various religious, cultural, and philosophical perspectives contribute to diverse viewpoints on these topics. It is essential to engage with these perspectives in order to develop a well-rounded understanding of the debates and controversies.
6. Human Rights Framework: These issues intersect with various human rights, including the right to life, the right to privacy, the right to health, and freedom from cruel, inhuman, or degrading treatment. Exploring the human rights framework provides a foundation for analyzing and evaluating the implications of policies, laws, and practices in relation to these rights.

7. Women's Rights and Reproductive Health: The right to life and abortion often intersect with women's rights and reproductive health. It is crucial to consider the specific challenges faced by women in accessing reproductive healthcare, the impact of restrictive laws on women's autonomy, and the importance of ensuring reproductive rights and choices.
8. Human Dignity and Equality: The issues surrounding the right to life, abortion, the death penalty, and the right to die are deeply connected to concepts of human dignity and equality. Analyzing these topics requires consideration of how different policies and practices impact an individuals' dignity and the potential for discrimination based on factors such as gender, socioeconomic status, or disability.
9. International and Domestic Legal Frameworks: International human rights law and domestic legal frameworks provide a basis for analyzing and assessing the rights and responsibilities related to these issues. It is important to examine relevant treaties, conventions, court decisions, and national laws to understand the legal context and implications.
10. Open Dialogue and Respectful Engagement: These topics often evoke strong emotions and differing viewpoints. It is essential to approach discussions with open-mindedness, respect for diverse perspectives, and a commitment to constructive dialogue. Engaging in respectful conversations and considering multiple viewpoints will contribute to a deeper understanding of the complexities involved.

Remember, studying these topics requires sensitivity, empathy, and a commitment to understanding the complexities and nuances involved. It is important to engage with a range of perspectives, examine case studies, and explore the human rights implications to foster a comprehensive understanding of these critical issues.

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Test your knowledge

1. **What type of Human right is the right to life?**

Answer: It is an *Absolute right*. States cannot suspend or restrict the right to life under no circumstances.

2. **Is it possible for a foetus to possess legal rights?**

Answer: No. Legal rights are given at birth, when it is apparent that the mother and the child are distinct and preserving the rights of the child would not restrict the woman's rights.

3. **What is the term for right to die?**

Answer: The term euthanasia refers to the practise of assisting a terminally ill person in dying as quickly as possible. By *active euth*anasia, we mean a physician's intentional act—typically the delivery of fatal drugs—to terminate the life of a person who is either hopelessly terminally sick or suffering from an incurable disease.

4. **Where can I hear experts' views on euthanasia?**

Answer: Here are some podcasts to listen to:

- Documenting a Death by Euthanasia, https://podcasts.apple.com/us/podcast/documenting-a-death-by-euthanasia/id1200361736?i=1000548804957
- Intelligence Squared U.S. Debates, #97 - Should We Legalize Assisted Suicide?, https://podcasts.apple.com/us/podcast/97-should-we-legalize-assisted-suicide/id216713308?i=1000460883016
- Australian Centre for Health Law Research, Learn Me Right in Voluntary Assisted Dying, https://podcasts.apple.com/cz/podcast/learn-me-right-in-voluntary-assisted-dying/id885338290?i=1000578649678
- Philip Nitschke, Exit Podcast - The Good Death, https://podcasts.apple.com/gb/podcast/exit-podcast-the-good-death/id1510854084
- Cambridge University Law Society Speakers, "The Last Human Right, or its Antithesis? Assisted Suicide, Euthanasia, the Right to Life and the Right to Choose the Timing and Manner of Death" - Paul Bowen QC: CULS Lecture, https://podcasts.apple.com/gb/podcast/the-last-human-right-or-its-antithesis-assisted/id507438477?i=1000411312455

Documentaries to watch

Here are some documentaries that explore the topics of the right to life, abortion, and the death penalty:

1. *After Tiller* (2013) - This documentary provides an intimate look into the lives of the last four doctors in the United States who openly provide late-term abortions. It explores the complex ethical and moral dilemmas surrounding the right to life and reproductive rights.
2. *12th and Delaware* (2010) - The film takes place at an intersection in Florida where an abortion clinic and a pro-life pregnancy center are located across the street from each other. It offers a thought-provoking examination of the opposing sides of the abortion debate.
3. *The Silent Scream* (1984) - This controversial documentary presents a pro-life perspective on abortion. It includes real-time ultrasound footage of an abortion procedure and seeks to depict the fetus as a living human being.
4. *The Execution of Wanda Jean* (2002) - This documentary follows the case of Wanda Jean Allen, a woman on death row in Oklahoma, and raises questions about the death penalty, justice, and human rights. It provides an in-depth exploration of the ethical implications of capital punishment.
5. *The Trials of Darryl Hunt* (2006) - The film tells the story of Darryl Hunt, a wrongfully convicted man who spent 19 years in prison for a crime he did not commit. It examines the flaws in the criminal justice system, including the death penalty and its impact on an individuals' right to life.
6. *Fourteen Days in May* (1987) - This documentary follows the final 14 days leading up to the execution of Edward Earl Johnson, a death row inmate in Mississippi. It raises questions about the fairness of the death penalty and its compatibility with human rights principles.

These documentaries offer different perspectives on the right to life, abortion, and the death penalty, allowing viewers to explore the complex ethical, legal, and social issues surrounding these topics.

Chapter 2 Terrorism and Human Rights

Abstract

Terrorism represents a significant source of human rights violations, thereby presenting a compelling context for human rights education. This chapter delves into the pertinent issues pertaining to the pervasive violations of fundamental rights stemming from acts of terrorism, supplemented by an in-depth analysis of the problematics amplified by international counter-terrorism measures. Furthermore, it examines recent instances of excessive police violence that have captured the attention of international organizations and civil society actors. By scrutinizing the interplay between terrorism, human rights violations, and counter-terrorism measures, this chapter seeks to provide valuable insights that can inform human rights education initiatives. Through a comprehensive examination of the multifaceted challenges arising from terrorism and counter-terrorism efforts, it endeavors to shed light on the complex dynamics that underpin the protection and promotion of human rights in these contexts. By illuminating the intricate complexities and implications of terrorism-related human rights abuses, the chapter aims to stimulate critical discourse, enhance understanding, and foster a nuanced appreciation of the challenges faced in safeguarding human rights. Moreover, it emphasizes the importance of incorporating these issues into human rights education curricula to empower individuals with the knowledge and skills necessary to address the inherent dilemmas arising from the intersection of terrorism, human rights, and counter-terrorism measures.

Required Prior Knowledge

Criminal law, human rights, law, philosophy.

B.2.1 Definition of Terrorism

Terrorism is often defined as the use of violence against innocent people for ideological or political ends (Schmid, 2011). Nevertheless, despite unilateral statements, resolutions, and treaties related to some particular component of terrorism, there is a lack of clarity as to what constitutes terrorism within the international community as a whole (Schmid, 2011). The present scenario, in which no legal and comprehensive definition of terrorism exists, is the result of the lack of such an agreement among governments (Schmid, 2011).

Human rights, including the rights to life, liberty, and bodily integrity, are threatened by terrorism since its goal is the collapse of democracies and the breakdown of the rule of law (CSOs). Many times, terrorist attacks end in disaster, putting at risk the very existence of regimes and the people who live under them (CSOs). Terrorism, as stated by the United States (UN), is an assault on the fundamental principles enshrined in the UN Charter, including the laws of war and the protection of civilians, the mutual respect and understanding among nations, and the peaceful settlement of disputes (CSOs).

Due to the intricate and diverse nature of the relationship between terrorism and human rights, counter-terrorist measures have become a severe danger to human rights and the efficacy of the rule of law in recent years (Schmid, 2011). All parts of the UN Global Counter-Terrorism Strategy must promote and preserve human rights and the rule of law, as they are overlapping and mutually reinforcing aims (Schmid, 2011).

Maintaining respect for human rights and the rule of law is essential to global anti-terrorism operations. This necessitates a serious commitment on the part of national authorities and international organizations to the execution of effective counter-terrorism policies aimed at preventing terrorist attacks and halting the spread of terrorism (Schmid, 2011). As a result, conditions improve for civil society organizations to do their work, for human rights to be protected, and for criminals to face just punishment (Schmid, 2011).

Terrorism affects the enjoyment of human rights in various ways and has negative effects both on individuals and on society. For example, people often experience PTSD, anxiety, and despair in the aftermath of terrorist attacks. Terror attack survivors also have an increased risk of developing drug misuse problems and experiencing psychosomatic symptoms (Schmid, 2011).

In the case of State-terrorism, the State is part of a different reality than the one presented by liberal values, and it has forsaken its responsibility to safeguard its citizens. Similarly, human rights theory in the age of globalized terrorism has been damaged by its self-proclaimed protectors more than by the terrorists themselves (Schmid, 2011).

Professor Raz, in his significant theorizing in the “Morality of Freedom”, discusses that, for an individual to reach full enjoyment of her natural rights, and in order for a society to get real equality for the people, then the State should provide the same opportunities for all (Raz, 1986). While a terrorist State appears to be in violation of its whole intended function as a political institution if one considers the conventional duty of the liberal State to secure Justice (Raz, 1986).

Following the terrorist attacks in New York on September 11, 2001, the United Nations Security Council unanimously adopted Resolution 1373, which required all Member States to make it illegal to provide aid to terrorists, cut off terrorists' access to funding and safe havens, and exchange information about potential terrorist attacks (UN). It is a “known secret” that many States, including some of the so-called major powers of the industrialized world, offer support to terrorist groups, despite the fact that Resolution 1373 requires all States to criminalize such support (UN).

In Schmid’s book, one can come across 260 different definitions of terrorism (Schmid, 2011). Nonetheless, it is tiresome to read academics', other professionals', and terrorist experts' exhaustive descriptions of the discussions and analytical methods they used in their efforts to establish a definition (Schmid, 2011). Although there are different national and regional definitions of the idea and, in some circumstances, the crime of terrorism, there is no global legal definition of terrorism authorized by the General

Assembly of the United Nations (Schmid, 2011). The United Nations Office on Drugs and Crime emphasizes the lack of an internationally enforceable document defining terrorism (UNODC).

The lack of a broad definition of terrorism does not present a legal challenge to practitioners (UNODC). Since 1963, the international community has elaborated a comprehensive set of universal legal instruments to prevent terrorist acts (UNODC). They consist of more than a dozen conventions and protocols covering almost every conceivable kind of terrorist act (UNODC).

The characteristics of terrorism that were highlighted by the Security Council in 2004's Resolution 1566 were suggestive of certain actions (UN). Unfortunately, even this definitional suggestion is not binding, hence it has no force under international law (UN). However, it is becoming clear that political pressure plays a role in governmental choices via the inciting of fear in the general public or a specific group of people, with the fear potentially being targeted at specific individuals (UN).

In summary, terrorism remains a complex and multifaceted phenomenon that poses significant challenges to human rights and the rule of law. While there is no universally agreed-upon definition of terrorism, international efforts have been made to address specific aspects of terrorism and establish legal frameworks for counter-terrorism measures. However, it is crucial to ensure that these measures do not infringe upon human rights and that the principles of justice and accountability are upheld in the fight against terrorism.

B.2.2 Caselaw

The ECtHR (*the Court*) has heard several cases involving terrorism since it issued its first ruling in *Lawless v. Ireland* (no. 1). This chapter provides a concise overview of this body of case law, outlining the steps involved in every antiterrorist action, from surveillance to arrest to punishment.

The case law on Article 1 of ECHR offers valuable lessons about the relationship of terrorism and human rights enjoyment. The referenced cases are representative of the most significant, current, and/or authoritative rulings in their respective fields.

In addition to resolving the specific cases before it, the Court's rulings also serve to clarify, protect, and develop the rules established by the Convention, helping to ensure that Contracting States live up to their commitments under the Treaty (see, for example, *Ireland v. the United Kingdom*[154], 18 January 1978, Series A no. 25, and, more recently, *Jeronovis v. Latvia* [GC], no. 44898/10, 109, ECtHR.

Due to the structure of Article 8 of ECHR, a complainant alleging a breach of Article 8 must first show that his claim falls within the scope of interests protected by the right to

privacy in one's personal life, residence, and/or correspondence. That's not hard to do in terms of surveillance techniques. Although Article 8's reach is restricted, the Court gives it a wide interpretation (Uzun v. Germany, 43) [1].

Once it is established that a surveillance measure is covered by Article 8, the Court must determine whether the challenged measure, or measures, interfered with the individual's ability to exercise the right guaranteed by Article 8 or whether the measures were taken in compliance with the Contracting State's positive obligations. In fact, Article 8's second paragraph lays out the circumstances in which the government might restrict someone's ability to exercise their protected right, including when doing so is “in conformity with the law” and “essential in a democratic society”.

Although a State Party's jurisdiction within the sense of Article 1 of the Convention is, in general, re-stricted to its territory, acts carried out by such a State or having consequences outside of its territory may, in some situations, constitute to exercise of extraterritorial jurisdiction (see, in particular, Al-Skeini and Others v. the United Kingdom [GC]) [2].

According to the Court's precedent, there are times when nations must work together to solve international crimes. For the first time, the Court ruled that a Member State, in this case Turkey, had violated its obligations under the procedural limb of Article 2 by failing to cooperate with Cyprus and, in particular, by failing to provide a reasoned reply to the extradition requests submitted to it by the Cypriot authorities in the case of *Güzelyurtlu and Others v. Chypre and Turkey* [GC]. The Turkish government contended that it had no “jurisdictional relationship” to the victims in this case, since their loved ones had died in territory within the jurisdiction of the Republic of Cyprus. There were two factors, however, that led the Court to conclude that jurisdiction existed. For the purposes of Article 1, it first established the notion that the mere fact that criminal proceedings are being investigated or initiated in relation to a death that occurred in another State Party is sufficient to establish a jurisdictional relationship. The Court said that it had to decide whether a jurisdictional nexus could be established even without such an inquiry or procedures. The Court reasoned that although the procedural obligation under Article 2, in principle, only applied to the State within whose jurisdiction the victim was at the time of death, *special features* peculiar to the case would justify a departure from that approach, in line with the principles set forth in the Rantsev v. Chypre and Russia judgment [3].

The European arrest warrant system is not inherently incompatible with the Convention on the basis that it involves extradition (Pirozzi v. Belgium). If one country requests an arrest warrant from another, and that country complies with its international obligations and detains the wanted person, the requesting country is still responsible under the Convention (Vasiliciuc v. Republic of Moldova, 23-24; Stephens v. Malta (no. 1), 51-54) [4]. The requesting State must accept responsibility under the Convention for the unlawful arrest warrant issued by the authorities under its domestic law and executed by the other State in accordance with its international obligations if the arrest warrant contains a technical irregularity that the authorities of the requested State could not have noticed (ibid., 52). The presumption of equivalent.

In the same terrain, one can find the product of three series of conferences between academics and other specialists, which is actually the revised and updated definition discussed earlier by Schmid. It seems that we will similarly profit by considering the Revised Academic Consensus Definition of 2011, which explains that:

1. Terrorism refers, on the one hand, to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties.
2. Terrorism as a tactic is employed in three main contexts: (i) illegal State repression, (ii) propagandistic agitation of non-state actors in times of peace or outside zones of conflict and; (iii) is an illicit tactic of irregular warfare employed by State and non-state-actors.

This newly minted scholarly consensus definition of terrorism still expressly includes and emphasizes the State as the perpetrator of terrorism. There can be no ambiguity or inference. According to this theoretical framework, there are three primary settings in which terrorism may occur; it is noteworthy that in two of these settings, the State plays a role as an employer of terrorism. Please note that the research presented here is among the most recent and rigorous in the field.

Furthermore, many academics agree with the wide definition that says terrorism is merely politically or ideologically motivated violence against civilians or non-combatants. Similarly to how Jeff McMahan characterizes the evolution of commonly held beliefs about key ideas, this expansive definition of terrorism has grown so pervasive that it is now widely recognized as the standard.

Terrorism, however, has progressed far beyond being merely a political stigmatization, and has been upgraded to one of the most serious crimes in existence; in many instances, it may even possess the necessary elements for constituting a crime against humanity, though this assertion is rather dubious given the International Criminal Court's reluctance to include terrorism in its jurisdiction.

"Terrorism has been described variously as, both a tactic and a strategy, a crime and a holy duty; a justified reaction to oppression and an inexcusable abomination."

But the challenge of defining these actions as terrorism, so that they may be prosecuted as specific horrific crimes, is ever present. The inextricable link between this violent menace and politics, poses serious challenges for its legal management.

Directly from Rosalyn Higgins:

> *"Whether terrorism should be treated primarily as an international crime or should be viewed mainly as a political problem [which may have international criminal elements] has been debated by the international legal community for years."*

Additionally, there is the famous argument, which says that “one man's terrorist is another man's freedom fighter.” As Derrida points out, for instance, the Germans labelled the French resistance groups, *terrorists* during World War Two. Undeniably, the right of self-determination, and of resistance to foreign occupation, is enjoying a great support in the negotiations of the definition of terrorism, an issue that requires special mentioning.

Therefore, it is not appropriate to use the term *terrorist* to those who commit crimes under these unusual conditions, and no definition of *terrorism* should include them. For many years, those who fought for Algeria's independence from French rule were labeled terrorists because they used tactics that were inspired by terrorism, such as attacking cafeterias and other public places. In spite of this, they have been recognized as heroes of the Algerian independence movement for their actions against the French occupying State-terrorist dictatorship. No one can dispute that there was State-terrorism during the French persecution in Algeria from 1954 to I962, as Derrida claims in the conversations with Borradori. To this day, the French (State) terrorism of the time is presented as a police operation for internal security, while the terrorism committed by the Algerian rebellion was for a long time thought to be a domestic phenomenon because Algeria was considered to be an integral part of French national territory. Many years later, in the 1990s, the French Parliament retroactively declared the conflict a *war*. War was, therefore, suddenly declared in the midst of armed repression, an internal police operation, and State-terrorism. On the other hand, terrorists were and are widely regarded around the globe as heroes of national independence and liberation movements. Was the terrorism committed by the armed organizations that aided in the establishment and acceptance of the State of Israel local or global in scope? Finally, what about the many modern-day Palestinian terrorist organizations? What about the Irish? What about the Afghans who fought against the Soviet Union? What about the Chechens? When does the use of terrorism cease to be condemned as such and instead be welcomed as the last resort in a worthy cause? What about the opposite, though?

Derrida's dialectic is quite insightful and applicable from many people’s standpoint. His line of thinking, followed by his *straight to the point* questioning pace, appears to highlight the varying terminological handling of terrorism by the international community, depending on the larger political interests of other countries. It is true that the manipulation of influential terrorism terms, by the holders of power, contributes to the production of knowledge and has an effect on historical memory, though the extent to which it does so depends on a number of factors, including the era in which the incident took place, the nature of the surrounding environment, the nature of the political system, and the vested interests of the various parties involved. While, what should be extracted from the preceding conversation is that injustice does not have an expiration date, and that the restoration of justice should not have one either.

In addition, a rational woman would find any acts of violence that injure humans to be inherently wrong and unethical. Whether or not such crimes are really unlawful and unjustifiable, is an entirely separate question.

One's fundamental legal right to a defense and due process of law must be respected whenever one is accused of anything; this is a right that has been systematically denied to, for example, the vast majority of accused suspected terrorists all around the world, although it is clearly ensured under the legal principle of the right to a fair trial. The accused must be charged with a crime that can be proven in a court of law, and the trial must be conducted by a tribunal that is both independent and impartial, and must adhere to all applicable international norms of fair trial.

Terrorism must be distinguished from legitimate resistance efforts because people under unlawful occupation have the right to use *all necessary measures at their disposal* to put an end to the occupation under international law.

An additional factor that must be emphasized is that of purpose, or *mens rea* in criminal law terminology. A lawyer considers not only whether an act was committed, but also whether or not the offender had criminal intent.

The motivations of liberation fighters are more difficult to foresee than those of terrorists. Given that they are motivated by a high ideal, such as the liberation of their homelands or the defense of their honor, we may assume that they represent no threat to society as a whole.

The aspect of purpose, or *mens rea*, is the most difficult to examine when thinking about terrorism because of the wide variety of motivations that may be found at every level of a terrorist organization. On the other hand, one may make the point that this is not the case with freedom fighters, who have every intention of defending their homeland and who, it is said, are engaged in a worthy cause that permits them to resort to whatever means necessary to achieve their goals.

However, many academics argue that certain terrorist activities might be tried as crimes against humanity while a consensus on the concept of terrorism is being negotiated. However, there are those who say that this is just a good option. Since terrorism is a distinct subset of violent crime, it is inherently preferable to have clearer jurisdiction over offenses of terrorism. Furthermore, due to the interconnected nature of terrorist activity, it is not only the *shooters* who should be held accountable.

But, as described by the Netherlands Hoge Raad in Public Prosecutor v. Menten:

The concept of *crimes against humanity* also requires that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.

B.2.3 Legal Definition and the ICC

One study identified a total of 109 different definitions of terrorism (Schmid, 2011), and a 2011 study, from the same scholar, compiled 260 definitions of terrorism (Schmid, 2011), while arguably the number would be most likely higher today (Schmid, 2011).

Nonetheless, it is intriguing to explore the claim that a definition is an equation. The term *codification* is often used in the legal profession to refer to the systematization of

rules on how to behave in various situations; in certain areas of law, such as criminal law, this systematization might take the form of an equation.

Accordingly, the theory of logic holds that the word to be defined is the definiendum, followed by the definiens in the form of a collection of words that describes the term of our interest. However, when discussing a term's legal meaning, it is being discussed as a matter of law that requires legal treatment.

It is well-known that attempts to advance in a commonly acknowledged legal description of terrorism have repeatedly failed (Schmid, 2011), despite the fact that the concept of terrorism has been the subject of centuries of intellectual struggle over its definition and even greater motivation since the September 11th, 2001 attack. To this point, everyone agrees that terrorist attacks are heinous acts that are expressly outlawed by domestic law. However, things are quite different and unsteady on the global stage. It seems like now would be a good time to take a peek at how things are doing over at the International Criminal Court.

The Preamble of the Rome Statute confirms that the International Criminal Court is the very last hope for victims of genocide, war crimes, and crimes against humanity since, as has been proclaimed, this court is focused only with the gravest of these crimes. Therefore, it calls on all nations to implement domestic reforms and boost international cooperation in order to remove impunity, and it reminds nations of their responsibility to prosecute those guilty of such atrocities (Rome Statute of the International Criminal Court, 1998).

Since national legal systems are not intended to replace the Court, the Rome Statute gives the Court a function that is complementary to them. Article 86 makes it clear that States must provide all necessary assistance to the ICC, although it should be highlighted that there is no mechanism to ensure prompt adherence (Rome Statute of the International Criminal Court, 1998). For some, this makes the outcome of this cooperation subject to legal paradoxes and politically motivated complications, while also imbuing the Court's credibility with the negative quality of an implied sense of procrastination and the standard of timely procedures with uncertain outcomes, thereby undermining the certainty that the administration of justice necessitates.

As a descriptional prerequisite, terrorism refers to an attack directed against a civilian population, while one could argue that is exactly as required by the Rome Statute for crimes against humanity, and if it is executed pursuant to or in furtherance of a State or organizational policy, it should effortlessly fulfill the jurisdictional necessities and requirements for a trial in the ICC as a crime against humanity (Schmid, 2011). Terrorism unquestionably, in principle, succeeds to fulfill the conditions of the ICC's jurisdiction as a crime against humanity since it is an occasion of cruel acts causing significant pain, or substantial impairment to body or mental or physical health. However, the Court really ignores these claims. While it is true that there may be some acts of terrorism that do not

rise to the level of crimes against humanity due to their smaller scale or less severe impact, even these cases should and must be admissible in the ICC if the State in charge of the imprisonment process has a direct interest.

B.2.4 Counter-Terrorism and the War on Terror

Counter-terrorism encompasses a range of strategies and actions undertaken by governments and international entities to prevent and combat terrorism (Schmid, 2011). Its aim is to identify, neutralize, and deter terrorist activities while addressing the underlying factors that contribute to terrorism's proliferation (Martin, 2018).

The term *War on Terror* emerged after the September 11, 2001 attacks, as a global response led by the United States and its allies (Hayes, 2016). This initiative involved military, political, and legal measures with the goal of dismantling terrorist networks, disrupting their operations, and preventing future attacks (Hayes, 2016).

Instances of the *War on Terror* have involved military interventions, intelligence operations, surveillance programs, legislative changes, and international collaboration (Bockstette, 2008). The emphasis has been on countering extremist ideologies, targeting terrorist organizations and their leaders, and bolstering security measures domestically and internationally (Bockstette, 2008).

Critics of the *War on Terror* contend that certain tactics employed, such as rendition programs, secret detentions, and mass surveillance, have encroached upon civil liberties and violated human rights (Cole, 2004). These measures have often resulted in the erosion of individual freedoms, an increase in State power, and a climate of fear and mistrust (Cole, 2004).

Furthermore, concerns exist regarding the efficacy of the *War on Terror* in achieving its objectives. Critics argue that military interventions and aggressive counter-terrorism measures have inadvertently led to unintended consequences, including civilian casualties, destabilization of regions, and the exacerbation of social and political grievances that can foster further radicalization (Pape, 2005).

Moreover, the *War on Terror* has faced criticism for its focus on a militarized approach at the expense of addressing root causes such as poverty, political instability, and socioeconomic disparities that contribute to the emergence of terrorism (Lutz & Lutz, 2013). Critics argue that a comprehensive approach encompassing diplomacy, development, and redressal of grievances is necessary to effectively combat terrorism (Lutz & Lutz, 2013).

In recent years, there has been an increasing recognition of the need to balance counter-terrorism efforts with the protection of human rights and the adherence to the rule of law (Singh, 2019). Efforts have been made to establish policies and frameworks

that respect fundamental rights while effectively countering terrorism. These include safeguards for fair trials, prohibitions on torture, and respect for privacy (Singh, 2019).

The ongoing discourse surrounding counter-terrorism and the War on Terror highlights the intricate challenges involved in striking a balance between security concerns and the preservation of individual rights, as well as the pursuit of long-term peace and stability (Gunaratna, 2021). This multifaceted issue necessitates continuous evaluation, dialogue, and a commitment to upholding both security and human rights imperatives (Gunaratna, 2021).

Real-life examples of the impact of counter-terrorism measures on human rights include cases such as rendition programs, where individuals have been unlawfully transferred to countries known for practicing torture (Carr, 2018). The establishment of *black sites*, secret detention facilities operated by intelligence agencies, has raised concerns about the violation of detainees' rights and the lack of transparency and accountability (Carr, 2018). Mass surveillance programs, such as those exposed by Edward Snowden, have raised questions about the right to privacy and the extent of government intrusion into individuals' lives (Lyon, 2014). These cases illustrate the tensions between counter-terrorism efforts and human rights, emphasizing the need for careful consideration and safeguards to protect individuals' rights while addressing security concerns.

B.2.5 Conclusion

Terrorism and the counterterrorism measures adopted by democratic governments have detrimental effects on the protection of human rights (OHCHR, n.d.). During times of crisis, States committed to human rights standards must uphold and promote all human rights, not selectively prioritize certain rights over others (OHCHR, n.d.). The Office of the High Commissioner for Human Rights emphasizes the importance of pursuing global security goals in conjunction with efforts to realize international human rights norms (OHCHR, n.d.). Therefore, nations should reaffirm their dedication to human rights as fundamental principles and integrate this aspect into every counterterrorism policy, rather than compromising efficacy by resorting to unlawful tactics.

Since the events of September 11, 2001, the international community has undergone a significant shift in its agenda, entering a State of emergency decision-making that revolves around combating terrorism (Ramraj, 2012). Paradoxically, more lives have been lost in the *War on Terror* than in the September 11 attacks themselves (Ramraj, 2012). This indicates a regression rather than progress, as we have failed to learn from our mistakes and instead resorted to increasingly drastic measures (Ramraj, 2012). Furthermore, the manipulation of legislation for political purposes has reached unprecedented levels, undermining the pursuit of justice (Ramraj, 2012).

A comprehensive examination of terrorism requires both legal and philosophical perspectives, as philosophy plays a significant role in understanding its nature and

function, offering unique avenues of thought beyond the limitations of law (Halabi, 2014). The challenges in the field of human rights arise primarily from theoretical and practical aspects (Halabi, 2014). Enforcing these lofty goals in reality will undoubtedly be challenging, especially considering the logocentric and antiquated nature of the legal system (Halabi, 2014). Integrating psychoanalysis into the legal framework can offer new insights into the human subject of law, as it acknowledges individuals as psychosomatic entities (Halabi, 2014). By combining law and psychoanalysis, new possibilities for development in both fields can emerge (Halabi, 2014).

Despite ongoing discussions, there is still no universally accepted definition of terrorism (Kaponyi, 2019). The United States Department of State provides a simple definition, but this viewpoint is unconvincing as it fails to account for the varying degrees and unique characteristics of different crimes (Kaponyi, 2019). While classifying a crime as terrorism allows for the use of broader investigative and prosecutorial tools, it is essential to establish a clear and legally valid definition of terrorism to prevent its exploitation for political purposes (Kaponyi, 2019).

However, it is crucial to acknowledge that involving politics and international relations in the law-making process can obscure the credibility of international law (Anderson, 2017). The principle of “no one is above the law” necessitates impartiality in administering justice, without shielding powerful politicians from prosecution (Anderson, 2017). Terrorism is a multifaceted crime, and accountability extends beyond the direct perpetrator to include all the intermediate steps leading to the act itself (Anderson, 2017). The flexible nature of *mens rea* in terrorism reflects the range of intentions involved, driven by fear and terror as tools for achieving political goals (Anderson, 2017).

It is important to recognize that although there is no legally binding definition, international customary law provides resources and arguments to support a definition of terrorism (Schabas, 2019). However, customary law poses challenges and lacks the necessary legal weight when addressing terrorism (Schabas, 2019). Given the complexities of this field, researchers must strive for impartiality and comprehensiveness by drawing on various disciplines such as law, philosophy, psychology, sociology, and politics (Schabas, 2019).

Rejecting the notion that violence is necessary to counteract terrorism is essential since it only exacerbates fear and anxiety (Jones, 2016). Strategies like the *War on Terror* have generated more fear than they have mitigated (Jones, 2016). If safety is defined as the absence of threat, such approaches have failed to eliminate danger or anxiety (Jones, 2016).

Reflecting on the lessons from the Second World War and the Cold War, which shaped humanitarian and human rights law, it is crucial to remember that human rights must be safeguarded and expanded (Forsythe, 2017). History serves as a reminder that nothing should be taken for granted, and the consequences of war and political violence should not be forgotten, particularly in the globalized context we live in today (Forsythe, 2017).

- **Important points to remember about "Terrorism and Human Rights"**

When studying "Terrorism and Human Rights," it is crucial for students to keep in mind the following important points:

1. Definition of Terrorism: Terrorism is a complex and contested concept. Different legal systems and international organizations provide varying definitions of terrorism. It is important to recognize that definitions of terrorism can impact the interpretation of human rights in relation to counter-terrorism measures.
2. Human Rights Framework: The protection and promotion of human rights remain fundamental, even in the context of countering terrorism. Human rights are universal, indivisible, and interrelated, and they should be respected and upheld in all circumstances, including in the fight against terrorism.
3. Balancing Security and Human Rights: The challenge lies in striking a balance between ensuring security and safeguarding human rights. It is crucial to examine how counter-terrorism measures can impact individuals' rights to privacy, liberty, fair trial, freedom of expression, and freedom from torture or cruel, inhuman, or degrading treatment.
4. Proportionality and Necessity: Counter-terrorism measures must meet the principles of proportionality and necessity. This means that any restrictions on human rights must be proportionate to the threat posed and necessary to achieve legitimate security objectives. It is important to assess whether measures adopted by States are justifiable and respectful of human rights standards.
5. Prevention and Preemptive Measures: Governments employ various preventive measures to counter terrorism, including surveillance, intelligence gathering, and preemptive actions. It is essential to examine the potential impact of such measures on the rights of individuals, including the right to privacy and the presumption of innocence.
6. Anti-Terrorism Legislation: Many countries have enacted specific anti-terrorism legislation to address terrorist activities. Students should critically analyze these laws to understand their scope, impact, and potential risks to human rights. Questions may arise regarding definitions of terrorism, broad powers granted to law enforcement, and the balance between security and civil liberties.
7. Due Process and Fair Trial: In cases involving terrorism, ensuring due process and fair trial rights is crucial. Students should examine issues such as

prolonged detention without charges, access to legal representation, presumption of innocence, and the use of evidence obtained through torture or coercion.

8. Protection of Vulnerable Groups: Terrorism can disproportionately affect certain vulnerable groups, including refugees, migrants, religious or ethnic minorities, and women. Students should explore how counter-terrorism measures can impact the rights and safety of these groups, as well as the importance of ensuring their protection and inclusion.
9. International Cooperation: Counter-terrorism efforts often involve international cooperation among States. It is essential to assess how collaboration, information sharing, and joint actions can be conducted in a manner consistent with human rights standards and respect for the sovereignty of States.
10. Role of Human Rights Organizations: Human rights organizations play a crucial role in monitoring and advocating for the protection of human rights in the context of counter-terrorism. Students should familiarize themselves with the work of these organizations, their reports, and recommendations to gain insights into human rights challenges and potential solutions.

Engaging with case studies, examining real-life scenarios, and analyzing the impact of counter-terrorism measures on human rights will enable students to develop a nuanced understanding of the complexities and tensions that arise in this field. It is important to foster critical thinking, respect for human rights, and a commitment to uphold the rule of law while addressing the threat of terrorism.

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Test your knowledge

1. **How does terrorism affect human rights?**

Answer:Terrorism has significant implications for human rights. Its impact can be seen in several ways:

1. Right to Life: Terrorism often results in the loss of innocent lives, targeting civilians and non-combatants deliberately. This directly violates the fundamental right to life, which is universally recognized as a basic human right.
2. Right to Security: Acts of terrorism create an atmosphere of fear and insecurity within societies. People may feel threatened and unsafe in their daily lives, leading to restrictions on the right to security. Governments may implement security measures that can potentially infringe on individuals' privacy and personal freedoms.
3. Right to Liberty: In response to acts of terrorism, governments may enact emergency measures, including detentions without due process, surveillance, and restrictions on movement, all of which can curtail the right to liberty.
4. Freedom of Expression: In some cases, terrorism can lead to limitations on freedom of expression. Governments may impose censorship or surveillance in the name of national security, restricting the ability of individuals and media outlets to express dissenting views or report on sensitive issues.
5. Freedom of Assembly and Association: In the aftermath of terrorist attacks, governments may impose restrictions on the right to assemble and associate, particularly if they perceive certain groups or gatherings as potential security threats. This can hinder peaceful protests, civil society activities, and the formation of associations.
6. Right to a Fair Trial: Counterterrorism measures sometimes involve the use of extraordinary legal procedures, such as special courts or military tribunals, which may lack proper safeguards and due process. This can undermine the right to a fair trial and the presumption of innocence.
7. Protection against Torture and Cruel, Inhuman, or Degrading Treatment: In the fight against terrorism, there have been instances of human rights abuses, including the use of torture, arbitrary detention, and mistreatment of suspects. Such actions violate the prohibition of torture and other forms of cruel, inhuman, or degrading treatment.

It is important to note that while counter=terrorism efforts are crucial to safeguarding societies, it is equally essential to ensure that these measures respect and protect human rights. Upholding human rights principles is vital in preserving the rule of law and maintaining the dignity and well-being of all individuals.

2. **Is terrorism always morally unjustified?**

Answer: The question of whether terrorism can be morally justified is a topic of great complexity and ongoing debate. It evokes diverse perspectives influenced by cultural, ideological, and ethical frameworks. However, it is important to highlight that terrorism is widely condemned by the international community and deemed morally unjustified for several significant reasons.

One critical factor is the deliberate targeting of innocent lives, with terrorism often aiming violence at civilians and non-combatants who are not involved in any conflict. Such intentional acts of harm against individuals who bear no responsibility are widely regarded as morally indefensible, as they violate the principle of non-combatant immunity and disregard the inherent value of human life.

Furthermore, acts of terrorism frequently involve the disproportionate and indiscriminate use of force, inflicting harm on a larger population beyond the intended targets. This contravenes the principle of proportionality, which requires the use of force to be commensurate with the threat faced.

Terrorism also frequently violates fundamental human rights, including the right to life, security, and physical integrity. These actions run counter to established principles of international humanitarian law that seek to safeguard civilians during armed conflicts.

Moreover, terrorism seeks to undermine or disrupt legitimate political processes and democratic institutions by resorting to violence and intimidation. This circumvents peaceful means of expressing grievances or effecting change, undermining the principles of democratic participation and peaceful coexistence.

The use of terror and violence to achieve political or ideological objectives erodes social trust, fosters fear and division, and destabilizes communities and societies. Consequently, the prospect of peaceful dialogue and conflict resolution is compromised.

While some individuals or groups may argue that terrorism represents a last resort or a necessary means to address perceived grievances in contexts of marginalization, oppression, or powerlessness, the vast majority of ethical frameworks and international norms condemn terrorism as morally unjustified. This condemnation arises from its inherent disregard for human rights, deliberate targeting of civilians, and the disproportionate use of violence.

3. **What is the role of human rights in counter-terrorism?**

Answer: Human rights play a pivotal role in the context of counter-terrorism endeavors. While the pursuit of counterterrorism is essential for safeguarding societies and ensuring security, it is imperative to ensure that counterterrorism measures maintain fidelity to and uphold human rights principles. The role of human rights in counter-terrorism encompasses several fundamental dimensions:

Preservation of Civil Liberties: Human rights frameworks place significant emphasis on safeguarding civil liberties and fundamental freedoms, such as the rights to freedom of expression, assembly, and association. It is vital to strike a balance wherein counter-terrorism measures neither excessively curtail nor unduly restrict these rights. Ensuring

the harmonization of security imperatives with the preservation of civil liberties is essential for fostering democratic and inclusive societies.

Prohibition of Torture and Inhumane Treatment: The respect for human rights unequivocally prohibits the employment of torture, cruel, inhuman, or degrading treatment or punishment. Counter-terrorism efforts must steadfastly adhere to these principles, ensuring that individuals identified as suspects or detainees are treated with dignity and afforded due process rights, including the right to a fair trial.

Non-Discrimination and Equality: Counter-terrorism measures must be implemented without discrimination based on race, ethnicity, religion, or any other protected characteristic. Adherence to the principles of non-discrimination and equality is instrumental in preventing the stigmatization or profiling of specific communities. It ensures that counter-terrorism endeavors are based on sound evidence, intelligence, and analysis rather than prejudice or bias.

Protection of the Right to Privacy: Counter-terrorism measures involving surveillance or data collection should conform to human rights standards. Respect for the right to privacy is imperative, and any encroachment upon personal privacy must be deemed necessary, proportionate, subject to appropriate oversight, and accountable.

Accountability and Rule of Law: Human rights principles underscore the significance of accountability and the rule of law. Counter-terrorism efforts should be conducted within a legal framework that respects due process, transparency, and the provision of avenues for legal redress. Law enforcement agencies and security forces must be held accountable for any human rights violations committed during the course of counterterrorism operations.

Fostering Trust and Encouraging Cooperation: Respecting and promoting human rights within counterterrorism measures serve to cultivate trust between authorities and communities. When individuals and communities perceive that their rights are protected and that they are treated equitably, they are more inclined to cooperate with law enforcement agencies, share information, and actively support endeavors aimed at preventing terrorism.

By incorporating human rights considerations into counter-terrorism strategies, it becomes possible to strike a harmonious equilibrium between security imperatives and the protection of fundamental rights and values. This approach fortifies the effectiveness of counter-terrorism measures while upholding the principles of dignity, justice, and respect for human rights.

4. **What was the *War on Terror* and how does it connect to human rights?**

Answer: The *War on Terror* refers to the global campaign launched by the United States and its allies following the September 11, 2001, terrorist attacks in the United States. It involved military operations, intelligence activities, and law enforcement efforts aimed at combating terrorism and dismantling terrorist networks, particularly those associated with Al-Qaeda.

The connection between the *War on Terror* and human rights, is multifaceted and complex. On one hand, the campaign was undertaken in response to grave human rights abuses perpetrated by terrorist groups. The attacks of September 11th resulted in the loss of thousands of innocent lives, violating the fundamental human right to life and security. The *War on Terror* sought to prevent future acts of terrorism and protect individuals from further harm.

However, the *War on Terror* also had significant implications for human rights. Some of the counterterrorism measures employed during this period resulted in the erosion of civil liberties, restrictions on freedoms of expression and privacy, and violations of due process rights. Practices such as prolonged detentions without trial, secret renditions, and enhanced surveillance programs raised concerns about the protection of human rights.

Moreover, incidents of torture, cruel treatment, and abuse perpetrated against detainees in the context of counter-terrorism operations emerged, casting doubt on the adherence to human rights principles and international legal norms. The mistreatment of detainees at locations like Guantanamo Bay and Abu Ghraib became emblematic of the human rights challenges associated with the *War on Terror*.

Furthermore, the *War on Terror* had broader implications for international humanitarian law and the conduct of armed conflicts. The campaign blurred the boundaries between traditional armed conflicts and counterterrorism operations, leading to debates over the application of legal frameworks governing armed conflicts, treatment of detainees, and the use of force against non-state actors.

Overall, while the *War on Terror* was driven by legitimate concerns for security and the protection of human rights, the manner in which it was conducted and the measures implemented raised significant human rights questions and prompted debates about striking the right balance between security and the preservation of individual rights and freedoms.

Documentaries to watch

Here are some documentaries that explore the topics of terrorism and human rights:

1. *The Act of Killing* (2012) - Directed by Joshua Oppenheimer, this documentary delves into the Indonesian genocide of the 1960s, exploring the brutal violence committed by paramilitary groups and their impact on human rights.
2. *The Fog of War* (2003) - Directed by Errol Morris, this documentary features an in-depth interview with former U.S. Secretary of Defense Robert McNamara, who reflects on the ethical challenges and human rights implications of the Vietnam War.
3. *Dirty Wars* (2013) - Directed by Richard Rowley, this documentary follows investigative journalist Jeremy Scahill as he uncovers covert U.S. military operations and their impact on human rights in countries like Afghanistan, Yemen, and Somalia.
4. *No End in Sight* (2007) - Directed by Charles Ferguson, this documentary examines the aftermath of the U.S. invasion of Iraq, highlighting the human rights abuses, sectarian violence, and insurgency that emerged in the wake of the conflict.
5. *The Trials of Henry Kissinger* (2002) - Directed by Eugene Jarecki, this documentary investigates the alleged war crimes committed by former U.S. Secretary of State Henry Kissinger during his tenure, particularly in relation to the Vietnam War and the U.S. involvement in Chile.
6. *Terror's Advocate* (2007) - Directed by Barbet Schroeder, this documentary explores the life and career of controversial lawyer Jacques Vergès, who defended various individuals accused of terrorism and sheds light on the complex relationship between terrorism and human rights.
7. *The Kill Team* (2013) - Directed by Dan Krauss, this documentary follows the story of a group of U.S. soldiers in Afghanistan who were involved in the killing of Afghan civilians, raising questions about military ethics, accountability, and human rights violations.
8. *Taxi to the Dark Side* (2007) - Directed by Alex Gibney, this documentary investigates the torture and abuse of prisoners by U.S. forces in Afghanistan, Iraq, and Guantanamo Bay, exploring the erosion of human rights in the context of the "War on Terror".
9. *The Invisible War* (2012) - Directed by Kirby Dick, this documentary sheds light on the issue of sexual assault within the U.S. military, examining the systemic failures and human rights violations faced by victims and the challenges they encounter seeking justice.
10. *Citizenfou*r (2014) - Directed by Laura Poitras, this documentary chronicles the

events surrounding Edward Snowden's leak of classified documents, exposing mass surveillance programs and sparking a global debate on privacy, national security, and human rights.

Please note that some of these documentaries may contain sensitive or disturbing content, so it's advisable to check the ratings and descriptions before watching.

Chapter 3 Cultural Rights

Abstract

Cultural rights, the Cinderella of human rights, is a much evolving cluster of rights. Despite being side-lined for many decades throughout academic literature and State practice, cultural rights have reached a momentum of maturity and enforceability. The chapter discusses the expanding scope of cultural rights (for example, by reference to the emerging right to cultural heritage) and the cultural dimensions of human rights. The chapter also discusses the cultural rights of children and the impact of COVID-19 on cultural rights overall.

Required Prior Knowledge

Human Rights, International Organisations.

B.3.1 Cultural Rights

Cultural rights is a much evolving cluster of rights that has previously been side-lined throughout academic literature and State practice.[310] According to the UN Special Rapporteur in the field of Cultural Rights, cultural rights "protect the rights of each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they assign to human existence and development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They also protect access to tangible and intangible cultural heritage as important resources enabling such identification and development processes."[311]

All international human rights instruments contain some provisions on the protection of cultural rights. But out of all international human rights instruments, the ICESCR is the only treaty that refers to cultural rights in its title. The ICESCR provides *inter alia* for the progressive realisation of the right to: self-determination; social security; an adequate standard of living, including adequate food, clothing and housing; protection of

[310] Due to word limit restrictions this chapter does not cover issues such as artistic freedom and status of artists. For futher information see Wiesand, Andreas J., Chainoglou, Kalliopi and Sledzinska-Simon, Anna. *Culture and Human Rights: The Wroclaw Commentaries*, Berlin, Boston: De Gruyter, 2017. https://doi.org/10.1515/9783110432251

[311] Report of the Special Rapporteur in the field of cultural rights, Cultural Rights, A/67/287, 10 August 2012, para. 7; Report of the Independent Expert in the Field of Cultural Rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36, 22 March 2010, para. 9.

the family; the highest attainable standard of physical and mental health; education; participation in cultural life; benefit from scientific progress; and protection of an author's moral and material interests resulting from scientific, literary or artistic production. The Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly confirmed that States Parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights enunciated in the Covenant; however, it accepts that a "full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time" and that their progressive realisation will take place "under the prevailing circumstances".[312] UN human rights bodies have consistently affirmed that ESC rights retain the same binding effect as civil and political rights.[313] While some of the rights enshrined in the ICESCR are clearly categorised as cultural rights, all other ICESCR rights have been recognised as having a cultural dimension and their effective application and implementation is required to be culturally mediated. Under ICESCR cultural rights *stricto sensu* encompass the right to education (Articles 13 and 14)[314] and the rights guaranteed in Article 15 (echoing the wording of Article 27 UDHR): the right to take part in cultural life (Article 15 (1)(a))[315], the right to enjoy the benefits of scientific progress Article 15 (1)(b)) and the right of authors/writers/artists to the protection of their moral and material interests (Article 15 (1)(c)). According to the CESCR intellectual property rights, which are of temporary nature, are not to be equated with the human right in Article 15 (1) (c).[316]

The right to education is one of the most protected rights within human rights law; not only it is protected in two ICESCR articles, but it is guaranteed in other UN human rights treaties, UNESCO normative instruments and at least 28 regional human rights treaties.[317] With regard to education, the CESCR has defined the general and specific states' obligations and has set the minimum core obligations (which apply irrespective of the availability of resources) whereby States are to: ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article 13 (1) ICESCR; to provide primary education for all in accordance with Article 13 (2)(a); to adopt and implement a national

[312] CESCR General Comment No. 3, The Nature of States Parties' Obligations (art. 2, para. 1, of the Covenant), E/1991/23, 14 December 1990, paras. 9–10.
[313] UN ECOSOC, Report of the UN Commissioner for Human Rights, E/2006/86, 21 June 2006.
[314] The present author embraces the understanding that the DNA of the right to education has strong cultural connotations which effectively merits the classification of "cultural rights". See discussion below in this text.
[315] Romainville, C. (2015). "Defining the Right to Participate in Cultural Life as a Human Right". Netherlands Quarterly of Human Rights, 33(4), 405-436. https://doi.org/10.1177/016934411503300404
[316] CESCR General Comment No. 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17, 12 January 2006, para. 3.
[317] UNESCO, Right to Education Handbook, (UNESCO: Paris, 2019), https://unesdoc.unesco.org/ark:/48223/pf0000366556

educational strategy which includes provision for secondary higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to the conformity with "minimum educational standards".[318]

The right to education has been interpreted in a broad manner by international human rights courts and national courts, for example, States' obligations include providing physical safety at schools, provision of sexual and reproductive health education, adopting measures for children not to drop out of schools, provision of inclusive education, etc. The UN Rapporteur on the Right to Education has noted that the limited cultural relevance of education systems is a barrier to the realisation of the right to education[319] and has called for the right to education to be viewed as a cultural right:

> the right of each person to the cultural resources necessary to freely follow a process of identification, to experience mutually rewarding relations his or her life long, to deal with the crucial challenges facing our world and to engage in the practices that make it possible to take ownership of and contribute to these resources.[320]

Such an approach requires a paradigm shift concerning the realization of the right to education under this cultural prism: for example, States need to "to unlock the cultural potential of groups of people who are severely disadvantaged"[321] and to ensure the protection of the right of all persons, including migrants, refugees, persons with intersecting identities, etc, to participate in educational life.[322] Moreover, there is an emerging consensus among human rights bodies to broaden the right to education to include digital competencies, digital literacy and access to online education.[323] The Special Rapporteur in Education has called for the harmonization of the cultural dimension of the right to education with digital education. This entails *inter alia* respect for persons' cultural rights "in accordance with their aspirations, needs, resources and capabilities"; the integration of local languages into digitalization processes; and for the empowerment of

[318] CESCR Comment No. 13, The Right to Education (Article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para. 57.
[319] Ibid.
[320] UN Rapporteur on the Right to Education, Right to education: the cultural dimensions of the right to education, or the right to education as a cultural right, A/HRC/47/32, 16 April 2021, Summary.
[321] UN Rapporteur on the Right to Education, Right to education: the cultural dimensions of the right to education, or the right to education as a cultural right, A/HRC/47/32, 16 April 2021, para. 14.
[322] See UN Rapporteur on the Right to Education, Right to education: the cultural dimensions of the right to education, or the right to education as a cultural right, A/HRC/47/32, 16 April 2021, paras. 53-65.
[323] See for example, Report of the Special Rapporteur on the Right to Education: Impact of the digitalization on the right to education, 19 April 2022, A/HRC/50/32, para. 30, whereby the Special Rapporteur has called for all relevant stakeholders to evaluate digitalized education based on its relevance, cultural appropriateness and quality.

"students and educators, as well as families, communities and indigenous peoples, as full participants in decision-making around digital technologies and their use".[324]

With respect to Article 15 of the ICESCR, CESCR has endorsed a broader understanding of *culture* that includes its individual and collective dimensions[325] and has affirmed the States' obligations to protect people against harmful practices attributed to customs and traditions and to take special measures for groups requiring special attention (migrants, minorities, Indigenous peoples, women, children, older persons and persons with disabilities) in order to protect their cultural identity and to enable them to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, i.e. access to one's own cultural and linguistic heritage, access to cultural materials, television programmes, films, theatre and other cultural activities, in accessible forms, etc. According to CESCR, the realization of the right to take part in cultural life, is dependent upon the fulfilment of five conditions: availability (of cultural goods and services), accessibility (in terms of opportunities for the rights-holders), acceptability (in terms of measures being acceptable to the rights-holders), adaptability (in terms of the measures being respectful of and adaptable to cultural diversity of individuals and communities) and appropriateness (in terms of the measures being suitable to and, at the same time, respectful of the culture and cultural rights of the individuals and the community).[326]

Human rights have a cultural dimension that is increasingly acknowledged on a normative level and in scholarly work.[327]The trend to reinterpret cultural or culture-oriented rights in international law instruments and to realign the scope of human rights through the prism of cultural connotations has effectively contributed to the enhancement of the status of cultural rights and has affirmed the interlinkage between cultural rights and all other human rights. As *cultural rights* are evolving, it is observed that the concept of *culture* and the identity of the right-holders is redefined on a normative level (see for example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Limburg principles on the Implementation of the ICESCR Rights, the Council of Europe Convention on the Value of Cultural Heritage for Society, etc).[328] The role of the CESCR,

[324] See Report of the Special Rapporteur on the Right to Education: Impact of the digitalization on the right to education, 19 April 2022, A/HRC/50/32, para. 96 (d).
[325] See CESCR, General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21 21 December 2009.
[326] CESCR, General Comment 21, para. 16.
[327] Wiesand, A. J., Chainoglou, K., Sledzinska-Simon, A., Donders, Y. (2017). Culture and Human Rights: The Wroclaw Commentaries. Berlin: De Gruyter. https://doi.org/10.1515/9783110432251
[328] Vleugel V., Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies, (Intersentia: Antwerp, 2020). See also the ongoing work of the World Intellectual Property Organisation on the preparation of an international instrument on the protection of traditional knowledge and traditional cultural expressions. For more information visit https://www.wipo.int/pressroom/en/briefs/tk_ip.html

Human Rights Committee, the Human Rights Council and the UN Special Rapporteurs cannot be ignored in this respect, as they have affirmed the broad and inclusive nature of *culture*[329], the overlap with civil and political rights, and the cultural dimension of all human rights, i.e. freedom of religion, freedom of assembly/association, freedom of information. For example, in General Comment No. 25 on science and economic, social and cultural rights, CESCR has emphasized that culture encompasses all manifestations of human existence and that the right to cultural life includes the right to participate and to enjoy the benefits of scientific activity as one of the dimensions of human existence:

> Cultural life is therefore larger than science, as it includes other aspects of human existence; it is, however, reasonable to include scientific activity in cultural life. Thus, the right of everyone to take part in cultural life includes the right of every person to take part in scientific progress and in decisions concerning its direction. This interpretation is also implied by the principles of participation and inclusiveness underlying the Covenant and by the expression, "to enjoy the benefits of scientific progress". Such benefits are not restricted to the material benefits or products of scientific advancement, but include the development of the critical mind and faculties associated with doing science. This understanding is corroborated by the *travaux préparatoires* on the drafting of article 15 of the Covenant, which demonstrate that the article was intended to develop article 27 of the Universal Declaration of Human Rights, which recognizes not only a right to benefit from the applications of science but also to participate in scientific advancement. The Universal Declaration of Human Rights is relevant to establish the scope of all the rights enshrined in the Covenant, not only because the preamble to the Covenant refers explicitly to the Universal Declaration of Human Rights, but also because both instruments represent international endeavours to give legal force to the rights in the Universal Declaration of Human Rights through the adoption of binding treaties. Thus, doing science does not only concern scientific professionals but also includes "citizen science" (ordinary people doing science) and the dissemination of scientific knowledge. States parties should not only refrain from preventing citizen participation in scientific activities, but should actively facilitate it.[330]

[329] CESCR, General Comment 21, para. 11. See also the African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v. Kenya*, Communication No. 276/2003, decision, forty-sixth ordinary session, 11–25 November 2005, para. 241, where culture is identified as a "complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society".

[330] CESCR, General Comment No. 25 (2020), on science and economic, social and cultural rights (Article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/25, 30 April 2020, para. 10.

The right to participate in cultural life is fundamental to protecting the collective identity of Indigenous and traditional communities and minorities as their identities are at risk of being eroded by the prevailing culture in a given society or may be exposed to assimilation policies. The I/A Court of HR has affirmed that the right to take part in cultural life includes the right to cultural identity.[331] The Court has defined the right to cultural identity as

> the freedom of individuals, including when they are acting together or as a community, to identify with one or several societies, communities or social groups, to follow a way of life connected to the culture to which they belong and to take part in its development. …[t]his right protects the distinctive features that characterize a social group without denying the historical, dynamic and evolutive nature of culture.[332]

Due to the interdependence between the rights to a healthy environment, food, water and cultural identity, the Court has noted that these rights are vulnerable to environmental impact;[333] hence, threats to the environment pose a tantamount threat to the cultural identity and the cultural rights, in general, of Indigenous groups.

The right to take part in cultural life is interlinked with the right to have access to land. Land is a prerequisite for individuals, Indigenous and other traditional communities to exercise social, cultural and religious practices, to formulate and express their cultural identity and to serve as a means for guaranteeing subsistence and security.[334] International and national case law has acknowledged that Indigenous and other traditional communities that maintain a similar symbiotic relationship with their lands have the right to express their opinion on the use of their land and the natural resources, have the right to have their lands demarcated and have the right to restitution in cases where their land

[331] Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Inter-American Court of Human Rights, Judgment 6 February 2020, para. 231.
[332] Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Inter-American Court of Human Rights, Judgment 6 February 2020, para. 240.
[333] Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Inter-American Court of Human Rights, Judgment 6 February 2020, para. 228; The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, Case of the *Yakye Axa Indigenous Community v. Paraguay*, Merits, reparations and costs. Judgment of 17 June 2005. Series C No. 125, para. 167; Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, reparations and costs. Judgment of 29 March 2006, Series C No. 146, paras. 156 to 178; Case of the *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, reparations and costs. Judgment of 24 August 2010, Series C No. 214paras. 195 to 213.
[334] CESCR, Draft General Comment No. 26 (2021) on Land and Economic, Social and Cultural Rights, E/C.12/69/R.2, 3 May 2021, paras. 1, 12.

is alienated and passed on to other owners.[335] Restitution entails not only pecuniary compensation but even to be given land of *equal extension and quality* to the original lost land.[336] To this end, CESCR has advised that:

> States parties should also recognize the social, cultural, spiritual, economic, environmental and political value of land for communities with customary tenure systems and should respect existing forms of self-governance of land. It is important that traditional institutions for collective tenure systems ensure the meaningful participation of all members, including women and young people, in decisions regarding the distribution of user rights. Ensuring access to natural resources, as concerns the Covenant, cannot be limited to specific protections granted to the lands and territories of indigenous peoples. Among those groups are those that depend on the commons. Fisher folk need access to fishing grounds, yet strengthening individual property rights might entail fencing off the land that gives them access to the sea or to rivers. Pastoralists also form a particularly important group in sub-Saharan Africa, where almost half of the world's 120 million pastoralists or agropastoralists reside. In addition, throughout the developing world, many rural households still depend on gathering firewood for cooking and heating, and on commonly owned wells or water sources for their access to water. The formalization of property rights and the establishment of land registries should not further worsen the situation of all those groups, as cutting them off from the resources on which they depend would threaten their livelihood.[337]

There are myths that surround cultural rights: myths that relate to not understanding the content of cultural rights or the nature of obligations arising under cultural rights. The enforcement of cultural rights has been limited due to budget constraints or policy priorities. As with other rights in the cluster of socio-economic rights, cultural rights have also met limited legal protection in practice. The UN and other organisations have tried to change the mentality among States and increase the

[335] See also Article 28 of the 2007 UN Declaration on the Rights of Indigenous Peoples. It is interesting to see the recognition of the indigenous customary rights in common law jurisdictions- see for example, *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R 1; *Calder v. AG*, [1973] S.C.R. 313; *Amodu Tijani v. the Secretary*, Southern Provinces () [1921] NGSC 1 (11 July 1921); Adong HC [1997] 1MLJ 418. See also Subramaniam Y. and Nicholas C., "The Courts and the Restitution of Indigenous Territories in Malaysia", Erasmus Law Review, 1, (2018):67-79.

[336] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, para. 128; African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v. Kenya*, para. 209

[337] CESCR, Draft General Comment No. 26 (2021) on Land and Economic, Social and Cultural Rights, para. 24.

accountability of duty-bearers, as well as the remedies to individuals or groups in cases of violations of cultural rights.

Cultural rights, under the ICESCR and other international instruments, have long been viewed as *luxury*; a narrow understanding of their scope and content has associated cultural rights with the special rights recognised to minorities and Indigenous peoples in order to enable them to preserve their cultural identity. It was only with the UN Declaration on the Rights of Indigenous Peoples[338] that the international community acknowledged at normative level the collective aspects of cultural rights; throughout the text of this document one comes across various aspects of cultural rights. However, the provisions that focus *ad hoc* on cultural rights are Arts. 11 (on the right of Indigenous peoples to practice their culture and cultural traditions), 12 (on the right to practice the religious aspects of Indigenous cultures), 13 (on intangible heritage and transmission of knowledge to future generations), 15 (on intercultural education and pubic information) and 34 (on the right to maintain their institutional structures and practices). But, while cultural rights are indeed guaranteed for this category of groups (Indigenous and traditional communities), a number of States have been reluctant to recognise collective cultural rights in fear of State fragmentation and separatism.

Another myth concerns the justiciability of cultural rights. The lack of a complaints procedure under ICESCR for many decades enforced the belief that only civil and political rights are effectively justiciable. The vaguely worded ICESCR provisions and the nature of the rights therein *vis-a-vis* the ICCPR rights have also reinforced objections as to their justiciability in the international and domestic sphere. The failure of the international community to adopt an international complaints mechanism under ICESCR for many decades, has been pointed as the main reason for the side-stepping of ESC rights. However, domestic courts' decisions have demonstrated that ESC rights benefit from judicial protection and are subject to judicial enforcement in a number of domestic jurisdictions. Since 2013, CESCR has received many complaints mostly on alleged violations of housing and social security rights but only a handful of complaints concerned cultural rights. For example, *AMB v. Equador*, is a complaint which concerned the alleged discrimination against a foreign minor in respect of participation in youth soccer tournaments; CESCR declared it *inadmissible*.[339]

Art. 27 of ICCPR provides for the protection of cultural rights of ethnic, religious or linguistic minorities and Indigenous peoples. The provision protects the right to use one's

[338] 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).
[339] UN Committee on Economic, Social and Cultural Rights, Communication No. 3/2014, Views Adopted by the Committee at its fifty-eighth session, E/C.12/58/D/3/2014, 8 August 2016.

language, to profess and practice religion and to enjoy one's culture. This provision creates positive and negative obligations for the States, i.e. they must not only refrain from interfering with it but they have to take positive action to ensure that the individuals enjoy their cultural rights under Art. 27. The Human Rights Committee (HRC) jurisprudence has affirmed that this right is an individual's right. It has held that *culture* manifests itself in many forms as are related rights, which include a way of life that is closely associated with the use of land resources and the activities conducted therein, as well as the rights of persons belonging to minorities to enjoy their own culture as a group.[340] While Article 27 does not refer to minorities *per se*, the HRC has consistently affirmed that the right to culture can only be realised when exercised *in a community*[341]. Thus, the HRC has allowed for individual communications which can have impact on the group while communications submitted by groups are not allowed. This link between the individual right to culture and its exercise in the collective context, as recognised by the ICCPR, is likely to take a new direction when addressed by CESCR future case law. While the line between the individual and the collective right to culture under Article 27 ICCPR is thin, given that their protection depends on whether the "ability of the minority group to maintain its culture, language or religion" is affected, the CESCR may see itself deviating from the HRC practice.

It is important to accept that cultural rights, no matter who identifies them or claims their exercise, cannot infringe human rights guaranteed by international law. Cultural practices which violate these rules cannot but face elimination. Conceptual traps surrounding cultural rights have been explored in literature, for example, as to how the concept of universality of human rights shapes the human rights movement or how cultural relativism can serve to understand the relativity of human rights and to identify what human rights are.[342] The collective dimension of cultural rights has also been met with opposition by liberal concerns; human agency and autonomy, being predominant Western conceptions, clash with the collective element of *culture*.[343] On the other hand, the potential clash of or the eventual competition among many cultures within a society seems equally problematic for policy-makers, duty-bearers and rights-holders themselves. Furthermore, in certain political and social contexts, the concept of the culture of the *others* has been demonised with a common portrayal of persons as victims of their cultures. For example, concerns over whether certain *cultures* restrict the human rights of women have been equally misused to misread the actual violations of women's rights as the consequence of their cultural frameworks. Xanthaki rightly points out that:

> recent social campaigns for the rights of women, such as #MeToo,

[340] HRC, Ilmari Länsman et al. v Finland, Communication No. 511/1992, para. 9.8.
[341] HRC, Lubicon Lake Band v Canada, Communication No. 167/1984.
[342] See Alexandra Xanthaki, "When Universalism Becomes a Bully: Revisiting the Interplay Between Cultural Rights and Women's Rights", Human Rights Quarterly 41 (2019), 701-724.
[343] Xanthaki, p. 704.

> #BalanceTonPorc, #AnaKaman, and #YoTambien, reminded the world that women's rights violations are not limited to non-European cultural traditions; patriarchal structures and discrimination exist in Western cultures as much as in non-Western ones. Even in this case, the link with the Western culture is not emphasised. In general, non-Western women are seen as vulnerable and in need of strong supporters.[344].

Thus, to restrict or not recognise cultural rights in the name of protecting persons whose cultures and traditions are important to their own sense of identity, is not tantamount to human rights protection. Framing discussions around the empowerment (*vis-a-vis* the victimhood) of persons and improving their socio-economic conditions is the only way that both cultural rights will be preserved and the rights-holders' needs will be met.

B.3.1.1 A Right to Cultural Heritage?

Heritage is an integral element to the construction of identities and to the cultural preservation of the individuals or communities as heritage-bearers, and a catalyst for social cohesion and economic growth. Cultural heritage includes immoveable heritage, moveable cultural heritage, intangible cultural heritage, natural heritage, underwater heritage and even digital heritage. Cultural heritage belongs to the human rights construct and, especially, to cultural rights. States bear responsibility under international law to protect cultural rights, including cultural heritage, and hold duties *vis-a-vis* the rights-holders, including Indigenous peoples and minorities. As the UN Special Rapporteur in the field of Cultural Rights has said "cultural heritage is a human rights issue itself and it is indisputably a fundamental resource for other human rights".[345]

There is an umbilical cord between international cultural heritage law (the 1972 World Heritage Convention and the 2003 ICH) and international human rights law that can holistically underpin the protection scheme and regulatory framework of cultural heritage. This is a normative gestation of international cultural heritage law and international human rights law which is at its beginning phase. Admittedly, there may be arguments in favour and against such theorising[346] but one has to bear in mind that, only international

[344] Xanthaki, op. cit, pp. 707-708.
[345] UN Special Rapporteur in the field of Cultural Rights. (2017). Speech – Karima Bennoune – Inter-sessional seminar on cultural rights and protection of cultural heritage. 7 July 2017. https://www.europanostra.org/speech-karima-bennoune-inter-sessional-seminar-cultural-rights-protection-cultural-heritage/. See also UN Special Rapporteur in the field of Cultural Rights, A/HRC/17/38, 21 March 2011.
[346] Lixinski, L. (2016). International Human Rights Law and International Cultural Heritage Law: Cooperation, Conflict or Cooption?. ESIL – International Human Rights Law Symposium. https://www.ejiltalk.org/esil-international-human-rights-law-symposium-international-human-rights-

human rights law can offer the human rights entitlements and enforcement mechanisms of legal claims that concern the enjoyment and protection of heritage, whether tangible or intangible.[347]

This line of thought seems to be progressively acknowledged by UNESCO[348] and the UN Human Rights Council with the latter having recognised that "…the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights, in particular the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage…" [349]. Hence, the element of cultural heritage, especially in the case of intangible cultural heritage, is interlinked with the individual or the group/community and their entitlements, and, when the element of cultural heritage becomes obsolete, then the enjoyment of human rights is being irrevocably denied to the cultural heritage bearers or holders. In this sense, attacks on and destruction of cultural heritage are not mere violations of international cultural heritage law but also violations of international human rights law.

In 2016, the UN Rapporteur in the field of cultural rights, presented her thematic report to the UN General Assembly addressing the issue of intentional destruction of cultural heritage.[350] The barbaric acts of destruction of cultural heritage against landmark monuments, the looting of museums and the widespread illicit trafficking of cultural goods, often used to finance terrorist groups, were deemed issues that required to be seen as urgent priority by the international community. The protection of cultural heritage can be as much a necessity for the maintenance of international peace and security, as a human rights issue that concerns the enjoyment of the rights of individuals, communities and groups that are in relation to this cultural heritage. The Human Rights Council acknowledged in Resolution 33/20 that access to and enjoyment of cultural heritage is a fundamental resource for other human rights and that "damage to cultural heritage, both tangible and intangible, of any people constitutes damage to the cultural heritage of

law-and-international-cultural-heritage-law-cooperation-conflict-or-cooption/. Accessed 24 June 2020.

[347] Chainoglou K. (2021). "Attacks on Tangible and Intangible Cultural Heritage: Human Rights Violations, Violations of International Cultural Heritage Law or a Threat to International Peace and Security?", in O. Niglio and E. Lee (eds.), Transcultural Diplomacy and International Law in Heritage Conservation: A Dialogue between Ethics, Law, and Culture, (Springer, 2021), pp. 359-376.

[348] Blake, J. (2017). "Development of 2003 UNESCO's Convention: Creating a new heritage protection paradigm?", in P. Davis & M. L. Stefano (eds.), The Routledge Companion to Intangible Cultural Heritage (pp. 11-21). London: Routledge.

[349] UN Human Rights Council, Resolution 33 Cultural Rights and the Protection of Cultural Heritage, 27 September 2016, preamble.

[350] Report of the Special Rapporteur in the field of Cultural Rights, A/HRC/31/59, 3 February 2016; Report of the Independent Expert in the field of Cultural Rights, A/HRC/17/38, 21 March 2011; Report of the Special Rapporteur in the field of Cultural Rights, A/71/317, 9 August 2016; Report of the Special Rapporteur in the field of Cultural Rights, A/73/277, 25 July 2018. See also K. Chainoglou, "The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes", Santander Art and Culture Law Review, 2017, 2/2017 (3), pp. 109-134, http://doi.org/10.4467/2450050XSNR.17.025.8426

humanity as a whole”[351]. The value of this Resolution is that it affirms for the first time the connection between the destruction of cultural heritage and the violation of cultural rights on the one hand, and on the other hand, the destabilization that can be caused due to it whether in peace-time or during conflict:

> the violation or abuse of the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage, may threaten stability, social cohesion and cultural identity, and constitutes an aggravating factor in conflict and a major obstacle to dialogue, peace and reconciliation[352]

The safeguarding of tangible and intangible cultural heritage is premised on human rights, and specifically the right to life, the right to participate in cultural life, including the ability to access and enjoy cultural heritage, and the right to participate in decision-making on heritage matters. The same rationale could also apply for the protection of tangible heritage. Tangible and intangible heritage can be interlinked and when attacks on one are materialized, they are usually accompanied by assaults or the same destructive force on the other. This means that any damage caused to tangible heritage is very likely to have severe impact on the intangible dimension of this cultural heritage. This has been acknowledged in the report of the Special Rapporteur on Minority Issues (UN Special Rapporteur on Minority Issues, 2017, p.16):

> While the destruction of specific cultural sites has been evident, the conflict itself has had a massive, destructive impact on whole cities and towns of deep historical, cultural and social significance to some ethnic or religious groups. One Yazidi community representative stated of Sinjar: "If liberation means total destruction, it means the end of our existence here. People are going to migrate. What is there to come back to?". This was a sentiment echoed by Shabak representatives and others, who conveyed a deep sense of loss of much more than mere buildings and infrastructure, but rather loss of their entire cultural and historical heritage.[353]

The protection of cultural heritage has its indisputable normative grounding on both international cultural heritage law and international human rights law (and international humanitarian law wherever applicable). In 2017, the Security Council adopted the emblematic Resolution 2347 which created a global governance scheme devoted to the protection of cultural heritage under threat from armed conflict and terrorism; hence, cultural heritage became tied to the international peace and security agenda of the

[351] UN Human Rights Council, Resolution 33 Cultural Rights and the Protection of Cultural Heritage, 27 September 2016, Preamble, para. 4.
[352] UN Human Rights Council, Resolution 33 Cultural Rights and the Protection of Cultural Heritage, 27 September 2016, Preamble, para. 8.
[353] United Nations General Assembly. (2017). Report of the Special Rapporteur on Minority Issues on Her Mission to Iraq. 9 January 2017. A/HRC/34/53/Add.1.

Security Council. This governance scheme displays particularities, such as 1) synergies that are promoted with UNESCO and other international organisations and bodies, civil society actors and professionals from the heritage domain, 2) the institutionalisation of cultural peacekeeping and 3) the establishment of safe havens.[354] These particularities serve as a guarantee for the sustainable protection of cultural heritage; however, there is a parallel need to strengthen the human rights' perspective of the protection of cultural heritage through international and regional case law.

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Within the Council of Europe's legal order there is a rich normative framework to protect various aspects of cultural heritage, with the most recent one being the Council of Europe Convention on Offences relating to Cultural Property.[355] The ECtHR has developed some limited jurisprudence on access to culture and access to cultural heritage. It is reminded that the ECHR is an instrument that essentially protects civil and political rights; hence, jurisprudence on access to cultural heritage has been gradually emerging under the ECHR provisions on freedom of expression (Art. 10), right to private life (Art. 8), the right to education Art. 2 Protocol No. 1) and even the right to property (Art. 1 of Protocol 1). In

[354] See Jakubowski, A. (2019). "International Protection of Cultural Heritage in Armed Conflict: Revisiting the role of safe havens". Indonesian Journal of International Law, *16*(2), 169 - 190.
[355] The Convention was adopted on 3 May 2017 and entered into force on April 1, 2022.

Akdas v. Turkey,[356] the case concerned the sentencing of a publisher for the publication of an erotic novel (originally published in 1907) in the Turkish language. The Court held that:

> the cultural, historical and religious particularities of the Council of Europe's member States could not extend so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage. Those factors formed a sufficient basis to conclude that the application of the legislation in force at the time of the events had not been intended to meet a pressing social need... the interference with the applicant's rights, in the form of a heavy fine and the seizure of all copies of the book, had not been proportionate to the legitimate aim pursued and had thus not been necessary in a democratic society.[357]

Thus, the Court's interpretation of freedom of expression covers European literary heritage that the public of a given language cannot be prevented from having access to. In *Catholic Archdiocese of Alba Iulia v. Romania*[358], the Court found that the failure of the State to return assets of historical and cultural value to their former owner, a religious association, amounted to a violation of Art. 1 of Protocol 1 of the ECHR.

In *Sargsyan v. Azerbaijan*[359], the applicant, an ethnic Armenian, had alleged that the State was in breach of its obligations under the ECHR for denying his right to return to the village of Gulistan and to have access to his property there or to be compensated for his loss, and the denial of access to his home and to the graves of his relatives. The Court held that there was a violation of Art. 1 of Protocol 1, Articles 8 and 13 of ECHR. In particular, the Court found that the applicant's inability to return to Gulistan, a place with which he had developed his social ties after having lived most of his life there, was an infringement of the right to private life. Furthermore, the Court found that:

> [t]he applicant's cultural and religious attachment to his late relatives' graves in Gulistan may also fall within the notion of "private and family life". In sum, the inability of the applicant to return to his former place of residence affects his rights to his "private and family life" and "home".[360]

Alas, we still have to be careful as to the intentions of the Court concerning the question whether there is a general right to protection of cultural heritage. Following, the decisions in two cases: *Syllogos ton Athin*aion *v. UK* [361]and *Ahunbay and Others v. Turkey*,

[356] Application No 41056/04, February 16, 2010.
[357] European Court of Human Rights, Information Note on the Court's case-law No. 127, February 2010, *Akdaş v. Turkey*, Freedom of Expression.
[358] Application No. 3303/03, 25 September 2012.
[359] Application No. 40167/06, 16 June 2015.
[360] Application No. 40167/06, 16 June 2015, para. 257.
[361]Application no. 48259/15, 23 June 2016.

it is evident for the Court that there is no European consensus which would have made it possible to conclude that there is a human right to protect cultural heritage. In Syllogos ton Athinaion v. UK, the Court examined the claim brought by a Greek association which argued that the retention of the Parthenon Marbles and the refusal to return them to Greece was a violation of Arts. 8,9, 10, 13 and Art. 1 of Protocol 1.[362] The Court's ruling is extremely short and declares the application inadmissible:

> The Court notes that the Marbles were removed from Greece in the early nineteenth century. In order to bring the matter within the temporal jurisdiction of the Court, the applicant has sought to rely on the refusal of the United Kingdom, on 26 March 2015, to enter into mediation with Greece concerning the return of the Marbles and the continuing refusal to return the Marbles. However, it is clear from the nature of the applicant's complaints that its underlying grievance is the allegedly unlawful removal of the Marbles from Greece. The removal having occurred some 150 years before the Convention was drafted and ratified by the respondent State, the applicant's complaints would appear to be inadmissible as incompatible ratione temporis with the provisions of the Convention.
>
> Even assuming that the continued retention of the Marbles constitutes a continuing act or that the refusal to engage in mediation could itself be viewed as an act which might arguably amount to an interference with Convention rights, such as to bring the application within the Court's temporal jurisdiction, the Court is satisfied that the application is inadmissible as incompatible ratione materiae with the provisions of the Convention and its Protocols. None of the Articles invoked by the applicant can be said, either on the basis of the text of the Article in question or by virtue of the Court's interpretative case-law, to give rise to any right for an association in the position of the applicant to have the Marbles returned to Greece or to have the respondent State engage in international mediation for their return.

[362] Application No. 48259/15, 23 June 2016: "Under Article 8, it contended that the statement of the United Kingdom to UNESCO, the retention of the Marbles and the refusal of mediation breached its right to respect for private life. The violation stemmed from the failure to respect the applicant's ability to protect the monuments of Athens, as provided for in its articles of association and as an aspect of its cultural identity, and the diffusion of alleged lies as to the legality of the acquisition of the Marbles. Under Article 9, the applicant argued that the statement made to UNESCO and the retention of the Marbles constituted a breach of its right to respect for its conscience. Under Article 10, the applicant relied on its right of access to cultural information that could be obtained from the Marbles in relation to their history and the history of Athens. Under Article 13, the applicant argued that the refusal of the United Kingdom to participate in mediation organised by UNESCO constituted the denial of a remedy. Finally, under Article 1 of Protocol No. 1 to the Convention, the applicant contended that the retention of the allegedly unlawfully removed Marbles constituted an interference with its proprietary right to access to the whole monument".

In particular, while it is true that the Court has been prepared, in certain circumstances, to give some degree of recognition to ethnic identity as an aspect of Article 8 rights (see, for example, *Chapman v. UK* [GC],), the applicant has failed to point to any case of this Court where it has held that Article 8 gives rise to a general right to protection of cultural heritage of the nature contended for in the present case...[363]

In *Anhubay and Others v. Turkey, Austria and Germany*[364] the Court had another opportunity to examine whether the right to enjoy and access to cultural heritage is guaranteed under Art. 8 of ECHR. The facts of the case concerned the building of a dam and a hydroelectric power station at Ilisu on the River Tigris which was allegedly a threat to the cultural heritage in the area, and specifically the Hasankeyf site. [365]The applicants sought the cancellation of the project in question in order to maintain the cultural heritage of the area and protect the right to transmit cultural values to future generations. In this case, the applicants alleged a violation of Art. 8 (respect for private life). The ECtHR declared the complaint inadmissible against Austria and Germany but communicated the complaint to Turkey.

These cases illustrate that the ECtHR has effectively affirmed the cultural dimension of civil and political rights; in line with *present-day* conditions, the ECtHR has broadened the scope of certain civil and political rights as encompassing access to culture and access to heritage issues only.[366] Following the pandemic, it remains to be seen whether access to cultural heritage has been transferred to the online dimension too. This is an emerging theme in literature that assesses -at least within the Council of Europe legal order- whether the right to online culture and online cultural heritage may fall under the right of access to culture and cultural heritage.[367]

[363] Application No. 48259/15, 23 June 2016.
[364] Application No. 6080/06, Decision 21 June 2016.
[365] The Committee on Culture, Science and Education of the Council of Europe and the General Rapporteur on the Cultural Heritage issued a report in 2001 tried to strike a balance between the concerns over the impact on the Hasankeyf site and the prospects for socio-economic development in the area, concluding that "those concerned for the cultural and archaeological heritage have rather more to gain than lose from the construction of the Ilisu Dam…". See Council of Europe, Committee on Culture, Science and Education, Cultural Aspects of the Ilisu Dam Project, Turkey, Information Report Doc. 9301, December 18, 2001. https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9579&lang=en
[366] European Court of Human Rights, Cultural rights in the case-law of the European Court of Human Rights, 2011,. https://www.culturalpolicies.net/wp-content/uploads/2019/10/ECHR_Research_report_cultural_rights_ENG.pdf
[367] Kużelewska, E., Tomaszuk, M. "European Human Rights Dimension of the Online Access to Cultural Heritage in Times of the COVID-19 Outbreak". Int J Semiot Law 35, 1067–1079 (2022). https://doi.org/10.1007/s11196-020-09712-x

B.3.1.2 Children's Cultural Rights

All human rights instruments, both universal and regional, apply equally to children and adolescents. The UN Convention on the Rights of the Child (UN CRC) guarantees, *inter alia*, a number of child-specific cultural rights for all children without discrimination of any kind, including immigration status or statelessness: the right to religion (Article 14), the right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts (Article 31); the right to education and implementation of educational programmes that respect "the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own" (Articles 28 and 29); the right of disabled children to physical, mental and cultural/spiritual development (Article 23). As minority/Indigenous children are vulnerable to the denial of their cultural rights, the UN CRC provides for mass media to have particular regard to their linguistic needs (Article 17 (d)) and guarantees the children's right to enjoy their own culture, language and religion (Article 30). The right in Article 30 for Indigenous children is conceived as being both individual and collective and it "may be closely associated with the use of traditional territory and the use of its resources"[368] . States are obliged to take special measures to enable minority, Indigenous, migrant or disabled children to preserve and develop their culture and to have effective access to cultural resources, infrastructures, activities and educational materials in accessible formats. Furthermore, while children are recognised as transmitters of cultural values and are entitled to their culture, States are obliged to protect them from practices perpetuated by culture and tradition (female genital mutilation, child and forced marriage, sex practices etc.) that are harmful to their health and development. Children's cultural rights are protected even during wartime.[369]

Education is a fundamental human right that is set to be realized within the 4As framework: availability, accessibility, acceptability and adaptability. The UN Rapporteur on the Right to Education has produced a number of thematic reports with regard to the barriers that children's groups with intersecting identities may face and the States' obligations to meet children's needs. For example, with regard to refugee children it is crucial that they are included in national education systems and that support is provided to them to adapt to the local curricula, including language training.[370] Refugee education should be considered from a medium and long-term perspective in order to provide

[368] Committee on the Rights of the Child, General Comment No 11 Indigenous children and their rights under the Convention, CRC/C/GC/11, February 12, 2009, para. 16.
[369] Articles 24 and 50 of 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 78 (2) Protocol I to the Geneva Conventions.
[370] Report of the Special Rapporteur on the right to education, A/73/262, 27 July 2018, paras. 112-120. See also para. 125 where it is stated that "education plans and educational institutions should anticipate and address the cultural and linguistic differences of students from refugee populations on the State's territory, including the development of language assistance programmes for refugees, particularly those who require such assistance in order to integrate into the education system".

uninterrupted education to refugee children that they could use for the rebuilding of their countries of origin, should they return to. With regard to the needs of migrant children, education should be: available in culturally relevant educational institutions; physically and economically accessible; adaptable to the diverse social and cultural settings of the migrants;[371] and of acceptable and appropriate quality (for example, the Special Rapporteur on the Right to Education refers to the need for migrant-oriented teachers' qualifications and training and the need to offer education ensuring the dignity, inclusion and equality for migrant children).[372]

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Access to arts and participation in cultural life is protected under Art. 31 of UN CRC; children, as individual holders, have the right to be creators of their own culture and to have access to and participate in arts and cultural activities that are designed with a child-centred approach. In this sense, children are entitled to be both beneficiaries and producers of culture. The CRC Committee has affirmed that "it is through cultural life and the arts that children and their communities express their specific identity and the meaning they give to their existence, and build their world view representing their encounter with external forces affecting their lives".[373]

[371] Report of the Special Rapporteur on the right to education, 16 July 2021, A/76/158. See also paras. 114-115 where it is provided that "States should consult and, where possible, partner with migrant organizations and other relevant stakeholders to ensure that educational curricula respect and promote migrants' cultural rights" and that "States and all other stakeholders involved are also called upon to address language barriers in education through, inter alia, the streamlining of migrants' needs in general language policies in the educational field".

[372] Report of the Special Rapporteur on the Right to Education, 16 July 2021, A/76/158, para. 37, 101.

[373] UN Committee on the Rights of the Child, General comment No. 17 (2013) on the right of the child to

Arts and cultural activities can be used as a means to enhance children's learning experience and to teach them about human rights and as a means for children to develop their cultural identity and bond with their family and community's cultural identity. Regular access to arts and diverse cultural experiences can be a means of achieving broader social policy goals, such as countering social exclusion, promoting active citizenship, increasing resilience and understanding, and helping children-at-risk (for example, juvenile deliquents, victims of violence, etc).[374] The potential of culture as a transformative opportunity across human societies calls for States to ensure that children have access to culture, as much as access to arts education, as part of their right to education. The UN Rapporteur on the right to education affirms that children's education should be interdisciplinary and interactive with other discriplines; hence, education should include arts education, language education, education on various religious, human rights education and even education on intangible cultural heritage.[375]

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rest, leisure, play, recreational activities, cultural life and the arts (art. 31), April 17, 2013, CRC/C/GC/17, para. *14*(f) p.6.

[374] See for example, Campagna, D., Caperna, G. & Montalto, V. Does Culture Make a Better Citizen? Exploring the Relationship Between Cultural and Civic Participation in Italy. Soc Indic Res 149, 657-686 (2020). https://doi.org/10.1007/s11205-020-02265-3

[375] UN Special Rapporteur on the Right to Education, The Right to Education as a Cultural Rights, April 16, 2021, p. 4 , https://www.ohchr.org/sites/default/files/Documents/Issues/Education/Friendly2021cultureEN.pdf

From a practical point of view, policy-makers tend to pay little attention to children's rights on play, recreation, culture and the arts[376] and to under-invest in cultural and artistic activities for children. For example, lack of spaces to stimulate creativity, cost of access, lack of transport are just a few of the factors that impede children's access to arts and cultural life; and this under-investment is severely affecting chidlren's cultural rights while they are still children but will likely affect them as adults. As the CRC Committee has stated "engagement [with arts and cultural acrivities] during childhood can serve to stimulate cultural interests for life".[377] Hence, it is pivotal for policy-makers to prioritise children's access to and pariticpation in cultural activities across all policy areas, including education, eradication of poverty, etc. This calls for direct investment in children's capacity to participate in cultural activities, for example by investing in universal design access to cultural and arts facilities, and even re-designing policies that guarantee universal access for all children to arts and cultural life. Within this context, it is important that structural, economic and other inequalities are levelled out so that all childen, including children from disadvantaged backgrounds, are able to participate in cultural and artistic activities, to the fullest extent.

In the European context, there are no child-specific provisions that protect children's cultural rights. The latter are dealt either within the broader context of socio-economic rights (i.e. Arts. 7, 15, 17 and 30 Revised ESC; Articles 14, 22, 26, 34 EU Charter on Fundamental Rights and Freedoms), under specific group rights (see Arti.14 FCNM) or under specific provisions of the ECHR, (i.e. Arts. 8, 9, 10, 14 ECHR, Article 2 of Protocol 1 to the ECHR (education)).

The African human rights system is the most vocal on the protection of children's cultural rights. The 1990 AfCRWC includes provisions on the right to education of the girls, gifted or disadvantaged and handicapped children (Articles 11(3)(e), 13), protection of children against apartheid (Article 26), the inclusion of *Africa-specific* aims of education (Article 11(2), the right to leisure and participation in cultural life and the arts (Article 12) and a provision dealing expressly with protection against harmful social and cultural practices (Article 21). Girls' rights are further protected under the Protocol to the AfCHPR on the Rights of Women in Africa 2003 (Article 17 Right to Positive Cultural Context). Finally, the African Youth Charter 2006 contains provisions on the rights of persons between the age of 15 and 35 (Article 22 Leisure, Recreation, Sportive and Cultural Activities).

In the European context, children's cultural rights have been largely unaddressed or under-developed. In a number of cases, the ECtHR has held that States must take positive

[376] UN Committee on the Rights of the Child, General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), para 43, p.6.
[377] Ibid, para. 44, p. 7.

measures against wrongful placement of Romani children in special schools[378]. The European Committee of Social Rights has found that educational practices regarding the placement of children with disabilities, amounted to segregation and discrimination.[379] The ECtHR has also examined the issue of religious education and has held that education or teaching should be "objective, critical and pluralistic" while ensuring respect for parents' religious and philosophical convictions[380] . In two cases the ECtHR has found that Turkey had to reform religious education in schools because the subject taught was likely to raise a conflict of values in the children[381]. The ECtHR has held that the right to education does not guarantee the right to education in a particular language.[382]However, the ECtHR has also found it difficult to dissociate language from education and the ethnic and cultural background of the children when they have received primary education in their mother- tongue; hence, in *Cyprus v. Turkey* the Court found that the lack of Greek-speaking secondary school services to students who had already completed their primary schooling in Greek language was a violation of Art. 2 of Protocol 1 to the ECHR[383]. Similarly, the disciplinary measure of the expulsion of University students who had requested the inclusion of optional Kurdish language courses was found to be a violation of Art. 2 of Protocol 1 to the ECHR.[384] Moreover, in a number of cases which concerned the expulsion of pupils from French schools because of their wearing of religious garment and the alleged violation of the freedom of religion and the prohibition of discrimination, the ECtHR declared the claims of these applicants manifestly ill-founded on inadmissibility grounds.[385] The same issue was addressed differently by the Human Rights Committee, which held that the expulsion from school was neither necessary nor proportionate to the benefits achieved[386].

International human rights judicial bodies often make reference to the UN CRC provisions when interpreting regional human rights instruments' provisions with regard to children's cultural rights and special measures of protection, i.e. minority or Indigenous

[378] *Horvath and Kiss v. Hungary*, Application No. 11146/11, 29/4/2013; Orsus and Others v. Croatia, Application No. 15766/03, 16/3/2010.
[379] *International Association AUTISM-EUROPE v. France*, European Committee of Social Rights 13/2002, 4/11/2003; *Mental Disability Advocacy Center v. Bulgaria*, European Committee of Social Rights, Complaint No. 41/2007, 3/6/2008.
[380] *Kjeldsen Busk Madsen and Pedersen v. Denmark*, Application Nos. 5095/71; 5920/72; 5926/72, 7/12/1976; *Folgero and Others v Norway*, Application No. 15472/02, 29/6/2007.
[381] *Mansur Yalcin and Others v. Turkey*, Application No. 21163/11, 16/2/2015; ZENGIN2008
[382] *Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium v. Belgium*, Application Nos. 1474/62; 1677/62;1691/62; 1769/63; 1994/63; 2126/64, 23/7/1968.
[383] *Cyprus v. Turkey*, Application No. 25781/94, 10/5/2001, para 275-80.
[384] *Irfan Temel and Others v Turkey*, Application No. 36458/02, 3/3/2009.
[385] See e.g. *Dogru v. France*, Application No. 27058/05, 4/3/2009; *R. Singh v. France*, Application No. 27561/08, 30/6/2009.
[386] *Singh v. France*, Human Rights Committee Communication No. 852/2008, 4/2/2013, U.N. Doc. CCPR/C/106/D/1852/2008.

children' right to preserve their distinctive identity[387] . The I/A Court of Human Rights has held that Article 30 of UN CRC "establishes an additional and complementary obligation that gives content to Article 19 ACHR, and that consists of the obligation to promote and protect the right of indigenous children to enjoy their own culture, their own religion, and their own language"[388]. The African Committee of Experts on the Rights and Welfare of the Child has issued a decision on culture-related rights of Nubian children, i.e. non-discrimination, the right to name and nationality, the right to education[389] and the highest attainable standard of health.[390]

Children's cultural rights are neglected in literature. To a certain extent this relates to the standing of cultural rights in the human rights spectrum (civil and political rights *v.* ESC rights) and the dominant paternalistic perceptions of children as passive objects of protection[391]. The innovation of UN CRC in including all social, economic, cultural, civil and political rights in a single framework and affirming children's right to participate in all decisions affecting them has, on the one hand, provided room for children to be viewed as active bearers of rights and has, on the other hand, resulted in reading the UN CRC as a combination of protection, provision (States to provide access to services) and participation (i.e. children to act and participate in society and in decisions concerning them) rights.[392] However, there is still controversy as to the competence and capacity of children to exercise their rights independently and autonomously.[393] This is reflected in the policies of some Arab and Asian countries too.

Despite the overwhelming legal instruments and human rights monitoring and complaint mechanisms, violations of children's cultural rights remain either unreported or unaddressed. The UPR and the UN Special Rapporteurs (i.e. Special Rapporteur in the field of cultural rights, Special Rapporteur on the Rights of Persons with Disabilities, Special

[387] See e.g. *Advisory Opinion on the Juridical Condition and Human Rights of the Child*, I/A Court of Human Rights 28/8/2002, OC-17/02, para 84.
[388] *Xakmok Kasek Indigenous Community v. Paraguay*, I/A Court of Human Rights 24/8/2010, Series C No. 214, para 261.
[389] See also UNESCO, Indigenous peoples' right to education: overview of the measures supporting the right to education for Indigenous peoples reported by Member States in the context of the ninth Consultation on the 1960 Convention and Recommendation against Discrimination in Education, Paris: UNESCO, 2019.
[390] Institute for Human Rights and Development in Africa & Open Society Justice Initiative on Behalf of Children of Nubian Descent in *Kenya v. Kenya*, The African Committee of Experts on the Rights and Welfare of the Child, Complaint No. 02/2009, 22/3/2011.
[391] Price Cohen, Cynthia: "Jurisprudence on the Rights of the Child: Individual Rights Concept and their Significance of Social Scientists", 46 (1) *American Psychologist* (2005) 60.
[392] Van Bueren, G.. *The International Law on the Rights of the Child*, (The Hague: Kluwer, 1995).
[393] Reynaert, Didier et al (eds.), Kinderrechten: Springplank of struikelblok? Naar een kritische benadering van kinderrechten, (Antewrp: Intersentia, 2011); Verhellen, Eugeen: "The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective" in Vandenhole Wouter et al (eds.) Routledge International Handbook of Children's Rights Studies, (Oxon: Routledge, 2015).

Rapporteur on the Right to Education, Special Rapporteur on the Rights of Indigenous Peoples, Special Rapporteur on Minority issues) are increasingly shedding light onto the existing legal, institutional, economic or cultural lacuna with regard to the poor recognition of children and adolescents' cultural rights, especially the rights contained in Article 31 of UN CRC.

The situation of children's cultural rights has worsened during the past two decades due to the financial crises and austerity measures that have led to severe cuts in public spending. To this end, the CRC Committee has affirmed the States' minimum core obligations with regard to public spending to ensure the satisfaction of, at the very least, essential levels of cultural rights of boys and girls[394]. The CRC Committee has also recognised the role and responsibilities of the private sector in the areas of recreation, cultural and artistic activities, as well as civil society organisations providing such services for children.[395]

B.3.1.3 Impact of COVID-19 on Cultural Rights

Due to the indisputable fact of the interconnectedness and indivisibility of human rights, the COVID-19 pandemic has displayed numerous and unfathomable dimensions of its negative impact on cultural rights, and in particular education, culture and cultural heritage.

Closures of educational institutions across the globe heavily impacted on the enjoyment of the right to education.[396] Structural inequalities and intersecting grounds for discrimination, presented various challenges for the realization of education. The most marginalized groups were hit the hardest. Children in poverty, refugee children, homeless children, and other vulnerable groups faced additional challenges from maintaining hygiene to food security. At the same time, with schools closed, children faced the risk of being subjected to domestic violence, sexual and gender-based violence, violence in the digital domain, child trafficking, child labour, etc. Children with disabilities faced a higher risk of exclusion as either parents or care-givers were unable to support them in homeschooling or due to lock-down measures they were not provided with any assistance tailored to their educational needs. The adverse consequences of the COVID-19 pandemic endangered the physical, mental and psychosocial health of children. Hence, even though

[394] CRC, General Comment No. 19 on public budgeting for the realization of children's rights (art. 4), CRC/C/GC/19, July 20, 2016, para. 37.
[395] CRC, General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), CRC/C/GC/17, April 17, 2013.
[396] See Report of the Special Rapporteur on the Right to Education, Right to Education: Impact of the Coronavirus Disease Crisis on the Right to Education: Concerns, Challenges and Opportunities, 30 June 2020, A/HRC/44/39; Sabine Meinck, Jullian Fraillon and Rolf Strietholt (eds.), The impact of the COVID-19 pandemic on education: international evidence from the Responses to Educational Disruption Survey, Paris: UNESCO, 2022.

the digitalization of education served the purpose of minimizing the impact of COVID-19 on education to an extent, it was hardly deemed to have been appropriate from a human rights perspective. At the time, the Special Rapporteur on the Right to Education and other UN Rapporteurs and UN agencies called for States to consider digitalized education only a temporary measure.[397] Furthermore, the violation of the right to education is an indicator that there is a continuum of violations of other human rights due to the indivisibility and interdependence of all human rights:

> Widening inequalities in the area of education have all the more dramatic consequences given the importance of education, as an empowering right, in giving the possibility to all to explore and realize their potential. Therefore, inequalities in education perpetuate and reinforce inequalities in the future. The crisis has further demonstrated how interrelated and interdependent human rights are, especially the right to education, the right to water and sanitation (including in educational institutions), the right to adequate nutritious food (when food is provided by schools), the right to adequate housing (necessary to pursue homeschooling), the right to an adequate standard of living and the right to work (which often depend on the level of education attained by people), as well as the child's right to freedom from all forms of violence, injury or abuse. Education finds itself at the crossroads of many public action policies in favour of vulnerable groups, especially children. When education is suspended, many other services are too.[398]

The pandemic had also adverse impact on the enjoyment of and access to cultural heritage.[399] For example, intangible cultural heritage bearers who belong to Indigenous communities were one of the first vulnerable groups identified to be at risk. Because of the systemic socio-economic marginalization they have been experiencing in their countries, i.e. poor access to healthcare and essential services, sanitation, or being subjected to extreme poverty etc, they have significantly higher rates of communicable and non-communicable diseases and less chances of survival.[400] As the UN Secretary General noted, COVID-19 presents "particular existential and cultural threats to

[397] See UNESCO, UNESCO COVID-19 Education Response- Education Sector Issue Notes, Issue Note No. 7.1. School Reopening, April, 2020.

[398] Report of the Special Rapporteur on the Right to Education, Right to Education: Impact of the coronavirus disease crisis on the right to education- concerns, challenges and opportunities, 30 June 2020, A/HRC/44/39, para. 31

[399] See the discussion in Hatzikidi K., Lenox C. and Xanthaki A., (2021) "Cultural and Language Rights of Minorities and Indigenous Peoples", The International Journal of Human Rights, 25:5, 743-751. http://doi.org/10.1080/13642987.2020.1859487

[400] UN Department of Economic and Social Affairs. (2020). Indigenous peoples and the COVID-19 pandemic: Considerations. https://www.un.org/development/desa/indigenouspeoples/covid-19.html (accessed 30 July 2020).

indigenous peoples".[401] The lockdown measures also endangered their food security and their access to and use of traditional lands. Their way of living and their cultural life, i.e. their large traditional gatherings to mark special events or the fact that they live in multi-generational housing, has put Indigenous peoples and member of their families, especially the elders who are the keepers of their cultural heritage and custodians of a wealth of traditional knowledge and practices, languages and culture, at risk.[402] So, it became apparent that the issue of the protection of Indigenous peoples was "not only a human rights issue but also one of preserving cultural diversity and ancestral wisdom".[403] One may think, for example, in the Amazon, "on Brazil's oldest indigenous reservation, the Xingu, guidance from elders is key to performing the Kuarup dance ritual that brings together the community's 16 tribes each year to celebrate life, death and rebirth".[404] During the pandemic, Indigenous peoples were shielding away their tribal elders in fear of the fact that if they die, their intangible cultural heritage, whether that may be cultural traditions, religious rituals (i.e. chanting), traditional medicine, etc, will die out too along with their cultural identity.[405] The loss of the elderly Indigenous and traditional communities' leaders amounted to an incalculable damage on their culture (spiritually, linguistically or otherwise), cultural diversity, the next generations' survival and ultimately their collective future.[406] The case of Brazil was particularly disturbing as Indigenous

[401] United Nations Secretary General. (2020) Report "COVID-19 and Human Rights: We are all in this together". April 2020, para. 57. https://unsdg.un.org/resources/covid-19-and-human-rights-we-are-all-together. Accessed 8 June 2020.

[402] See e.g. Assembly of First Nations Knowledge Keepers (2020). COVID-19 MESSAGE. https://www.afn.ca/assembly-of-first-nations-knowledge-keepers-covid-19-message/ (accessed 30 July 2020); ECLAC, The impact of COVID-19 on Indigenous peoples in Latin America (Abya Yala) Between invisibility and collective resistance, (UN: Santiago, 2020). https://www.cepal.org/sites/default/files/publication/files/46698/S2000893_en.pdf.

[403] UNESCO. (2020). Culture and COVID-19: Impact and Response Tracker. https://en.unesco.org/sites/default/files/issue_10_en_culture_covid-19_tracker-2.pdf (accessed July 24, 2020).

[404] Garrison C., Lammerty, M., Boadle, A. (2020). "Latin America's indigenous shield elderly 'cultural guardians' from coronavirus". Reuters. https://www.reuters.com/article/us-health-coronavirus-latam-indigenous-f-idUSKBN22N1BO. (accessed June 24, 2020).

[405] Garrison et al, *op. cit*.

[406] See for example Resolution 1/2020 of the Inter-American Commission on Human Rights, 10 April 2020, paras. 54-57, https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf, whereby States are called to " provide information about the pandemic in their traditional language, and where possible, provide intercultural facilitators who can help them clearly understand the measures the State has taken and the effects of the pandemic; respect unconditionally non-contact with indigenous peoples or groups who are in voluntary isolation, given the very severe impact that contagion with the virus could have on their livelihood and survival as a people.; take utmost measures to protect the human rights of indigenous peoples in the context of the COVID-19 pandemic, bearing in mind that these groups are entitled to receive health care that is culturally appropriate, and that takes into account traditional preventive care, healing practices, and traditional medicines; and refrain from introducing legislation and/or moving forward to carry out production and/or extractive projects in the territories of indigenous peoples during the period the pandemic may last, given the impossibility of conducting prior informed and free consent processes (due to the recommendation of the World Health Organization (WHO) that

groups and other NGOs accused President Jair Bolsonaro for genocide and crimes against humanity for instigating actions that promoted destruction of the lands where Indigenous people resided, killing members of the tribes, ignoring World Health Organisations' recommendations on COVID 19 (for example by avoiding taking restrictive measures to contain the virus or defending drugs without proven scientific efficacy) and contributing to the spread of the disease across Brazil and within the Indigenous and traditional communities' groups.[407]

Furthermore, the pandemic brought about a change to the humanity's common understanding of physical *cultural life*. One of the immediate impacts of COVID-19 was to violently renegotiate how we define *cultural life*. The emergency measures in many countries and social distancing rules, impacted communities everywhere; cultural minorities and Indigenous people were not allowed to go through cultural practices that were embedded in the physical public cultural space, i.e. mourning rituals, etc.

The impact of COVID-19 has been experienced in tourism, as well as other sectors of culture. The closure of heritage sites and cultural facilities, i.e. museums, theatres, cinemas, libraries, etc and the disruption of cultural services were consequences of the lockdown measures across many countries. Access to such cultural institutions was prohibited for many months, for public health reasons, and States suffered from a large decrease in user charges and fees resulting from the closure of public facilities (e.g. cultural, recreational, educational and sport venues, etc.).[408] This, in effect, jeopardised funding for the culture and cultural heritage sector, including the conservations of heritage places and had an impact on the livelihoods of local communities. The disruptive effect on the cultural sector has also been evident in the publishing and literature world. The production of films was halted andthe impact on performing arts was devastating. High rates of unemployment in the culture sector (cultural professionals and artists) was recorded in the totality of the countries across the globe. Furthermore, the security of cultural heritage sites was also an issue during the lockdown period.[409]

But the pandemic also offered the opportunity to explore other forms of public cultural life, primarily through digital spaces, as well as to explore new possibilities and

social distancing measures be adopted) provided for in ILO Convention 169 and other pertinent international and national instruments".

[407] Garcia R. T., "New ICC Complaint against Jair Bolsonaro Unlikely to Prosper", The Brazilian Report, November 11, 2021. https://brazilian.report/power/2021/11/11/icc-complaint-bolsonaro/

[408] OECD. (2020). Policy Responses to COVID-19: The territorial impact of COVID-19: Managing the crisis across levels of government. https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/ (accessed July 17, 2020).

[409] ICOM & INTERPOL. (2020) Ensuring cultural heritage security during lockdown: a challenge for museum professionals and police services: Recommendations https://icom.museum/wp-content/uploads/2020/04/ICOM-INTERPOL-Recommendations.pdf (accessed July 30, 2020).

new cultural forms. It goes without saying that new forms of cultural heritage must have emerged during this time. Some of them may still be undetected.

While digital space is a multiplying force for access to culture and cultural heritage, it is still early to identify what kind of vulnerable groups might have emerged during these difficult times. i.e. due to a lack of access to an Internet connection, or due to excessive measures allowing censorship, or even due to the lack of a shared, physical and public cultural life. On the other hand, other vulnerable groups, like persons with disabilities or elderly people might have been empowered in their access to culture and cultural heritage.

Furthermore, the pandemic is revealing a new picture of how the right to participate in cultural life and the ability to access and enjoy cultural heritage must be exercised in conformity with public health[410]. However, it is too soon to predict how the dynamic between public health and cultural heritage will turn out.

The efforts of the UN to make States align their COVID-19 responses with their human rights obligations have been best displayed through the enthusiastic work of the UN Secretary General, the UN Human Rights Council and the UN Special Rapporteurs.[411] By 30 April 2020, the UN Human Rights Council had convened an online meeting with the Coordination Committee of the Special Procedures on the human rights implications of the COVID-19 crisis and many of them acknowledged that the COVID-19 crisis proves the interconnectedness of all human rights and requested that States uphold economic, social and cultural rights in both the emergency response and the post-crisis recovery phases.[412] On 27 May 2020, the President of the UN Human Rights Council issued a statement that was later adopted by the UN Human Rights Council and which categorically affirmed States' obligations "to ensure that all human rights are respected, protected and fulfilled while combating the pandemic, and that their responses to the COVID-19 pandemic are in full compliance with their human rights obligations and commitments"[413]. UNESCO made

[410] United Nations Special Rapporteur in the field of cultural rights. (2020).Culture is the Heart of Our Response to COVID-19. #BeyondTheOutbreak: Cultural Rights During and After the Pandemic. 22 April 2020. https://www.ohchr.org/Documents/Issues/CulturalRights/BeyondTheOutbreak-online2020-KBspeech.pdf (accessed July 30, 2020).

[411] The UN Secretary General released in April 2020 a report highlighting how human rights could and should guide COVID-19 response and recovery. For example, by July 2020, the UN Special Rapporteurs had issued 90 press releases, 12 guidance and other tools and 16 reports to HRC/GA were planned or presented. United Nations (b). (2020) COVID-19 and Special Procedures. https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx

[412] United Nations Human Rights Council, UN Human Rights Council discusses human rights implications of the COVID-19 crisis with its special procedures mandate holders. 30 April 2020. https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25853&LangID=E

[413] United Nations Human Rights Council, (2020). PRST 43/…Human rights implications of the COVID-19 pandemic. 27 May 2020. A/HRC/43/L.42.para. 3.

good use of this momentum to develop tools on compiling information concerning the impact of COVID-19, including on living heritage[414] as well as response trackers.[415]

B.3.2 Conclusion

Cultural heritage is a fundamental resource for all human rights and it should be a priority at this time. Despite cultural rights' normative grounding and despite the repeated calls from the UN Expert in the field of Cultural Rights to recognize cultural rights as "human rights with the same standing as other rights", cultural rights were greatly misplaced having received neither adequate support nor appropriate protection during the pandemic.[416] Except for UNESCO and some regional organizations' initiatives on mitigating the impact of COVID-19 on culture and cultural heritage, the documents that have been adopted by the UN General Assembly and the UN Security Council display, at best, a lack of attention to the cultural dimension of human rights, i.e. the rights of everyone to take part in cultural life without discrimination, freedom of artistic expression, the right to access and enjoy cultural heritage, the right of everyone to benefit from scientific progress, cultural rights of particular groups, such as Indigenous peoples, refugees, LGBTI persons, and persons with disabilities, etc, and to the devastating impact of COVID-19 on cultural heritage and cultural heritage bearers. If anything, the health pandemic showed that across many states -at domestic level- there has been a hierarchy of rights and even a hierarchy of vulnerable groups where cultural rights, cultural groups and their cultures (for example, in terms of their knowledge on traditional medicine and practices) were not taken into consideration when designing the programmes to fight COVID-19 or the emergency and preventative programmes.

[414] UNESCO. (2020). Living heritage experiences and the COVID-19 pandemic. https://ich.unesco.org/en/living-heritage-experiences-and-the-covid-19-pandemic-01123. Accessed 30 July 2020.

[415] UNESCO. (2020). Culture and COVID-19: Impact and Response Tracker. https://en.unesco.org/sites/default/files/issue_10_en_culture_covid-19_tracker-2.pdf. (accessed July 24, 2020).

[416] United Nations Special Rapporteur in the field of cultural rights. (2020). Interactive Dialogue Statement- Human Rights Council, 43th Session. https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25877&LangID=E

▪ Important points to remember about "Cultural Rights"

When studying "Cultural Rights," it is crucial for students to keep in mind the following important points:

1. Definition of Cultural Rights: Cultural rights refer to the rights that individuals and communities have to practice, preserve, and enjoy their own culture, including their language, religion, traditions, and artistic expressions. These rights are recognized internationally and are essential for the protection of cultural diversity and the dignity of individuals and communities.
2. Universality and Cultural Relativism: Cultural rights are grounded in the universality of human rights, which means that all individuals are entitled to these rights regardless of their cultural background. However, cultural rights also acknowledge the importance of cultural diversity and respect for different cultural practices and traditions.
3. International Framework: Cultural rights are enshrined in various international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights. Students should familiarize themselves with these instruments to understand the legal basis for cultural rights.
4. Collective and Individual Rights: Cultural rights encompass both collective and individual dimensions. Collective cultural rights recognize the rights of communities and groups to maintain and develop their cultural practices and identities. Individual cultural rights protect the rights of individuals to freely participate in cultural life and enjoy their own cultural heritage.
5. Protection of Cultural Heritage: Cultural rights include the protection of cultural heritage, including tangible and intangible cultural heritage. This encompasses historical sites, artifacts, traditional knowledge, rituals, languages, and artistic expressions. Students should explore the importance of preserving cultural heritage and the impact of its destruction or loss. Access to and Participation in Cultural Life: Cultural rights ensure that individuals have access to and can actively participate in cultural life, including the enjoyment of arts, literature, music, and other cultural expressions. It emphasizes the freedom to express, create, and access cultural activities without discrimination.
6. Cultural Rights and Identity: Cultural rights play a crucial role in the formation and expression of individual and collective identities. They enable individuals and communities to maintain, develop, and transmit their cultural practices, traditions, and languages across generations.
7. Balancing Cultural Rights and Other Human Rights: Cultural rights may

intersect with other human rights, and conflicts may arise. It is important to navigate the balance between cultural rights and the rights of individuals, such as gender equality, freedom of expression, and non-discrimination. Students should critically analyze cases where cultural practices may infringe upon the rights of specific individuals or groups.

8. Cultural Rights and Development: Cultural rights are closely linked to human development and the overall well-being of individuals and communities. Recognizing and respecting cultural diversity fosters social cohesion, inclusivity, and sustainable development.
9. Indigenous Peoples' Rights: Cultural rights are particularly significant for Indigenous peoples, who often face unique challenges in preserving and protecting their cultural heritage. Students should examine the specific rights and protections afforded to Indigenous peoples in relation to their cultural rights.

It is essential for students to approach the study of cultural rights with cultural sensitivity, respect for diversity, and an understanding of the interconnectedness of human rights. Engaging with case studies, cultural practices, and real-life examples will help students grasp the complexities and importance of cultural rights in promoting human dignity and cultural diversity.

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Test your knowledge

1. **Indigenous Peoples: What are the main problems Indigenous peoples face with regard to their ancestral lands?**

Answer: Deforestation, climate change and governmental policies which oust Indigenous peoples from their ancestral lands. For further information, see: https://minorityrights.org/2021/08/05/quiz-indigenous-peoples/

2. **What is the International Day of the World's Indigenous Peoples about?**

Answer: See: https://www.un.org/en/academic-impact/unai-quiz-international-day-world%E2%80%99s-indigenous-peoples-0

You can also listen to some of the following podcasts:

- *Indigenous peoples must continue to challenge human rights violations, Strive: Toward a more just, sustainable future:* https://podcasts.apple.com/us/podcast/indigenous-peoples-must-continue-to-challenge-human/id1581850617?i=1000569124099
- *Romeo Saganash - Indigenous Rights are Human Rights. Bill C-15Ahkameyimok Podcast with Perry Bellegarde:* https://podcasts.apple.com/ca/podcast/romeo-saganash-indigenous-rights-are-human-rights-bill-c-15/id1507212458?i=1000510543543
- *Indigenous Land Rights and Reconciliation Podcast – CFRC Podcast Network:* https://podcasts.apple.com/ca/podcast/indigenous-land-rights-and-reconciliation-podcast/id1491073281

3. **What is the right to participate in cultural life? Does it encompass a right to cultural heritage?**

Answer: The right to participate in cultural life is a much evolving right. The right to access and enjoy heritage is premised on this human right. On intangible cultural heritage you can find information here: https://ich.unesco.org/doc/src/01855-EN.pdf You can watch UNESCO's video on culture https://www.youtube.com/watch?v=thHGOYOhWf0

For further information you can also listen to some of the following podcasts:

- *Culture as a Human Right with Cultural Heritage Partners*, https://podcasts.apple.com/us/podcast/culture-as-a-human-right-with-cultural-heritage-partners/id1601832073?i=1000569190586
- *International Cultural Heritage Law-With Lucas Lixisnki*
- https://podcasts.apple.com/us/podcast/e15-international-cultural-heritage-law-with-lucas/id1568918214?i=1000569961927
- *Culture & Traditions*, https://podcasts.apple.com/us/podcast/culture-traditions-videos/id1402057763

Documentaries to watch

Here are some documentaries that explore the topic of cultural rights:

1. *The Square* (2013) - Directed by Jehane Noujaim, this documentary captures the story of the Egyptian Revolution from 2011 to 2013, focusing on the role of Tahrir Square as a symbol of political and cultural rights.
2. *The Salt of the Earth* (2014) - Directed by Wim Wenders and Juliano Ribeiro Salgado, this documentary follows the life and work of Brazilian photographer Sebastião Salgado, who documents indigenous cultures and their struggle to preserve their way of life.
3. *Samsara* (2011) - Directed by Ron Fricke, this documentary is a visually stunning exploration of various cultures around the world, highlighting the beauty, diversity, and interconnectedness of human civilizations.
4. *He Named Me Malala* (2015) - Directed by Davis Guggenheim, this documentary tells the inspiring story of Malala Yousafzai, a Pakistani activist and Nobel Peace Prize laureate, who advocates for girls' education and cultural rights.
5. *The Music of Strangers: Yo-Yo Ma and the Silk Road Ensemble* (2015) - Directed by Morgan Neville, this documentary follows cellist Yo-Yo Ma and the musicians of the Silk Road Ensemble as they explore the power of music in bridging cultural divides and promoting understanding.
6. *Pina* (2011) - Directed by Wim Wenders, this documentary celebrates the life and work of German choreographer Pina Bausch, showcasing her groundbreaking dance performances and their expression of cultural identity.
7. *Living on One Dollar* (2013) - Directed by Chris Temple and Zach Ingrasci, this documentary follows the journey of four young friends as they live on one dollar a day in rural Guatemala, shedding light on poverty, cultural rights, and resilience.
8. *The Devil's Miner* (2005) - Directed by Kief Davidson and Richard Ladkani, this documentary tells the story of a young Bolivian miner and his struggle to reconcile his indigenous traditions with the harsh working conditions in the silver mines.
9. *The Eagle Huntress* (2016) - Directed by Otto Bell, this documentary showcases the remarkable journey of Aisholpan, a young Kazakh girl in Mongolia, as she becomes the first female eagle hunter in her family, challenging cultural norms and advocating for gender equality.
10. *Jiro Dreams of Sushi* (2011) - Directed by David Gelb, this documentary profiles Jiro Ono, an 85-year-old sushi master in Tokyo, Japan, and explores the cultural significance of his pursuit of perfection in the art of sushi-making.

These documentaries offer valuable insights into cultural rights and the diverse experiences and challenges faced by different communities around the world.

Chapter 4: LGBTQI+ Rights

Abstract

Changes in the human rights discourse usually occur when there is a momentum of unchoreographed yet timely coordinated advocacy, activism and engagement of the international organizations which as a consequence bring new or forgotten human rights claims to the center stage of national policy-making. Ever since the outbreak of HIV/AIDS and the stigmatization suffered primarily by the male homosexual community in the 1990s, there has been a growing interest in LGBT[417] issues, as well as a gradual unveiling of human rights violations that are being experienced by the persons who belong to the LGBTQI+community in any part of the world. Even to this day, the ongoing quest to guarantee the human dignity and equality of the LGBTQI+persons and their right to live free from any forms of discrimination based on sexual orientation reveals that there is still tension between, on the one hand, universal human rights, and on the other hand, cultural attitudes and negative stereotypes perpetuated by lack of awareness on the LGBTQI+issues. This tension often tends (whether purposefully or not) to also mislead the academic world as much as the civil society actors into debating a wrongly-framed question: "are LGBTQI+rights (or otherwise called 'gay rights') recognized as human rights?", directing away from the more appriopriately-framed question "do existing human rights standards and norms cover LGBTQI+issues?", or "do we need a human rights convention on the rights of LGBT?"?

Required Prior Knowledge

International Organisations, regional human rights protection systems, UN.

B.4.1 LGBTQI+Rights are Human Rights

The human rights discourse by its inception is inclusive; it is a spectrum upon which various rights-holders may emerge at any time and pursue legal claims. This is reflected in the various provisions of key UN instruments, for example, Art. 1 (3) of the UN Charter provides for the "respect for human rights and for fundamental freedoms for all without distinction", or Article 2 of the UDHR states that, "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind". All these core values of the UN have to be respected by all Member States of the UN. Despite this

[417] The term "LGBTQ+" can be found to be exclusive of other identities that are not or have not till recently been acknowledged to fall under it. However, it is used herein in a broad and inclusive manner. Therefore the chapter addresses LGBTQI+ persons generally or sexual orientation and/or gender identity specifically depending on the theme of each section herein.

normative background, the reality is that LGBTQI+ persons strive to enjoy their human rights in their everyday reality. Why is this happening?

Firstly, there is a historical absence of the LGBTQI+ persons from the concept of *vulnerable groups* entitled the legal protection of human rights both at national and international level. Even when such protection exists, it is unevenly enshrined in law across States. It appears that, when there are no explicit references to the rights of LGBTQI+ persons to live free from discrimination based on sexual orientation or gender identity in national constitutions and laws, States are likely to ignore the "LGBTQI+ elephant in the room" and the LGBTQI+ persons are pre-ordained to live in a vacuum of legal rights. This has adverse impact on both the lives of LGBTQI+ persons, as much as the communities and economies they live in. In many countries, LGBTQI+ persons remain invisible in the national statistics too. Lack of comprehensive data on the quality of life and developmental experiences of LGBTQI+ persons (i.e. access to health, housing, education, employment, etc), especially across developing States, is not only a form of exclusion of these persons from the *mainstream* society, but also a challenge for the implementation of the UN Sustainable Development Goals. Even national population censuses have left out LGBTQI+ persons; as of 2021 there are only a few States that have included questions on sexual orientation, gender identity, same-sex couples, etc, missing out, thus, a great opportunity to collect data on their social, economic and labour market situation.[418] Furthermore, even human rights NGOs have overlooked the human rights issues of LGBTQI+ persons (for example, the Human Rights Watch started investigating the rights of intersex people only in 2017)[419] or the human rights issues of other identities that are not necessarily reflected in the term *LGBTQ+*. Intergovernmental organizations have only recently started collecting disaggregated and comparable data on the human rights situation of LGBTQI+ people- for example, the EU Fundamental Rights Agency conducted its first survey on the experiences of LGBTQI+ in their daily life across the EU in 2012 and its second survey in 2019.[420]

Secondly, sexual orientation and sexuality have been perceived as fixed, static, binary concepts (for example, overlooking the experience of other people such as intersex,

[418] See for example:
Canada:
https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.cfm;
UK:https://www.ons.gov.uk/census/censustransformationprogramme/questiondevelopment/sexandgenderidentityquestiondevelopmentforcensus2021;
Australia:
https://www.abs.gov.au/websitedbs/censushome.nsf/home/factsheetsssc?opendocument&navpos=450
OECD countries: https://www.oecd.org/els/soc/lgbti.htm

[419] See https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity

[420] EU Agency for Fundamental Rights (FRA), *EU-LGBTI II, A long way to go for LGBTI equality*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf

gender diverse or non-binary persons). This has been explained by many scholars as being a heteronormative, *normalised* approach.[421] This heteronormative approach is responsible for treating claims by LGBTQI+ persons as exceptions both temporarily and spatially to the heteronormative power structures and societal institutions. As a consequence, States have been slow in amending their national legislation in order to guarantee that LGBTQI+ persons are not discriminated for their sexual orientation, with quite a number of States resisting any changes based on the need to protection the so-called *traditional* institutions, such as marriage, family, etc. Even to this day, many States have anti-LGBTQI+ laws (for example, laws criminalizing homosexual activity) and pervasive homophobia and transphobia. The *de facto* (or *de jure* in certain countries) marginalization of LGBTQI+ persons has been exacerbated during the COVID 19 pandemic as they were denied health and community-based services; existing inequalities in terms of access to education, employment, participation to cultural life, etc only deepened for the LGBTQ+persons.

Moreover, the quest to classify *LGBTQI+ rights* as *human rights* is criticized by many queer and other scholars as a compromise to the heteronormative society's power structures and socio-political institutions. To term *LGBTQI+ rights* as *human rights* is tantamount to succumb to the "politics of normalization"; instead of deconstructing, reconceptualising and expanding by new meanings the human rights discourse, it is argued that LGBTQI+ rights are disciplined or remodeled to fit the existing understandings and limitations of human rights. But, do we really need to acknowledge LGBTQI+ rights as distinct human rights and hence call for a new set of standards to be adopted, or do we need to understand, document and investigate the situations in which LGBTQI+ persons are human rights violations victims and enforce the legal protections that are already in place under human rights law?

From a legal perspective, the human rights and fundamental freedoms of LGBTQI+ persons are already covered by the existing international human rights instruments. And this is why the UN has not proceeded with elaborating on a human rights instrument addressing LGBTQI+ rights per se. What the UN has done though, is to clarify that there are five minimum core obligations of the States to protect, fulfil and respect the human rights of LGBTQI+ persons on the basis of the existing human rights norms and standards, including customary law (i.e. prohibition of torture).[422] This means that States are under the duty to refrain from the enjoyment of human rights of LGBTQI+ persons, prevent human rights abuses conducted by State organs, public authorities, and individuals, investigate human rights abuses and provide remedies to the victims in an appropriate manner. The core obligations include: the protection of individuals from homophobic and

[421] N. Lovell, Theorising LGBTQI+rights as human rights, 30 December 2015, https://www.e-ir.info/2015/12/30/theorising-lgbt-rights-as-human-rights-a-queeritical-analysis/

[422] OHCHR, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, 2nd edition, 2019. https://www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf

transphobic violence; the prevention of torture and cruel, inhuman and degrading treatment; the repealing/amendment of laws criminalizing homosexual activity and transgender people; the prohibition of discrimination based on sexual orientation and gender identity; and the safeguarding of the freedoms of expression, association and peaceful assembly for LGBTQI+ persons.

At the same time though, the common challenge (for the enforcement of LGBTQI+ rights) is the lack of awareness and understanding as to the breadth, spectrum and temporality of the human rights violations the LGBTQI+ persons experience. This is so for two reasons:

1. LGBTQI+ persons are subjected to various forms of multiple and intersectional discrimination. Case law and amendments to national legislation have not managed to bring about structural changes for LGBTQI+ inclusivity. Even in countries with exemplary human rights records, there is still room for improvement for addressing discrimination against LGBTQI+ persons from all walks of life (i.e youth, elderly, biracial/multiracial LGBTQ+, etc).
2. The experiences of human rights abuses are different for any of the persons falling under the wider LGBTQI+ umbrella. For example, typical human rights violations for the lesbians include denial of reproductive health-services, custody, rape, etc.[423] On the other hand, transgender persons (apart from the human rights violations that other LGBTQI+ persons experience), have to deal with a persistent denial of being allowed to change their gender marker on birth certificates without sterilisation, gender-reassignment surgery and/or treatment, or a mental health diagnosis.[424] Within this context, it is also noted that the rights to autonomy of intersex people, including children, are even less talked about; sex-selective surgeries on infants and children born with intersex traits are deemed to violate the right to health and bodily autonomy of the person. For this reason, intersex people should be perceived as a vulnerable group within the wider vulnerable group of LGBTQI+ persons as they are subjected to harmful practices in medical settings, often without consent, and suffer from stigmatisation and violence all over the world.[425]

[423] See https://outrightinternational.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf

[424] For example, OECD reports that in 2009 no OECD State allowed for gender legal recognition without any medical requirement, while in 2019 only 15 OECD states allow for gender legal recognition. https://www.oecd-forum.org/posts/beyond-the-rainbow-let-s-make-lgbti-equality-a-reality?_ga=2.219953817.1679545459.1636630144-1411613381.1636630144.

[425] A positive development has taken place with regard to intersex persons only in 2021 when a cross-regional group of 53 states called for action by the Human Rights Council. See Permanent Mission of Austria in Geneva, Joint Statement on the Human Rights of Intersex Persons, 48th session, 4 October 2021.
https://www.bmeia.gv.at/oev-genf/speeches/alle/2021/10/united-nations-human-rights-council-48th-

A welcome development in addressing the multi-fold and perhaps unacknowledged manifestations of human rights abuses of LGBTQ+, has been the initiative of a group of experts and civil society actors who put together a set of general principles concerning the human rights of the LGBTQI+ persons in the form of the Yogyakarta Principles[426] in 2007. Ten years later, the Yogyakarta Principles plus 10[427] elaborated on principles in areas such as torture, asylum, privacy, health and the protection of human rights defenders. Albeit these two instruments are targeted toward States, they are not legally binding upon States. Yet, their value is immense in that the principles are framed in gender-neutral, non-exclusionary language and they are self-reflective of the very unique experiences and human rights abuses LGBTQI+ persons have been subjected to, all over the world. The drafters are self-conscious about not introducing labels or categories that people may identify with based on sexual orientation or gender identity and which may not be, after all, appropriate in all cultural contexts; hence they do not create standards for specific groups. The aim of the two Yogyakarta PrinciplesYogyakarta Principles' instruments is rather to introduce standards for diverse sexual orientations and gender identities and apply the existing international human rights standards in response to well-documented patterns of human rights abuse affecting people on the grounds of sexual orientation, gender identity, gender expression, and sex characteristics (SOGIESC). These two documents are written in such a way in order to empower LGBTQI+ people in asserting their rights and reporting the violations when they occur, and, on the other hand, to educate governments and State authorities, and perhaps create the conditions for a sincere dialogue between the States and civil society actors, for the development of a legal framework on LGBTQI+ issues at national level. Furthermore, the Yogyakarta Principles often feature in national case law and they are cited by international courts.

The international organizations have been actively pushing for changes across States and during the past ten years they respond to the call for systematic attention to the breadth of human rights issues of the LGBTQI+ persons. Hence, the UN and the UN agencies, and various regional organizations, like the OAS, the EU and the Council of Europe, albeit at different pace, are actively setting a trend of global institutions' engagement with LGBTQI+ issues and/or through standard-setting. This is the case where international organisations explicitly include sexual orientation and gender identity as

session-joint-statement-on-the-human-rights-of-intersex-persons/

[426] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: https://www.refworld.org/docid/48244e602.html%C2%A0%5baccessed%208%20November%202021

[427] International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, available at: https://www.refworld.org/docid/5c5d4e2e4.html (accessed November 8, 2021).

vulnerable grounds in their policy action plans on intersectionality and multiple forms of discrimination, and produce relevant case law through their international courts.

The involvement of the UN into the advancement of LGBTQI+ issues as human rights has been gradual since the 1990s. On 15 December 2011, the OHCHR issued its first report on the human rights of LGBTQI+ persons.[428] This has been a rather belated development for the UN standards as the LGBTQI+ persons have been historically subjected to neglect, stigmatization, harassment and violence across all countries. In 2011, the UN Human Rights Council, alarmed by the increasing number of cases of violence against LGBTQI+ persons, requested "the United Nations High Commissioner for Human Rights to commission a study, to be finalized by December 2011, documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity".[429] In 2014, the UN Human Rights Council, led by a group of Latin American States, requested the High Commissioner to update the report (A/HRC/19/41) with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards, and to present it to the Human Rights Council; it is noteworthy that the members of the Council were divided on this Resolution.[430] With the Resolution on the Protection against violence and discrimination based on sexual orientation and gender identity[431] adopted by a vote of 23 in favour, 18 against and 6 abstentions, the UN Human Rights Council appointed, for the first time, an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, the mandate of whom includes *inter alia* to address the multiple, intersecting and aggravated forms of violence and discrimination. In 2021, 27 States came together and announced the formation of the Group of Friends of the mandate of the UN Independent Expert on SOGI,[432] an informal partnership of countries working together proactively on SOGI issues.

In the European continent, both the EU[433] and the Council of Europe have developed and strengthened standards on non-discrimination and equality for LGBTQI+ people. The

[428] UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, November 17, 2011.
[429] A/HRC/RES/17/19, 14 July 2011/
[430] A/HRC/RES/27/32, 2 October 2014. With Algeria, Botswana, Côte d'Ivoire, Ethiopia, Gabon, Indonesia, Kenya, Kuwait, Maldives, Morocco, Pakistan, Russian Federation, Saudi Arabia, United Arab Emirates voting against, and Burkina Faso, China, Congo, India, Kazakhstan, Namibia, Sierra Leone abstaining.
[431] A/HRC/RES/32/2, July 15, 2016.
[432] Argentina, Chile, Uruguay, Australia, Austria, Belgium, Canada, Costa Rica, Denmark, Greece, Finland, Germany,Iceland, Israel, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Mexico, Norway, Netherlands, Portugal, United Kingdom, United States, Sweden, Switzerland.
[433] See for example relevant caselaw: Case C-267/06, Maruko ECLI :EU:2008:179. See also EU, European Parliament, Obstacles to the Free Movement of Rainbow Families in the EU, PE 671.505- March 2021.

EU is now even pushing forward with the advancement of the rights of LGBTQI+ persons across its external actions (see EU Action Plan on Gender Equality and Women's Empowerment in External Relations 2020–2025 (GAP III) which aims at mainstreaming a gender perspective in all policies and actions and addressing all intersecting dimensions of discrimination). Various bodies of the Council of Europe have adopted policy guidelines on LGBTQI+ issues: see for example, Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity (Committee of Ministers); Resolution 2048 (2015): Discrimination against transgender people in Europe (Parliamentary Assembly); Resolution 2191 (2017): Promoting the human rights of and eliminating discrimination against intersex people (Parliamentary Assembly); Resolution 2239 (2018): Private and family life: achieving equality regardless of sexual orientation (Parliamentary Assembly); Resolution 230 (2007): Freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons (Congress of Local and Regional Authorities); Resolution 380 (2015): Guaranteeing lesbian, gay, bisexual and transgender people's rights: a responsibility for Europe's towns and regions (Congress of Local and Regional Authorities). The ECtHR has been examining cases on various aspects of LGBTQI+ issues and compared to other regional human rights courts, it is leading the way in recognising more and more areas of the public, social and cultural life where LGBTQI+ persons experience discrimination.

In the American continent, the OAS has adopted four successive resolutions referring to the protection of persons against discriminatory treatment based on their sexual orientation, calling for States to take specific measures for an effective protection against discriminatory acts.[434] In the African continent, the African Commission on Human and Peoples' Rights has adopted Resolution 275 on "Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity", which affirms that LGBTQI+ persons are equally protected under the African Charter on Human and Peoples' Rights. Currently, there is a growing pressure across African States to abolish colonial laws that criminalized homosexual activity; such colonial laws have been deemed unconstitutional elsewhere, i.e. India, etc.

International organisations' engagement with LGBTQI+ issues is manifested by the creation of SOGI institutions within the organizations[435] (see for example, the OAS

https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU(2021)671505_EN.pdf

[434] AG/RES. 2653 (XLI-O/11), Human rights, sexual orientation and gender identity, approved at the fourth plenary session, held on June 7, 2011; AG/RES. 2600 (XL-O/10), Human rights, sexual orientation and gender identity, approved at the fourth plenary session, held on June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, sexual orientation and gender identity, approved in the fourth plenary session, held on June 4, 2009; AG/RES. 2435 (XXXVIII-O/08), Human rights, sexual orientation and gender identity, approved at the fourth plenary session, held on June 3, 2008.

[435] See A. Trithart, *A UN for all? UN Policy and Programming on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, February 2021, IPI Publications, https://www.ipinst.org/wp-content/uploads/2021/02/A-UN-for-All.pdf

Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons (LGBTI) of the I/A Commission on HR).

International courts have already acknowledged that human rights instruments, like the ECHR, ACHR, etc, are living instruments to be interpreted "hand in hand with evolving times and current living conditions".[436] And it is often the case that international courts cite each other in their judgments; for example, the I/A Court of HR relies extensively on European judgments on LGBTQI+ rights and considers them to be of *persuasive value*. The advancement of LGBTQI+ issues as human rights also benefits from the progressive wind of transformative constitutionalism that is applied by many national courts; national constitutions are being interpreted with the goal of realizing constitutional objectives while bringing about social change responsive to society's problems and the need to eliminate stereotypes.[437] Such an example within LGBTQI+ caselaw is the *Arunkumar & Sreeja v. The Inspector General of Registration*. The Court examined whether the term *bride*, as mentioned in Section 5 of the Hindu Marriage Act (HMA) referred to only women, or it could be understood as including transgender persons who identify as women. The Court found that:

> The expression "bride" occurring in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or immutable meaning.., the court is free to apply the current meaning of a statute to present day conditions. A statute must be interpreted in the light of the legal system as it exists today.[438]

National advocacy and activism are catalysts to cementing equality and non-discrimination for LGBTQI+ persons. National and international courts are taking in consideration the reports compiled by national and international non-governmental organizations and the bodies of international organizations, such as the UN Rapporteurs, the UNHCR, etc. For example, in a case examining whether LGBTQI+ persons could qualify for international protection based on their sexual orientation, the Raad van State (*Dutch Council of State*) requested observations by the Office of the United Nations High Commissioner for Refugees (*UNHCR*) in the joined cases of *Minister voor Immigratie en Asiel v. X, Y and Z* (*X and Others*) in order to reach its conclusions[439]. Similarly, in the case

[436] Case of *Apitz Barbera et al. ("Corte Primera Contencioso Administrativo") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 209 and *Case Barbani Duarte et a v. Uruguay. Merits*, Reparations and Costs. Judgment of October 13, 2011. Series C No. 234,., para. 174; *Case of Atala Riffo and daughters v. Chile*, JUDGMENT OF FEBRUARY 24, 2012 (Merits, Reparations and Costs) para. 83.

[437] Von Bogdandy, A., & Urueña, R. (2020). "International Transformative Constitutionalism in Latin America". *American Journal of International Law*, 114(3), 403-442. http://doi.org/10.1017/ajil.2020.27

[438] Madras High Court, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019, https://translaw.clpr.org.in/case-law/arunkumar-vs-the-inspector-general-of-registration/

[439] UN High Commissioner for Refugees (UNHCR), UNHCR intervention before the Court of Justice of the European Union in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z*, 28 September 2012, C-199/12, C-200/12, C-201/12, available at: https://www.refworld.org/docid/5065c0bd2.html [accessed 9

of *Identoba and Others v. Georgia*[440] the ECtHR consulted various reports on the situation of lesbian, gay, bisexual and transgender people in Georgia – in particular, by the Commissioner for Human Rights of the Council of Europe, before finding that Georgia had violated Article 3 (prohibition of degrading treatment) and Article 14 (principle on non-discrimination) ECHR when it failed to protect the applicants who participated in a peaceful demonstration in Tbilisi, in May 2012, to mark the International Day against Homophobia. Moreover, the civil society actors' reports also feed in the UPR process in terms of bringing to the attention of the international community issues that are underreported -if not reported at all- in closed communities and authoritarian regimes.

Despite the existence of international human rights instruments and the increasing number of policy documents and reports on LGBTQI+ issues by regional organizations, it is observed that States are taking a slow pace at mainstreaming them in their national legal systems. Furthermore, domestic accountability lags behind while the implementation gap between the legal and policy instruments becomes deeper. What is even more worrisome is that, in geographic regions where there is absence of a regional human rights protection system, for example Asia, the LGBTQ+persons are at even greater risk. This chapter presents some long-standing issues for the LGBTQI+ community upon which progress is being made, for example, family and parentage rights, discrimination in workplaces, as well as topics that need to be seriously and urgently addressed by states across the world, i.e. the rights of intersex people, discrimination in housing and workplaces. By way of conclusion, the chapter briefly looks into some emerging LGBTQI+ issues that will be subject to debate before national parliaments and within societies across the world, such as asylum claims of LGBTQI+ persons and conversion therapies.

B.4.1.1 Family

LGBTQI+ persons experience discrimination in the whole group of family rights; steps are taken to eliminate discriminatory policies and laws that deprive LGBTQI+ persons from marriage, partnership, reproductive health rights, adoption and parental responsibility.

One of the stereotypes that the LGBTQI+ persons stumble upon is whether they are allowed to exercise their right to family. And in many countries, even to this day, there is a persistent viewing of *family* as the *traditional family*, that is the family unit between opposite-sex persons. This presents an intersection where the quest by LGBTQI+ persons to have their right to family acknowledged is viewed as an attack on a very specific model

November 2021]. On the matter, see also the amicus curiae brief prepared by LGBTQI+ civil society actors challenging the Trump Proclamation which would potentially "inflict unique harm on LGBTQ people in the eight target countries by foreclosing escape from the venomous, and often vicious, anti-LGBTQ conditions that prevail there", see https://cases.justia.com/federal/appellate-courts/ca4/17-2231/97/0.pdf?ts=1520976406

[440] Georgian authorities, despite being aware of the negative attitude towards LGBTQI+ people, they failed to protect them from the violent attacks of the counter-demonstrators and to effectively investigate the incident by establishing, in particular, the discriminatory motive behind the attacks.

of family. Therefore, States may shy away from the legal recognition of same-sex couples, unions and partnerships in order to protect the institution of the traditional family. And within the Council of Europe legal order, for example, States have been enjoying a margin of appreciation on this matter.[441] The ECtHR has acknowledged that "protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" against same-sex couples but if it is to be done, it must be based on the principle of proportionality, which means that the State must show that the measure chosen was suited for realizing the aim sought and that it was necessary ,in order to achieve that aim, to exclude certain categories of people, such as LGBTQI+ persons.[442]

UN treaty-based bodies embrace a broad interpretation of *family*, acknowledging also that the concept of family may differ in some respects from State to State.[443] International caselaw, as it stands, is in favour of recognizing same-sex relationships as *family*. The courts usually refer to factors that indicate the existence of a de facto family unit, such as the sufficient constancy of the relationship, the intentions of same-sex partners in terms of living together, personal closeness, regular contact, economic and emotional ties, making family plans etc. In *X, Y and Z v. United Kingdom*, the ECtHR had upheld that:

> When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.[444]

The ECtHR has noted the rapid evolution of social attitudes among member States of the Council of Europe to include same-sex couples in the notion of *family*, and therefore has acknowledged that "a cohabiting same-sex couple living in a stable *de facto*

[441] See for example: *t*, Judgment of June 24, 2010. Final, 22/11/2010, para. "[s]ame-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes".

[442] ECtHR, *Karner v. Austria*, (No. 40016/98), Judgment of 24 July 2003. Final, 24 October 2003, paras. 40-41.

[443] UN Human Rights Committee, General Comment No. 19 (39th period of sessions, 1990). The Family (Article 23), HRI/GEN/1/Rev.9 (Vol. I), para. 2; United Nations, Human Rights Committee, General Comment No. 16 (32nd period of sessions, 1988). Right to Privacy (Article 17), HRI/GEN/1/Rev.9 (Vol. I), para. 5; Committee on the Rights of the Child, General Comment No. 7. Implementing Child Rights in Early Childhood, CRC/C/GC/7, September 30, 2005, paras. 15 and 19.

[444] Para. 36

partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would".[445]

Likewise, the I/A Court of HR in *Atala Riffo and Daughters v. Chile* has found that the ACHR does not define a limited concept of family, for example a family that is based on marriage. Accordingly, the legal protection of Articles 11 and 17 of the ACHR expands beyond the *traditional* model of family, including thus LGBTQI+ persons living together outside of marriage. In this case, a lesbian mother, who was co-habiting with her same-sex partner and was denied custody of her daughters, was found to have been discriminated because of her sexual orientation contrary to Articles 11 (2), 17 (1) and 24 ACHR in conjunction with Article 1 (1) ACHR, with sexual orientation being a category protected under the said provision. The following dictum also shows the willingness to reinforce the protection of same-sex relationships as *family* within the American human rights protection system:

> The Court emphasizes that, unlike the provisions of the European Convention, which only protect the right to family life under Article 8, the American Convention contains two provisions that protect family life in a complementary manner. Indeed, the Court considers that the imposition of a single concept of family should be analyzed not only as possible arbitrary interference with private life, in accordance with Article 11(2) of the American Convention, but also, because of the impact it may have on a family unit, in light of Article 17 of said Convention.[446]

B.4.1.2 Same-sex Marriage

The quest for legalizing same-sex marriage[447] is a work-in-progress for the LGBTQI+ community. About thirty States (for example, Canada, the Netherlands, the USA (certain States), New Zealand, Norway, Britain) have expanded their definition of marriage to include marriage between same-sex persons. Other countries have amended their national legislation to legalise civil union/partnerships between same-sex persons, and recognize a variety of inheritance, social security benefits, health and tax-related rights.

In the European human rights protection system, the Court has already dealt with the matter. In *Oliari and others v. Italy*, it was noted that a number of European States have extended marriage to same-sex persons. However, Article 12 of ECHR could not be construed as imposing an obligation on the member States of the Council of Europe to grant access to marriage to same-sex couples.[448] While the States enjoy a margin of

[445] Para. 94.
[446] Para. 175
[447] G. Fedele, "The (Gay) Elephant in the Room: Is there a Positive Obligation to Legally Recognise Same-Sex Unions after Fodotova v. Russia?," *EJIL:Talk!,* 23/6/2021, https://www.ejiltalk.org/the-gay-elephant-in-the-room-is-there-a-positive-obligation-to-legally-recognise-same-sex-unions-after-fedotova-v-russia/
[448] Appl Nos 18766/11 and 36060/11, Judgment of July 21, 2015, para. 191.

appreciation on the matter, in this case the Court found that Italy had "overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions".[449] This means that while respecting the margin of appreciation of the States, the duty to respect family life under the ECHR requires at least the availability of *some* form of formalized relationship for same-sex couples.[450]

There are a few noteworthy examples of national case law which support the expansion of the institution of marriage to include same-sex persons. For example, the Supreme Court of Mexico has noted that:

> [t]he institution of marriage had undergone many changes in recent decades. These had included the legalisation of divorce and, most important, the break of the bond between marriage and reproduction. According to the Court, the institution of marriage was no longer tied to procreation and was grounded solely in the mutual bonds of affection, sex, identity, solidarity and the commitment of two individuals willing to live a life together. Therefore, recalling the right to free development of the personality that included both the right to sexual identity and the right to marriage, the Court held that the heterosexuality of the couple was not a defining feature of the institution of marriage. Because same-sex couples have exactly the same characteristics as heterosexual couples, that is, both constituted a life partnership based on emotional and sexual bonds, it was reasonable to extend the right of marriage to them.[451]

In 2017, the Supreme Court of Taiwan found that the institution of marriage, whether same-sex or opposite sex, is equally protected under the Taiwanese Constitution. The Court disassociated the institution of marriage from the process of natural procreation, stating that procreation, as such, is not "an essential element to marriage". Furthermore, sexual orientation could not be acceptable grounds to deny the right of same-sex persons to form a union for the purpose of living a common life, as such differential treatment would breach the principle of equality without rational basis. The reasoning of the Court was the following:

> Assuming that marriage is expected to safeguard the basic ethical orders, such concerns as the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other are fairly legitimate. Nevertheless, the basic ethical orders built upon

[449] Para. 185.
[450] Banda, F., & Eekelaar, J. (2017). "International Conceptions of the Family". *International and Comparative Law Quarterly*, 66(4), 833-862. http://doi.org/10.1017/S0020589317000288
[451] *Acción de Inconstitucionalidad 2/2010*, Mexican Supreme Court of Justice (August 10, 2010). https://www.icj.org/sogicasebook/accion-de-inconstitucionalidad-22010-mexican-supreme-court-of-justice-10-august-2010/

> the existing institution of opposite-sex marriage will remain unaffected, even if two persons of the same sex are allowed to enter into a legally-recognized marriage pursuant to the formal and substantive requirements of the Marriage Chapter, inasmuch as they are subject to the rights and obligations of both parties during the marriage and after the marriage ends....Unspoused persons eligible to marry shall have their freedom of marriage, which includes the freedom to decide 'whether to marry' and 'whom to marry'… Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity and therefore is a fundamental right to be protected by Article 22 of the Constitution. Creation of a permanent union of intimate and exclusive nature for the purpose of living a common life by two persons of the same sex will not affect the application of those provisions on betrothal, conclusion of marriage, general effects of marriage, matrimonial property regimes, and divorce as provided for in Sections 1 through 5 of the Marriage Chapter, to the union of two persons of the opposite sex. Nor will it alter the social order established upon the existing opposite-sex marriage. Furthermore, the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage. The need, capability, willingness, and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage under Article 22 of the Constitution…[452]

Following this ruling, within two years' time the national legislature legalized same-sex marriage with the adoption of the Act for Implementation of Judicial Yuan Interpretation No. 748 (2019).[453]

Even when national legislatures shy away from legislating on same-sex marriages, the national courts may still find themselves in the position of having to adjudicate on same-sex marriages of their nationals conducted elsewhere. Courts are often invited to legally recognize such same-sex marriages and award spousal and other rights that accrue from the institution of marriage even when national legislation provides protection for marriage between opposite-sex persons only. Such an example is the *Leung Chun Kwong v. Secretary for the Civil Service and Another* where the applicants had entered into a same-sex marriage in New Zealand and were deemed not eligible for spousal benefits and joint tax assessment on the same basis as with opposite-sex spouses under the laws of Hong Kong.[454] The Hong Kong Court of Final Appeal had to examine whether the differential

[452] Interpretation No. 748, 2017/05/24. https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748
[453] See https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008
[454] See https://www.doj.gov.hk/en/notable_judgments/pdf/FACV_8_2018e.pdf?

treatment against persons in a same-sex marriage that was the country, were rationally connected to Hong Kong's legitimate aim of protecting or not undermining opposite sex marriage.[455] The Court rejected the logic that by denying same-sex spouses the extension of employment, health or tax benefits, this would essentially encourage any person to enter into an opposite-sex marriage in Hong Kong. On the contrary, "traditionally spousal benefits in the context of employment and taxation were not conferred in order to protect the institution of marriage, but were to acknowledge the economic reality of the family unit, and to encourage the recruitment and retention of staff".[456]

B.4.1.3 Parenting Rights

Even in countries where there is some legal protection for same-sex couples (i.e. recognition of civil unions/parthnerships of same-sex persons), it is often the case that LGBTQI+ persons are subjected to restrictions based on their sexual orientation and gender identity on issues concerning the legal parental status of LGBTQI+ persons, i.e. second-parent and joint adoption, parental authority, assisted insemination and presumption of legal parenthood, etc. What is often not talked about is that, the discrimination against LGBTQI+ parents or LGBTQI+ persons in same-sex relationships brushes off on children of same-sex couples. This is an example of how the law shapes parenthood. Restrictive national laws that do not recognize parentage rights for LGBTQI+ persons based on their sexual orientation or gender identity, are laws that are actually discriminating against children of same-sex couples and/or LGBTQI+ parents and condemning the children in tremendous lack of protection. Even though the situation of children's rights may eventually be rectified by resorting to national courts or international courts (i.e. the Court of Justice of the EU or the I/A Court of HR), considerable time is lost and anguish is experienced by the same-sex parents and their children.

In many countries, the formalisation of legal parenthood in same-sex families can only be materialised through adoption, court procedures and/or the involvement of child welfare authorities. Two cases from the Singapore High Court serve as an example. In the case *UKM v. Attorney-General*[457] the applicant was a gay man who wished to adopt his son for the purposes of establishing a legal nexus with the child that was conceived through in vitro fertilisation and birthed in the U.S. by a surrogate mother. The Court's approach was to determine and weigh the material considerations of the existing Singaporean public policies and strike the proper balance between the competing considerations on the facts of the case.[458] The Court found that there was a public policy in favour of parenthood

[455] [2019] HKCFA 19. https://www.lexology.com/library/detail.aspx?g=f37d97fc-f67b-4ba7-9c88-188ca917af63.
[456] Para. 13.
[457] [2018] SGHCF 18. https://www.elitigation.sg/gdviewer/SUPCT/gd/2018_SGHCF_18
[458] "Whereas public policy focuses on what is good for the community at large, the adjudicative task focuses on correcting the injustice between the parties in the particular case at hand". Para. 108 "Where

within marriage and a policy against the formation of same-sex family units and considered that if the adoption order was made, then "this would be the first case in Singapore in which the court allowed a gay adult to adopt a child, and it seems fair to say that that could have an appreciable effect on traditional parenting norms in Singapore, which the Prime Minister was eager to preserve. Hence, making an adoption order in this case would violate the public policy against the formation of same-sex family units."[459] The Court eventually decided to make an adoption order "not with insignificant difficulty" (in the words of the Court); it did so based on "an application of the law as [the Court] understood it to be" and the statutory imperative to promote the welfare of the child; for the Court the child's well-being was regarded as *first and paramount* and accorded a broader understanding to it by referring, for example, to the environment within which the child's sense of identity, purpose and morality would be developed. Hence, the Court concluded that "an adoption order would be for the welfare of the Child because it would enhance the Child's prospects of acquiring Singapore citizenship and possible long-term residence in Singapore, which would contribute to his sense of security and emotional well-being, as well as the long-term stability of his care arrangements".[460]

As opposed to opposite-sex families, where parenthood is established through the legal presumption of paternity either through the couple's marriage or civil union/partnership or through the official recognition of the child by the father before the competent national authorities (i.e. usually involving a notary), in same-sex families the second partner is usually not instantly recognized as the parent of the child. In such cases, adoption or guardianship may be the only means for a person to create a family with their partner and the partner's child. This differential treatment against same-sex couples (even though it may vary across States) is discriminatory, in that it creates obstacles for same-sex couples to create a family with children as there are additional legal requirements to formalise the relationship between the co-parents and the children.[461] The ECtHR has also maintained a rather restrictive approach.

Within the EU, not all EU Member States recognize the right of same-sex couples (whether they have entered into marriage or union) to adopt; instead, they may offer the option of fostering or guardianship. But what happens in cases where EU States do not

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public policy is used to justify the curtailment of a statutory right, the court is not in the business of painting over the Legislature's canvas. In that regard, it seeks not to exceed its constitutional position as the interpreter and applier of the law in that context. Yet, because its duty is to visit the consequences of the law on members of society, it has a concomitant duty to consider the effect of applying the established regime on the common good. In those exceptional cases where applying the default regime would violate an established public policy or a fundamental purpose of the law itself, the court must have the right not to enable this. And the court must find a rational method of balancing its concerns in these circumstances against the need to allow the law as written to take its course as far as possible." para. 121.

[459] Para. 207.

[460] [2018] SGHCF 18. https://www.cmel.hku.hk/resources-detail.php?id=16.

[461] See https://hal.archives-ouvertes.fr/hal-02512475/document

recognize the parent-child relationship of the second partner in a same-sex family? And what happens with respect to same-sex families coming to their territory from other EU Member States that recognize same-sex spouses' parental rights? How can LGBTQI+ persons exercise their parental rights recognized in other EU Member States on the territory of other EU Member States that they do not? This can potentially create a friction with the fundamental freedom of movement within the EU and Article 21 of the Charter, which could potentially be resolved only when all the EU Member States recognise the adults listed in a child's birth certificate as the legal parents of the child, regardless of the adults' sexes. A landmark case which will eventually shed some light on this issue has been recently brought before the Court of Justice of the European Union and it concerns the child of a British-Bulgarian same-sex couple and the refusal of the Bulgarian authorities to recognize a Spanish birth certificate listing two women as the legal parents of a child. In this case, the Bulgarian authorities requested proof of DNA as to the biological relationship between the second mother and the child. The case was referred to the Court of Justice because of:

> the fact that Bulgarian law does not allow two mothers to be registered as the parents of a child on a birth certificate. This is precluded since, in Bulgaria, the conception of the so-called "traditional" family prevails, which, according to the information provided by the referring court, is a value protected as an element of national identity within the meaning of Article 4(2) TEU. Since that means that there can be only one mother of a child, the Bulgarian authorities therefore consider it necessary to identify the woman who gave birth to the child in order to record only her name on the birth certificate, information which the couple concerned refuses to disclose.[462]

The approach by the Advocate General was to affirm that "the rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State"; furthermore for the purposes of the EU law, *family members* include same-sex spouses. The parentage rights of same-sex spouses which are legally recognized in an EU Member State must be uniformly recognized in other EU Member States even when their national legislation does not provide so; failing to do so "would risk a variation in the rights deriving from Article 21(1) TFEU from one Member State to another";[463] that could render the exercise of the free movement of LGBTQI+ EU citizens in such EU Member States less attractive. From a practical perspective, the same-sex mother who is not legally recognized

[462] Para. 2.
[463] Para. 61.

as a *mother*, will be hindered from exercising other parentage-related rights, such as custody, maternal leave, social security, right to make decisions on matters concerning the health and education of the child, etc. Accordingly, in the Opinion of the AG:

1. A Member State is required, under Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, to issue to a child, who is a national of that Member State, of two women who are designated on the birth certificate issued by the Member State of birth and residence as mothers of that child, an identity document and the necessary travel documents referring to both women as parents of that child, even if the law of the child's Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child.

   Article 21(1) TFEU must be interpreted as meaning that that Member State also may not refuse, on the same ground, to recognise the family relationships between that child and the two women designated as her parents on the birth certificate issued by the Member State of residence for the purpose of exercising the rights conferred on that child by secondary EU law on the free movement of citizens.

2. Article 21(1) TFEU must be interpreted as meaning that a Member State may not refuse to recognise the family relationships, established on the birth certificate issued by another Member State, between one of its nationals, her wife and their child for the purpose of exercising the rights conferred on that national by secondary EU law on the free movement of citizens, on the ground that the domestic law of that woman's Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child. This applies irrespective of whether the national of that Member State is or is not the biological or legal mother of that child under the law of her Member State of origin and the nationality of the child.[464]

[464]Case C490/20, *V.M.A. v. Stolichna obshtina*, (Sofia municipality, Pancharevo district, Bulgaria), Opinion of Advocate General Kokott, delivered on 15 April 2021. https://curia.europa.eu/juris/document/document.jsf?text=&docid=239902&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4748494

The prejudice that LGBTQI+ persons may face in their reality because of their sexual orientation or gender identity is often extended to custody and care decisions. For example, the Supreme Court of Chile has found in the past that "it cannot be ignored that the mother of the minors, in making the decision to openly express her homosexuality, as may be done freely by anyone in the context of very personal gender rights, without deserving any juridical disapproval or reproach for this, put her own interests before those of her daughters, especially when she began to live with her homosexual partner in the same home where she undertook the upbringing and care of her daughters separately from their father."[465]

Another case where the ECtHR could not find proportionality between the aims pursued and the means was the case of *Salgueiro da Silva Mouta v. Portugal*, where the Court found that the denial of residence to a child with his father and the denial of custody to the father based on the father's sexual orientation, was in violation of the right to privacy and the principle of non-discrimination.[466] The ECtHR took into consideration the language used by the national court:

> [T]he child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife.[467]

and indicated that the applicant's homosexuality was picked up as a new factor when making its decision as to the award of parental responsibility. This was found by the ECtHR to constitute discriminatory treatment against the applicant, which is not acceptable under ECHR.[468]

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[465] Judgment of the Supreme Court of Justice of Chile, May 31 2004, cited in Inter-American Court of HR, *Case of Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment 24 February 2012, para. 132.

[466] It is noteworthy to look into the arguments submitted by Portugal in this respect: "With regard to family life, however, the Government pointed out that, as far as parental responsibility was concerned, the Contracting States enjoyed a wide margin of appreciation in respect of the pursuit of the legitimate aims set out in paragraph 2 of Article 8 of the Convention. They added that in this field, in which the child's interests were paramount, the national authorities were naturally better placed than the international court. The Court should not therefore substitute its own interpretation of things for that of the national courts, unless the measures in question were manifestly unreasonable or arbitrary." Para. 30.

[467] "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations. such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria", paras. 30, 33.

[468] Note that this case is different to *P.V. v. Spain* (no. 35159/09) 30 November 2010 "This case concerned a male-to-female transsexual who, prior to her gender reassignment, had had a son with his wife in 1998. They separated in 2002 and the applicant complained of the restrictions that had been imposed by the court on the contact arrangements with her son on the ground that her emotional

Likewise, the I/A Court of HR found in *Atala v. Chile* that the State authorities should have limited themselves to examining Ms. Atala's parental behavior but without exposing and scrutinizing her sexual orientation and found that this consistuted a violation of Article 11(2), in conjunction with Article 1(1)of the American Convention:

> there was arbitrary interference in her private life, given that sexual orientation is part of a person's intimacy and is not relevant when examining aspects related to an individual's suitability as a parent.[469]

The Court also found that victims of human rights violations (Articles 11(2) and 17(1), in conjunction with Article 1(1) of the American Convention on Human Rights) were also the daughters of Ms. Atala, as they were separated from the family unit with their mother in an unjustified manner (contrary to Article 19 of ACHR).[470]

The *Atala v. Chile* case makes an interesting reading because the I/A Court of HR also brought up the issue of the bias of State organs, whether that is national judges or social care services, concerning custody cases with LGBTQI+ parents involved. As the protection of the *child's best interests* is a paramount legal principle, it may be inappropriately used in order to cover personal bias on the part of the people involved. In *Atala v. Chile* the Court took the stand to declare any efforts to legitimize social discrimination and stereotypes completely inadmissible, under the pretext of argument of protecting the child's best interest and sent out a message to the national judges of the Member States of the OAS, as State organs. The Court reminded that it is their duty to ensure the implementation of ACHR and not be impaired by their interpretation:

> But when a State is Party to an international agreement such as the American Convention on Human Rights…this obliges [the judges] to remain vigilant and to ensure that the effects of the Convention's provisions are not impaired by the application of other laws contrary to its purpose and aim.[471]

instability after her change of sex entailed a risk of disturbing the child, then aged six. The Court held that there had been no violation of Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination) of the Convention. It found that the restriction on contact had not resulted from discrimination on the ground of the applicant's transsexualism. The decisive ground for the restriction imposed by the Spanish courts, having regard to the applicant's temporary emotional instability, had been the child's well-being. They had therefore made a gradual arrangement that would allow the child to become progressively accustomed to his father's gender reassignment". Factsheet, https://www.echr.coe.int/Documents/FS_Parental_ENG.pdf

[469] Para. 166-167.

[470] Para. 178.

[471] Para. 281.

B.4.1.4 Intersex Rights

Sex-normalising therapies on intersex children and adults are human rights abuses for a variety of reasons. They can be intrusive and non-reversible. They are, effectively, a violation of human dignity, tempering with the right to health and development of the person. They can amount to a form of torture. They can be carried out without the infomed consent of the person or without the informed consent of the parents. Sometimes, parents are minimally involved in the decision-making process because of the cultural, social, familial and/or medical settings. The latter indicates that, there is a responsibility for the health providers and medical professional associations. Even worse, they can be carried out on children under the pretext of the *child's best interests*.
Since 2013, the UN Rapporteur on Torture has called upon all States to repeal any legislation that allows "intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, *reparative therapies* or *conversion therapies*, when enforced or administered without the free and informed consent of the person concerned."[472]

Article 32 of the Yogyakarta Principles plus 10, states that: "Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person."[473]

Medically unnecessary surgeries and interventions,including cosmetic interventions, on intersex children are carried out in many parts of the world yet they rarely reach the

[472] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53, para. 38, 76-78; see also CEDAW, A/HRC/19/41, para. 56)
[473] There are measures listed as to what the Governments should do in order to enforce this right: For example, "A) Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination; B) Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics; C) Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children; D) Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity; E) Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity; F) Provide adequate, independent counselling and support to victims of violations, their families and communities, to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination; G) Prohibit the use of anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose.

national, let alone international, courts. A couple of landmark cases on the matter come from India and serve as evidence as to how human rights-driven legal interpretation can advance intersex rights within the existing legal framework. In the first case, the Supreme Court held that "[d]etermination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of 'personal autonomy' and 'self-determination'", and hence ordered that, "no one shall be forced to undergo medical procedures including sex reassignment surgeries, sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity".[474] In a latter case, the Madras High Court (India) ruled that, "the consent of the parent cannot be considered as the consent of the child"[475] and ordered the Government to effectively ban sex reassignment surgeries on intersex infants and children.

In the European continent, there is almost non-existent caselaw on the matter. As of 2020, only two EU Member States had prohibited medical intervention on intersex babies without consent.[476] The ECtHR has not yet expressed its opinion on the issue of sex-normalising therapies ;[477] *M v. France* will be the first case where the EctHR will decide whether unnecessary medical interventions (such as bilateral castration, clitoridoplasty, vaginoplasty and vulvoplasty) on an intersex person, constitue a violation of Article 3 of ECHR and whether France has failed to fulfil its positive obligation under Article 3 of ECHR to take effective measures to protect vulnerable intersex individuals, such as intersex children, from ill-treatments perpetrated by other individuals.[478] It is noted though that, the ECtHR has already accepted that Article 3 of ECHR extends beyond acts of physical ill-treatment to also cover the infliction of psychological suffering.[479]

[474] *National Legal Services Authority (NALSA) v Union of India*, AIR 2014 SC 1863, para. 20. https://translaw.clpr.org.in/wp-content/uploads/2018/09/Nalsa.pdf This is a famous case in India as the Court recognized for the first time "third gender"/transgender persons (Hijras/Eunuchs), "over and above binary genders under [the Indian] Constitution and the laws", para. 74.

[475] Madras High Court, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019, para. 17. https://translaw.clpr.org.in/case-law/arunkumar-vs-the-inspector-general-of-registration/

[476] See https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf

[477] See Derave C., Medical "Normalisation" of Intersex Persons: Third-Party Intervention to the ECtHR in the Case of M.V. France, *Strasbourg Observers*, 7/4/2021. https://strasbourgobservers.com/2021/04/07/medical-normalisation-of-intersex-persons-third-party-intervention-to-the-ecthr-in-the-case-of-m-v-france/

[478] See https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-205290%22]}

[479] See *Case of Aghdgomelashvili and Japaridze v. Georgia*, (Application no. 7224/11), Judgment 8 October 2020, Final Judgment 8 January 2021, para. 42, where the Court stated: "Treatment can be qualified as "degrading" – and thus fall within the scope of the prohibition set out in Article 3 of the Convention – if it causes in its victim feelings of fear, anguish and inferiority, if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes, whether or not that was the aim, if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience, or if it shows a lack of respect for, or diminishes, human dignity".

B.4.1.5 Discrimination in Work-place

Despite the fact that non-discrimination in the workplace is well-established across States, the majority of LGBTQI+ persons experience some form of workplace discimination ranging from unfair dismissals, denial of promotion or hiring, violence, harassment and degrading treatment (i.e. to be outed by colleagues), defamation, to denial of access to hygiene and other facilities that are gender-dentity appropriate, etc. A 2015 ILO report revealed that legislation protecting LGBTQI+ work-related rights was absent across many Member States of ILO; even when such legislation existed "workers [did] not always have access to legal redress, either due to prohibitive financial costs, or because of drawn-out legal procedures".[480] Ending discrimination in the workplace and enforcing employability of LGBTQI+ persons is not only a human rights issue, but also an economic imperative, as the exclusion of LGBTQI+ skills in the labour market is equivalent to forsaking economic growth. A refreshing approach to accelerate the pace of change is the one by the UN which has developed the "Standards of Conduct for Tackling Discrimination against LGBTI people"[481] addressed to companies and civil society actors. Companies may use the Standards of Conduct to develop policies and mechanisms to promote anti- LGBTQI+ discmination and civil society actors may monitor companies' compliance policies and practices towards this end. What is interesting with these Standards is that they are to be applied not only in the workplace, but also to prevent human rights violations in the market place (i.e. to end discrimination against LGBTQI+ distributors and suppliers and LGBTQI+ end-receivers, such as consumers) and in the community (i.e. to raise awareness on LGBTQI+ issues, to support LGBTQI+ organisations, etc). LGBTQI+ inclusivity in the workplace is still in its embryonic stage as it is is very much dependent on the adoption of national legislation prohibiting discrimination on grounds such as sexual orientation and gender identity, as well as intersex status, i.e. sex characteristics that are not unambiguously female or male, as much as on the adoption and implementation of LGBTQI+ inclusive policies whose impact is well defined and translates into the improvement of the lives of the LGBTQI+ persons. Currently, States are progressively adopting legislation prohibiting discrimination on grounds such as sexual orientation and gender identity[482] or more and more national courts are invited to read into existing anti-

[480] See https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_368962.pdf

[481] See https://www.unfe.org/standards/

[482] For example, in the EU "The Employment Equality Directive 2000/78/EC forbids discrimination based on sexual orientation only in the context of employment, occupation and training. However, most Member States have extended protection on the basis of sexual orientation, and in some cases gender identity, to cover some or all fields to which the Race Equality Directive (2000/43/EC) applies. These fields include social security and healthcare, education, and access to and supply of goods and services, including housing. EU law also prohibits sex discrimination in employment and access to goods and services (the Gender Equality Directive (Recast) 2006/54/ EC and the Goods and Services Directive 2004/113/ EC), partly covering trans people." FRA Report 2020 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf On the other

discrimination legislation the right of LGBTQI+ persons not to be subjected to discrimination based on their sexual orientation or gender idenity.

In 2020, the USA Supreme Court dealt with the question of whether an employer can fire someone simply for being homosexual or transgender and whether this amounts to sex discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq).[483] Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." In this case, the Supreme Court adopted a textualist interpretation of the Statute in question, which paid off, in terms of reaching a decision which is sound for policy reasons in the USA. Discrimination against LGBTQI+ persons is abhorrent and should not be tolerated. Despite the Statute explicitly stating the prohibited grounds such as race, sex, etc, reflecting thus the values of the society and the intentions of the policy-makers of 1964, it falls short of explicitly stating the grounds of *gender identity* and *sexual orientation*. This is a landmark decision for LGBTQI+ rights but, at the same time, the Supreme Court is threading on thin lines; it is on the verge of temping with the bounds of Constitutional separation of powers and gently usurping the role of the Congress, as the role of the Court is to interpret the law as it is and not as it should be. In the absence of a reform of the Civil Rights Act 1964, the Court rises to the challenge to *update* the Statute and reflect the current values of society through a decision that expands the definition of the term *sex* in Title VII to include sexual orientation and ultimately serves an LGBTQI+ policy-oriented outcome. Hence, the Court reads into the Statute that discrimination against LGBTQI+ is tied to their *sex*. The Court acknowledges that *sex* plays a pivotal, yet impermissible role in the decision of an employer to discharge an LGBTQI+ employee. In the words of the Court "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge".[484] The Court shies away from providing definitions of *gender*

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hand, there are still a few states that have failed to grasp the challenge. For example, the Philippine Congress failed in 2020 to pass legislation prohibiting discrimination based on sexual orientation and gender identity in employment, education, health care, housing, and other domains.See https://www.hrw.org/video-photos/interactive/2021/04/23/country-profiles-sexual-orientation-and-gender-identity

[483] See https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

[484] "First, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it... When an employer fires an employee for being homosexual or

identity or *sexual orientation* albeit they are different concepts that should not be fused; but what we may conclude is that, discrimination based on sexual orientation and discrimination based on gender identity inherently involves treating persons differently because of their sex. Furthermore, the language used by the Court is devoid of any references to bisexuals and other sexual minorities; it is not clear whether this is done purposefully or not, but it surely is a missed opportunity to have this case added to the almost non-existent case law addressing discrimination against bisexuals and other sexual minorities.

The impact of the Supreme Court's decision in *Bostock v. Clayton County* is expected to be immense as the vast majority of federal nondiscrimination laws (at least 100) bar sex discrimination, such as Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522); this means that they should now be read to extend legal protection to LGBTQI+ people. Following President Biden's Executive Order in 2021, all agencies are mandated to "review all existing orders, regulations, guidance documents, policies, programs, or other agency action"[485] in view of enforcing prohibitions of sex discrimination on the basis of sexual orientation and gender identity.[486]

There is little, so far, case law concerning the rights of non-binary persons in workplaces. An interesting case was examined by the British Columbia Human Rights Tribunal, whereby it was held that misgendering and the use of the wrong pronouns in a workplace was a violation of the Canadian Human Rights Code.[487] The actual facts concerned Jessie Nelson, a gender fluid, transgender person who uses they/them pronouns. During their 4-week employment, the employers addressed Nelson with

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transgender, it necessarily intentionally discriminates against that individual in part because of sex. Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action... It is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role in the employer's decision. Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. An employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

[485] See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/

[486] See for example, the US Department of Education interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in Bostock v. Clayton County. Therein the Department interprets Title IX's prohibition on discrimination ''on the basis of sex'' to encompass discrimination on the basis of sexual orientation and gender identity. See https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf

[487] Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others, 2021 BCHRT 137, 29 September 2021, http://www.bchrt.bc.ca/shareddocs/decisions/2021/sep/137 EU Agency for Fundamental Rights (FRA), *EU-LGBTI II, A long way to go for LGBTI equality*, p. 34. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf

she/her pronouns and with gendered nicknames like *sweetheart*, *honey*, and *pinky*. After many complaints on Nelson's part towards management, they were eventually suspended. The Tribunal acknowledged that the burden of proving that they were treated adversely in their employment and that their gender identity or expression was a factor in that adverse treatment, lied with Nelson. Furthemore, the Tirbunal accepted that Nelson's gender identity was a factor in the termination of their employment and, as such, the employers' responses to Nelson's complaints of discrimination, as well as the use of female pronouns and gendered nicknames, were discriminatory. The Tribunal proclaimed the use of such pronouns as *infantilizing and patronising* and reinforcing *gendered hierarchies*. The adversarial impact (of the use of the wrong pronouns) was to undermine their dignity at work and to "erase and degrade the gender identity"[488] of the applicant in their place of work:

> Like a name, pronouns are a fundamental part of a person's identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are. Especially for trans, non-binary, or other non-cisgender people, using the correct pronouns validates and affirms they are a person equally deserving of respect and dignity... When people use the right pronouns, they can feel safe and enjoy the moment. When people do not use the right pronouns, that safety is undermined and they are forced to repeat to the world: I exist.[489]

The Tribunal awarded compensatory damages to Nelson and ordered the employers to implement mandatory human rights training in the workplace and to "add a statement to its employee policies that affirms every employee's right to be addressed with their own personal pronouns."[490]

B.4.1.6 Discrimination in Housing

Having access to affordable and secure housing, including homeless shelters and housing-related services, while living free from fear and stigma, is a challenge for the LGBTQI+ persons in almost every single corner of the world. Housing discrimination on the basis of sexual orientation and gender identity is one of the persistent forms of human rights violations that LGBTQI+ persons experience. It may range from family rejection and being homeless, to harassment from housing-providers or even denying housing and social care services to LGBTQI+ elders and LGBTQI+ youth. Housing discrimination, whatever its form,

[488] Nelson v Goodberry, para.86, p. 22, http://www.bchrt.bc.ca/shareddocs/decisions/2021/sep/137_Nelson_v_Goodberry_Restaurant_Group_Ltd_dba_Buono_Osteria_and_others_2021_BCHRT_137.pdf?fbclid=IwAR0ujVSkidW0YV9wcgfoIPccNl66EAUoi2OH_krJiO_5dBrOWE5ComWuKUI
[489] Para.82, p. 21
[490] P.41.

increases housing insecurity and the risk of homelessness. Ultimately, housing discrimination negatively impacts LGBTQI+ persons' physical and mental health.

Housing insecurity has been greatly exacerbated during the pandemic with homelessness and evictions greatly affecting the LGBTQI+ and LGBTQI+ youth. National surveys also reveal that LGBTQI+ persons have low rates of ownership and higher rates of poverty, with many of them reporting discrimination in mortgage lending, i.e. being denied a mortgage or being charged a higher interest rate leading, thus, to a possible reduction of home equity. For example, in the EU, 11% of the respondents to a survey reported that they had experienced discrimination for being LGBTQI+ when buying or attempting to rent accommodation.[491] In the USA, nearly half (49.8%) of LGBTQI+ adults own their homes, compared to 70.1% of non- LGBTQI+ adults while male same-sex mortgage applicants have a 3% to 8% lower mortgage approval rate.[492] This is expected to change following the Supreme Court's decision of *Bostock v. Clayton County,* according to which, LGBTQI+ persons will be protected from discrimination under the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) when renting or buying a property; applying for a mortgage; seeking housing assistance; or participating in any other housing–related activity.

From an international human rights perspective, the right to housing is guaranteed in international legal instruments dealing with socio-economic rights, such as the ICESCR and the European Social Charter whereas human rights instruments on civil and political rights, such as the ICCPR and the ECHR, provide for the right to be free from interference with one's home, private and family life, etc. The right to housing under the ICESCR, is a right that that requires the States to take reasonable measures subject to available financial resources. States have developed different approaches with regard to housing. In some countries the national case law affirms the right to housing as a right protected under the umbrella of civil and political rights, for example the right to life. In States where there is no positive duty to provide housing, the principles of non-discrimination and equality serve as the legal basis upon which the LGBTQI+ persons can pursue housing-related claims, i.e. to be treated on an equal basis like others in the same or an analogous situation. The emerging case law concerns the denial of housing rights to LGBTQI+ persons, and in particular same-sex couples, in violation of the principle of non-discrimination. The ECtHR examined a case which essentially concerned whether same-sex cohabitation could be protected on an equal basis as a *traditional family* would be under S. 14 of the Austrian Rent Act. In *Karner v. Austria,* the surviving co-habitee was originally denied his succession in the tenancy agreement based on his sexual orientation; the Austrian government's accepted "that that difference in treatment had an objective and reasonable justification, as the aim of the relevant provision of the Rent Act had been the

[491] See EU Agency for Fundamental Rights (FRA), *EU-LGBTI II, A long way to go for LGBTI equality*, p. 34. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf
[492] See https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf

protection of the traditional family".[493] The ECtHR found that Austria had violated the principle of non-discrimination in conjunction with the right to family. The Court held that, where there is a difference in treatment based on sex or sexual orientation, States have a narrow margin of appreciation and they are expected to show more than that the measure chosen is in principle suited for realising the aim sought:

> It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of Section 14 (3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.[494]

In a more recent case, the High Court of Hong Kong examined whether the rejection of a same-sex application for Public Rental Housing on the grounds that it could not be classified as an *ordinary family* under the Public Rental Housing Regulation, was constitutional.[495] The decision by the public authority was justified on the grounds that the relationship between the two men fell outside the meaning of *family* as being the relationship between a husband and a wife. The High Court held that "the Spousal Policy of the Housing Authority to exclude same-sex couples who have entered into lawful and monogamous marriages overseas from eligibility to apply for Public Rental Housing as Ordinary Families under the General Application category is unlawful and unconstitutional" for being in violation of Article 25 of the Basic Law[496] and/or Article 22 of the Hong Kong Bill of Rights.[497]

B.4.2 Conclusion

This chapter aimed at presenting the normative setting within which certain LGBTQI+ issues have progressed. While recognition of LGBTQI+ issues expands and equality laws are advanced in all geographic regions, there are more LGBTQI+ issues that societies and national parliaments still have to debate.

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[493] *Karner v Austria* (2004) 38 EHRR 24, para. 41.
[494] *Ibid*, paras. 41-42.
[495] *Infinger and Hong Kong Authority*, HCAL 2647/2018, [2020] HKCFI 329.
[496] "All Hong Kong residents shall be equal before the law".
[497] All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

One of these issues concerns the increasing number of people seeking international protection based on their sexual orientation or gender identity. Even though the Convention on Refugees does not make an explicit reference to SOGI as grounds for asylum, there is an emerging consensus at the level of human rights mechanisms that national legislation should be amended so that anyone who is in danger of being a victim of persecution in their country of origin, on account of their sexual orientation or gender identity (or sex characteristics), may be granted refugee status.[498]

The elimination of conversion therapies aiming at altering a person's sexual orientation or gender identity should be the next common goal of governments and international organisations. The very term of *conversion therapy* is often used in a vague and broad manner and, as a consequence, it is difficult to identify the practices causing considerable harm to LGBTQI+ persons, especially children. Conversion therapies are equal to torture or inhuman and degrading treatment.[499] The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has already presented a report with the contribution of 33 States calling for a global ban on conversion therapies.[500] The EU has also called on States to ban the practice, with Germany being the only State explicitly banning conversion therapies for children. Other States like Albania, Australia, Brazil,[501] Canada, France, Malta, Ireland, New Zealand, Spain, the United Kingdom, have either adopted some form of legislation banning such practices or are in the process of doing so. The process of successfully eliminating harmful conversion therapies entails acknowledging the setting within which such therapies take place (i.e. often religious and faith-based groups/institutions) and the professionals (i.e. medics, psychologists, teachers, religious leaders, etc) in order to tailor the legal ban measures and provide remedies for the victims (i.e. psychological support for survivors). For the opponents, the banning of conversion therapies is likely to be couched in a rhetoric alleging attempts to impinge upon the freedom of religion, freedom of expression (in terms of racial, ethnic or cultural disparities), etc.

[498] See for example, the ECRI Factsheet on LGBTQI+issues, March 1, 2021. https://rm.coe.int/ecri-factsheet-lgbti-issues/1680a1960a

[499] https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic See also https://www.stonewall.org.uk/about-us/news/which-countries-have-already-banned-conversion-therapy

[500] https://www.ohchr.org/Documents/Issues/SexualOrientation/ConversionTherapyReport.pdf

[501] See for example, Permanent Mission of Brazil to the United Nations Office and other International Organizations in Geneva, *Written reply from the Federative Republic of Brazil to the letter of the Independent expert on protection against violence and discrimination based on sexual orientation and gender identity*, dated 21 November 2019, 29 January 2020, where it is stated that "The practice of 'conversion therapy' is prohibited in Brazil. On March 22 1999, the Federal Council of Psychology (CFP, in its Portuguese acronym) published Resolution No. 001/99, which establishes rules for psychologists in relation to the subject of sexual orientation. According to the Resolution, psychologists are prohibited from offering conversion therapy, but they can treat the anguish experienced by LGBTQI+people who face personal conflicts and discrimination, in order to help them overcome situations of difficulty. Finally, the Supreme Federal Court has ratified the Resolution of the Federal Council of Psychology".

Finally, the impact of States' measures in the context of COVID 19 pandemic on the LGBTQI+ and LGBTQI+ youth is a matter open to many readings.[502] There were many cases where such national measures led to the persecution of LGBTQI+ persons because of their sexual orientation or gender identity while very few States enforced measures tailored to the needs of LGBTQ+. Unfortunately, there is a bleak picture of how States irresponsibly designed measures that indirectly or unintendendly resulted in the exclusion of LGBTQI+ persons from access to health services, social care and housing, etc, and deepened existing inequalities and reinforced stigmas against LGBTQI+ persons.[503] The UN Independent Expert, in an effort to mitigate the impact of COVID 19 on LGBTQI+ persons, issued a toolkit, entitled "ASPIRE" (an acronym for "Acknowledgement, Support, Protection**,** Indirect discrimination avoidance, Representation, Evidence-gathering")[504] to help States in identifying policy-priorities areas and reversing the patterns of social exclusion and discrimination against LGBTQI+ across all geographical and income-level settings.

[502] LGBTQI+Foundation, "Why LGBTQI+people are disproportionately impacted by COVID-19", 29/5/2020. https://lgbt.foundation/coronavirus/why-lgbt-people-are-disproportionately-impacted-by-coronavirus

[503] Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Report on the impact of the COVID-19 pandemic on the human rights of LGBTQI+persons, July 28, 2020, A/75/258.

[504] ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity, June 18, 2020.

▪ Important points to remember about “LGBTQI+ Rights”

When studying “LGBTQI+ Rights,” it is crucial for students to keep in mind the following important points:

1. Sexual Orientation and Gender Identity: LGBTQI+ rights pertain to the protection and recognition of individuals' sexual orientation and gender identity. It is important to understand the diverse range of identities within the LGBTQI+ community and recognize that sexual orientation and gender identity are integral aspects of a person's identity.
2. Discrimination and Stigma: LGBTQI+ individuals often face discrimination, stigmatization, and marginalization based on their sexual orientation or gender identity. Students should explore the various forms of discrimination, including legal, social, and institutional barriers that affect LGBTQI+ individuals' access to their rights.
3. International and Regional Standards: LGBTQI+ rights are protected under international human rights standards. Students should familiarize themselves with key documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and regional human rights instruments that address LGBTQI+ rights.
4. Legal Recognition and Equality: LGBTQI+ individuals have the right to equality before the law and should not face discrimination in any aspect of their lives, including employment, education, healthcare, housing, and participation in public life. Students should examine the legal frameworks and protections in place to ensure LGBTQI+ individuals' equal treatment and access to their rights.
5. Same-Sex Relationships and Marriage Equality: The recognition of same-sex relationships and marriage equality is an important aspect of LGBTQI+ rights. Students should explore the different legal approaches and social attitudes towards same-sex relationships, including the recognition of same-sex marriages and civil unions.
6. Transgender Rights: Transgender individuals face specific challenges related to legal recognition, healthcare, and protection from discrimination. Students should learn about the unique issues faced by transgender individuals, including access to gender-affirming healthcare, legal gender recognition, and protection from violence and harassment.
7. Freedom of Expression and Assembly: LGBTQI+ individuals have the right to express their sexual orientation and gender identity freely and openly without fear of persecution. Students should understand the importance of freedom of expression, assembly, and association for LGBTQI+ individuals

and the challenges they may face in exercising these rights.

8. Intersectionality: LGBTQI+ rights intersect with other aspects of identity, such as race, ethnicity, religion, disability, and socio-economic status. Students should recognize the importance of an intersectional approach when examining LGBTQI+ rights to understand the unique experiences and challenges faced by individuals with multiple marginalized identities.
9. Advocacy and Activism: LGBTQI+ rights have been advanced through the efforts of advocacy groups, activists, and allies. Students should explore the history of LGBTQI+ activism and the role of civil society in promoting and protecting LGBTQI+ rights.
10. Evolving Legal and Social Landscapes: LGBTQI+ rights have evolved significantly in recent years, with increasing recognition and acceptance in some societies. However, challenges and barriers still persist in many parts of the world. Students should stay informed about the latest legal developments, social attitudes, and ongoing struggles for LGBTQI+ rights globally.

Engaging with personal narratives, case studies, and examining the lived experiences of LGBTQI+ individuals will foster empathy and a deeper understanding of the importance of LGBTQI+ rights. It is essential for students to approach the topic with sensitivity, respect, and a commitment to promoting equality and inclusion for all individuals, regardless of their sexual orientation or gender identity.

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Test your knowledge

Here's a short quiz on LGBTQI+ rights:

1. Q: What does LGBTQI+ stand for? A: Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning) and *plus* is for representing other sexual identities.
2. Q: What is the importance of LGBTQI+ rights? A: LGBTQI+ rights advocate for equal treatment and protection of individuals regardless of their sexual orientation or gender identity, promoting inclusivity, dignity, and non-discrimination.
3. Q: Which international human rights document explicitly addresses LGBTQI+ rights? A: The Yogyakarta Principles is a document that specifically addresses human rights relating to sexual orientation and gender identity.
4. Q: True or False: In many countries, same-sex sexual activity is still criminalized. A: True. Same-sex sexual activity is criminalized in numerous countries, often resulting in discrimination, persecution, and human rights abuses against LGBTQI+ individuals.
5. Q: What does *coming out* mean in the context of LGBTQI+ individuals? A: *Coming out* refers to the process in which an individual openly discloses their sexual orientation or gender identity to others, usually to family, friends, or the broader community.
6. Q: Which country was the first to legalize same-sex marriage? A: The Netherlands was the first country to legalize same-sex marriage in 2001.
7. Q: What is conversion therapy? A: Conversion therapy refers to practices aimed at changing or suppressing an individual's sexual orientation or gender identity. It is widely discredited and considered harmful by professional medical and psychological organizations.
8. Q: What is the significance of the Stonewall Riots? A: The Stonewall Riots, which took place in 1969 in New York City, marked a turning point in the LGBTQI+ rights movement. They sparked widespread activism and advocacy for equal rights and are commemorated annually during Pride Month.
9. Q: True or False: Many countries have laws that protect individuals from discrimination based on their sexual orientation and gender identity. A: True. Many countries have implemented laws or policies that prohibit discrimination against LGBTQI+ individuals, although the extent of legal protections varies worldwide.
10. Q: What is the purpose of Pride Month? A: Pride Month is observed in June each year to celebrate and honor the LGBTQI+ community, raise awareness about LGBTQI+ rights, and advocate for equality and acceptance.

Feel free to use these questions to test your knowledge and engage in discussions on LGBTQI+ rights and inclusivity.

There are some interesting podcasts to listen to:

- RightsCast, Essex Human Rights Centre, https://podcasts.apple.com/no/podcast/rightscast/id1458285388
- "The Human Rights Defenders", https://podcasts.apple.com/gb/podcast/the-human-rights-defender/id1517613802
- "We Were Always Here", https://podcasts.apple.com/gb/podcast/we-were-always-here/id1587035513

Documentaries to watch

Here is a list of documentaries that address LGBTQI+ rights and provide insightful perspectives on various aspects of the LGBTQI+ experience:

1. *Paris Is Burning* (1990) - Directed by Jennie Livingston, this documentary explores the vibrant ballroom culture and the lives of African American and Latino LGBTQI+ communities in New York City during the 1980s.
2. *How to Survive a Plague* (2012) - Directed by David France, this film chronicles the early days of the AIDS epidemic and the activism of organizations like ACT UP (AIDS Coalition to Unleash Power) and TAG (Treatment Action Group).
3. *The Death and Life of Marsha P. Johnson* (2017) - Directed by David France, this documentary investigates the mysterious death of transgender activist Marsha P. Johnson and explores her impact on the LGBTQI+ rights movement.
4. *The Celluloid Closet* (1995) - Directed by Rob Epstein and Jeffrey Friedman, this film examines the representation of homosexuality in Hollywood films and its influence on societal perceptions.
5. *For the Bible Tells Me So* (2007) - Directed by Daniel Karslake, this documentary explores the intersection of religion and homosexuality, featuring the stories of various religious families and their LGBTQI+ children.
6. *Before Stonewall* (1984) - Directed by Greta Schiller and Robert Rosenberg, this documentary delves into LGBTQI+ history before the Stonewall Riots, examining the struggles, activism, and cultural shifts leading up to that pivotal event.
7. *We Were Here* (2011) - Directed by David Weissman, this film focuses on the AIDS epidemic in San Francisco during the 1980s and the community's response to the crisis.
8. *Kumu Hina* (2014) - Directed by Dean Hamer and Joe Wilson, this documentary offers a glimpse into the life of Hina Wong-Kalu, a transgender Native Hawaiian teacher and cultural icon.
9. *Call Me Kuchu* (2012) - Directed by Katherine Fairfax Wright and Malika Zouhali-Worrall, this film sheds light on the struggles and activism of the LGBTQI+ community in Uganda, particularly following the introduction of anti-homosexuality legislation.
10. *Disclosure* (2020) - Directed by Sam Feder, this documentary explores the representation of transgender individuals in media and examines the impact of stereotypes and misinformation on transgender lives.

These documentaries provide powerful narratives, personal stories, and historical context that contribute to a better understanding of the LGBTQI+ rights movement and the challenges faced by the community.

Chapter 5 Disability Rights

Abstract

Disability rights is a much evolving and accommodating cluster of rights. At universal level disability rights are guaranteed through the UN Convention on the Rights of Persons with Disabilities. At regional level, there are similar efforts to protect persons with disabilities from discriminatory treatment. The chapter looks into the particular aspects of disability rights, for example, the case law concerning the rights of persons with mental disabilities, and the regression on disability rights during the last decade.

Required Prior Knowledge

UN, International Organisations.

B.5.1 Disability rights after the UN Convention on the Rights of Persons with Disabilities

Persons with disabilities present one of the most vulnerable social groups within past and contemporary societies. They have long faced de jure and de facto discrimination in various forms, ranging from segregation and isolation through the imposition of physical and social barriers to institutionalisation and deprivation of their fundamental rights.[505] At the UN level, efforts to abolish disability-based discrimination in various fields, including education, employment, housing, transport, cultural life, and access to public places and services, and to promote the social inclusion, self-reliance and autonomy of persons with disabilities (including persons with mental disabilities) culminated in the adoption of various standard-setting documents dating back to 1970s.[506]

The painstaking process of cultivating a human-rights culture for the protection of the rights of persons with disabilities (which is reflected in the chronic efforts of raising public awareness with regard to the rights of disabled persons or in the change in the use of derogatory terminology in the drafts of the earlier legislative instruments) found legal expression in the UN Convention on the Rights of Persons with Disabilities [hereinafter "UN CRPD"]- the first UN human rights convention of the 21st century. The UN CRPD was adopted on 13 December 2006, during the sixty-first session of the General Assembly by

[505] The very concept of disability is an expansive one. See Inter-American Court of Human Rights, *Case Artavia Murillo v. Costa Rica*, 2012, para 291, where the Court found that female sterilization could be equivalent to a disability.

[506] Other important normative documents are the Committee's on Economic, Social, and Cultural Rights General Comment 5 and General Comment 14; Human Rights Committee's General Comment No. 18; CEDAW's General Recommendation No. 18 on Disabled Women; the UN Human Rights Commission Resolution 2000/51; and the General Assembly Resolution 56/168 (2001).

resolution A/RES/61/106 and entered into force on 3 May 2008. As of 2022, the UN CRPD has been ratified by 185 State Parties, including one international organization party, the EU.[507] All the aforementioned instruments reflect an evolution of the norms with regard to the protection of human rights and the paradigm shift from the medical model of disability (a view of disability based on medical impairments) to a human rights and social-based model (a view of disability as the outcome of a combination of individual biomedical impairment and associated individual functional limitations in a social environment which lacks the means of satisfying the needs of a disabled person[508]).

The UN CRPD is the outcome of disability activism and lobbying throughout the decades. Even though the UN website proclaims that that the Convention is "the fastest negotiated human rights treaty",[509] homage must be paid to the work and long-standing commitment of disability human rights defenders worldwide for their hard-won battles across political, societal and legal domains, which have resulted in developing such an elaborate human rights instrument that covers nearly all aspects of life and is transforming societies and individual's attitudes towards persons with disabilities.

UN CRPD's value as a bill of rights of persons with disabilities is highly remarkable in that it presents an acknowledgment by the international community of the equal enjoyment of all human rights by persons with disabilities and a guarantee of autonomy and effective participation in society on an equal basis with others. Each right that is guaranteed by UN CRPD's provisions, mirrors the long suffering of people with disabilities. As noted above, the broad definition of disabilities under UN CRPD also covers people with mental impairments.[510] The Committee, as early as in 2011, expressed its view that persons "who should be protected by the Convention, [include] persons with psychosocial disabilities or intellectual disabilities".[511] Through the enforcement of the UN CRPD in State Parties, what is expected with regard to persons with mental disabilities is the development of a range of community-based support services conducive to their health, dignity and inclusion in order to enjoy the right to equal participation in all aspects of

[507] UN Committee on the Rights of Persons with Disabilities, List of issues prior to submission of the second and third periodic reports of the European Union, CRPD/C/EU/QPR/2-3, 20/4/2022. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fQPR%2f2-3&Lang=en

[508] M. Oliver and C. Barnes (eds.), Disabled People and Social Policy: From Exclusion to Inclusion, (London: Longman, 1998).

[509] See UN, Convention on the Rights of Persons with Disabilities. https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[510] Perlin, Michael L., 'The UN Convention: The Impact of the New UN Convention on the Rights of Persons with Disabilities on International Mental Disability Law', International Human Rights and Mental Disability Law: When the Silenced are Heard, American Psychology-Law Society Series (2011; online edn, Oxford Academic, Sept. 22, 2011). https://doi.org/10.1093/acprof:oso/9780195393231.003.0015,

[511] UN Committee of the Rights of Persons with Disabilities (2011a), para. 8

society and the right to community integration.[512] However, the lack of an *ad hoc* General Comment by the UN Committee on the Rights of Persons with Disabilities (CRPD) addressing mental disabilities or mental health issues across the whole spectrum of human rights, is rather a missed opportunity given the fact that, even to this day, persons with mental disabilities are victims of marginalization, institutionalization, and denial of access to education and employment.

The UN CRPD establishes an interesting monitoring and implementation mechanism that relies on the Conference of State Parties and the Committee on the Rights of Persons with Disabilities. The former is created pursuant to Article 40 of the Convention and its mandate is to consider any matter with regard to the implementation of the Convention. Since 2008, the Conference of State Parties has been held annually at the UN headquarters in New York, covering a range of themes and issues in round-tables, interactive dialogues and side-events. Article 34 of the Convention establishes the Committee on the Rights of Persons with Disabilities [hereinafter "CRPD"], a committee of 18 independent experts. The CRPD members serve in their individual capacity. They are elected from a list of persons nominated by the States at the Conference of the State Parties for a four year term with a possibility of being re-elected once. The CRPD meets in Geneva and normally holds two sessions per year. The implementation of the UN CRPD provisions are monitored by the Committee.[513] The latter also offers interpretation of the UN CRPD provisions through the adoption of General Comments.

The legal framework on the protection of the rights of persons with disabilities is complemented by the Optional Protocol to the Convention. The Optional Protocol was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 and entered into force on 3 May 2008. As of 2022, the Optional Protocol has 100 State Parties. The Optional Protocol establishes two procedures: the individual communications procedure and the inquiry procedure. Under the former, individuals or groups of individuals can take a complaint to the CRPD when one or more of their UN CRPD rights has been breached, and under the latter, individuals or organisations can bring a complaint to the CRPD alleging "grave or systematic violations by a State Party

[512] See E/CN.4/2005/51, 11 February 2005, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, para.85: "Deriving from the right to health and other human rights, the right to community integration has general application to all persons with mental disabilities. Community integration better supports their dignity, autonomy, equality, and participation in society. It helps prevent institutionalization, which can render persons with mental disabilities vulnerable to human rights abuses and to damage their health on account of the mental burdens of segregation and isolation. Community integration is also an important strategy in breaking down stigma and discrimination against persons with mental disabilities."

[513] The Committee examines national reports and shall make such suggestions and general recommendations on the reports as it may consider appropriate and shall forward these to the State Party concerned. Under the Optional Protocol the Committee is provided with competence to examine individual complaints with regard to alleged violations of the Convention by States parties to the Protocol.

of rights set forth in the Convention" (Article 6 of the OP) and the CRPD can initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations". It is noteworthy that, the EU has not ratified the Optional Protocol to the Convention yet.

The UN CRPD does not include an exhaustive definition of *disability* but it aims at a paradigm shift: to move beyond the medical model of *disability* and to view disability as a "result of the interaction between an impairment and society at a given time and place".[514] The UN CRPD advances the principle of *inclusive equality* and creates an obligation for the States to recognise the diversity of persons with disabilities.[515] In the preamble of the UN CRPD it is mentioned that persons with disabilities may be subject "to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status"; the CRPD has now extended the grounds of discrimination by referring to discrimination on the basis of "other layers of identity".[516]

The principles of *inclusive equality*[517] and prohibition of all forms of discrimination on the basis of disability are the foundations of the UN CRPD. In General Comment No. 6, the CRPD has defined inclusive equality as entailing four dimensions:

> (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.[518]

The CRPD identified the following as prohibited forms of discrimination: direct and indirect discrimination, structural discrimination, harassment, multiple or intersectional discrimination, discrimination by association and denial of reasonable accommodation.[519]

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[514] This is what disability scholars call the "social model" of disability and is reflected in the Preamble of the CRPD: "Disability is an evolving concept, and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis with others". See Markus Schefer, UN Convention on the Rights of Persons with Disabilities and Ratification of Optional Protocol: Discussion, Joint Committee on Disability Matters Debate, May 27, 2021, House of the Oirechtas. https://www.oireachtas.ie/en/debates/debate/joint_committee_on_disability_matters/2021-05-27/2/

[515] Andrea Broderick, "Transforming Hearts and Minds Concerning People with Disabilities: Viewing the UN Treaty Bodies and the Strasbourg Court through the Lens of Inclusive Equality", Erasmus Law Review, (2020) *3*:113-129, http://doi.org/10.5553/ELR.000166

[516] General Comment No. 6 (CRPD/C/GC/6), paragraph 34. See also S.C. v. Brazil (CRPD/C/12/D/10/2013)

[517] See General Comment No. 6, para. 11.

[518] para. 11.

[519] See paras. 17-19.

X v. Tanzania[520] and *Y v. Tanzania*[521], are two examples of what the CRPD considers direct discrimination based on disability. Tanzania is one of the few countries around the world with high numbers of people with albinism across its population. Being born with albinism in Tanzania has long equaled to facing discrimination on multiple fronts, including acts of violence, being subjected to harmful traditional and witch-craft practices and trafficking of human limbs or organs, segregation, denial of education and health and other human rights violations.[522] The CRPD found that albinism is a form of disability and that in both cases the State had failed to protect them from a wide-spread practice that targeted exclusively persons with albinism because of their medical condition. For this reason, the CRPD requested *inter alia* from Tanzania to address harmful practices and rampant myths affecting the enjoyment of human rights by persons with albinism through awareness-raising campaigns that are based on the human rights model of disability.[523]

In *X v. Tanzania*, the author of the complaint had his arm cut off due to his albinism by strangers and the Tanzanian authorities had neither investigated nor prosecuted the perpetrators of the crime. As a result of his injury he was not self-sufficient anymore. Based on the facts of the case, the CRPD found that there was a violation of Articles 5, 15, 17 of the UN CPRD in conjunction with Art. 4 and requested from Tanzania to review its legal and policy framework to prevent further attacks against persons with albinism:

> [d]iscrimination can result from the discriminatory effect of a rule or measure which does not intent to discriminate, but that disproportionately affects persons with disability. In the present case, the Committee notes that the author was victim of a violent crime responding to the characteristics of a practice which exclusively affects persons with albinism: he was attacked on 10 April 2010 while he was fetching firewood. Two men hit him on the head with clubs and hacked off

[520] UN Committee on the Rights of Persons with Disabilities, Communication No. 22/2014, CRPD/C/18/D/22/2014, 31/8/2017.

[521] UN Committee on the Rights of Persons with Disabilities, Communication No. 23/2014 CRPD/C/20/D/23/2014, 31/10/2018.

[522] See Giorgio Brocco (2016) Albinism, stigma, subjectivity and global-local discourses in Tanzania, Anthropology & Medicine, *23*:3, pp. 229-243. http://doi.org/10.1080/13648470.2016.1184009; Sheryl Reimer-Kirkham, Barbara Astle, Ikponwosa Ero, Kristi Panchuk, Duncan Dixon. (2019) Albinism, spiritual and cultural practices, and implications for health, healthcare, and human rights: a scoping review. Disability & Society 34:5, pp 747-774; Sheryl Reimer-Kirkham, Barbara Astle, Ikponwosa Ero, Elvis Imafidon, Emma Strobell. (2022) Mothering, Albinism and Human Rights: The Disproportionate Impact of Health-Related Stigma in Tanzania. Foundations of Science 27:2, pp. 719-740; Human Rights Watch, "It Felt Like a Punishment": Growing Up with Albinism in Tanzania", 9/2/2019. https://www.hrw.org/news/2019/02/09/it-felt-punishment-growing-albinism-tanzania The UN has created the mandate of an Independent Expert on the Enjoyrment of Human Rights with Albinism since 2015. For further information see here https://www.ohchr.org/en/special-procedures/ie-albinism/mandate-independent-expert-human-rights-persons-albinism The EU has also funded projects on this matter, such as the Maisha Yetu Project which aims at tackling violence and witch-craft related practices against persons with albinism.

[523] *X v. Tanzania*, para. 9 (b) (iv). ; *Y v. Tanzania*, para. 9 (b) (iv).

> half of his left arm from below the elbow, and took it away. Since then, the author's access to justice has been significantly limited: no investigative action seems to have been taken by the competent authorities after the withdrawal of the first prosecution, and his case remains in total impunity more than eight years after the criminal attack he suffered… the Committee notes that the author has not been provided with any support from State Party's authorities to enable him to live independently again after the loss of his arm and that, generally speaking, the State Party has not adopted any measures to prevent this form of violence against persons with albinism and to protect them therefrom. In the absence of any explanation from the State Party on these issues, the Committee considers that the author has been a victim of a form of violence that exclusively targets persons with albinism. It further considers that the State Party's failure to prevent and punish such acts has resulted in a situation putting him and other persons with albinism in a situation of particular vulnerability, and preventing them from living in society on an equal basis with others. The Committee therefore concludes that the author has been a victim of a direct discrimination based on his disability, in violation of article 5 of the Convention.[524]

In *Y v. Tanzania*, the author of the complaint had suffered attacks because of his condition on two occasions with the first one being when he was 12 years old; as result of the first attack he had three fingers on his right hand stolen from the perpetrator of the crime. At a later stage, he had his left shoulder hacked with a machete, thus leaving him unable to use either of his right hand or left arm. The author had to stop going to school in fear of persecution and he was never offered any rehabilitation by the State. Again, the Tanzanian authorities had not prosecuted the perpetrators of the crime. The CRPD found that the State had failed to fulfil its obligations arising under Articles 5, 7, 8, 15, 16, 17 of the UN CRPD in conjunction with Articles 4 and 24 of the UN CRPD. It is noteworthy that, for the CRPD the failure on the part of the State to investigate and prosecute the perpetrators of the crimes was a cause for revictimisation which amounted to psychological torture and ill-treatment.[525] Furthermore, the fact that the State did not help the author to continue with his education when he had to physically stop going to school in this general climate of violence against persons with albinism, was found to be a failure of the State's obligation to provide reasonable accommodation appropriate to the *individual's requirements* [Art. 24 2(2) (c) UN CPRD],

The CRPD has offered normative interpretation as to reasonable accommodation, distinguishing it from other kind of measures that guarantee and sustain inclusive equality for persons with disabilities, such as accessibility,[526] affirmative action,[527] and support

[524] Paras. 8.3-8.4.
[525] Para. 8.7.
[526] General Comment No. 6 on Equality and Non-Discrimination, (CRPD/C/GC/6), 26 April 2018,

measures, like the provision of assistants.[528] In particular, the CRPD has emphasised that with reasonable accommodation there is a "duty applicable directly to individuals and bound by a possible excessive or unjustifiable burden on the accommodating party".[529] For example, in terms of education, the CRPD has suggested that the reasonableness of the accommodation measures should be based on a "contextual test that involves an analysis of the relevance and the effectiveness of the accommodation and the expected goal of countering discrimination also stressing that the proportionality depends on the context".[530] In a case where the Indian Supreme Court ruled on the refusal of the Union Public Service Commission, the organisation that conducts civil service examinations, to offer the petitioner, who is affected by a writing disorder, a scribe [writer] for his exam, the Court provided for a qualified contextual test by referring also to the *intersectional* nature of disability-based discrimination that needs to be taken into consideration when providing accommodation measures:

> The principle of reasonable accommodation must also account for the fact that disability based discrimination is intersectional in nature. The intersectional features arise in particular contexts due to the presence of multiple disabilities and multiple consequences arising from disability. Disability therefore cannot be truly understood by regarding it as unidimensional. Reasonable accommodation requires the policy makers to comprehend disability in all its dimensions and to design measures which are proportionate to needs, inclusive in their reach and respecting of differences and aspirations. Reasonable accommodation cannot be construed in a way that denies to each disabled person the customization she seeks*. Even if she is in a class of her own, her needs must be met. While assessing the reasonableness of an accommodation, regard must also be had to the benefit that the accommodation can have, not just for the disabled person concerned, but also for other disabled people similarly placed in future.[emphasis added]*[531]

The UN CRPD also guarantees economic, social and cultural ("ESC") rights for persons with disabilities; as with all ESC rights, the UN CRPD ESC rights are subject to their

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paragraph 24.

[527] Ibid, paragraph 25 (c).

[528] See Marine Uldry and Theresia Degener, Towards inclusive equality: 10 Years Committee on the Rights of Persons with Disabilities, Bochum: Protestant University of Applied Sciences Rhineland-Westphalia-Lippe. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/1_Global/INT_CRPD_INF_21_28325_E.pdf; General Comment No. 6 on Equality and Non-Discrimination, paragraph 25 (c).

[529] See para. 50.

[530] See para. 50.

[531] *Vikash Kumar v. Union Public Service Commission & Ors*., Supreme Court, Civil Appellate Jurisdiction, Civil Appeal No. 273 of 2021, Special Leave Petition (C) No. 1882 of 2021, para. 48, https://main.sci.gov.in/supremecourt/2019/19177/19177_2019_36_1503_26115_Judgement_11-Feb-2021.pdf

progressive realisation. However, there is an inherent presumption against any retrogressive measures which may lower them unless they are fully justified in the absence of alternative measures. Persons with disabilities are recognized as rights holders with a claim to various cultural rights, including the right to participate in cultural life and the right to education without discrimination and on the basis of equal opportunities.

The CRPD has built on the soft-law framework that has been shaped by other UN treaty-based human rights committees and has, therefore, adopted a number of General Comments which inter alia guarantee the safeguarding of the disability culture based on the principle of inclusive equality; for example, the CRPD has called States to adopt measures which ensure that persons with disabilities are entitled, on an equal basis with others, of "their specific cultural and linguistic identity, including sign languages and deaf culture".[532] At the same time, the CRPD has called States to adopt measures which allow persons with disabilities "to access cultural life and to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit but also for the enrichment of society."[533]

The UN CRPD recognizes participation as both a general obligation and a principle upon which the implementation of the provisions is dependent on. The Convention encompasses the obligation of States parties to closely consult and actively involve persons with disabilities (art. 4 [3]) and the participation of persons with disabilities in the monitoring process (art. 33 [3]) as part of a wider concept of participation in public life. Participation of persons with disabilities is essentially viewed as an obligation for the States and as a duty for the individuals and their organizations under the spirit of the provisions of the Convention. It will be recalled that without the participation/involvement of persons with disabilities in the drafting process of the Convention, this legal instrument would not come into life. The participation of individuals and their organizations is a textbook example of democratic governance within the UN human rights system. As the CRPD has noted:

> The participatory processes and the involvement of persons with disabilities, through their representative organizations, in the negotiation and drafting of the Convention proved to be an excellent example of the principle of full and effective participation, individual autonomy and the freedom to make one's own decisions.[534]

The CRPD is the only UN treaty-based human rights organ that has adopted an *ad hoc* General Comment on the concept of *participation*: General comment No. 7 (2018) on

[532] General comment No. 4 (2016) on the right to inclusive education, CRPD/C/GC/4, 25 November 2016.
[533] Ibid.
[534] General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, November 9, 2018.

the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention (9 November 2018). This Comment offers definitions on *representative organizations* and draws distinction between organizations of persons with disabilities and organizations *for* persons with disabilities, and between organizations of persons with disabilities and civil society organizations.

The CRPD has clarified that the "organizations of persons with disabilities" have certain characteristic aspects, such as that:

> (a) They are established predominantly with the aim of collectively acting, expressing, promoting, pursuing and/or defending the rights of persons with disabilities and should be generally recognized as such;
>
> (b) They employ, are represented by, entrust or specifically nominate/appoint persons with disabilities themselves;
>
> (c) They are not affiliated, in the majority of cases, to any political party and are independent from public authorities and any other non-governmental organizations of which they might be part/members of;
>
> (d) They may represent one or more constituencies based on actual or perceived impairment or can be open to membership of all persons with disabilities;
>
> (e) They represent groups of persons with disabilities reflecting the diversity of their backgrounds (in terms of, for example, sex, gender, race, age, or migrant or refugee status). They can include constituencies based on transversal identities (for example, children, women or indigenous people with disabilities) and comprise members with various impairments;
>
> (f) They can be local, national, regional or international in scope;
>
> (g) They can operate as individual organizations, coalitions or cross-disability or umbrella organizations of persons with disabilities, seeking to provide a collaborative and coordinated voice for persons with disabilities in their interactions with, among others, public authorities, international organizations and private entities.[535]

Within these organisations, various types of organisations can be found, such as umbrella organizations of persons with disabilities, cross-disability organizations, self-advocacy organizations, organizations including family members and/or relatives of persons with disabilities, organizations of women and girls with disabilities and organizations and initiatives of children and young persons with disabilities.

[535] General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, November 9, 2018, para. 11.

The participation should be guaranteed in all legislative, administrative and other measures that may directly or indirectly impact the rights of persons with disabilities. The CRPD is also, very clearly, in favour of a very broad and specific understanding of *participation*. It therefore, also refers to the obligation of the States to "closely consult with and actively involve" persons with disabilities through their representative organizations in order to fulfil the requirement for "full and effective participation" as envisaged under Article 3 of the UN CRPD.

Furthermore, there are eight guiding principles that underlie the UN CRPD:

1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
2. Non-discrimination
3. Full and effective participation and inclusion in society
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
5. Equality of opportunity
6. Accessibility
7. Equality between men and women
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities
9. All these principles can be viewed as integral and interdependent components of the principle of *participation*. The CRPD has consistently recommended the respect of the above principles, and has placed strong emphasis on the accessibility and full inclusion of persons with disability in line with the principle of *participation*.

Accessibility and disability inclusion are the key ingredients for the effective participation of persons with disabilities in our societies; without those ingredients, the realization of human rights of persons with disabilities, i.e. accessibility (art. 9); living independently and being included in the community (art. 19); work and employment (art. 27); adequate standard of living and social protection (art. 28); and participation in political and public life and in cultural life, recreation and sport (arts. 29 and 30), is seriously endangered. Hence, the CRPD frames accessibility as "a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities" (General Comment No 2, para. 4).

Under the work of the CRPD, the concept of *participation* entails both physical and non-physical accessibility to public spaces, the urban infrastructure and environment, opportunities and information; this is also in line with the general comment No. 5 (1994) on persons with disabilities, the Committee on Economic, Social and Cultural Rights and the United Nations Standard Rules on the Equalization of Opportunities for Persons with

Disabilities (esp. Rule 5). The importance of accessibility as a means of precluding marginalization of persons with disabilities is also raised by the General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health (para. 12), the CRC General Comment No. 9 (2006) on the rights of children with disabilities, and the CRC General Comment No. 17 (2013) on the right of the child to rest, leisure, play, to recreational activities, to cultural life and the arts.

In its general comment No. 2 (2014) on accessibility, the CRPD reaffirms that "[a]ccessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. Without access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies".[536] Furthermore, the CRPD has recently acknowledged *participation* in the context of the *inclusive urban development*. In its Statement on "Inclusion and full participation of persons with disabilities and their representative organizations in the implementation of the convention",[537] the CRPD has called States to transform the current urban settlements that "are strewn with obstacles that do not enable persons with disabilities to function effectively in them"[538] and to commit that when designing and deciding upon the future planning of urban environments they will always take into consideration the human rights of persons with disabilities, including the right to participate in cultural life. This is in line with the UN 2030 Agenda for Sustainable Development Goals and particularly Goal 11 on making cities and human settlements disability-inclusive, safe, resilient, and sustainable. In view of including persons with disabilities in urban development contexts, the CRPD declares that "all goods and services opened to the public, including apartments, schools, shops, banking facilities, sports and recreational grounds, transport systems, information and communication technologies and all support services must be made accessible and suitable for the use of persons with disabilities… [I]n order to secure an inclusive and sustainable urban development, there must be active, meaningful and effective participation of persons with disabilities, through their representative organizations, in the planning, implementation and monitoring of urban development throughout all stages, in line with article 4 (3) of the Convention on the Rights of Persons with Disabilities".[539] The latter affirms the view that persons with disabilities must be enabled *urban active citizens*.

[536] General comment No. 2 (2014) on Article 9: Accessibility, CRPD/C/GC/2, para. 4.
[537] CRPD, Statement on "Inclusion and full participation of persons with disabilities and their representative organizations in the implementation of the convention" Adopted at the CRPD 19th session (14 February - 9 March 2018).
[538] *Ibid*.
[539] *Ibid*.

Furthermore, the CRPD has recognized that participation cannot materialize without the States taking measures for persons with disabilities be included in the community life. As it has stated:

> Cultural life, recreation, leisure and sport (art. 30) are important dimensions of life in the community in which inclusion can be pursued and achieved, for example by ensuring that events, activities and facilities are accessible to persons with disabilities and are inclusive. Personal assistants, guides, readers and professional sign language and tactile interpreters, among others, contribute to an inclusive life in the community in accordance with the will and preferences of persons with disabilities. It is important that the use of support of any kind is considered part of disability-related expenses as such support services help foster inclusion in the community and independent living. Assistants necessary for participating in cultural and leisure activities should not be required to pay entrance fees. There should also be no restrictions on when, where and for what kinds of activities assistance can be used, nationally and internationally.[540]

Some limited caselaw from the ECtHR has touched on the issue of participation and access to cultural spaces and has illustrated the Court's approach on enabling people with disabilities to fully integrate into society and participate in the life of the community. In the case of *Glaisen v. Switzerland*,[541] the applicant, a paraplegic and a wheel-chair user, complained that the refusal of access to the cinema on account of his disability had not been characterised as discrimination by the Swiss courts and that it resulted in a violation of Arts. 14 (non-discrimination) and 8 of ECHR (the right to private and family life). The complaint was declared inadmissible. The Court took into consideration that access to the cinema and other cultural spaces for a person with disability is not only a matter of access to culture but it also entails the additional dimension of social interaction with others. However, access to a particular film which was not played in any other cinema in the area did not fall within the ambit of the right to private and family life:

> The Court took the view that Article 8 could not be construed as requiring access to a specific cinema to see a given film in a situation where access to other cinemas in the vicinity was possible. The Court indeed noted that in the surrounding area there were other cinemas adapted to Mr Glaisen's needs, and that he therefore generally had access to his local cinemas. The Court thus concluded that the refusal to allow Mr Glaisen to enter the cinema to see a specific film had not affected his life in such a way as to interfere with his right to personal development or to establish and develop relationships with other human beings

[540] General comment No. 5 (2017) on living independently and being included in the community, CRPD/C/GC/5, 27 October 2017, para. 94.
[541] Application No. 40477/13, Decision 18/7/2019.

> and the outside world. The Court reiterated that States were afforded a broad margin of appreciation in situations where they had to strike a balance between competing private and public interests or between different Convention rights. Similarly, domestic courts had to give detailed reasons for their decisions, in particular to allow the Court to exercise its European scrutiny.[542]

Unlike the previous case which concerned access to private cultural spaces, the case of *Arnar Helgi Lárusson v. Iceland*[543] concerned a complaint on the lack of wheelchair access in two buildings housing arts and cultural centres run by the complainant's municipality. The Court found that the complaint fell within the ambit of the right to private and family life as "the lack of access to the first [cultural centre] had hindered the applicant's participation in a substantial part of the cultural activities that his community had to offer, and the lack of access to the second [cultural centre] had hindered him from attending birthday parties and other social events with his children".[544] The ECtHR referred to the obligation of the States under UN CRPD to provide reasonable accommodation also in light of the right of persons with disabilities to participate in social and cultural life but clarified that this obligation could not impose a disproportionate burden on the public authorities when considerable measures have already been taken to enable persons with disabilities to exercise their rights. Based on the facts of the case, the Court concluded that there was no violation of the right to private and family life in conjunction with the principle of non-discrimination:

> Such reasonable accommodation helps to correct factual inequalities which are unjustified and which therefore amount to discrimination… The present case had to be considered from the viewpoint of whether or not the national authorities had complied with their positive obligation to take appropriate measures to enable the applicant, whose mobility was impaired due to disability, to exercise his right to private life on an equal basis with others. For that assessment, and taking account of the facts of the case, the test to be applied was limited to examining whether the State had made "necessary and appropriate modifications and adjustments" to accommodate and facilitate persons with disabilities, like the applicant, which, at the same time, did not impose a "disproportionate or undue burden" on the State. The Court proceeded to assess whether the respondent State had fulfilled its duty to accommodate the applicant, as a person with disabilities, in order to correct factual inequalities, applying the above-outlined test.
>
> The Court had not benefitted from a prior assessment by the national courts of the

[542] European Court of Human Rights, Press Release, Inability of wheelchair user to access specific cinema in Geneva did not breach Convention prohibition of discrimination, ECtHR 276 (2019), 18/7/2019.
[543] Application No. 23077/19, Judgment 31/5/2022.
[544] *Ibid.*

balancing of the competing interests and whether sufficient steps had been taken to accommodate the accessibility needs of people with disabilities, including the applicant. Nevertheless, taking account of the nature and limited scope of its assessment, and the State's wide margin of appreciation, the Court was not convinced that the lack of access to the buildings in question had amounted to a discriminatory failure by the respondent State to take sufficient measures to correct factual inequalities in order to enable the applicant to exercise his right to private life on an equal basis with others.

In that regard, considerable efforts had been made to improve accessibility of public buildings and buildings with public functions in the municipality following a parliamentary resolution in 2011. In deciding on those improvements, the municipality had prioritised improving accessibility to educational and sports facilities, which was neither an arbitrary nor unreasonable strategy of prioritisation, also considering the emphasis which the Court had placed on access to education and educational facilities in its case-law. Further accessibility improvements which had since been made demonstrated a general commitment to work towards the gradual realisation of universal access in line with the relevant international materials. In the circumstances of the present case, imposing on the State a requirement to put in place further measures would have amounted to imposing a 'disproportionate or undue burden' on it within the context of its positive obligations established by the Court's case-law to reasonably accommodate the applicant.

The respondent State and municipality had therefore taken considerable measures to assess and address accessibility needs in public buildings, within the confines of the available budget and having regard to the cultural heritage protection of the buildings in question.[545]

The adoption of UN CRPD ,and its Optional Protocol, presents a great success for the global movement of persons with disabilities. The value of UN CRPD is bolstered by the flourishing disability-related jurisprudence of the ECtHR and other regional courts, whereby reference is repeatedly made to the spirit and provisions of UN CRPD. In the years to come, it is expected that there will an increase in disability-related jurisprudence as more forms of intersectional discrimination are being acknowledged at national and international level.

[545] *Arnar Helgi Lárusson v. Iceland*, Application No. 23077/19, Judgment 31/5/2022, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13670%22]}

B.5.2 Mental Disabilities

The UN General Assembly's Declaration on The Rights of Mentally Retarded Persons stands as the international community's first formal recognition of the rights of people with mental disabilities. It aimed at setting out a normative context within which people with mental disabilities would be protected from discrimination, as it recognized that they would be accorded the same rights as other human beings to the maximum degree of feasibility [emphasis added]. Although this Declaration adopted a restrictive view of the rights of persons with mental disabilities, this was later rectified with the Declaration on the Rights of Disabled Persons that was adopted in 1975 by the UN General Assembly. In the 1980s, the General Assembly adopted Resolution 37/52 and Resolution 37/53 on a World Programme concerning Disabled Persons. In the 1990's, as part of its commitment to the *International Decade of Disabled Persons*, the United Nations mandated two Special Rapporteurs to report on living conditions of people with disabilities throughout the world. At this time, the UN General Assembly also adopted Resolution 44/70 (1990) on the Implementation of the World Programme of Action concerning Disabled Persons and the United Nations Decade of Disabled Persons. Twenty years after the adoption of the 1971 Declaration, the United Nations General Assembly adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, (the MI Principles) setting, thus, the minimum UN standards for the protection of fundamental freedoms and rights of persons with mental illness. It is noteworthy that, MI Principles are applicable to persons with mental illness, whether or not they are admitted to psychiatric facilities and they are also applicable to any person admitted to a mental health facility, irrespective of whether he has been diagnosed as mentally ill. In 1991, the UN General Assembly adopted Resolution 46/119 on the protection of persons with mental illness and the improvement of mental health care. Following the 1993 World Conference on Human Rights where it was proclaimed that "all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities", the United Nations General Assembly adopted a resolution on the "Standard Rules on Equalization of Opportunities for Persons with Disabilities". The broad definition of disability in UN CRPD includes mental and psychosocial disabilities (see discussion above).

The UN CRPD forces us to focus on the barriers which persons with disabilities face in human societies and to develop legal and policy responses that are sensitive to the context, as much as to the intersecting identities that a person with disabilities may have. For example, people with mental disabilities or psychosocial disabilities present an even more vulnerable category within the group of persons with disabilities due to the nature and form of their disability and the social stigma attached to their condition (which has a negative impact regarding equality and social inclusion). For many decades, persons with mental health-related problems were even excluded from the category of people with disabilities; therefore, in many parts of the world, including certain European States, they were precluded even from enjoying the same rights as persons with disabilities (at least at

the national level). It is only during the last decade and following the adoption of the UN CRPD, that we see more and more States addressing mental health issues and improving the rights of persons with mental disabilities.[546] The inclusion of mental health in the UN Sustainable Development Goals and the Shared Framework on Leaving No One Behind: Equality and Non-Discrimination at the Heart of Sustainable Development[547] has also led to building a momentum on global health issues. Mental disabilities and mental disorders eventually became very much part of the health crisis that started with the outbreak of COVID-19. Isolation, loneliness, anxiety, COVID-19 related mental illnesses, and even domestic violence, poverty and professional burn-out are just the tip of the iceberg of mental health issues that people (including persons with disabilities) around the world experience.[548] The consequences of COVID-19 on persons' social, economic and public lives are assumed to have major implications for the mental health of people, irrespective of whether they had a disability before the pandemic or not; currently, research is carried out on this subject matter across all disciplines.[549] Policy-wise, this is a matter of concern for both governments and international organizations.[550]

[546] See for example, UNICEF, Discussion Paper: A rights-based approach to disability in the context of mental health, March, 2021. https://www.unicef.org/media/95836/file/A%20Rights-Based%20Approach%20to%20Disability%20in%20the%20Context%20of%20Mental%20Health.pdf

[547] UN, Shared Framework on Leaving No One Behind: Equality and Non-Discrimination at the Heart of Sustainable Development, UN, New York, 2017. https://unsceb.org/sites/default/files/imported_files/CEB%20equality%20framework-A4-web-rev3.pdf See also van Driel, M., Biermann, F., Kim, R.E., & Vijge, M.J. (2022) International organisations as 'custodians' of the sustainable development goals? Fragmentation and coordination in sustainability governance. Global Policy, *00*, 1-14. https://doi.org/10.1111/1758-5899.13114

[548] See UN Special Envoy of the UNSG on Disability and Accessibility and Special Envoy on COVID19 for Latin America and the Carribean/WHO, Joint Statement: Mental Health of Persons with Disabilities during the COVID-19 pandemic, (2020). https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/04/Salud-Mental-Covid19-y-personas-con-discapacidad-ENGapril15.pdf; Courtenay, K., & Perera, B. (2020). COVID-19 and people with intellectual disability: Impacts of a pandemic. Irish Journal of Psychological Medicine, *37*(3), 231-236.

[549] Tull, M. T., Edmonds, K. A., Scamaldo, K. M., Richmond, J. R., Rose, J. P., and Gratz, K. L. (2020). "Psychological outcomes associated with stay-at-home orders and the perceived impact of COVID-19 on daily life". Psychiatry Res. 289:113098. http://doi.org/10.1016/j.psychres.2020.113098; Xiong, J., Lipsitz, O., Nasri, F., Lui, L. M. W., Gill, H., Phan, L., et al. (2020). "Impact of COVID-19 pandemic on mental health in the general population: a systematic review". J. Affect. Disord. *277*, 55–64. doi: 10.1016/j.jad.2020.08.001; Oppenauer, C., Burghardt, J., Kaiser, E., Riffer, F. & Sprung, M. (2021) "Psychological Distress During the COVID-19 Pandemic in Patients With Mental or Physical Diseases". Front. Psychol. 12:703488. http://doi.org/10.3389/fpsyg.2021.70348; Sharpe, D., Rajabi, M., Chileshe, C. et al. Mental health and wellbeing implications of the COVID-19 quarantine for disabled and disadvantaged children and young people: evidence from a cross-cultural study in Zambia and Sierra Leone. BMC Psychol 9, 79 (2021). https://doi.org/10.1186/s40359-021-00583-w; Ahmed, G.K., Mostafa, S., Elbeh, K. et al. "Effect of COVID-19 infection on psychological aspects of pre-schooler children: a cross-sectional study". Middle East Curr Psychiatry 29, 42 (2022). https://doi.org/10.1186/s43045-022-00207-y; Jones, K., Mallon, S., & Schnitzler, K. (2021). "A Scoping Review of the Psychological and Emotional Impact of the COVID-19 Pandemic on Children and Young People". Illness, Crisis & Loss, *0*(0). https://doi.org/10.1177/10541373211047191

[550] See for example, WHO, Recommendations from the WHO Technical Advisory Group on the mental

B.5.2.1 Mental Disabilities: European Human Rights Protection System

Within the Council of Europe's legal order, there are instruments that also guarantee the human rights and fundamental freedoms of persons with disabilities. Although the provisions of the ECHR do not contain any explicit references to the rights of persons with disabilities, except in the case of Article 5 (1) which refers to persons of *unsound mind*[551], the ECHR guarantees the protection of human rights for all people who fall under the jurisdiction of the contracting parties – this means that even persons with mental disabilities are included. The ECtHR has repeatedly stated the ECHR and its Protocols must be read and interpreted "in the light of present-day conditions".[552] Cases on the grounds of disability-related discrimination can be brought based on Article 14 of ECHR and Protocol 12.[553] The first case where disability was recognized as grounds for violation of the principle of non-discrimination was *Glor v. Switzerland* 554. In this case, the applicant was denied his right to carry out compulsory military service because of his disability but nonetheless his disability was not considered by the Swiss authorities severe enough to forgo the military service exemption tax. The ECtHR noted that the Swiss authorities failed to provide *reasonable accommodation* to the applicant's disability, echoing thus Article 2 of the UN CRPD, and stated that:

> the domestic authorities failed to strike a fair balance between the protection of the interests of the community and respect for the [ECHR] rights and freedoms of the applicant, who was not allowed to do his military service, or civilian service instead, but was nevertheless required to pay the exemption tax. It takes into account the particular circumstances of the case, including: the amount payable – which was not a negligible sum

health impacts of COVID-19 in the WHO European Region (2021), 12/4/2021, https://www.who.int/europe/publications/m/item/recommendations-from-the-who-technical-advisory-group-on-the-mental-health-impacts-of-covid-19-in-the-who-european-region-(2021); WHO, Action required to address the impacts of the COVID-19 pandemic on mental health and service delivery systems in the WHO European Region: recommendations from the European Technical Advisory Group on the mental health impacts of COVID-19, 30 June 2021, 18/7/2021, https://www.who.int/europe/publications/i/item/WHO-EURO-2021-2845-42603-59267; Schluter, P.J., Généreux, M., Landaverde, E. et al. An eight country cross-sectional study of the psychosocial effects of COVID-19 induced quarantine and/or isolation during the pandemic. Sci Rep 12, 13175 (2022). https://doi.org/10.1038/s41598-022-16254-8; IOM (2020), Mental Health and Psychosocial Support (MHPSS) in the COVID-19 Response: Guidance and Toolkit for the use of IOM MHPSS Teams: Version III-Final. IOM, Geneva; OECD, Supporting young people's mental health through the COVID-19 crisis, 12/5/2021; https://read.oecd-ilibrary.org/view/?ref=1094_1094452-vvnq8dqm9u&title=Supporting-young-people-s-mental-health-through-the-COVID-19-crisis

[551] See *Ashingdane v. UK*, Application No. 8225/78 (May 28, 1985).

[552] See for example, *Marckx v. Belgium*, June 13, 1979, §41, Series A no. 31, Vo v. France [GC], no 53924/00, §82, ECHR 2004-VIII, etc.

[553] A general prohibition of discrimination is provided in Protocol 12 to the Convention. See L. Loukaides, 'The Prohibition of Discrimination under Protocol 12 of the European Convention on Human Rights', in L. Loukaides, *The European Convention on Human Rights: Collected Essays*, (Leiden: Martinus Nijhoff Publishers, 2007), pp. 55-72.

[554] Application no. 13444/04 (April 30, 2009), Final 6/11/2009.

for the applicant – and the number of years over which it was charged; the fact that the applicant was willing to do military or civilian service; the lack of provision under Swiss law for forms of service suitable for people in the applicant's situation, and the minor role the tax plays nowadays in terms of preventing or compensating for the avoidance of compulsory national service.[555]

Hence, the ECtHR concluded that both at European and universal level there is consensus that persons with disabilities must be protected from discriminatory treatment.[556]

The European Social Charter [hereinafter "ESC"] and the Revised European Social Charter [hereinafter "Revised ESC"] complement the ECHR in the field of social and economic rights. The ESC and the Revised ESC are human rights instruments which aim at the protection of human rights in theory and practice[557]; therefore the manner their provisions are implemented by the State Parties, i.e. in terms of legislation, policies and programmes, is decisive.[558] The monitoring body of these instruments, the European Committee for Social Rights, has examined collective complaints concerning infringement of the rights of persons with disabilities.

Under the ESC, the rights of disabled people are limited to vocational training, rehabilitation and resettlement, irrespective of the origin and nature of their disability (Art. 15); however, under Article 15 of the Revised ESC, persons with disabilities are accorded the right to independence, social integration and participation in the life of the community.[559] The spirit of this provision reflects the determination of the State Parties to provide persons with disabilities equal citizenship in European societies which share common values of integration and social cohesion. Article 15 is purported to apply to all persons with disabilities irrespective of the nature and origin of their disability (mental and intellectual disabilities are deemed to be included in the definition of disability). The

[555] Para. 96.

[556] Para. 53.

[557] *International Commission of Jurists v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32.

[558] *MDAC v. Bulgaria*, para. 38.

[559] See G. Quinn, 'The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose', in G. de Burca and B. de Witte (eds.), Social Rights in Europe (Oxford: OUP, 2005), pp. 279-304. Cf Article 26 of UN CRPD for a right of 'habilitation and rehabilitation. An interesting point is made by G. Quinn: "Although there is such a right [of habilitation and rehabilitation] in the European Social Charter (Revised) it does not find a strong echo elsewhere in international law. Given that the Convention [UN CRPD] was not intended to create 'new' rights then how did Article 26 make it in? The answer is simple. It was argued for on the basis that is was necessary to give efficacy to other more general human rights such as liberty. This dependence on general human rights is plain from Article 26 (1) which asserts that the right is a means to the higher end of 'attain[ing] and maintain[ing] maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life'." G. Quinn, 'Disability and Human Rights: A New Field in the United Nations', in C. Krause and M. Scheinin, International Protection of Human Rights: A Textbook (Turku/Abo: Abo Akademi University Institute for Human Rights, 2009), pp.247-271, at 263-4

Committee has, in the past, confirmed that State Parties to the Revised ESC are obliged to ensure that education; access to employment (Art. 3)[560]; vocational guidance (Art. 9)[561]; social welfare services; housing (Art. 31)[562]; social inclusion and participation in the life of community and cultural activities (Art. 15)[563] are available to people with disabilities and specifically people with mental or intellectual disabilities.

Through the Conclusions and the Decisions that the Committee has issued, the provisions of the Revised ESC are interpreted to cover classic integration issues that concern people with disabilities. The Committee has held that Article 15, in conjunction with other provisions of the Revised ESC, guarantees the rights of people with disabilities, including persons with mental or intellectual disabilities. Accordingly, the Committee has urged States to adopt non-discrimination legislation on classic integration issues with respect to the rights of people with disabilities, i.e. education, employment on the open labour market, occupational policies, and communication and mobility, and provide effective remedies for victims.[564] Regarding education, the Committee has taken the view that, under Article 15 States' obligations include inclusion of people with disabilities into general or mainstream educational schemes, and adapted teaching in mainstream and special schools. It should be noted that the Committee is particularly wary of the level of progress that is being made in setting up educational systems which neither segregate nor exclude persons with disabilities; the Committee has stressed the importance for State Parties to achieve tangible and steady-fast progress with regard to the exercise of the disabled persons' right to education in general or mainstream educational schemes.

Due to the fact that Article 15 is applicable to persons with disabilities irrespective of their age, the right of persons with intellectual disabilities, either children or adults, to education is also guaranteed. Furthermore, the Committee has noted that under Article 15 in conjunction with Article 1 (4), guidance and vocational training should be also available to people with disabilities.[565] Under Article 15 (3), States are obliged to provide people with disabilities with access to communication and mobility, transport and cultural activities and leisure. Accordingly, States have to reconstruct public buildings; supply appropriate public, social or private housing; and even provide the people with disabilities with technical aids or financial assistance to adapt housing. Regarding employment, the

[560] Case law Digest 2008 of the European Committee of Social Rights [hereinafter "the Case law Digest"], Commentary on Art. 3, p.33 para. 1, Conclusions 2005, Lithuania, p. 306.
[561] Case law Digest, 2008, p. 74, "vocational guidance of persons with disabilities is dealt with under Article 15 of the Charter for States having accepted both provisions." Conclusions 2003, France, p. 127.
[562] See the Case law Digest 2008: housing: para. 1., p. 170, fn668; Conclusions 2003, Italy, p. 342
[563] Case law Digest pp. 111-114. Conclusions 2005, Norway, p. 558; Conclusions 2007, Slovenia, p.1033.
[564] European Committee of Social Rights, Conclusions 2005, p.187 ff. For example, the Committee suggests that "[a]ction should be taken to remove barriers preventing persons with disabilities from entering public building, using public transport and enjoying new communication and information technologies"
[565] If states have not accepted Article 15, then the right of people with disabilities to vocational training should be covered by Art. 10 (1). Conclusions XIV-2, Statement of Interpretation on Article 10,§1 p. 62.

Committee has interpreted Article 15 in conjunction with Article 1(2) to guarantee the right of persons with disabilities including their right to access to work; the Committee has further affirmed that under Article 3 on safe and healthy working conditions States are obliged to formulate occupational risk prevention policies that have to form part of public policies on persons with disabilities. All forms of discrimination in employment, direct or indirect, are prohibited. Moreover, the right to adequate housing of people with disabilities, including people with mental disabilities, is also guaranteed by Article 31. Finally, under Article 23 elderly people should avail themselves of mental health programmes for any psychological problems, dementia and other related illnesses.[566] Although there is no explicit reference to the rights of people with mental disabilities with regard to the interpretation of these provisions, the Committee has issued decisions on the complaints of persons with disabilities, such as autism or intellectual disabilities, that are usually classified as mental disabilities. Therefore, it can be inferred that the provisions, which have been interpreted as applicable to people with disabilities, are also applicable to people with mental illnesses.

B.5.2.1.1 Legal Capacity

Legal capacity is fundamental to the dignity of persons with disabilities and the exercise and enjoyment of all other rights.[567] A common problem that persons with mental disabilities face in many European countries is the absolute loss or restriction of their legal capacity, and their placement under guardianship where their decision-making is substituted by a third party, a guardian. Absolute deprivation of legal capacity and placement under plenary guardianship equals to the loss of a person's legal capacity to act and participate in all aspects of their life. A person under partial guardianship is assumed to be incompetent with regard to the exercise of many of their rights, including consent to medical treatments; political participation; contractual rights; the right to bring legal proceedings (and even to participate in proceedings that directly concern him) and the right to establish a family or exercise parental rights. The inability of persons with mental disabilities, due to the restriction of their legal capacity to access justice, can lead to impunity for violations of their rights. Bearing this in mind, the Court noted in *Shtukaturov v. Russia* that: "[…] the applicant lacked *de jure* legal capacity to decide for himself. However, this does not necessarily mean that the applicant was *de facto* unable to

[566] Conclusions 2003, Slovenia, p. 530

[567] This is verified in Rec (2011) 14: "All persons with disabilities, whether they have physical, sensory, or intellectual impairments, mental health problems or chronic illnesses, have the right to vote on the same basis as other citizens, and should not be deprived of this right by any law limiting their legal capacity, by any judicial or other decision or by any other measure based on their disability, cognitive functioning or perceived capacity. All persons with disabilities are also entitled to stand for office on an equal basis with others and should not be deprived of this right by any law restricting their legal capacity, by any judicial or other decision based on their disability, cognitive functioning or perceived capacity, or by any other means".

understand his situation".[568] Therefore, the Court upheld the principles as proclaimed in the Recommendation (99)4 on principles concerning the legal protection of incapable adults and recommended that legislation should be flexible by providing a *tailor-made* response to each individual case. The Court is even of the view that when a restriction on fundamental rights applies to a group, a state's margin of appreciation may be actually narrower than expected due to the vulnerability of persons with mental disabilities, who have suffered considerable discrimination in the past.[569] As the Court explains, "[t]he reason for this approach, which questions certain classifications per se, is that such groups [i.e. mentally disabled] were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs". [570]

Furthermore, it has been observed that under national laws, persons with mental disabilities are often prohibited from exercising their right to vote and to participate in public life on an equal basis with others. [571] In *Alajos Kiss v. Hungary* the Court noted that, "the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny... The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote".[572] Hence, the Court ruled that no blanket ban on voting rights on the basis of guardianship is compatible with Art. 3 of Protocol 1 to the Convention.[573] With regard to this judgment, one should not bypass the Court's reference to Art. 12 (equal recognition before the law) and Art. 29 (participation in political and public life) of UN CRPD, which, in essence, reflects the value of the UN CRPD in the eyes of the Court.

[568] *Shtukaturov v. Russia*, Application No. 44009/05, 27/3/2008, para. 108.
[569] *Alajos Kiss v. Hungary*, Application No. 38832/06, judgment of 20/5/2010, para. 42.
[570] *Ibid*.
[571] See for example the concluding observations of the UN Committee on the Rights of Persons with Disabilities regarding Tunisia; Fifth session, 11- 15 April 2011, paragraphs 13 and 35.
[572] *Alajos Kiss v. Hungary*, para. 44.
[573] See also the instruments adopted by European Commission for Democracy Through Law (the Venice Commission) in respect of the eligibility of persons with intellectual disability to stand for election and vote. In 2002 the Venice Commission adopted the Code of Good Practice in Electoral Matters (30.10. 2002), Opinion no. 190/2002, CDL-AD (2002) 23). Following the entry into force of CRPD (i.e. Arts, 3, 12, and 29), the Code was heavily criticized for providing a base upon which persons with mental disabilities could be deprived of their right to vote and to be elected (see Principle I. 1.1. v.), and in general for not reflecting the spirit of the CRPD in terms of the political participation and inclusion of persons with disabilities. As a consequence, in 2010, the Venice Commission adopted the "Interpretative Declaration to the Code of Good Practice In Electoral Matters on the Participation of People with Disabilities in Elections" (15. 10. 2010), 84th Plenary Session, CDL-AD(2010)036).

B.5.2.1.2 Detention and Mental Health

Practices that led to the suffering of a person with mental disabilities are now condemned by the CRPD. For example, the CRPD has explicitly stated that the right to liberty and security of persons with disabilities is also guaranteed for persons with intellectual disabilities and that there is an absolute prohibition of detention on the grounds of their actual or perceived impairment. The CRPD has also clarified that:

> Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14[1] [b]) and the principle of free and informed consent of the person concerned for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments.[574] Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.[575]

Art. 3 of ECHR prohibits any form of torture and degrading or inhuman treatment or punishment. The case law has long established that the appropriateness of a treatment of a person held in detention under Art. 3 should be assessed based on the person's characteristics, i.e. age, State of health, disability,[576] etc. Furthermore, under Art.3, States have to ensure that every prisoner is detained in conditions that are compatible with respect for human dignity. There is a considerable line of human rights jurisprudence which imposes positive obligations on States to protect the lives of citizens, even against their own will,[577] although the State authorities must be aware that a risk to life exists.

The Court has adjudicated on a number of complaints brought by prisoners with mental disabilities and who require special treatment whilst in prison, and it has reiterated that it is a State's positive obligation to take adequate measures to protect the health of detainees with mental disabilities and to establish standards of care in respect to the treatment and monitoring of mentally ill prisoners. If a State fails to fulfil this positive obligation, i.e. the State fails to protect the mental well-being of a person deprived of their liberty, then there will be a violation of Art. 3.

In cases concerning disabled people, Article 5 of ECHR (which protects the right to liberty and security) has been interpreted by the Court to impose on States the obligation

[574] CRPD/C/KOR/CO/1, para. 29, CRPD/C/DOM/CO/1, para. 27, CRPD/C/AUT/CO/1, para. 30

[575] Committee on the Rights of Persons with Disabilities, "Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities", Adopted during the Committee's 14th session, September 2015.

[576] See *Price v. UK* (Application no. 33394/96) July 10, 2001.

[577] *Tanribilir v. Turkey* (Application no 21422/93) November 16, 2000, para. 74.

to adopt positive measures so that these people's rights are not infringed when they are deprived of their liberty. Within the ambit of the provision falls placement of persons with disabilities and especially persons with mental disabilities in an institution. Given the sensitive nature of the issue and the requirement that placement in an institution is based on the informed consent of the individual concerned, the Court has not clarified this issue in detail. Apart from suggesting that the conditions for deprivation of liberty should be clearly defined under domestic law, the Court in *Wintwerp v. Netherlands*[578] found that the confinement of a person with mental disabilities could be authorised by competent national authorities only if this person's mental disorder is of such a kind or of such gravity as to make him/her an actual danger to himself/herself or to others. The Court has endorsed the Principles set out in the Recommendation concerning the legal protection of persons suffering from mental disorder placed as involuntary patients. In other words, the decision for the placement of a mentally disabled person in an institution should be determined by a competent national authority, certified by an objective mental authority and be subject to review before an independent body.

When States consider the appropriate measures that should be taken to protect the lives of patients who suffer from mental illness in hospitals, the authorities will have to take account of the vulnerability of these patients - including a considerable risk they may commit suicide. The Court noted in *Herczegfalvy v. Austria* "…[t]hat the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with."[579] As it has been already observed in *Aerts v. Belgium,* the vulnerability of a mentally ill person is such that "it is unreasonable to expect a severely mentally disturbed person to give a detailed or coherent description of what he has suffered during his detention".[580] The Court took the *Aerts* judgment one step beyond in *De Donder and De Clippel v. Belgium;*[581]in this case the Court ruled the detention of the applicants' son, who suffered from paranoid schizophrenia, a mental disorder entailing an especially high risk of suicide, in the ordinary section of a prison, contrary to Art. 2 and Art. 5 (1). Although the authorities did not fail their obligations under Art. 2 concerning their investigation into the applicants' son death, they failed their obligation under Art. 2 to take preventive measures in the light of the erratic behaviour of the mentally ill person.

[578] (1979) 2 EHRR 387.

[579] (1992) 15 EHRR 437, 484, para. 82.

[580] *Aerts*, para. 66. In this case the Court ruled that detention of a mentally ill person in a psychiatric wing of a prison where the applicant "had literally been left to his own devices and had not received any regular medical or psychiatric attention" and the denial of his transfer to an appropriate therapeutic establishment was not contrary to Art. 3 but it nevertheless constituted a breach of Art. 5 (1). According to the Court, the detention of a person of unsound mind "as a mental health patient will only be "lawful"… if effected in a hospital, clinic or other appropriate institution (see *Aerts*, para. 46; *Ashingdane v. UK* of 28 May 1985, Series A no. 93, p. 21, §44).

[581] Application no. 8595/06, ECtHR 272 (2011), 06.12.2011.

In *Dybeku v. Albania*[582], after noting that "it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible," the Court stressed out that, "such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation".[583] In this case, the applicant, who had been suffering from chronic paranoid schizophrenia and he was sentenced to life imprisonment for murder and illegal possession of explosives, was placed in a normal prison, where he shared cells with other detainees who were in good health and he was treated as an ordinary prisoner. Given the nature of the applicant's psychological condition, which made him more vulnerable comparing to the average detainees and as a result he had overwhelming feelings of distress, anguish and fear, the Court concluded that there was a violation of Article 3 and a failure to comply with the Council of Europe's recommendations on dealing with prisoners with mental illnesses.[584]

When persons with mental disabilities are admitted to a psychiatric facility and are subjected to involuntary treatment[585], the Court has ruled in favour of the establishment of *fair and proper procedures* which ultimately safeguard individuals against the arbitrary deprivation of their liberty in psychiatric institutions. In *LM v. Latvia*[586]*, the Court* affirmed the importance of ensuring that domestic laws provide adequate safeguards and *fair and proper procedures* to persons with mental illness who are involuntarily detained and treated. Accordingly, "the existence of formalised admission procedures, a requirement to fix the exact purpose of admission, clear time-limits for continued medical treatment and regular review of persistency of the necessity", were listed as some of the possible safeguards.[587] In this case, the Court found that, at the material time of the involuntary hospitalization, domestic law did not provide for any safeguards against arbitrary confinement in psychiatric institutions (i.e. appeal procedure) and therefore constituted violation of Art. 5 (1).

The Court has taken the stance that the Convention does not impose an obligation to provide a person, who is suffering from illness, with medical care which would exceed

[582] *Dybeku v. Albania*, (41153/06) 18.12.2007 (Chamber).
[583] *Ibid*, para. 47.
[584] para. 48; *Rivière v. France*, Application No. 33834/03, §72, 11/7/2006, and, *Naumenko v. Ukraine*,§94.
[585] CPT Standards, para. 41.
[586] [2011] ECtHR (Application No 26000/02, 19 July 2011). The Court recalled in its judgment the established principle on involuntary treatment of Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder. See also CRPD CRPD/C/ESP/CO/1 (19-23 September 2011), para. 36, where the Committee recommended to a State Party with respect to this issue to "review its laws that allow for the deprivation of liberty on the basis of disability, including mental, psychosocial or intellectual disabilities; repeal provisions which authorise involuntary internment linked to an apparent or diagnosed disability; and adopt measures to ensure that health care services including all mental health care services are based on informed consent of the person concerned".
[587] Para. 47.

the standard level of health care available to a Member State's population in general;[588] accordingly, a detainee will not be released on health grounds or he will not be transferred to a civil hospital even in the case that he suffers from an illness which is difficult to treat.[589] However, the positive obligation that arises under Art. 3 requires a State "to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance".[590] Overall, the Court has held that ill-treatment under Art. 3 entails a minimum level of severity which is certified by all the circumstances of the case, including the form and the duration of the treatment, the physical and mental effects on the person, as well as by the age, State of health, and other factors.[591] The Court has interpreted Art. 3 to include *inhuman treatment*, i.e. where actual bodily injury or intense physical or mental suffering was premeditatedly caused;[592] *degrading treatment*, i.e. causing feelings of fear, anguish and inferiority capable of humiliating the person, and possibly driving the person to act against their will or conscience.[593] Whether the humiliating treatment is premeditated, is a fact that needs to be taken into consideration; however, even the absence of such purpose does not nullify the application of Art. 3.[594] Furthermore, when assessing the conditions of deprivation of liberty under Art.3, regard must be had to other factors, such as the objective pursued, duration and severity of the measure, as well as the effects on the person.[595]

In *Kaprykowski v. Poland*[596] the applicant had at least three serious medical conditions (epilepsy, encephalopathy and dementia) which required regular medical care; while in detention, the applicant was given non-specialised drugs to treat his condition, and he was placed in an ordinary cell where his cellmates were responsible for providing him with first aid when he suffered from his epileptic seizures. The Court noted that the applicant's placing "in a position of dependency and inferiority *vis-à-vis* his healthy cellmates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty"

[588] *Nitecki v. Poland* (dec.), Application No. 65653/01, 21/3/2002.
[589] *Mouisel v. France*, Application No. 67263/01, §40, ECHR 2002-IX; Kudla, para. 93.
[590] *Kaprykowski v. Poland*, para 69; *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, §79, and Mouisel, para. 40
[591] *Kudła v. Poland* [GC], Application No. 30210/96, §90, ECHR 2000-XI; *Poltoratskiy v. Ukraine*, no. 38812/97, §130, ECHR 2003 V.
[592] *Labita v. Italy* [GC], Application No. 26772/95, §120, ECHR 2000 IV.
[593] *Jalloh v. Germany* [GC], Application No. 54810/00, §68, ECHR 2006 IX.
[594] *Peers v. Greece*, no. 28524/95, §§67, 68 and 74, ECHR 2001-III; *Kalashnikov v. Russia*, no. 47095/99, §95, ECHR 2002-VI; *Stanev*, para. 203.
[595] *Kehayov v. Bulgaria*, Application No. 41035/98, §65, 18 January 2005; Stanev para. 205.
[596] Application No. 23052/05 (2009) ECHR 198.

and held that his detainment in a prison without adequate medical treatment and assistance constituted inhuman and degrading treatment, amounting to a violation of Article 3.[597]

In *Kudla v. Poland*[598] the applicant who suffered from chronic depression and twice tried to commit suicide, argued that, while in detention, he was not given adequate psychiatric treatment. The Court found that there was no violation of Art. 3 as the suicide attempts were not proven to "have resulted from or have been linked to any discernible shortcoming on the part of the authorities".[599] Moreover, the Court underlined, that under Art. 3, it falls upon the State to ensure that the detention conditions respect human dignity; the person is not subjected to distress or hardship which goes beyond the unavoidable level of suffering inherent in detention; and that detained person's well-being and health are secured by providing him, inter alia, the requisite medical assistance.[600]

In *Raffray Taddei v. France*,[601] the applicant who suffered from a number of medical conditions including anorexia, lodged a complaint with regard to her continuing detention and the lack of appropriate treatment for her health problems. Even though the Court dismissed the continuing detention as a ground of violation of Art. 3, it nonetheless held that, the failure by the authorities to sufficiently take into account the need for specialized care in an adapted facility in conjunction with her transfer to an unsuitable establishment for the treatment of her condition and her overall vulnerability, were deemed capable of causing her distress that exceeded the unavoidable level of suffering inherent in detention, and therefore there was an infringement of Art. 3.

B.5.2.1.3 Suicide in detention

While the prison authorities are not obliged to regard all prisoners as potential suicide risks, it is statistically proven that, a considerable number of prisoners suffer from some kind of mental disorder. Accordingly, the Court has accepted that any deprivation of physical liberty entails the risk of suicide among prisoners against which the authorities must take general precautions and that States are obliged to prevent a person's life from being put at risk (i.e. removing objects, knifes, etc), as long as this does not amount to a disproportionate burden to the State. In *Ataman v. Turkey*,[602] the Court found that there was a violation of Article 2 as a result of the suicide of the applicant's son, a military conscript. The authorities were found to have failed to have taken the necessary steps to protect the applicant's son known to have psychological troubles and, in particular, to

[597] para. 76.
[598] Application No. 30210/96, 26.10.2000 (Grand Chamber).
[599] *Kudla*, para. 96.
[600] *Aerts v. Belgium*, judgment of 30 July 1998, Reports 1998-V, p. 1966, §§64 et seq; *Kudla*, para. 94.
[601] Application No. 36435/07, 21.12.2010 (Chamber).
[602] [2006] ECHR 46252/99. See also *Akdogdu v. Turkey* (Application No 46747/99) 18 October 2005, para 47; *Tanribilir v. Turkey* [2000] ECHR 21422/93.

prevent his access to lethal weapons. In *Keenan v. UK*[603] the applicant's son who suffered from a chronic mental disorder, which involved psychotic episodes, feelings of paranoia and personality disorder, had committed suicide while serving a prison sentence. While the complaint was based on Articles 2, 3 and 13, the Court held that only Articles 3 and 13 had been violated. The Court found that the lack of effective monitoring and of informed psychiatric input into his assessment and treatment in conjunction with the imposition of punishments, including seven days' segregation, was incompatible with the standard of treatment required in respect of a mentally ill person.[604] Herein, the Court established that the prison authorities were under an obligation to protect the health of persons deprived of their liberty and that, in assessing whether the treatment or punishment was compatible with the standards imposed by Art.3 in the protection of fundamental human dignity, consideration should be given to the vulnerability of a person suffering from a mental illness and the fact that the person in question "may not be able, or capable of, pointing to any specific ill-effects".[605] In other words, the Court accepted that in certain circumstances, proof of the actual effect on the person does not necessarily qualify as a major factor when considering whether a particular treatment constitutes an infringement of the right set forth in Article 3. In *Khudobin v. Russia*[606] the Court ruled that the lack of medical treatment to the detained applicant (who suffered from a number of illnesses, including mental illness and HIV) amounted to a violation of Art. 3. The applicant's rights (Art. 5 [3], 5[4], 6[1]) with respect to his pre-trial detention and the undue delays that occurred when considering two of his separate applications for release, were found to have been violated.

In *Renolde v. France*[607]*, the Court* held that the suicide of a prisoner who suffered from mental illness and the lack of supervision of his daily taking of medication, were attributable to the authorities' failure to provide adequate medical care. Furthermore, given the prisoner's vulnerability, the failure to admit him to a psychiatric institution and instead granting him with a maximum disciplinary penalty, including the prohibition of all visits and all contact with other prisoners, with no consideration for his mental state, were found to amount to a violation of Art. 3. With regard to prisoners known to be suffering from mental disorders and whose life is at risk, the Court underlined the States' positive obligation to take preventive operational measures geared to their condition and compatible with their continued detention, in order to protect them. The Court clarified that, the vulnerability of mentally ill persons entails the risk that they are not in the

[603] Application No. 27229/95 (2001) ECHR 242.
[604] para. 115.
[605] para. 112.
[606] Application no. 59696/00 (2006) ECHR 898.
[607] Application no. 5608/05, 16.10.2008 (Chamber).

position "to complain coherently or at all about how they are being affected by any particular treatment".[608]

The ECtHR has had the opportunity to examine critical questions regarding the lawfulness of *institutionalization*, the practice of placing people with disabilities in social care homes, in the absence of adequate community based services, under Articles 5 and 8. The Council of Europe has engaged in a fight against institutionalization, a practice affecting the lives of many people with mental disabilities especially throughout Central and Eastern Europe who are placed in long-term residential care. In *Stanev v. Bulgaria*,[609] the Court found that the applicant suffering from mental health problems (schizophrenia) had been unlawfully detained in a mental health institution. This is a landmark case for people with mental disabilities as the Court ruled, unanimously, that there was a string of violations with respect to: 1) the applicant's illegal detention in an institution (which had already been pointed out to be suspicious by CPT[610]) (Art. 5 [1]; 2) the degrading conditions he lived in and the impossibility to apply for compensation (Art. 3, Art. 13); 3) his inability to bring proceedings to have the lawfulness of his detention decided by a court (Art. 5 [4]); his impossibility to apply for compensation for his illegal detention (Art. 5 [5]; 4) and the denial of access to a court to seek release from partial guardianship (Art. 6 [1]). With regard to the latter, and the protection of people with mental disorders, the Court noted the importance of international instruments such as the UN CRPD and the Recommendation No. R (99) 4 on principles concerning the legal protection of incapable adults which "recommend that adequate procedural safeguards be put in place to protect legally incapacitated persons to the greatest extent possible, to ensure periodic reviews of their status and to make appropriate remedies available".[611] Accordingly, the Court's interpretation of Art. 6 (1) affirms the right of a person (who is suffering from a mental disorder and has been declared partially incapable) to have direct access to a court to seek restoration of his legal capacity.

[608] *Renolde v. France*, para. 120.
[609] Application no. 36760/06 (2012) ECHR 46, (2012) MHLO 1.
[610] See Stanev, Application No. 36760/06, 17/1/2012, [2012] ECHR 46, [2012] MHLO 1, para. 210: "The Court cannot overlook the fact that the applicant was exposed to all the above-mentioned conditions for a considerable period of approximately seven years. Nor can it ignore the findings of the CPT, which, after visiting the home, concluded that the living conditions there at the relevant time could be said to amount to inhuman and degrading treatment. Despite having been aware of those findings, during the period from 2002 to 2009 the Government did not act on their undertaking to close down the institution".
[611] Stanev. para. 244.

B.5.2.1.4 Education

Discrimination in educational context has been addressed by the European Committee for Social Rights when examining violations of the European Social Charter. Despite the lack of explicit reference to disability as prohibited grounds of discrimination according to Article E, the Committee has expressed its satisfaction that disability is covered adequately by the present provision.[612] The Committee has adopted the ECHR's line of interpretation with regard to the principle of non-discrimination as guaranteed by Article 14 of ECHR; the Committee has noted that Article E is almost identical to the wording of Article 14 of ECHR and therefore the principle of equality should be interpreted as "treating equals equally and unequals unequally"[613]. The Committee has emphasised that human difference is valid grounds to treat disability "with discernment in order to ensure real and effective equality".[614] States' failure to take appropriate measures to take account of existing differences constituted a form of discrimination. Hence, the Committee pointed out that the States' non-inclusive educational practices for people with disabilities could amount to segregation, and therefore discrimination.[615] In *Autism-Europe v. France*[616], the Committee found that France had failed to provide sufficient education to adults and children with autism and this constituted a violation of Article 15 (the rights of persons with disabilities), Article 17 (the right of children and young persons to social, legal and economic protection), and to Article E (non-discrimination) of the Revised ESC. In *Mental Disability Advocacy Center (MDAC) v. Bulgaria*[617], the Committee found that Bulgarian legislation concerning the right to education of children with moderate, severe or profound intellectual disabilities residing in homes for mentally disabled children, as well as the low number of children receiving any type of education, amounted to a violation of the right to education (Article 17[2]) independently and in conjunction with the right to non-discrimination (Article E) of the Revised ESC. In this case, an international NGO lodged a complaint against Bulgaria on the grounds of the Bulgarian government's failure to provide education for up to 3,000 children with intellectual disabilities. Given the low number of children with intellectual disabilities residing in homes for mentally disabled

[612] *Autism-Europe v. France*, Complaint No.13/2000, decision on the merits of 4 November 2003, §51.
[613] *Thlimmenos v. Greece*, no 34369/97, ECHR 2000-IV, §44)], 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.
[614] *Autism-Europe v. France*, Collective Complaint No. 13/2002, decision on the merits of 4 November 2003, §52.
[615] In *Autism- Europe v. France*, Complaint No. 13/2002 the Committee found that France had failed to provide sufficient education to adults and children with autism and this constituted a violation of Article 15 (the rights of persons with disabilities), Article 17 (the right of children and young persons to social, legal and economic protection), and to Article E (non-discrimination) of the Revised ESC.
[616] Complaint No. 13/2002. For an alternative view see *DH v. Czech Republic*, Application No. 57325/00, 7/2/2006.
[617] Complaint No. 41/2007. Resolution CM/ResChS(2010)7, Collective complaint No. 41/2007 by the Mental Disability Advocacy Centre (MDAC) against Bulgaria.

children (HMDCs) that were integrated in mainstream primary schools in Bulgaria, MDAC argued that the Bulgarian practice amounted to discrimination and segregration. The Committee confirmed this view and noted that:

- mainstream schools are not accessible nor adaptable to children who live in 'homes for mentally disabled children'.
- teacher-training is inadequate and educational curricula and teaching resources are not adapted to the special learning needs of children with intellectual disabilities.
- the Bulgarian Government failed to implement a 2002 law which provided that children in 'homes for mentally disabled children' could be integrated into schools.
- as a result of the failure to implement the law, only 6.2% of children in 'homes for mentally disabled children' receive an education, whereas primary school attendance for Bulgarian children in general is approximately 94%.
- the disparity between school attendance for children with and without disabilities is so great that it constitutes discrimination against children with intellectual disabilities living in 'homes for mentally disabled children'.[618]

It is also interesting to note that, the Committee dismissed financial constraints as valid grounds for the slow or non- implementation of the Charter provisions. In a number of cases, including the disability cases, the Committee affirmed State Parties' obligations with respect to the implementation of any of the rights guaranteed by the Revised ESC, even where a State claims financial constraints as impeding grounds for limited implementation measures. The Committee held that, even in such a case, the State should proceed with the realization of measures which: 1) achieve the Revised ESC's within a reasonable timeframe, 2) point to a measurable progress and 3) are granted financing consistent with the maximum use of available resources.[619] The Committee's observation with regard to a State's limited financial resources is a timely call, in an era of global financial crisis, for States to always be mindful of the impact of the practical action they take in order to give full effect to the rights guaranteed by the Charter, especially in cases where vulnerable groups are concerned.[620]

[618] Mental Disability: Mental Disability Advocacy Center v. Bulgaria, Child Rights Information Network, October 2008, http://www.crin.org/Law/instrument.asp?InstID=1381

[619] *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006, §37; *Autism-Europe v. France*, Complaint No.13/2000, decision on the merits of 4 November 2003,para. 53.

[620] *Autism-Europe v. France*, ibid.

B.5.2.2 Mental Disabilities: Inter-American Human Rights Protection System

Disability rights feature in a dynamic manner in the jurisprudence of the Inter-American human rights protection system. The Inter-American system has a number of international instruments guaranteeing disability rights, such as OAS (1999) Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities[621]; OAS (2006) Declaration on the Decade of the Americas for the Rights and Dignity of Persons with Disabilities, [622]OAS (2006) Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities[623], OAS (2016) Declaration on Extension of the Decade of the Americas for the Rights and Dignity of Persons with Disabilities and Consolidation of the Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2016–2026).[624] What is noteworthy is that there is also an evolution in the interpretative method where cases are now interpreted from a disability rights perspective. Within the Inter-American human rights protection system, *disability* is broadly defined based on the social model of the UN CRPD. In the case of *Gonzales Lluy et al. v. Ecuador*, the I/A Court of HR concluded that, persons with HIV could be classified as persons with disability based on the fact that, they may face social and attitudinal barriers that will result in disability:

> [T[he determination of whether someone can be considered a person with disability depends on their relationship with their surroundings, and does not respond solely to a list of diagnoses. Therefore, in some situations, persons living with HIV/AIDS may be considered persons with disabilities as conceived in the Convention on the Rights of Persons with Disabilities.[625]

Along these lines, the Court has affirmed that such barriers could be of socio-economic nature. Hence, States "must promote social inclusion practices and adopt measures of positive differentiation to remove the said barriers".[626] In *Artavia Murillo v. Costa Rica,* the I/A Court of HR found that persons with infertility issues in Costa Rica faced not only their medical condition, but also barriers created by judgment of the Constitutional Court that limited their reproductive autonomy. The Court held that the rights of persons with infertility issues were protected under the rights of persons with disabilities, including the right to have access to the necessary techniques to resolve reproductive health problems.[627] In *Chinchilla Sandoval et al. v. Guatemala*[628]*,* the I/A

[621] AG/RES. 1608, XXIX-O/99.
[622] AG/DEC. 50 (XXXVI-O/06).
[623] AG/RES. 2230 (XXXVI-O/06).
[624] AG/DEC. 89 (XLVI-O/16).
[625] Para. 238.
[626] Para. 292.
[627] Amicus Curiae in the case of *Artavia Murillo et al (in vitro fertilization) v. Costa Rica*. Legal arguments related to the analysis of legal problems presented by civil organizations dedicated to the defense of human rights in Latin America: Asociación por los Derechos Civiles (ADC)/Argentina; CEDES/Argentina;

Court of HR affirmed that types of limitations or barriers commonly encountered by persons with disabilities in society, include *inter alia* physical or architectural barriers and communication barriers.[629] In this case, the Court also stressed that the social model of disability does not necessitate the granting of assistance *vis-à-vis* reasonable accommodation measures; as the Court said, "for many other cases, providing assistance instead of implementing measures of accessibility and reasonable accommodation, could be regarded as a perpetuation of the clinical model of disability".[630] This is a case where the Court affirmed all rights of persons with disabilities in the context of prisons and deprivation of their liberty and reminded that States are under an obligation to take measures towards this end:

> [t]he social model based on human rights must also have an impact on persons who are physically confined within prisons; therefore, the facilities and their functionality within those detention centers should be designed and planned based on an approach to disability that ensures accessibility and the possibility of providing reasonable accommodation, as positive measures to guarantee the rights of persons with disabilities who are serving a custodial sentence.[631]

Persons with mental disabilities, in the American continent, experience similar discriminatory practices that are noted elsewhere around the world. They are often, and unnecessarily, segregated from society in psychiatric institutions and they are subject to cruel and degrading treatment. ecause of such discriminatory practices, persons with mental disabilities may be deprived of legal capacity or they may lack other resources to voice their concerns and defend their rights at national or regional level. In *Ximenes-Lopes v. Brazil*[632], the I/A Court of HR had the opportunity to examine a case which concerned the rights of persons with mental disabilities in confinement and their right to refuse medical treatment. The I/A Court of HR clarified therein:

Mental illnesses should not be understood as a disability for determination and the assumption that persons with mental illness are capable of expressing their will, which should be respected by both the medical staff and the authorities, should prevail. When

Centro de Estudios Legales y Sociales (CELS)/Argentina; Ipas; Grupo de Información en Reproducción Elegida (GIRE)/Mexico; La Mesa por la Vida y la Salud de las Mujeres (La Mesa)/Colombia, http://colegiodebioetica.org.mx/wp/wp-content/uploads/2012/10/Amicus-Curiae-CasoArtavia-Murillo-y-otros-fecundacion-in-vitro-vs-Costa-Rica.pdf

[628] Inter-American Court of Human Rights, *Chinchilla Sandoval et al. v. Guatemala*, Judgment, 29/2/2016; OAS (2020). The IACHR Calls on States to Adopt Measures to Guarantee People with Disabilities Full Legal Capacity from a Human Rights Approach, Press Release, http://www.oas.org/en/iachr/media_center/PReleases/2020/289.asp

[629] Inter-American Court of Human Rights, *Chinchilla Sandoval et al. v. Guatemala* , Judgment, 29/2/2016, para. 207.

[630] Para. 24.

[631] Para. 46.

[632] *Ibid*., para. 130

the patients´ inability to give their consent has been proven, their next of kin, legal representatives or pertinent authorities will give the consent required as regards to the treatment to be administered thereto.[633]

The Court also stressed out the vulnerability of persons with mental disabilities, which is caused by any health treatment and especially when they are admitted to psychiatric institutions.[634] Overall, the Court has maintained a consistent position on raising awareness about the vulnerability of persons with disabilities which is amplified by other factors and which, ultimately, lead to a form of intersectional discrimination. For example, in *Gonzales Lluy et al. v. Ecuador, the Court* recognized that the intersection of factors such as being a child, being a girl, being a person with HIV and living in poverty, resulted in discrimination. It is thus the States' duty to take into consideration the distinct characteristics and particular needs of persons with disabilities:

> [t]he State should undoubtedly avoid inequality and discrimination practices and provide a universal protection to the individuals who are subject to its jurisdiction, regardless of individual or group conditions that may leave them aside of the general protection or may impose on them –either *de jure* or *de facto*- additional levies or specific restrictions.

It is equally incumbent on the State to provide, when factual inequality places the right holder in a difficult situation – that may result in the absolute impossibility to exercise the rights and freedoms-, the means of correction, leveling, compensation and balancing that may allow the individual to have access to said rights, either under relative, conditional or imperfect circumstances that the State protection intends to redress. These means embody other reasonable, pertinent and efficient 'protections' aimed at broadening the opportunities and enhancing the quality of life that, in turn, pave the way to the natural evolution of the individuals, instead of restricting or eliminating it under the guise of assistance and protection.

(Advantage or) disadvantage factors are many in number. Some derive from the particular conditions of the individual –like health, age or sex- others, from social circumstances –like indigenous, foreigner or inmate status-. The State is under a duty to speak out against said differences, weed out the source of discrimination and give adequate support to the individuals under undesirable conditions –from 'cradle to grave,' if necessary, as the old welfare State slogan goes- trying to prevent, mitigate and redress the consequences.[635]

[633] Para. 130.
[634] Para. 129.
[635] Ximenes-Lopes v. Brazil, paras.3-5.

It is noteworthy that the consequences of the violation of rights may affect not only the applicant, but also the family members, thus making them victims of human rights violations too.[636]

B.5.2.3 Mental Disabilities: African human rights protection system

Within the African human rights system, the protection of persons with disabilities is primarily guaranteed by Art. 18 (4) of the African Charter on Human and People's Rights, which provides special protection for them "in keeping with their physical or moral needs". Other African human rights instruments, such as the Protocol to the African Charter on Human Rights' Rights on the Rights of Women in Africa (Maputo Protocol), address the special protection of women with disabilities; for example, Art. 23 of the Maputo Protocol requires States to enable women's with disabilities access to employment, vocational training and participation and protect them from violence, sexual abuse and discrimination. In 2018, the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa was opened for signature, making it the newest human rights instrument in the system. As of 2022, only Libya, Mali and Rwanda have ratified the said Protocol; the Protocol will only enter into force once it has been ratified by 15 States. The Protocol provides *inter alia* for the prohibition of discrimination not only against persons with disabilities but also against their family members and caregivers. According to Art. 11 of the Protocol, States are required to take measures to eliminate harmful practices and the association of disability with omens and ritual killings of persons with disabilities. Moreover, there is a specific provision on their right to live in the community on an equal basis with others (Art. 14). The Protocol also calls for States to facilitate the full enjoyment of human rights of women and girls with disabilities (Art. 27), children (Art. 28) and youth (Art. 29) and older persons (Art. 30).

A glimpse of the human rights situation of the persons with mental disabilities is offered by a complaint on the institutionalisation practices in the Gambia.[637] The case was examined by the African Commission on Human Rights. It concerned the detention of persons with mental disabilities in psychiatric institutions based on the national law, the Lunatic Detention Act, which allowed for the indefinite institutionalization of persons classified as *lunatics* without due process. This national law classifies persons with mental illness as *lunatics* and *idiots*. The African Commission on Human Rights observed that such terms "dehumanize and deny persons with mental illness any of human dignity"[638]; this was found to be incompatible with Article 5 of the African Charter which protects the rights of every person to the respect of their human dignity. The fact that the national law

[636] Para. 43.
[637] *Purohit and Moore v. the Gambia*, 241/01, 29/5/2003.
[638] Para. 59

did not allow for the review of the decisions made by the medical practitioners, who were not experts in mental health, was found to fall short of the international standards on the treatment of persons with mental illness. In particular, the absence of a right to appeal against the decision, was in violation of Art. 7 (1) (a) and (c) of the African Charter. Furthermore, the African Commission on Human Rights noted that "as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only to attain but also sustain their optimum level of independence and performance"[639]; hence, the African Commission on Human Rights found that the national legislative and policy effort "is lacking in terms of therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities".[640] For these reasons, the State was ordered to amend its national law in order to make it compatible with the African Charter and the international standards for the protection of mentally ill or mentally disabled persons; to set up "an expert body to review the cases of persons detained… and make recommendations for their treatment or release"; and "to provide adequate medical and material care for persons suffering from mental health problems…". [641]

B.5.3 Conclusion

There has certainly been a progress in disability rights over the past two decades. Technological advancements and digital tools have enhanced accessibility for persons with disabilities. There is certainly more awareness on disability issues through the social model advanced by the UN CRPD at national and international level. For example, the Office of the UN High Commissioner on Human Rights published a study on the negative impact of climate change on the enjoyment of the rights of persons with disabilities, also mentioning the intersecting factors of discrimination which can aggravate the risks that persons with disabilities already experience. [642] In many countries, there is an increase in disability rights jurisprudence. More and more claims are heard before national Supreme Courts and there is an overall optimistic view as to this development. National jurisprudence appears to be embracing empowering language on disability rights; for example, the Indian Supreme Court speaking of disability litigation acknowledged that:

> [Disability] cases….offer us an opportunity to make a meaningful contribution in the project of creating the Rights of Persons with Disabilities Act generation in India. A generation of disabled people in India which regards as its birthright access

[639] Para. 81.
[640] Para. 83.
[641] *Purohit and Moore v. the Gambia*, 241/01, 29/5/2003, Decision, paras. a-c.
[642] OHCHR (2020). Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change, UN Doc A/HRC/44/30.

> to the full panoply of constitutional entitlements, robust statutory rights geared to meet their unique needs and conducive societal conditions needed for them to flourish and to truly become co-equal participants in all facets of life.[643]

At the same, the outbreak of COVID-19 revealed a regression of disability rights. The pandemic highlighted the many forms of discrimination that disabled persons face, even in countries that have an advanced human rights and progress in the implementation of the UN CRPD. For one thing, the economic crisis across many countries after 2010 and onwards, the budgetary reforms and cuts across the education and health sectors, severely impacted on the quality of life of disabled persons as much as the enjoyment of their human rights.[644] The human rights situation of persons with disabilities deteriorated during the pandemic at an alarming pace.[645] Out of all vulnerable groups, persons with disabilities experienced disproportionate harms and human rights violations. Due to lockdown measures and disruption of services in many countries around the world, their lives and dignity were undermined (especially for the people who lived in residential institutions); they were disproportionately affected by the breakdown of essential services such as the supply of food and personal assistance. Persons with disabilities also experienced denial of healthcare services due to disability-based discrimination in the allocation of medical resources and denial of education services appropriate to their needs. Because of the intersecting identities of persons with disabilities, this meant that sub-groups within the broader disability group experienced various forms of intersectional discrimination (for example, disabled children, disabled women and girls, disabled homeless persons, disabled refugees, or disabled medical personnel). In the UK, disability NGOs raised concerns about "how disabled people were much more likely to die from COVID-19, even after taking into account factors such as age, underlying health conditions, poverty and whether they lived in a care home", as well as "the rise in foodbank use and homelessness among disabled people, the impact of the pandemic on disability poverty, continuing concerns about the disability benefit assessment system, and the continuing refusal of the Department for Work and Pensions to order an inquiry into deaths linked to its failings".[646] Disability NGOs reported on a *severe and deliberate* regression in PWD's

[643] *Vikash Kumar v. Union Public Service Commission & Ors*., Supreme Court, Civil Appellate Jurisdiction, Civil Appeal No. 273 of 2021, Special Leave Petition (C) No. 1882 of 2021, 11 February 2021, para. 81, https://main.sci.gov.in/supremecourt/2019/19177/19177_2019_36_1503_26115_Judgement_11-Feb-2021.pdf

[644] John Pring , UN to hear how disabled people feel 'expendable' after rights regression since 2017, March 24, 2022, Disability News Service. https://www.disabilitynewsservice.com/un-to-hear-how-disabled-people-feel-expendable-after-rights-regression-since-2017/

[645] Teodor Mladenov & Ciara Siobhan Brennan (2021) The global COVID-19 Disability Rights Monitor: implementation, findings, disability studies response, Disability & Society, *36*:8, 1356-1361. http://doi.org/10.1080/09687599.2021.1920371

[646] John Pring , UN to hear how disabled people feel 'expendable' after rights regression since 2017, March 24, 2022, Disability News Service. https://www.disabilitynewsservice.com/un-to-hear-how-disabled-people-feel-expendable-after-rights-regression-since-2017/

right to inclusive education, as much as the government's failure to prepare adequately for the pandemic by adopting disability-oriented measures which effectively led into having disproportionately numbers of PWD dying from COVID-19.[647] The human rights violations that were experienced by the persons with disabilities worldwide during the pandemic were not created by the pandemic; the ill-designed COVID-19 responses, rather shed light on the systemic flaws and ableist attitudes that predated the pandemic. This would suggest that, despite all the progress on disability rights, States are still falling behind in adopting a disability-based perspective when designing policies[648] and in embracing the human rights model of disability which "does not allow the exclusion of persons with disabilities [from society] for any reason, including the kind and amount of support services required."[649]

Disability NGOs around the world report that, the most difficult challenge for the persons with disabilities remains this systemic ableism that is entrenched in law, policy and practice frameworks around the world and which is responsible for the persisting economic and social de-evaluation of the persons with disabilities. Ableism is responsible for the wide spectrum of discrimination that persons with disabilities still face: from forced sterilization practices to being denied the right to make their own choices to experiencing disablement and hierarchies of impairment at work.[650] The practice of forced sterilization on persons with disabilities, which has been a common, yet, illegal practice around the world, is still ongoing[651]. The principles of autonomy and equality are fundamental to the protection of women's with disabilities sexual and reproductive rights. The CRPD has condemned forced sterilization as a violation of the right to family, health, legal capacity and bodily integrity and has called States to abandon such practices that effectively deny

[647] John Pring , UN to hear how disabled people feel 'expendable' after rights regression since 2017, March 24, 2022, Disability News Service. https://www.disabilitynewsservice.com/un-to-hear-how-disabled-people-feel-expendable-after-rights-regression-since-2017/

[648] Some scholars even claim that the overall treatment of persons with disabilities . For example, Mladenov and Brennan, citing the scholarly work of Davis (2021) claim that "the emergency created by the COVID-19 pandemic has shifted the biopolitical process of controlling disabled people's lives through healthcare interventions towards a thanatopolitical process of letting disabled people die through denial of access to healthcare". See Mladenov and Brennan op. cit; Davis, L. 2021. "In the Time of Pandemic, the Deep Structure of Biopower Is Laid Bare." Critical Inquiry 47 (S2): S138–S142. https://www.journals.uchicago.edu/doi/pdf/10.1086/711458. https://doi.org/10.1086/711458

[649] CRPD, General Comment No.5, (CRPD/C/GC/5), para. 60.

[650] Paul David Harpur, Ableism at Work: Disablement and Hierarchies of Impairment, Cambridge University Press, 2019.

[651] See for example, Center for Reproductive Rights Submission to the Special Rapporteur on the Rights of Persons with Disabilities, Questionnaire on the right of persons with disabilities to the highest attainable standard of health, 10April 2018; OFUANI, Anwuli Irene. Protecting adolescent girls with intellectual disabilities from involuntary sterilisation in Nigeria: Lessons from the Convention on the Rights of Persons with Disabilities. Afr. hum. rights law j. [online]. 2017, vol.17, n.2 [cited 2022-09-21], pp.550-570. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962017000200010&lng=en&nrm=iso ISSN 1996-2096. http://dx.doi.org/10.17159/1996-2096/2017/v17n2a9

control over the women and girls with disabilities' decision-making.[652] In *Gauer and Others v. France*[653], the applicants, who were five young girls with mental disabilities, were subjected to sterilisation without their knowledge or consent, and without the medical process being deemed medically necessary. The applicants alleged that the medical intervention damaged their physical integrity, their right to found a family and that they suffered discrimination due to their disabilities and were denied access to justice, relying on Article 3 (prohibition of degrading treatment), Article 8 (right to a family life), Article 12 (right to marry) and Article 14 (prohibition of discrimination). Unfortunately, the ECtHR declared the application inadmissible, and one might only speculate as to how the ECtHR could have treated this issue given the fact that, within the Council of Europe's legal order, the issue of forced sterilization of women is intersecting with Art. 39 of the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence which specifically criminalises forced sterilization procedures.[654]

Regression of disability rights is taking place in particular countries that have taken backward steps with regard to human rights, including sexual and reproductive rights of women. The USA has not ratified the UN CRPD, but in recent years there has been a stream of policies and caselaw that is alarming for the human rights situation of many vulnerable groups, including women and persons with disabilities[655]. Such an example is the USA Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[656]; disability NGOs have expressed their dismay at the decision as it was felt that the ban of abortion rights would have a disproportionate effect on the rights of PWD, including rights surrounding marriage, intimacy, sterilization, and medical care:

> Disabled people have the right to self-determination and bodily autonomy. We have the right to make our own decisions. Our human rights include reproductive rights. Abortion rights are disability rights. People with disabilities already face barriers to abortion and contraception. Sex ed is not accessible to us. Health care and telehealth are not accessible. Transportation is not accessible. We are more likely to live in poverty and we are more likely to rely on the government for health care. Many of us are multiply marginalized. We are more likely to be sexually

[652] CRPD Committee, Gen. Comment No. 1: Article 12: Equal recognition before the law, (11th session, 2014), U.N. Doc. CRPD/C/GC/1 (2014), para. 35.
[653] Application No. 61521/08, communicated on 14/3/2011.
[654] See also European Disability Forum and Fundacion Cermi Mujeres, Ending Forced Sterilisation of Women and Girls with Disabilities, May, 2017. https://www.edf-feph.org/content/uploads/2021/06/EDF-and-CERMI-Womens-Foundation-report-on-ending-forced-sterilisation-of-women-and-girls-with-disabilities.pdf
[655] See also the statement by the American Civil Liberties Union See Susan Mizner, Three Ways we're fighting for Disability Rights in Courtrooms across the country, 8/7/2022, https://www.aclu.org/news/disability-rights/three-ways-were-fighting-for-disability-rights-in-courtrooms-across-the-country, where she explains on how the rights of children with disabilities in the educational context should be respected without risking their health and safety
[656] 597 U.S. _(2022), 24/6/2022, https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf

> assaulted. Especially people with intellectual and developmental disabilities. Some of us have complex medical conditions and pregnancy is dangerous. The government already tries to control our lives and our bodies. Disabled people need abortion. Abortion bans do not protect people with disabilities. Abortion bans do not help us end eugenics.[657]

Regrettably, sexual health rights of persons with disabilities are overlooked in a persistent manner across many geographic regions around the world. Forced contraception or forced sterilisation of women and girls with disabilities is against the very principle of legal autonomy. Furthermore, women and girls with disabilities are being excluded from comprehensive sexuality education and domestic violence-related support services.[658] They also remain invisible in responses to emergencies and conflict situations. Intersectional discrimination remains the biggest challenge for the enforcement of rights of persons with disabilities.

As it has been explained throughout this chapter, social contexts may place persons with disabilities in vulnerable positions more frequently. Policy regulations that do not embrace a disability-rights approach increase the vulnerability of persons with disabilities. The way forward must be beyond tokenistic measures that superficially deal with disability issues; the principle *Nothing about us without us*, correctly identifies that, only through the full, meaningful and equal participation of persons with disabilities may States design and implement inclusive and sustainable practices. When doing so, States need to bear in mind that this principle also includes the rights of future generations of persons with disabilities.

[657] DREDF Statement on the Supreme Court's Ruling Overturning the Right to Abortion, https://dredf.org/2022/06/24/dredf-statement-on-the-supreme-courts-ruling-overturning-the-right-to-abortion/ See also Autistic Self Advocacy Network et al, Memorandum: *Dobbs v. Jackson Women's Health Organization* and Its Implications for Reproductive, Civil, and Disability Rights https://autisticadvocacy.org/wp-content/uploads/2022/06/Dobbs-memo.pdf

[658] Human Rights Comment, Addressing the invisibility of women and girls with disabilities, 21/4/2022. https://www.coe.int/en/web/commissioner/-/addressing-the-invisibility-of-women-and-girls-with-disabilities?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fpersons-with-disabilities

- **Important points to remember about "Disability Rights"**

When studying "Disability Rights," it is crucial for students to keep in mind the following important points:

1. Understanding Disability: Disability is a diverse and multidimensional concept that encompasses physical, sensory, intellectual, and mental impairments. Students should recognize that disability is a social construct and that the barriers and limitations faced by individuals with disabilities often result from societal attitudes, inaccessible environments, and discriminatory practices.
2. Human Rights Perspective: Disability rights are human rights. Students should approach the topic with the understanding that individuals with disabilities are entitled to the same human rights and fundamental freedoms as everyone else. The rights-based approach emphasizes the dignity, autonomy, and full inclusion of persons with disabilities.
3. The Convention on the Rights of Persons with Disabilities (CRPD): The CRPD is an essential international legal instrument that protects and promotes the rights of persons with disabilities. Students should familiarize themselves with the key provisions of the CRPD and understand its significance in advancing disability rights globally.
4. Equality and Non-Discrimination: Persons with disabilities have the right to equality before the law and should not face discrimination based on their disability. Students should explore the different forms of discrimination faced by individuals with disabilities, including access to education, employment, healthcare, transportation, and participation in public life.
5. Accessibility and Universal Design: Accessible environments, products, and services are crucial for the full participation and inclusion of persons with disabilities. Students should learn about the principles of universal design, reasonable accommodations, and the importance of ensuring accessibility in various contexts, such as physical spaces, information and communication technologies, and transportation.
6. Inclusive Education: Inclusive education promotes equal opportunities for students with disabilities to access quality education in mainstream settings. Students should understand the importance of inclusive education, the benefits it brings to students with and without disabilities, and the barriers that need to be addressed for its effective implementation.
7. Independent Living and Personal Autonomy: Persons with disabilities have the right to live independently and make choices about their lives. Students should examine the barriers to independent living, including

institutionalization and lack of community-based support services, and explore models of support that uphold individual autonomy and promote community inclusion.

8. Employment and Economic Empowerment: Equal access to employment and the right to work are vital for persons with disabilities. Students should learn about the challenges faced by individuals with disabilities in the labor market, including discrimination, inaccessible workplaces, and limited opportunities, as well as initiatives that promote inclusive employment practices.
9. Intersectionality: Disability intersects with other aspects of identity, such as gender, race, ethnicity, and socio-economic status. Students should recognize that individuals with disabilities who belong to multiple marginalized groups, may face compounded discrimination and barriers. An intersectional approach is important in understanding the diverse experiences and needs of persons with disabilities.
10. Empowering Voices and Self-Advocacy: The voices and perspectives of persons with disabilities are essential in shaping policies, programs, and practices that affect their lives. Students should engage with self-advocacy movements and disability rights organizations to learn about the lived experiences and advocacy efforts of persons with disabilities.

It is essential for students to approach the study of disability rights with empathy, respect, and a commitment to promoting the full inclusion and participation of persons with disabilities in all aspects of society. Engaging with personal stories, case studies, and disability rights frameworks will deepen students' understanding of the barriers faced by individuals with disabilities and the actions required to build a more inclusive and equitable world for all.

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Test your knowledge

1. **Are the decisions by the UN Committee on the Rights of Persons with Disabilities legally binding upon States?**

Answer: They are not legally binding. However, States have accepted the competence of the Committee to examine complaints against them and they are handed out recommendations that they have to comply with. The Committee will monitor the States' compliance with the recommendations (follow-up procedures).

2. **Why is it important for all States to ratify the Optional Protocol to CRPD?**

Answer: Under the Optional Protocol, the UN Committee on the Rights of Persons with Disabilities (CRPD) can examine complaints by individuals or groups concerning the violation of the UN CRPD provisions by a State. The CRPD considers the case on its merits and decides whether the violation has occurred. The decision of the CRPD is final and no appeal can be filed.

3. **Are there online resources that can advance my knowledge?**

Answer: Yes. You can find information here: https://www.ohchr.org/en/disabilities/ohchr-training-package-convention-rights-persons-disabilities
There are some interesting materials here:

- Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/frequently-asked-questions-regarding-the-convention-on-the-rights-of-persons-with-disabilities.html
- UN Human Rights, Participation of people with disabilities benefits all https://vimeo.com/492481525
- UN Human Rights, Legal Capacity for All https://vimeo.com/492479409
- Essex Autonomy Project, Lecture by Wayne Martin, Capacity, Incapacity and Human Rights: A CRPD Perspective, 15/2/2017, https://autonomy.essex.ac.uk/crpd/

Documentaries to watch

Here is a list of documentaries and films that focus on disability rights and provide valuable insights into the experiences and challenges faced by individuals with disabilities:

1. *Crip Camp* (2020) - Directed by Nicole Newnham and Jim LeBrecht, this documentary follows the journey of a group of disabled teenagers who attended Camp Jened in the 1970s. It explores their experiences at the camp and their subsequent activism in the disability rights movement.
2. *Murderball* (2005) - Directed by Henry Alex Rubin and Dana Adam Shapiro, this film is a documentary about wheelchair rugby and the lives of quadriplegic athletes who participate in the sport. It offers an intimate portrayal of their determination and resilience.
3. *Rising Phoenix* (2020) - Directed by Ian Bonhôte and Peter Ettedgui, this documentary highlights the extraordinary journeys of Paralympic athletes from different countries and explores the history and impact of the Paralympic Games.
4. *Defiant Lives* (2016) - Directed by Sarah Barton, this documentary traces the history of the disability rights movement and features personal stories of activists who fought for equal rights and accessibility.
5. *Including Samuel* (2007) - Directed by Dan Habib, this film focuses on the life of Samuel Habib, a young boy with cerebral palsy, and his family's advocacy for inclusive education and disability rights.
6. *Lives Worth Living* (2011) - Directed by Eric Neudel, this documentary chronicles the history of the disability rights movement in the United States, highlighting the efforts of activists who fought for the passage of the Americans with Disabilities Act (ADA).
7. *Deej* (2017) - Directed by Robert Rooy, this film follows the life of DJ Savarese, a non-speaking young man with autism, as he navigates the educational system and advocates for inclusive education and communication rights.
8. *Take a Look at This Heart* (2018) - Directed by Ben Duffy, this documentary explores love, relationships, and sexuality among people with disabilities. It challenges stereotypes and sheds light on the complexities of intimate relationships.
9. *Fixed: The Science/Fiction of Human Enhancement* (2013) - Directed by Regan Brashear, this documentary critically examines the concept of *normalcy* and explores the intersection of disability, technology, and ethics in the pursuit of human enhancement.

10. *Wretches & Jabberers* (2010) - Directed by Gerardine Wurzburg, this film follows two men with autism, Tracy Thresher and Larry Bissonnette, as they embark on a global journey to change attitudes about disability and advocate for communication rights.

These documentaries and films provide perspectives on disability rights, accessibility, inclusion, and the experiences of individuals with disabilities. They shed light on the challenges faced by the disability community and highlight the importance of promoting equality, acceptance, and the right to full participation in society.

Part C

Chapter 1 Creative Media and New Technologies for Human Rights

Abstract

Over the past decade, we have witnessed a transformative revolution characterized by the emergence of groundbreaking technologies and invaluable digital tools. These advancements have profoundly revolutionized the manner in which we access, utilize, and store information, as well as the dynamics of communication within both private and public spheres, particularly among individuals engaged in political activities. The purpose of this chapter is to delve into the exploration of social movements that have originated and thrived through the utilization of social media and novel technologies.

Our investigation will focus on the profound impact of digital advocacy for human rights, illustrating the transformative influence it has had on the promotion of human rights campaigns. Additionally, we will examine how the amalgamation of climate action and civil protests associated with human rights has significantly amplified their political influence through the expansive reach and communication channels offered freely online.

Moreover, this chapter will highlight the role of cinema in human rights education, emphasizing the potential of films as the educational materials of the future. By employing documentaries and advocating for human rights, we aim to cultivate a heightened consciousness regarding human rights issues and foster a comprehensive human rights culture. Notably, creative media has been strategically integrated into the realm of human rights education to infuse the study of law with a more humanistic approach. For instance, human rights film festivals serve as platforms for showcasing thought-provoking documentaries addressing social issues, aiming to raise awareness and inspire transformative change. These festivals facilitate global collaboration among filmmakers and journalists, while fostering an open dialogue on the moral quandaries prevalent in our society, ultimately cultivating a greater sense of human rights awareness.

Required Prior Knowledge

Arts, Cinema, Creative media, new technologies, communications, advocacy, storytelling.

C.1.1 Exploring the Key Concerns of Emerging Technologies and Artificial Intelligence: Implications for Human Rights

Over the past few years, the rapid advancement of new technologies, particularly of artificial intelligence (AI), has brought about significant transformations in various aspects of our lives. These advancements have introduced unprecedented opportunities and efficiencies, revolutionizing industries, enhancing communication, and expanding the frontiers of human knowledge. However, as we embrace these technological advancements, it is crucial to recognize and address the range of pressing issues that have arisen, demanding our immediate attention and thoughtful consideration. Of utmost

importance are the human rights implications associated with the widespread adoption and utilization of new technologies and AI.

The integration of new technologies and AI into our daily lives carries far-reaching consequences that extend well beyond mere convenience. As these tools become increasingly ubiquitous, they possess the potential to profoundly impact fundamental human rights, including but not limited to privacy, freedom of expression, equality, and autonomy. Consequently, it becomes imperative to conduct a critical examination of the ethical, legal, and social implications of these technologies to ensure their development and deployment align with the principles that uphold and safeguard human rights.

One primary concern arises within the realm of privacy. The extensive amount of data generated by individuals through their interactions with technology is often collected, stored, and analyzed by various entities. This situation poses significant risks to individuals' right to privacy, as sensitive information can be exploited, misused, or fall into the wrong hands. Additionally, AI algorithms and automated decision-making systems have the potential to perpetuate biases and discrimination, thereby adversely affecting marginalized communities and exacerbating existing inequalities.

Moreover, the impact of new technologies and AI on freedom of expression and access to information cannot be underestimated. The algorithms responsible for curating and prioritizing content wield considerable power in shaping public discourse and influencing individuals' exposure to diverse perspectives. These circumstances raise concerns about the manipulation of information and the suppression of dissenting voices, which undermine the foundations of democratic societies.

The intersection of new technologies, AI, and human rights extends beyond the realm of individual rights to encompass broader societal implications. Questions emerge regarding the effects of automation on the labor market, the potential for widespread unemployment, and the necessity for robust social protections. Furthermore, the deployment of AI in law enforcement and surveillance gives rise to concerns regarding accountability, transparency, and the potential for discriminatory targeting.

As we find ourselves on the brink of a future driven by technology, it is crucial to navigate these challenges with an unwavering commitment to upholding human rights principles. Balancing innovation with ethical considerations and legal frameworks is essential to ensure that the benefits of new technologies and AI are harnessed, while mitigating potential harms. This undertaking necessitates interdisciplinary collaboration, involving stakeholders from academia, industry, civil society, and policymakers, to develop comprehensive frameworks that protect and promote human rights in the digital age.

In light of this context, the purpose of this paper is to delve into the exploration and analysis of the most pressing issues surrounding new technologies and AI with significant human rights implications. By examining the multifaceted challenges at hand, we strive to foster a deeper understanding of the intricate interplay between technology and human

rights. Moreover, this study aims to provide valuable insights and recommendations to guide the responsible development and deployment of these transformative tools. To support our analysis, we will draw upon relevant cases and provide links to additional resources that offer comprehensive information on the topic at hand.

The rapid evolution of new technologies has paved the way for innovative approaches to address human rights challenges and promote positive social change. In the realm of "*Tech for Good*," a growing emphasis is placed on leveraging cutting-edge technologies to protect and advance human rights, ensuring dignity, equality, and justice for all. This emerging field holds immense potential to empower individuals, communities, and activists, providing them with tools and platforms to amplify their voices, promote accountability, and drive transformative progress in the realm of human rights.

Enhancing Access to Information and Communication:
New technologies have revolutionized access to information, enabling individuals to exercise their right to freedom of expression and access to knowledge. Internet connectivity and mobile devices have bridged the digital divide, empowering marginalized communities to share their stories, express their concerns, and mobilize for change. Social media platforms and digital communication tools have played a pivotal role in galvanizing social movements, facilitating the exchange of ideas, and connecting individuals across borders to advocate for human rights causes.

Technological Solutions for Human Rights Documentation:
Innovative technologies are being developed to address the crucial need for accurate and secure human rights documentation. Mobile apps and digital platforms allow individuals to capture and share evidence of human rights violations, ensuring that these abuses are not silenced or forgotten. Furthermore, blockchain technology is being explored as a means to establish immutable records and enhance the credibility and integrity of human rights documentation, protecting against tampering or manipulation.

AI and Big Data Analytics in Human Rights Research:
Artificial Intelligence (AI) and big data analytics are revolutionizing human rights research and advocacy. These technologies enable the processing and analysis of vast amounts of data, uncovering patterns, trends, and correlations that can inform evidence-based advocacy and decision-making. AI-powered algorithms can identify human rights violations, monitor social media platforms for hate speech or incitement, and assist in the identification of missing persons in conflict zones. By harnessing the power of AI and big data, human rights organizations can leverage insights to strengthen their campaigns, identify systemic issues, and advocate for policy change.

Ensuring Ethical Considerations and Safeguarding Human Rights:
While embracing new technologies for human rights, it is essential to address ethical considerations and safeguard against potential risks. Transparency, accountability, and privacy are critical aspects that must be prioritized. Stakeholders must work collaboratively to establish robust ethical frameworks and ensure that technology is developed and utilized in a manner that respects and upholds human rights principles. Engaging with diverse stakeholders, including civil society organizations, academics, technologists, and policymakers, it is vital to foster dialogue, shape policies, and ensure that "Tech for Good" aligns with human rights values.

The "Tech for Good" movement presents a transformative opportunity to advance human rights, offering innovative solutions to longstanding challenges. By harnessing the power of technology, individuals and organizations can enhance access to information, document human rights violations, conduct data-driven research, and amplify advocacy efforts. However, ethical considerations and safeguarding human rights must remain at the forefront of this movement. As we navigate this evolving landscape, interdisciplinary collaboration and the active involvement of stakeholders are crucial to ensure that technology serves as a catalyst for positive change and a cornerstone in the promotion and protection of human rights.

Furthermore, many aspects of human rights are being impacted by new technology. Human rights activists and international NGOs are increasingly including technology and digital rights problems in their fundamental work, and a wide spectrum of independent experts at the United Nations now see these issues as crucial.

Misuse of emerging technology, such as in widespread monitoring, the instigation of hate crimes, or the deployment of deep fakes, might pose serious risks. However, they also provide chances to have a beneficial influence on human rights, such as by helping find missing individuals or convicting wrongdoers. It is essential to address human rights issues associated with new technologies via a multi-stakeholder strategy, which requires a strengthening of the critical conversation between technology and telecoms corporations, UN experts, and civil society.For a comprehensive list of relevant caselaw, please go to this link.

This chapter, examines the links of creative media and arts with human rights by looking at the new technologies that have an impact on human rights.

The relationship between creative media, arts, and human rights is profound, as these mediums serve as powerful tools for expression, awareness, and advocacy. They enable individuals and communities to delve into, question, and address social issues, fostering empathy, understanding, and social change. This discussion explores the interconnectedness of creative media and the arts with human rights, emphasizing their role in raising awareness, facilitating dialogue, and advocating for justice.

Raising Awareness and Amplifying Voices:
Creative media, encompassing films, documentaries, visual arts, literature, and music, plays a vital role in increasing awareness about human rights abuses and marginalized communities. Through their ability to captivate audiences, these mediums evoke emotional responses that encourage empathy and a deeper comprehension of human rights issues. By employing compelling storytelling, impactful visuals, and thought-provoking narratives, creative media shed light on the experiences, struggles, and resilience of individuals facing human rights violations, amplifying their voices and providing a platform for their stories to be heard.

- Case Study Example 1: The documentary *The Square*, directed by Jehane Noujaim, portrays the experiences of Egyptian activists during the Arab Spring, providing an intimate and powerful account of their fight for freedom and human rights. This film raised global awareness about the challenges faced by individuals in oppressive regimes and sparked conversations about political activism and human rights in Egypt. [Source: *The Square* Documentary Official Website](Link: http://www.thesquarefilm.com/)

Encouraging Dialogue and Challenging Norms:
Creative media and the arts often challenge societal norms, prevailing narratives and power structures, promoting critical thinking and dialogue around human rights issues. They act as catalysts for discussions on topics such as gender equality, racial justice, LGBTQI+ rights, freedom of expression, and social justice. By presenting alternative perspectives and narratives, creative media encourage audiences to question existing beliefs, confront biases, and engage in constructive conversations that can lead to positive societal change.

- Case Study Example 2: The play *The Vagina Monologues* by Eve Ensler has become a global phenomenon, sparking dialogue and activism around gender-based violence, sexuality, and women's rights. It challenges societal taboos and addresses issues of violence and discrimination against women, encouraging audiences to question and challenge patriarchal norms. The play has been performed worldwide, raising awareness and funds for organizations working to end violence against women. [Source: V-Day Campaign Official Website](Link: https://www.vday.org/)

Inspiring Action and Advocacy:
Creative media and the arts inspire individuals and communities to take action, serving as a call to mobilize for human rights causes. They possess the power to ignite social movements, foster solidarity, and galvanize individuals to advocate for justice and equality. Through their emotional impact and ability to connect with diverse audiences, creative media motivate viewers to get involved, support human rights organizations, and actively participate in campaigns and initiatives that promote human rights.

- Case Study Example 3: The #BlackLivesMatter movement gained significant momentum through the use of creative media, including social media platforms, visual arts, and music. Artists created powerful visual representations, shared personal stories, and composed protest songs that amplified the movement's message against systemic racism and police violence. These artistic expressions not only inspired widespread activism, but also generated resources for organizations dedicated to racial justice. [Source: #BlackLivesMatter Official Website](Link: https://blacklivesmatter.com/)

Fostering Healing and Resilience:

Artistic expression serves as a means of healing, empowerment, and resilience for individuals and communities affected by human rights violations. Through creative outlets such as visual arts, music, theater, dance, and poetry, survivors of trauma find solace, reclaim their narratives, and cultivate a sense of agency and empowerment. Artistic expression provides a safe space for healing and enables the communication of experiences and emotions that may be challenging to express through conventional means.

- Case Study Example 4: The exhibition "The Art of Hope" featured works created by Syrian refugee children, showcasing their resilience, creativity, and determination in the face of adversity. Through their artistic expressions, these children found a voice to share their experiences and dreams, inspiring empathy and solidarity among viewers. The exhibition not only provided a platform for healing but also raised funds for educational initiatives supporting refugee children. [Source: The Art of Hope Exhibition Official Website](Link: http://www.theartofhope.org/)

Incorporating creative media and the arts into human rights education and advocacy efforts, enriches and enhances the impact of these initiatives. Human rights film festivals, art exhibitions, theater performances, and literary works focused on human rights themes create spaces for dialogue, reflection, and engagement. They also serve as platforms for artists, filmmakers, writers and activists to collaborate, share perspectives, and mobilize communities in support of human rights causes.

Overall, the interplay between creative media, arts, and human rights is multifaceted and dynamic, offering unique opportunities to raise awareness, foster dialogue, inspire action, and empower individuals and communities. By harnessing the power of creative expression, we can continue to explore the complexities of human rights issues, advocate for justice, and strive for a more equitable and inclusive world.

> *"Art was once at the centre of societies and provides some of the greatest connections between current civilisations and the past, going back centuries and even millennia. However, art has seemingly moved to the periphery of modern societies and its marginalisation may even gather pace, given the decline in recognised 'public intellectuals'. Art must regain a central place in*

society, especially to prepare for new challenges, such as the loss of jobs from new technologies. To that end, the prominence of arts in education should be increased."

The purpose of this chapter is to broaden the horizons of the human rights student and aid in their comprehension of the essence of human rights by investigating the relationship between the arts and human rights and providing an overview of the utility of film, creative media, and new technologies in human rights education.

What human rights can do for the arts and creative media, and vice versa, are the key topics of interest in this field; and how creative expression can advance the cause of human rights, is the wind beneath the wings of this rapidly developing field of the new technologies, creative media, and human rights.

Using these two issues as a springboard and guide, this chapter will provide an overview of the intersections between the arts and human rights.

Numerous issues need our consideration, such as the importance of art and film in human rights education, the value of cultural rights, or the view of creative freedom, and the assistance that human rights may provide to artists.

The phrase "*the human rights message requires aid and reinforcement,*" sums up one insightful way of thinking about the connection between the two. Creatives have the potential to aid. "However, artists all over the world have embraced and grown as a result of the academic community's neglect of the role of the arts in advancing human rights."

This is a fast developing field of study with priceless utility for human rights education. For example: "Art and Human Rights: An Aesthetic Critique of Academic Discourse on Human Rights".

This list contains links to some useful research documents, policy documents and books on the arts and human rights:

- *Human Rights explained: Guides to Human Rights Law*, Irish Human Rights and Equality Commission, 2015. Read here.
- *Exploring the Connections between Arts and Human Rights: Report of high-level expert meeting Vienna, 29 – 30 May 2017*, European Union Agency for Fundamental Rights, 2017. Read here.
- Using Arts Activism and Poetry to Catalyze Human Rights Engagement and Reflection', Jane McPherson and Nicholas Mazza, Social Work Education: The International Journal, 2014. Read here.
- *Human Rights, Development, and Democracy in Africa: What Role for the Arts?*, Mike Van Graan, *World Policy Journal*, 2013. Read here.
- *Human Rights and the Arts: Perspectives on Global Asia (Global Encounters: Studies in Comparative Political Theory),* Susan J Henders and Lily Cho, 2017. Available to buy here.

- *Is* access *to art a human right?* Barry Knight, *Alliance Magazine*, 2015. Read here.
- Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: The right to freedom of artistic expression and creativity, Farida Shaheed, United Nations General Assembly, 2013. Read here.
- *The importance of art in human rights*, Cimakh, *Institute for Human Rights, The University of Alabama at Birmingham*, 2018. Read here.

In recent years, the incorporation of technology and inventive media has enriched the study of human rights legislation. The purpose of this chapter is to provide an overview of how creative media might be used to the field of human rights education. The effect of emerging technology on the realm of human rights will also be explored.

Cinema, videography, photography, and other similar forms of digital art are examples of creative media, while examples of emerging technologies include the Internet of Things (IoT), artificial intelligence (AI), and virtual reality (VR).

The advancement of technology has many positive applications and prospects, one of which is protecting human rights. The growth of the Internet has increased people's access to information, while the emergence of new media platforms has provided activists lightning-fast tools for organizing communities and disseminating information on a massive scale. For the greater good of society, new technologies like AI have the potential to greatly increase both the quantity and quality of data used to influence policy and healthcare choices. Those who advocate for these innovations say they will expand people's options, boost productivity, and allow them to reach their full potential.

Simultaneously, concerns regarding the effects of AI, automation, and robots on human rights and the future of labor have been raised in light of their fast growth. There is a danger that increasing productivity via the use of robots would lead to greater social inequality as a consequence of pay stagnation and job loss. The proliferation of the *gig economy*, made possible by advances in technology, has altered the nature of employment by expanding access to temporary, contract-based occupations that benefit some workers at the expense of others. Concurrently, large data collecting has the potential to impede free and fair societies by resulting in abuses of the right to privacy.

The full scope of these effects is still unclear. Human rights groups are looking into ways to make sure that technological progress helps everyone and doesn't make things worse for disadvantaged groups.

An interesting development, that is worthy of mentioning, involved a recebt study where it has been claimed by researchers that an AI system has accurately anticipated the results of hundreds of cases heard by the ECtHR. According to the experts, the AI was 79

percent accurate in its verdict predictions. Journalism, law, and accounting are just few of the industries that are finding useful applications for AI, but skeptics insisted that no artificial intelligence could grasp the subtleties of a court case.[659]

This is just the tip of the iceberg when it comes to new technologies and the introductions of AI to the Courtrooms.

What is also interesting to mention is the new "Tech for Good" movement. There is a growing worldwide movement known as "Tech for Good"[660] the goal of which is to put cutting-edge tools to work for the benefit of people, the environment, and society at large. The people involved in this movement are reacting specifically to the United Nations' sustainable development objectives (also known as #GlobalGoals).

To return to the discussion about creative media and arts for human rights, we need to highlight that the most useful example from this field is to be found in the relationship of cinema and human rights. There is a special and constructive connection between human rights and the medium of film. In this section, we will examine the role that movies can play in educating people about human rights abuses and how they can help stop them, as well as the role that movies can play as an instructional tool for human rights oriented education. It is important to learn as much as we can about cinematography since it has the potential to be a strong global language for imparting information and evoking feelings. That is, in keeping with the ultimate goal of human rights which is to foster the growth of a culture based on respect for human rights in all communities. Human rights scholarship might benefit from investigating this possibility. Emotional intelligence may be honed with the help of cinema's own brand of emotional stimulation and the cultivation of our sentimental education. That's something an artistic endeavor can do. It has the potential to evoke strong emotions and create a sense of community and commonality among people. Cinema, as an art form, appears to have a particularly direct influence on the human psyche in the direction of emphasizing what binds us together.

The following debate will focus on art, but it should be made clear that we should be more concerned with the philosophical truths that film, as a distinct language and means of communication, can bring into the world.

In the end, this chapter is meant to be used in a human rights centered education, but it draws on a wide range of disciplines to get there.

The question is how films and other forms of creative media may be used to promote human rights and education.

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[659] See: Jane Wakefield, 'AI predicts outcome of human rights cases', BBC, 23 October 2016. https://www.bbc.com/news/technology-37727387 (Accessed 13 March 2022).
[660] See: https://www.techforgood.net/ (Accessed 29 March 2022).

Without a doubt, the most powerful *influencer* of modern political and cultural movements is the film industry.

This means it can provide innovative and effective assistance with human rights readiness.

The movies will replace the books: Documentary films are unparalleled in their capacity to educate audiences about important issues like human rights by using innovative narrative techniques that bring viewers closer to the action on screen.

There is a need for reinforcement and support of the human rights message, and artists can provide it. The medium of film offers a special platform from which to spread awareness of human rights and its associated principles of justice, equality, and freedom. The movie experience, with its empathetic screen, may evoke emotional reactions and spark empathy to the spectator like no other human product, hence inspiring unity and a feeling of belonging. This art of moving pictures has an impact on the viewer-witness unlike any other media or method of delivering facts via narrative. Fascinatingly, viewing a great film may make even the most superficial barriers between people dissolve. To put it simply, human rights cinema is a subgenre of documentary film that explores issues of social justice and the protection of individual rights. Human rights cinema, for instance, is renowned for its ability to document historical facts, promote awareness of human rights, restore the truth, incite discussions about rights in societies, challenge stereotypes, morality, and systemic inequalities, inspire activism, tolerance and respect, and so on. The arts are crucial to the success of every community because they serve to unite its members by showcasing their shared humanity.

The super-spreading *infodemic* and false news that are being utilized deliberately for media distortion, and political and cultural manipulation, pose serious threats to human rights and should be taken into account by any comprehensive plan for protecting these fundamental freedoms. In this context, new technologies, particularly communication platforms and social media, might function as crucial tools for crashing the infodemic's misunderstandings and providing aid in deactivating the disinformation machine.

Human rights claims seem ironically utopic in our capitalist world, or better put, human rights in a free market are like romantic letters to the Santa Claus, since this pandemic has proven once again that politicians are prioritizing economy over human rights and profit over human life. That being said, human rights can tame these powers for the benefit of humankind, therefore, the worth of a complete human rights preparedness plan for pandemics, is enormous. It should be the first and last concern in all covid-19 relevant responses from the authorities. For example, to adopt a public policy and be willing to sacrifice part of your country's population for achieving *herd immunity*, is in absolute contrast and violation of human rights. Certain policies, and measures are more harmful than beneficiary, and all these issues must be provided for in a complete preparedness plan. History taught us that humanity's greatest steps forward were taken after catastrophes, wars, and collective suffering. It is indicative that, even the UDHR (1948) was created in the aftermath of WWII. Connecting our historical evolution, with this

pandemic, we can see that COVID-19 is more than a deadly virus. It is a symptom of the deteriorated health of our planet, brought about by humanity's defective relationship with nature.

C.1.2 Rights in the digital era

The protection of human rights should be the same online as it is offline. In the past ten years, the proliferation of digital technology has led to a sea change in almost every aspect of human life, from education to employment to socializing to advocating for social and political change. The harsh realities of the Covid-19 pandemic have helped accelerate the digital transition, as the measures adopted by governments around the world have included home isolation, prompting a shift toward all aspects of individual life that would otherwise and traditionally require human interaction face to face, and the second best option for living a fulfilling life within our organized societies, like online communications.
The term *digital rights* is used to describe the freedoms that allow people to make use of and contribute to digital media, as well as the usage of digital devices and the Internet. The concept is connected to the defense of rights like the right to privacy, which has received a lot of attention over the last decade, and the freedom of speech, which is always under attack and often abused all over the world. In today's linked world, every discussion of digital technology must inevitably include the Internet. Without an online connection, no digital gadget can perform its full range of functions. Net neutrality, which is essentially about ensuring a free and open internet and equal access to it by every individual, has led several countries and regions around the globe to recognize a right to internet access. This fact brings another dimension to light and that is the concept of net neutrality, which in relation to privacy includes the principle that the company that connects you to the Internet does not get to control what you do on the Internet.

There are numerous relevant cases, that have been heard by the ECtHR. In *Copland v. United Kingdom*[661], for example, the Court found that storing data on an individual's email and internet use violated the individual's right to privacy. Over the last several years, the Court has also heard[662] complaints about the covert surveillance system in place in the UK, following a pattern that began with the 1984 case *Malone v. United Kingdom*.[663]

[661] 45 EHRR 37. Monitoring of telephone usage was also in issue.
[662] See: Kennedy v United Kingdom Application No. 26839/05, 18 May 2010; and Liberty and Others v United Kingdom Application No. 58243/00, 1 July 2008.
[663] A82(1984);7EHRR14.

C.1.3 Access to the Internet

Studying cases involving Internet censorship helps clarify the concept of *net neutrality*, as such measures "may be in direct conflict with the actual wording of paragraph 1 of Article 10 of the Convention, according to which the rights set forth in that Article are secured 'regardless of frontiers'" (*Ahmet Yldrm v. Turkey*, para. 67). This case involves a preliminary injunction on access to Google Sites. The petitioner, in this instance, ran a website on which he mostly published scholarly articles. Access to Google Sites was temporarily disabled during criminal proceedings against a third-party site in accordance with a legislation forbidding insults against the memory of Atatürk. The applicant's right to receive and access information was violated when he was unable to see his own website due to the internet ban.

Since the Internet has become one of the primary means by which individuals exercise their right to freedom of expression and information by providing essential tools for participation in activities and discussions concerning political issues and issues of general interest, the fact that it was a "restriction on Internet access" does not diminish its significance. Among other things, the court found a breach of Article 10 because, to quote the Court's opinion:

> *"(...) the Court finds that such previous constraints are not necessarily incompatible with the Convention as a matter of principle.But a legislative structure is needed, one that ensures both strict control over the extent of restrictions and effective judicial review to forestall abuse of authority (...) Therefore, a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression is necessary for the judicial review of such a measure, which is based on a weighing of the competing interests at stake and designed to strike a balance between them (...)."*[664]

In that case, the Court found fault with the national authorities:

- for not considering that blocking large amounts of information would severely limit the rights of Internet users and "have a significant collateral effect;"
- for not having adequate safeguards in place to prevent abuse; and for not checking whether a different approach would have allowed for blocking of only the offending website. To prevent a blocking order for one site from being extended to prohibit access to other sites, domestic legislation should include certain protections (para 66-68).

[664] *Ahmet Yldrm v. Turkey*, para. 64.

This chapter places a premium on digital rights due to its significance in safeguarding fundamental freedoms including the right to free speech and the right to personal privacy. The term *digital rights* refers to the fundamental freedoms that enable individuals to create and share digital content, utilize digital devices, and participate in online communities. Human rights have evolved, and digital rights are the natural progression of such rights in the Internet age. This is a rapidly developing field of international law and human rights that demands our close attention.

C.1.4 Internet and Human Rights

Human rights concerns with the Internet and other new technologies must first address the question of which courts have jurisdiction over human rights claims and which ones have the authority to hear and rule on them.

Therefore, any human rights oriented approach to the new technologies should focus on territoriality and jurisdiction. The word *jurisdiction* is used to describe a court's authority to hear and rule on a matter, and hence issue an enforceable ruling. On the other hand, the phrase may also be used to describe the geographical limits of a court's ability to exercise its authority. The concept of jurisdiction is central to the concept of State sovereignty, and under international law, a State's jurisdiction is only intended to be effective inside its own borders.[665]

Paradoxes abound inside the boundaries of territory when it comes to online life and online commerce. Due to the global nature of the Internet, it is impossible to pinpoint the exact place where an alleged crime or violation of human rights occurred. It is a fact that, cases using the Internet often include parties from several countries, which complicates jurisdictional concerns and human rights litigation like never before. How, therefore, can a court with jurisdiction over an alleged human rights violation committed online enforce local laws against a defendant who is physically situated in a different country, is one of the challenging questions lingering in the field of internet and human rights.

Prememiny v. Russia (no. 44973/04, 10 February 2011), established that domestic remedies must be exhausted before resorting to regional or international human rights protection, so the answer to the question posed above is typically provided by domestic courts applying the relevant principles of international law on jurisdiction. In this instance that is helpful for our knowledge of this area, the petitioners were two Russian citizens now residing in Russia. They were arrested in Russia on suspicion of breaking into the

[665] Consider the following case: English: *Al-Skeini and Others v. United Kingdom* [GC], no. 55721/07, 131, European Court of Human Rights 2011.

computer network of a bank in the United States (referred to only as "Green Point Bank") in 2001, stealing the bank's customer information, and demanding ransom in return for not making the database public. The first petitioner claimed that he was assaulted while in pre-trial custody and that his bail application was not thoroughly reviewed. After reviewing the case, the Russian courts ruled that they had the authority to do so. Without challenging its authority, the Court investigated the problems raised including the charges of unlawful detention under Articles 3 and 5 of the Convention.[666]

Importantly, the Court will exert its *jurisdiction* if it can be shown that the claimed injury must be resolved by one of the Parties to the Convention. Therefore, the Court's precedents on the inadmissibility of evidence based on ratione loci and ratione personae may eventually be applied to instances using the Internet.[667]

C.1.5 The scope of Article 8 and personal data

The term *personal data* refers to any information on a specific or identifiable individual, and it is defined as such in the Council of Europe Convention of 1981 for the protection of people with respect to automated processing of personal data.

It is abundantly obvious that the safeguarding and storage of private information comes within the ambit of private life as guaranteed by Article 8 of the Convention. The scope of Article 8 is quite broad, including such diverse spheres as domestic and family life, as well as correspondence:

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.[668]
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic

[666] Similarly, in *Ahmet Yldrm v. Turkey* (no. 3111/10), there was no question as to whether or not Turkish courts had the authority to rule on the blocking action affecting internet access to all Google Sites.

[667] For future Internet-related disputes, the judgment in *Ben El Mahi v. Denmark* (no. 5853/06, ECHR 2006-XV) is instructive. In that case, the Court ruled that the petitioners, a Moroccan resident in Morocco, lacked jurisdiction over the member State Denmark. If the petitioners had committed an extraterritorial act—in this example, publishing cartoons—Denmark would not have had jurisdiction over them. According to Article 35 3 and 4, the application was deemed inadmissible since it was considered to be in conflict with the Convention's requirements.

[668] *S. and Marper v. the United Kingdom*, 4 December 2008 (Grand Chamber),
This case concerned the indefinite retention in a database of the applicants' fingerprints, cell samples and DNA profiles after criminal proceedings against them had been terminated by an acquittal in one case and discontinued in the other case. The European Court of Human Rights held that there had been a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

> society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In fact, the Court has ruled that protecting an individual's privacy is crucial to ensuring that he or she may exercise their right to a private and family life.[669]

Article 8 safeguards people' right to have their private information, such as their home address, kept private.[670]

In cases of data retrieved following surveillance, it is common that data is obtained after being subjected to covert State monitoring.[671] Systems of covert surveillance must have checks and balances mandated by legislation to oversee the operations of the relevant agencies.[672] This is due to the fact that, in the name of protecting democracy,[673] a system of covert monitoring aimed to preserve national security runs the danger of weakening or even destroying it. Therefore, the Court must be convinced that there are sufficient and efficient safeguards against misuse. For Article 8 purposes, the Court rules that the authority to order covert monitoring of persons is permissible only if it is both adequate and effective.[674]

C.1.6 Data protection with specific reference to the Internet

The fast advancement of Internet technology has entailed the quick development of equipment and ways to monitor online conversations, making questions of surveillance all the more pertinent in the context of the Internet.

For example journalists and content creators, believe that the legislative system, in respect to the surveillance of external communications, has impeded their capacity to do their job of investigative journalism without worrying about the safety of their communications. This, threatens the press's ability to serve as a watchdog over the public. In *Copland v. the United Kingdom* (3 April 2007): The applicant was employed by a college of further education, a statutory entity governed by the State, as a personal assistant to the principal. From the end of 1995, she was forced to work closely with the deputy

[669] *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 41, 4 December 2008).
[670] *Alkaya v. Turkey*, no. 42811/06, 9 October 2012; *Flinkkilä and Others v. Finland*, no. 25576/04, 75, 6 April 2010; *Saaristo and Others v. Finland*, no. 184/06, 61, 12 October 2010.
[671] See *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V).
[672] *Weber and Saravia v. Germany* (dec.), no. 54934/00, 94, ECHR 2006-XI; *Liberty and Others v. the United Kingdom*, no. 58243/00, 62, 1 July 2008).
[673]See *Klass and Others v. Germany*, 6 September 1978, 49-50, Series A no. 28.
[674] *Catt v. the United Kingdom* (24 January 2019): This case concerned the complaint of the applicant, a lifelong activist, aboutthecollection and retention of his personal data in a police database for "domestic extremists". The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention.

principal. Her telephone, e-mail and internet activities were subjected to surveillance at the deputy principal's insistence. The UK government claims this was done so they could determine whether the applicant was abusing campus resources.

The Court found that there had been a breach of Article 8 (right to respect for private life and correspondence) of the Convention. It first noticed that telephone conversations from company premises were prima facie protected by the conceptions of *private life* and *correspondence*. It followed naturally that e-mails received from work should be similarly protected, as should information collected from the surveillance of personal internet activity. In this instance, the Court found that the applicant's right to privacy had been violated because of the unwarranted acquisition and preservation of personal information about her telephone, email, and internet usage. While leaving open the question whether the monitoring of an employee's use of a telephone, e-mail or internet at the place of work might be considered "necessary in a democratic society" in certain situations in pursuit of a legitimate aim, the Court concluded that, in the absence of any domestic law regulating monitoring at the material time, the interference was not "in accordance with the law".

C.1.7 Internet and Freedom of Expression

Freedom of expression is guaranteed by Article 10 of the Convention in the following terms:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Publications published on the Internet are covered by Article 10 and its broad principles, although the Strasbourg Court has ruled on specific constraints placed on freedom of speech on the Internet due to the unique characteristics of this medium.

The Court's general principles concerning freedom of expression apply to the Internet

Internet usage falls within Article 10 of the Convention (*Delfi AS v. Estonia* [GC]), regardless of the content of the message or whether or not it is used for commercial reasons. For the first time, the Court ruled that a fashion website's decision to make images from runway events available for viewing, purchase or both, came within the protections of the First Amendment.[675]

The Court has made an important observation in the case of *Delfi AS v. Estonia* [GC]:

> (...) the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general (see *Ahmet Yıldırım*, cited above, §48, and *Times Newspapers Ltd*, cited above, §27). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see *Editorial Board of* Pravoye Delo *and Shtekel*).

Due to its unique characteristics, the Internet, as a tool for disseminating information, poses a greater threat to the security of the rights guaranteed by Article 8 of the Convention than the printed press does (*Wgrzynowski and Smolczewski v. Poland* (no. 33846/07), section 98 (16 July 2013). In addition, the Supreme Court said in *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (no. 33014/05, 2011, 63):

> It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.

The Court has been able to uphold limits on the First Amendment's protection of the press because of the Internet's accessibility to information. As explained in the ruling *Mouvement ralien Suisse v. Switzerland* [GC] (no. 16354/06, 13 July 2012), the applicant's website was never restricted or curtailed, hence the government's decision to outlaw a poster campaign did not violate the Convention. The Court's ruling said in para. 75:

[675] Case No. 36769/08, Ashby Donald et al. v. France, Paragraph 34 (January 10, 2013).

> (...) it might perhaps have been disproportionate to ban the association itself or its website on the basis of the above-mentioned factors ... To limit the scope of the impugned restriction to the display of posters in public places was thus a way of ensuring the minimum impairment of the applicant association's rights. The Court reiterates in this connection that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question (...) In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate.

Another important consideration is that, if the contents of a book containing secret information are made public on the Internet, it is no longer reasonable to prohibit the book's sale since the need to protect the material's secrecy is no longer paramount (*France v. Editions Plon*). For the same reason that material is readily available online, the Court found that limits on broadcast media access were necessary. Access to other forms of media, such as the Internet, helped to mitigate a ban on radio and television in the case of *Animal Defenders International v. the United Kingdom* [GC] (no. 48876/08, 119, ECtHR 2013). The Court's statement that "other media remain available to the present petitioner because access to alternative media is crucial to the proportionality of a limitation on access to other potentially beneficial media", is worth noting.

C.1.8 The Internet, Intellectural Property and Access to the Internet

Without a doubt, intellectual property law's goal is to safeguard creative works wherever they may exist (online, in print, digitally, etc.). In the field of new technologies, a work that has been distributed over the Internet, such as a digital book or a digital artwork, is likewise eligible for protection. The ECtHR's precedent on the subject of intellectual property and online freedom, is weak and inadequate. Nonetheless, it is necessary to reflect on this topic and provide a few insights that might help advance our conceptual and practical knowledge of this field's connections to the preservation of human rights.

The issue of access is central to the discussion of human rights in relation to digital media. Internet service providers (ISPs) in the European Union (EU) are required to provide a minimum amount of bandwidth, and in Finland, access to decent broadband is considered a human right. Publicly funded projects at state, county, and city levels provide open, free, and public Wi-Fi connection points in neighborhoods and public spaces. These government-sponsored programs operate on the premise that universal access to the Internet should be provided by all levels of government. So, the argument goes, social media sites should be classified as a matter of public and widespread concern.

A result of these efforts is the expansion of human rights, which are extended not only to those who live in the area but also to *visitors* who go across boundaries in

cyberspace, regardless of their legal status. It is possible that a governmental endeavor to provide free internet access to everybody would spark discussions about individual rights to express their identity and to take part in the democratic process.

When compared to the public nature of the Internet's creation, the gadgets that provide access to the Internet today — computers, cellphones, and tablets — are pricey and heavily commodified.

Moreover, most ISPs and the most prominent social media sites are privately held businesses. Therefore, social media are inevitably modified according to business interests, leading to three major strands of discussion: first, the extent to which private agreements between free individuals can be examined from a human rights approach; second, debates about the processes of production, ownership, and labor as a matter of the right to work, rights in work, and the right to leisure; and third, the question of intellectual property and the conflict between the right to accede to and the right to benefit from ideas.

C.1.9 Access to Information and the Internet under Article 10 ECHR

The freedom of expression is guaranteed under Article 10 of ECHR. Since any restriction imposed on the means substantially affects the right to information, Article 10 also applies to the different ways in which the information is transferred and shared.[676]

Cases in point include *News Verlags GmbH & Co. KG v. Austria*[677], *Autronic AG v. Switzerland*[678] and *De Haes and Gijsels v. Belgium*[679]. The Internet, as a novel and potent means of communication, falls within the ambit of Article 10. The Court has recognized the critical role played by the Internet in expanding people's access to the news and information by virtue of its transparency, archival capacity, and interconnectedness.

[676] *Youth Initiative For Human Rights v. Serbia*, Application No. 48135/06, Judgment 25 June 2013, Final 25/09/2013. This case concerned access to information obtained via electronic surveillance by the Serbian Intelligence Agency. The applicant NGO complained that the intelligence agency's refusal to provide it with the information it had requested – it had requested tobe provided with information on how many people the agency had subjected toelectronic surveillance in 2005 – prevented it from exercising its role as "public watchdog". The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention. It found that the agency's obstinate reluctance to comply with a final and binding order to provide information it had obtained was in defiance of domestic law and was tantamount to being arbitrary. Under Article 46 (binding force and implementation) of the Convention, the Court further held that the most natural way to implement its judgment in this case would be to ensure that the agency provided the applicant NGO with the information it had requested on how many people had been subjected to electronic surveillance in 2005.

[677] Application No. 31457/96, 11 January 2000, Final 11/04/2000.

[678] Application No. 12726/87, 22 May 1990.

[679] Application No. 19983/92 24 February 1997.

The Court has not explicitly recognized that Article 10 guarantees a general right of access to information, for example in *Loiseau v. France*[680]. This is because Article 10 forces the State's negative duty not to interfere with the freedom of individual to accessing and disseminating information. See, for example, *Roche v. the United Kingdom*[681] where the Court reiterated its position that a government may not prevent a citizen from obtaining information that third parties seek to convey to him. However, the Court also made clear that this right could not be read to impose a positive obligation on a State to disseminate information. Therefore, it is the government's principal responsibility to not get in the way of people sharing knowledge with one another.[682]

Despite the fact that rights under Article 10 are protected *regardless of frontiers*, States may restrict information received from abroad only within the confines of the justifications set forth in Article 10 (2).

C.1.10 Conclusion

Since there is still a lot of room for legal gray areas when it comes to the internet and new technologies, due to the fact that they are both areas that are mostly uncontrolled. But it cannot be denied that the Courts around the globe have, on several occasions, upheld the right to access information. This right to *freedom of information*, as articulated in the recent case-law of Ahmet Yldrm, may be exercised by people via the use of the Internet. Consequently, the Convention serves as a crucial and instrumental tool in defending human rights in this field, despite the fact that its ever-evolving legal character might make it appear incomprehensible.

As can be seen, the Courts gives matters involving governmental intervention, such as Internet access limits, careful and serious consideration. This dynamic shifts, however, when it becomes impossible for the website administrator to visit their own website due to a larger blockade of access to Google, as in the aforementioned situation. An instance in point of severe *collateral censorship*, as documented by Ahmet Yldrm, caused by the suspension of Internet connection, the Court ruled that the *rights of Internet users* must be protected, and that it is the responsibility of individual States and their domestic courts to weigh and balance the competing interests at play.

The TechEthos project recently analyzed international and European Union (EU) human rights law in relation to climate engineering, neurotechnologies, and digital extended reality. This included the International Bill of Human Rights, the ECHR, and the

[680] Application No. 46809/99, ECHR 2003-XII.
[681] Application No. 32555/96, 19 October 2005.
[682] For a more in-depth discussion of the Court's reasoning and considerations, see the case of *Cox v. Turkey*, Application No. 2933/03, 31, 20 May 2010.

Charter of Fundamental Rights of the EU (CFREU). Although many of the laws in such legal frameworks do not specifically address climate engineering, they are, nonetheless, likely to be immediately relevant. The report, basically, presents a human rights impact evaluation of the three technology families by identifying the potential for improvements to and interferences with different human rights. It points up several blank spots and ambiguities in the law that may need future legislation or at least more legal explanation.

Social media and online platforms like Facebook, Twitter, and Instagram has the potential to be both liberating and repressive platforms for advancing democracy and human rights. When applied to the circumstances of real-time, international involvement in public discourse, the development of cultural community and the blending of individual diversity, freedom of speech and privacy protection are assets that may coexist. These collaborative online spaces have the potential to topple authoritarian governments. Some see this as evidence for the revolutionary and liberating potential of social media and its ability to spread ideas and put them into practice in the sake of human rights.

The promise of global egalitarianism implicit in globalization's early stages, was accompanied with practices of dominance; they are also present in the rise of social media. The allure of inclusiveness may be hiding a warped view of human rights, though. This means that Article 28 of the UDHR, which states, “Everyone is entitled to a social and international order in which the rights and freedoms set out in this Declaration may be fully realized,” must be taken into account while thinking about the role of social media in today's world.

- **Important points to remember about "Creative Media and New Technologies for human rights"**

When studying "Creative Media and New Technologies for Human Rights," it is crucial for students to keep in mind the following important points:

1. Role of Creative Media: Creative media, including art, films, music, literature, and digital media, plays a significant role in raising awareness, promoting dialogue, and advocating for human rights. Students should recognize the power of creative media in challenging social norms, amplifying marginalized voices, and shaping public opinion.
2. New Technologies and Human Rights: New technologies, such as artificial intelligence (AI), virtual reality (VR), and social media, have both positive and negative implications for human rights. Students should critically examine the impact of these technologies on various human rights issues, including privacy, freedom of expression, surveillance, and access to information.
3. AI and Human Rights: AI technologies, including language models like ChatGPT, have the potential to support human rights efforts, but also raise concerns regarding bias, discrimination, and the ethical use of AI. Students should explore the ethical considerations of AI in relation to human rights, including transparency, accountability, and fairness.
4. Digital Activism and Online Platforms: Online platforms and social media have become important tools for human rights activism and raising awareness. Students should analyze the role of digital activism in promoting human rights, the challenges faced by activists, and the ways in which online platforms can both enable and restrict freedom of expression.
5. Access to Information: New technologies have expanded access to information, enabling individuals to share and access human rights-related content. However, digital divides and restrictions on internet access can limit information flow and hinder the realization of human rights. Students should examine the importance of universal access to the internet and the challenges faced by marginalized communities in accessing online information.
6. Digital Security and Privacy: As technology advances, the protection of digital security and privacy becomes crucial for human rights defenders and individuals at risk. Students should explore the threats to privacy and digital security, such as surveillance, data breaches, and cyberattacks, and the importance of safeguarding these rights in the digital age.
7. Ethical Considerations: When utilizing creative media and new technologies for human rights, students should be mindful of ethical considerations. This

includes obtaining informed consent, respecting the privacy and dignity of individuals portrayed in media, avoiding harmful stereotypes or misrepresentation, and considering the potential impact on marginalized communities.

8. Collaboration and Partnerships: Creative media and new technologies often require collaborative efforts between human rights organizations, artists, technologists, and communities. Students should explore examples of successful collaborations and partnerships that have harnessed the power of creative media and technology for human rights purposes.
9. Digital Literacy and Critical Thinking: As technology continues to evolve, digital literacy and critical thinking skills are crucial for navigating the digital landscape. Students should develop their ability to critically evaluate information, discern credible sources, and understand the potential biases and limitations of digital media.
10. Future Implications: Students should consider the future implications of creative media and new technologies for human rights. This includes exploring emerging technologies, such as augmented reality (AR) and blockchain, and anticipating their potential impact on human rights issues, including accountability, access to justice, and the right to be forgotten.

Engaging with case studies, multimedia content, and ethical discussions will enable students to explore the opportunities and challenges presented by creative media and new technologies in the context of human rights. By fostering a critical understanding, students can contribute to the responsible and inclusive use of technology to advance human rights goals.

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Test your knowledge

Here's a quiz on the topic of technology and human rights:

1. **What is the role of technology in advancing human rights?**

Answer: Technology can contribute to raising awareness, enabling access to information, promoting advocacy, facilitating documentation, enhancing accountability, empowering individuals, and aiding data analysis for human rights purposes.

2. **How can technology be used to raise awareness about human rights issues?**

Answer: Technology, such as social media platforms and online campaigns, can be used to amplify voices, share stories, mobilize support, and spread information about human rights abuses.

3. **Why is privacy and digital security important in the context of human rights?**

Answer: Privacy and digital security are crucial to protecting individuals, activists, and human rights defenders from surveillance, censorship, and cyber attacks, ensuring their safety and enabling the exercise of their rights.

4. **How can technology facilitate the documentation of human rights violations?**

Answer: Technology, including mobile devices with cameras and recording capabilities, allows individuals to capture and share instances of human rights violations in real-time, providing crucial evidence for accountability and advocacy.

5. **What is the potential impact of artificial intelligence (AI) in the field of human rights?**

Answer: AI can aid in analyzing large-scale human rights data, identifying patterns of discrimination, predicting human rights violations, and supporting evidence-based decision-making and targeted interventions.

6. **How can technology empower individuals to exercise their rights?**

Answer: Technology provides platforms for civic engagement, allowing individuals to voice their opinions, participate in public discourse, and hold governments and institutions accountable.

7. **What are some ethical considerations when using technology for human rights purposes?**

Answer: Ethical considerations include ensuring privacy protection, preventing misuse of technology for surveillance or repression, addressing biases in algorithms and AI systems, and promoting responsible and inclusive use of technology.

Documentaries to watch

Here are some documentaries that explore the intersection of new technologies, artificial intelligence (AI), and human rights:

1. *The Social Dilemma* (2020) - This documentary delves into the dark side of social media platforms, examining their impact on privacy, mental health, democracy, and social polarization.
2. *Coded Bias* (2020) - The film investigates the biases embedded in facial recognition technology and AI algorithms, highlighting their implications for civil rights and the potential for discrimination.
3. *Do You Trust This Computer?* (2018) - Narrated by Elon Musk, this documentary explores the potential risks and benefits of AI and its impact on society, addressing concerns about job automation and AI's influence on decision-making.
4. *Terms and Conditions May Apply* (2013) - This documentary examines the privacy policies and terms of service agreements that users typically accept without reading, shedding light on the vast amount of personal data collected by technology companies and its implications for privacy.
5. *The Great Hack* (2019) - The film explores the Cambridge Analytica scandal and its implications for data privacy, electoral manipulation, and the influence of technology companies on democratic processes.
6. *Zero Days* (2016) - Directed by Alex Gibney, this documentary investigates the world of cyber warfare, focusing on the Stuxnet virus and its implications for global security and human rights.
7. *Human Rights, Inc.* (2020) - This documentary examines the role of technology companies in aiding surveillance and censorship by authoritarian regimes, raising questions about corporate responsibility and human rights.

These documentaries provide insights into the ethical, social, and human rights implications of new technologies and AI. They encourage critical thinking and stimulate conversations around the responsible development and deployment of technology. Please note that, availability may vary across different streaming platforms or sources, so be sure to check the respective platforms or websites for access to these documentaries.

Chapter 2 Climate Justice

Abstract

Climate justice emerged as a result of the convergence of human rights and environmental concerns, highlighting the unequal distribution of the negative impacts of climate change among individuals. The rapid expansion of this field underscores the need for climate policies to align with fundamental human rights standards, ensuring that climate justice solutions respect and uphold these rights. A key step towards achieving climate justice is identifying the specific populations that will be most affected by climate change. It is evident that those who are already marginalized and vulnerable will bear the brunt of its consequences.

Human rights education plays a crucial role in fostering awareness, understanding, and action on climate justice. By integrating climate justice into educational curricula, we can empower individuals to recognize the interconnections between environmental issues and human rights, and inspire them to become agents of change. Education is a powerful tool for cultivating a sense of responsibility, promoting sustainable practices, and advocating for climate justice at local, national, and global levels.

By embracing the principles of climate justice and human rights education, we can forge a path towards a more just and sustainable world, where the rights of all individuals are protected, and the impacts of climate change are mitigated for the benefit of present and future generations.

Required Prior Knowledge

Human rights, UNFCCC, ECHR, UN, ICC, Green crimes, Environmental law.

C.2.1 What is Climate Justice?[683]

Climate justice encompasses the principle of equal treatment and fairness for all individuals and communities in the face of climate change and its consequences. It acknowledges that certain groups, particularly marginalized and vulnerable populations, bear a disproportionate burden of the impacts due to limited resources and adaptive capacity. Emphasizing the link between human rights and climate justice, advocates for the adoption of policies and measures that prioritize social justice, uphold human rights principles, and promote equitable sharing of responsibilities and benefits in addressing climate change. By addressing the intersection of human rights and climate change,

[683] Aliozi, Z. (2021). Climate Justice and Human Rights, in a World in Climate Emergency, Global Campus of Human Rights. https://doi.org/10.25330/1232

climate justice seeks to rectify existing inequalities and create a more just and sustainable future for all.

> *"Climate justice is the blueprint for a fair and sustainable future of life on this planet. Climate justice can be understood as a lens for looking at climate change as a social, ethical and legal issue, rather than solely an environmental one. This frame of justice has in its core the protection of human rights and of the most vulnerable in a climate changed world. Climate justice should be seen as a flexible umbrella that is about ensuring that the process of implementing policies to tackle the anthropogenic harms of climate change is mirroring the rule of law and is developed on a rights-based approach. It is a matter of global justice with duties spreading from the international to the regional and national stakeholders. If the United Nations (UN) fails to promote climate justice, then we collectively fail to protect human rights and negligently violate the rights of future generations."*[684]

Climate justice offers a pathway towards a fair and sustainable future for humanity. Viewing climate change through the lens of climate justice highlights its social, ethical, and legal dimensions, in addition to its environmental impact. This framework emphasizes the need to protect human rights, particularly those of the most vulnerable populations, in a world affected by climate change. Achieving climate justice requires understanding the process of implementing policies to address climate change impacts as one that, upholds the rule of law and is based on a rights-based approach. It is the responsibility of actors at all levels, from local to global, to share the burden of addressing climate change according to international law.

The fundamental principle of climate justice recognizes that the negative consequences of climate change are not distributed equally. Those who are already disadvantaged are disproportionately affected by climate change, despite having contributed the least to the crisis. Any effective solution for climate justice must uphold human rights, equality, the rights of future generations, and the rights of the environment. Rather than considering climate change solely as an environmental issue, a climate justice approach acknowledges its ethical, legal, and political dimensions. Academics, attorneys, and activists working towards climate justice connect the impacts of climate change to the principles of environmental justice and fairness. They explore topics such as equality, human rights, collective rights, intergenerational justice, and historical responsibility for carbon emissions as part of the comprehensive concept of climate justice.

[684] Aliozi, Z. (2021). Climate Justice and Human Rights, in a World in Climate Emergency, Global Campus of Human Rights. https://doi.org/10.25330/1232

Climate justice represents a natural progression from the concept of environmental justice, which advocates for the rights of all living beings to exist and be protected from harm. Anderson (2004) argues that climate justice extends this notion to encompass the rights of people and future generations. The climate justice movement mobilizes from grassroots efforts to address the energy and climate crises and protect the rights of all individuals and future generations. Remarkably, there were 894 climate change cases being litigated worldwide in 2017 (UN Environment Programme & Columbia Law School's Sabin Center for Climate Change Law, 2017), and as of November 2020, over 1,650 climate change lawsuits have been filed (source: http://climatecasechart.com/).

Despite the existence of numerous climate change lawsuits, there is a lack of comprehensive research on the implications of climate change litigation within the climate justice project. Further evaluation and legal research are needed to understand the broader effects of these legal proceedings beyond the courtroom.

The urgency to address climate change is underscored by scientific consensus on the severe environmental threat it poses. A policy brief from the past decade, unequivocally states that greenhouse gas emissions need to be drastically reduced to avoid catastrophic consequences of global warming (UNDESA, 2009). Given the long-standing knowledge of these dangers, it is concerning that a climate change denialist movement persists, spreading false information. The limited actions taken by international stakeholders to treat the situation as an emergency and prevent the violation of human rights by climate, change raise important questions about the need for immediate and decisive action in 2021.

C.2.1.1 Why is climate change an injustice?

Climate change is regarded as unjust for several reasons:

1. Disproportionate impact: Climate change disproportionately affects disadvantaged and vulnerable populations who bear the brunt of extreme weather events, rising sea levels, and other consequences. These groups, such as low-income communities, marginalized ethnic groups, and developing countries, often lack the resources to adapt and recover from climate-related disasters. Despite contributing the least to greenhouse gas emissions, they suffer the most from the effects of climate change.

One example of a case highlighting the unequal distribution of climate impacts is Juliana v. United States. In this landmark lawsuit filed in 2015, a group of young people sued the U.S. government for violating their constitutional rights by promoting policies that exacerbate climate change. The case argued that the government's failure to take sufficient action to mitigate climate change disproportionately harms young people who will bear the long-term consequences. Although the case faced legal challenges and was ultimately dismissed, it drew significant attention to the issue of intergenerational justice

and the unequal burdens of climate change (more information: https://www.ourchildrenstrust.org/us/federal-lawsuit/).

2. Intergenerational injustice: Climate change poses a significant threat to future generations, whose lives will be profoundly impacted by the actions taken today. Failure to address climate change undermines the rights and well-being of future populations, violating the principle of intergenerational justice.

One notable case highlighting the intergenerational injustice of climate change is the Urgenda Foundation v. The State of the Netherlands. In this case, the Dutch environmental organization Urgenda sued the Dutch government, arguing that it had a legal obligation to reduce greenhouse gas emissions to protect the rights of current and future generations. In 2019, the Dutch Supreme Court ruled in favor of Urgenda, affirming that the government had a duty to take more ambitious climate action. The case set a significant precedent by recognizing the legal responsibility of governments to protect the rights of future generations in the context of climate change (more information: https://www.urgenda.nl/en/themas/climate-case/).

3. Historical responsibility: The historical emissions of greenhouse gases, primarily from developed nations, have contributed significantly to the accumulation of greenhouse gases in the atmosphere. Consequently, countries and communities that have contributed the least to climate change often experience the most severe impacts, highlighting the injustice of the situation.

Although not a case in the traditional legal sense, the concept of historical responsibility for climate change has been recognized in international climate negotiations. The principle of *common but differentiated responsibilities* acknowledges that developed nations, due to their historical emissions, bear a greater responsibility in addressing climate change. This principle has been a fundamental element of international climate agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC), emphasizing the need for equitable action based on historical contributions.

4. Disruption of human rights: Climate change undermines various human rights, including the rights to life, health, food, water, and housing. The impact of climate change, such as extreme weather events and environmental degradation, can displace populations, exacerbate poverty and inequality, and threaten the ability of individuals and communities to lead secure and dignified lives.

While not a case itself, the recognition of the link between climate change and human rights is reflected in international frameworks and legal instruments. The UN Human Rights Council, for instance, has acknowledged the interdependence between human rights and climate change, emphasizing the need to protect vulnerable groups and ensure their rights are upheld in climate action.

Addressing climate change and pursuing climate justice requires not only reducing greenhouse gas emissions, but also adopting adaptive strategies, supporting vulnerable communities, promoting equitable policies, and ensuring the participation of marginalized groups in decision-making processes. Legal cases and international agreements play a crucial role in shaping the discourse and actions towards achieving climate justice.

Lawmakers, on a global scale, are not dedicating enough resources to studying climate justice, and this is something that has to be addressed and countered. It is fascinating to observe how much more money is put into studies that deny climate change than ones that seek to bring about climate justice.[685] The answer to this riddle may be found by following the money (i.e., researching which industries will be hit most by climate justice) and finding out which groups of people currently control the world's wealth.

The UN Framework Convention on Climate Change (UNFCCC) is essential reading for anybody interested in learning more about climate justice (1992). "Stabilization of greenhouse gas concentrations in the atmosphere at a level that would preclude hazardous human interaction with the climate system" is the stated goal of the UNFCCC in Article 2. It cannot be stressed enough that a rights-based approach to climate change must be the vehicle through which any effort to define climate justice is launched.

Implementing global climate change policy guided by human rights principles, is essential. Some of the features identified by the UN Human Rights Council and the UN might help provide light on what would comprise the basic aspects of a human rights-based strategy. The characteristics of good practice within a rights-based approach, for instance, need the formulation of policies with the overarching goal of realizing human rights. In order to assure that those with duties will fulfill them, it is necessary to first identify the rights-holders and the entitlements to which they are entitled.

All policies, at all stages of this process, should be informed by principles and norms drawn from international human rights legislation, particularly UDHR and the fundamental universal human rights treaties.

C.2.1.2 Linking climate change with human rights

Climate justice is linked[686] with the agenda of human rights and the UN Sustainable Development Goals, sharing the benefits and burdens associated with climate stabilisation, as well as concerns about the impacts of climate change.[687]

[685] Aliozi Z 'Climate Justice: Climate Change and Human Rights' in R Moerland & H Nelen (eds) Denialism and Human Rights (2017) Cambridge: Intersentia Ltd 403

[686] Council of Europe 'Protecting the environment using human rights law', available at https://www.coe.int/en/web/portal/human-rights-environment (last visited 27 April 2022)

[687] Zoi Aliozi, 'Climate Justice: Human Rights and Animal Rights', discussed in the Environmental Crimes Conference 2019. Status: Published in the peer-reviewed Law Journal: 'The Resolution Journal', Jersey Law Commission, 2020.

We know today that, human rights and climate change are linked in numerous ways. Let's look at the three main ways this interconnected linkage blooms:

1. Firstly, climate change has implications for the real satisfaction of the full range of human rights, especially for the most vulnerable people.
2. Secondly, a failure to act and incorporate human rights into climate action can undermine people's rights and activate duties of responsibility.
3. Thirdly, the integration of human rights into climate change policies can improve effectiveness and benefit people and the planet.
4. Using these three pillars, we have all the rationale we need to conduct human rights-based research in the arena of climate change.

Climate change is intricately linked to human rights, as its impacts have far-reaching consequences on individuals and communities, threatening the enjoyment of fundamental rights. Here are some key aspects of the link between climate change and human rights:

1. Right to Life: Climate change exacerbates health risks, extreme weather events, and natural disasters, leading to loss of life. The increasing frequency and intensity of heatwaves, storms, floods, and wildfires directly impact individuals' right to life.
2. Right to Health: Climate change affects public health through various pathways. It contributes to the spread of infectious diseases, disrupts healthcare systems, increases malnutrition and food insecurity, and exposes vulnerable populations to air pollution and heat-related illnesses.
3. Right to Water and Sanitation: Climate change alters rainfall patterns, leading to droughts and water scarcity in some regions while causing increased flooding in others. These changes pose challenges to the access to clean drinking water, sanitation facilities, and hygiene, compromising the right to water and sanitation.
4. Right to Food: Climate change affects agricultural productivity, leading to crop failures, disrupted food systems, and reduced availability and access to nutritious food. This undermines the right to adequate food and exacerbates food insecurity, particularly for vulnerable populations.
5. Right to Housing and Adequate Standard of Living: Rising sea levels, extreme weather events, and displacement caused by climate change, threaten the right to housing and the ability to enjoy an adequate standard of living. Climate-induced migration and displacement place additional strains on already vulnerable communities.
6. Rights of Indigenous Peoples and Local Communities: Indigenous peoples and local communities often have deep connections with and dependency on the environment for their livelihoods, cultural practices, and spiritual well-being.

Climate change disrupts their traditional lifestyles, territories, and cultural heritage, impacting their rights to self-determination, culture and land.

7. Right to Participation and Access to Information: Meaningful participation in decision-making processes related to climate change is essential to ensure that the voices and concerns of affected communities are heard. Access to information about climate change impacts, policies, and measures is crucial for informed decision-making and effective participation.

The recognition of the link between climate change and human rights is reflected in international human rights instruments, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and regional human rights conventions. Furthermore, bodies like the UN Human Rights Council and the Inter-American Commission on Human Rights have acknowledged and addressed the human rights dimensions of climate change.

Efforts to address climate change and promote climate justice should be grounded in the protection and fulfillment of human rights. Integrating human rights considerations into climate policies and actions, is crucial to ensure equitable and just outcomes for all individuals and communities affected by climate change.

The ecological drama that threatens to bring the end of human rights is having the greatest impact on people and communities with inadequate protection for their rights. Many recently coined terms in the fields of environmental or green crimes and human rights are gaining traction in academic circles around the world. Taken from a purely pragmatic perspective, they all have the same goal: to get across the idea that human activities are the primary cause of climate change and that those responsible for the problem should be held accountable (Article 3 of UNFCCC). For this reason, the necessity to achieve climate justice on a worldwide scale necessitates the inclusion of green crimes in climate legislation and the partnership of international criminal law, environmental law, and human rights law. Experts in climate justice need to consider the criminal aspects of climate change, asking tough questions like, “Should the leaders of the developed countries be held legally responsible for the climate emergency our world is experiencing now, given that they have known about the threat of climate change since the 1960s and were alerted by scientists?”

There is no question that the sectors that pollute the most are also the most lucrative ones, and that enterprises that exploit natural resources, conduct green crimes, or abuse animal rights, are flourishing. These are all important points to make in a discussion of climate justice, but to get a sense of the nuances involved in putting these ideas into practice, it is helpful to look at the UN Framework Convention on Climate Change (UNFCCC), where concepts like *intergenerational justice* and *historically differentiated responsibility* have emerged.

The field of human rights provides us with a full and helpful framework of legal processes and a tried and true arsenal of legal weapons that may be used to the field of climate justice. Scientists have produced compelling evidence linking climate change and

human rights, and this argument has recently gained traction. For instance, it is no longer debatable that climate change would have a negative impact on the ability of future generations to fully enjoy their fundamental human rights.[688]

C.2.1.3 Climate justice and the law

Climate justice and the law are closely intertwined, as legal frameworks and mechanisms play a vital role in advancing climate justice.

Here are some key aspects of the relationship between climate justice and the law:

1. Recognition of Rights: Climate justice recognizes that the protection and fulfillment of human rights, including social, economic, and cultural rights, are essential in addressing climate change. The law provides a framework for the recognition and enforcement of these rights, ensuring that individuals and communities affected by climate change can seek legal remedies and hold responsible parties accountable.
2. International Climate Agreements: International agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC), aim to address climate change and promote climate justice. These agreements establish legal obligations for countries to mitigate greenhouse gas emissions, adapt to the impacts of climate change, and provide support to vulnerable countries and communities. They also emphasize the principle of common but differentiated responsibilities, recognizing historical and contextual disparities in responsibility for and vulnerability to climate change.
3. National Climate Laws and Policies: Many countries have enacted climate change laws and policies to guide their actions in mitigating and adapting to climate change. These laws can include targets for greenhouse gas emissions reduction, renewable energy promotion, adaptation strategies, and measures to support vulnerable communities. By incorporating principles of climate justice into national legislation, governments can address the unequal impacts of climate change and ensure equitable outcomes.
4. Litigation for Climate Justice: Legal actions and climate change litigation play a crucial role in advancing climate justice. Individuals, communities, and organizations can use the legal system to challenge governments, corporations, and other actors for their contributions to climate change or inadequate responses. Climate change litigation seeks to protect human rights, hold

[688] Council of Europe 'Human Rights and Climate Change: What Role for the European Convention on Human Rights?' (2021), available at https:// www.coe.int/en/web/portal/-/human-rights-andclimate-change-what-role-for-the-european-convention-on-human-rights- (last visited 10 April 2022)

polluters accountable, and advocate for equitable and just climate policies and actions. Landmark cases, such as Juliana v. United States and Urgenda Foundation v. The State of the Netherlands, have highlighted the intersection of climate change, human rights, and legal remedies.

5. Environmental Justice: Climate justice is closely connected to environmental justice, which seeks to address disproportionate environmental burdens and ensure equal protection and meaningful participation in environmental decision-making. Environmental justice laws and regulations aim to prevent and remedy environmental discrimination, particularly against marginalized communities. By addressing environmental injustices, the law can contribute to more equitable and just climate actions.
6. Compliance and Enforcement: The law provides mechanisms for monitoring compliance with climate agreements and regulations and enforcing legal obligations. International bodies, such as the UNFCCC and its subsidiary bodies, oversee the implementation of international climate commitments. National regulatory agencies and judicial systems play a role in enforcing climate-related laws and regulations and holding non-compliant actors accountable.

Efforts to achieve climate justice require robust legal frameworks, effective enforcement mechanisms, and the integration of equity and fairness principles into climate policies and actions. The law provides a critical foundation for advancing climate justice by recognizing rights, promoting accountability, and guiding decision-making processes at various levels.

The Stockholm conference was referenced by the UN General Assembly in resolution 45/94, which said, “all persons are right to live in an environment sufficient for their health and well-being.” The United Nations urged its member nations to work together to protect a cleaner planet. Nearly half a century later, the links established by these introductory statements have been recreated and expanded in many ways in international legal instruments, as expressed in judgments of human rights agencies and the appropriate caselaw precedent. Our explanation is bolstered by the fact that, the vast majority of these legally useful facts were built on a rights-based approach to the subjects at hand. Following that line of thinking, familiarity with environmental law is essential if we are to ensure the effective realization of internationally recognized human rights.

The UDHR relies heavily on the conservation of the environment as a means of transmission and preservation.

Indeed, most human rights legislation were drafted long before environmental preservation was a hot topic on the international agenda. As an example, the UDHR was drafted after World War II to address the injustices that had arisen as a result of the atrocities of war, which may help to explain why there is no explicit reference to environmental preservation in human rights legislation. Exceptions include the rights to life and health, which are contained in many human rights documents and include some

references to the environment. The International Covenant of Economic, Social, and Cultural Rights (1966), for instance, protects workers' rights to a healthy workplace and the right of minors to avoid hazardous jobs. Article 12 of the Convention on the Rights of the Child guarantees everyone the right to health, which includes the need for States to adopt *appropriate measures* to ensure that their citizens enjoy a clean and safe environment, free of hazards such as pollution and disease.

Human rights complaint processes can only help in restoring insufficient protections for environmental rights "as contrasted to attempts to integrate a right to environment in human rights treaties," as any competent legal thinker would agree (Picolotti & Taillant 2003: 1).

Instead of supporting climate justice measures to avert human rights costs, politicians ultimately appeal to human rights to promote ambiguous action on climate change legislation.

The effects of climate change brought on by human activities violate human rights, making human rights legislation relevant. Since the climate emergency is about suffering, the human rights framework shifts the focus to the damage that people cause to the natural world, and more specific green crimes (Aliozi 2021). The negative consequences of rising temperatures are felt by many groups, but few remedies have been made available to help them. By providing the building blocks for a climate justice legal framework, the human rights regime may help put an end to these wrongs. The climate crisis facing our planet has reached a stage where further postponement of action is no longer an option. Unfortunately, there are not yet globally effective climate change legislation in place. Almost three decades ago, in 1994, the United Nations Framework Convention on Climate Change (UNFCCC) came into effect, marking the beginning and laying out a road map for the activities that need to be done to combat the devastating effects of anthropogenic climate change.

In a scenario where the damage implicated is of unimaginable range, our understandings of the man-made consequences of climate change and the participation of law-making institutions into the climate justice process are muddled.

To achieve climate justice in the future, it is imperative to consider a comprehensive framework that encompasses human rights, green crimes, animal rights, and the rights of nature. Shifting from the traditional anthropocentric perspective of law to an ecocentric vision, is necessary for this endeavor.

The urgency of addressing climate change requires swift action. The human rights regime offers a robust framework that can facilitate accountability, enforce laws, enable individual and collective justice claims, and effectively implement environmental law within the context of climate justice. It is crucial to avoid dominance of discussions on climate change by arguments revolving around environmental law, politics, or commercial interests. Recognizing that humans are responsible for climate change and the harm it inflicts upon others, justice in the realm of climate change necessitates the application of both criminal law and *green criminology*.

Incorporating human rights norms into the ongoing development of climate justice can simplify the identification of vulnerable individuals and enable appropriate protective measures. The current architecture addressing climate change exposes numerous gaps, including the absence of human rights processes. Overcoming these challenges requires comprehensive policy changes on a global scale, encompassing aspects such as data collection, group decision-making, lawmaking, and implementation and enforcement.

The Universal Declaration of Human Rights (Article 28) asserts that, everyone is entitled to a social and international order that facilitates the full realization of their rights and freedoms. Climate change disrupts this progress and undermines the fulfillment of basic human rights.

By integrating human rights principles into the pursuit of climate justice, we can establish a more equitable and sustainable approach that addresses the multidimensional challenges posed by climate change.

Human rights, in essence, act as restraints on the excesses of governments and large enterprises. This is what human rights can bring to the climate justice table, and how they can help us combat, avoid, and mitigate the devastation that climate change will wreak on humanity, the biosphere, and every living thing. As a result, we must hear from those who are concerned about animals' rights and try to incorporate their perspectives into the law (Aliozi 2020).[689]

To call things by their proper names, what we are seeing today is the ultimate violation of the human rights of the most vulnerable people on the planet. Since equity for future generations is a defining legal principle, and since the science is clear that anthropogenic climate change poses an immediate threat to the planet, it is imperative that we recognize unequivocally that this phenomenon will result in the greatest human rights violation in recorded history.

Human rights legislation has been "greened" by the ECtHR during the last 30 years. Damage to the environment and efforts to preserve it have long been recognized as matters of human rights. As legal experts, our priority should be to increase public understanding of international green crimes and to advocate for reforms to existing international criminal law. If the world community does not act swiftly and effectively to combat climate change, human rights will be in jeopardy. This was the case during the difficult days of the COVID-19 epidemic. All parties engaged should treat this climate emergency as if it were a question of life and death.

Human-caused climate change has implications for everyone's right to a comfortable environment, thus it is only natural that this issue would be linked to the Human Rights regime. Human rights discourse uses terminology with a more distinct reference

[689] Zoi Aliozi, 'Climate Justice: Human Rights and Animal Rights', *The Resolution Journal, Jersey Law Commission,* 2020.

foundation and meanings than those used in climate change discussions. Throughout this chapter, the term *human rights* will be used to refer to a systematized collection of claims about the entitlements of all humans. These claims were initially outlined in the United Nations International Bill of Human Rights and are generally seen as having substantial universalist moral authority and legal weight. International law's primary source documents are the International Covenants on Civil and Political Rights (ICCPR) of 1966 and the Economic, Social, and Cultural Rights (ICESCR) of 1966, as the Universal Declaration of Human Rights is not a legally enforceable document. There are other human rights binding agreements at the national, regional, and international levels that supplement the two Treaties, making them legally binding on the vast majority of the world's governments. Soft law, which refers to non-binding resolutions and other texts from transnational organizations like the United Nations General Assembly, provides further support for all of these documents via the established case law of international, regional, and national courts.

For instance, both statutes' opening articles include the line "[i]n no situation may a people be robbed of its own means of sustenance." In places where the climate is changing, this is becoming more relevant. Water, food, medical treatment, a safe place to live, and so on, might all be considered necessities. It is important to keep in mind that it is not necessary to substitute a legal language for a more humanitarian one while discussing rights terminology. However, it assumes and mandates adherence to a set of standards that have been established across continents, elevating those prerequisites for survival to the status of rights for all people. Despite having as part of its mandate the "protection of the climate system for the benefit of present and future generations of humankind," the United Nations Framework Convention on Climate Change (UNFCCC)[690] is not intended to provide Human Rights protection, humanitarian aid, or redress to individuals or communities who have suffered environmental harm. As such, this is the law's biggest flaw. Despite the fact that this rule is not obligatory, it has inspired a variety of ideas, such as intergenerational equality, sustainable development, and the precautionary principle.

The UNFCCC is an agreement amongst States to: "anticipate, prevent or minimize the causes of Climate Change and mitigate its adverse effects". The violations of Human Rights, due to human-made harmful impacts on Climate Change, fall easily into the category of obligations imposed on States as stated in the UNFCCC. This is not a broad misinterpretation but a matter of fact, arising from many current legal cases like the *Inuit* and the *Small Islands States* cases. It is useful to point out that, the increasing interest in the Human Rights dimensions of Climate Change has been ignited mainly by the *Inuit* and

[690] UN General Assembly, *United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189, available at: https://www.refworld.org/docid/3b00f2770.html [accessed 20 November 2021].

the *Small Island States* cases.[691] In their 2005 petition before the Inter-American Commission on Human Rights, the Inuit argued that the effects of Climate Change could be credited to actions and omissions of the U.S. and violated their fundamental Human Rights, namely rights such as: the benefits of culture; property; the preservation of health; life; physical integrity; security; means of subsistence; residence; movement; and inviolability of the home. These rights, it was argued, were protected under several international Human Rights instruments, including the American Declaration of the Rights and Duties of Man. The Commission declined to review the merits of the petition, stating that the "information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."[692]

Although the Inuit petition did not proceed any further, it drew attention to the links between Climate Change and Human Rights and led to a "Hearing of a General Nature" on Human Rights and global warming. The hearing was held on March 1 2007, and included statements from the Chair of the Inuit Circumpolar Conference (ICC) and its lawyers, but not representatives of the U.S. The Commission unfortunately has not taken any further action, but the ICC petition generated considerable debate in the academic literature.

Meanwhile, the Small Island States, and the Maldives in particular, launched a campaign to link Climate Change and Human Rights. Representatives of Small Island Developing States met in November 2007 to adopt the Malé Declaration on the Human Dimension of Global Climate Change, requesting among others, that the UN Human Rights Council organise a discussion on Climate Change and Human Rights. The Council adopted a Resolution tabled by Maldives, entitled Human Rights and Climate Change in March 2008, that requested that the Office of the High Commissioner for Human Rights (OHCHR) conduct a detailed analytical study on the relationship between Climate Change and Human Rights.

Following these developments, the OHCHR published its study on the relationship between Climate Change and Human Rights on January 2009. The study argued that Climate Change threatens the enjoyment of a wide spectrum of Human Rights, including rights to life, health, food, water, housing, and self-determination. It fell short of finding that Climate Change necessarily or categorically *violates* Human Rights but it did accept that States have duties under Human Rights law to address Climate Change. The Human Rights Council decided, in March 2009, to hear a panel debate on the topic and

[691] For more information see http://climatecasechart.com/non-us-case-category/suits-against-governments/

[692] See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Ommissions of the US, http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/ .

encouraged its Special Procedures mandate-holders to consider the implications of Climate Change for Human Rights within their mandates.

In a similar vein, in the Americas, Argentina drafted and tabled a resolution on Human Rights and Climate Change that was adopted by the General Assembly of the Organisation of American States in June 2008. The Resolution instructed the Inter-American Commission on Human Rights to "determine the possible existence of a link between adverse effects of Climate Change and the full enjoyment of Human Rights".

Argentina expressed concern that the inequitable impacts of Climate Change will place an undue strain on vulnerable States that will need to introduce climate policies and measures to ensure that they meet their Human Rights obligations.

The emerging interest in Human Rights in the Climate Change terrain can possibly be credited, to a certain point, to a growing international condemnation of the pace and directions of multilateral diplomacy. But the sluggish progress of international discussions is not in line with the urgency that flows from the adequate, if alarming, scientific information and unequivocal agreement of the scientific community, concerning the role of human activities in producing Climate Change.

Looking at the role of Human Rights politics in international Climate Change discussions, does not reveal simple solutions. Yet, a consideration of certain political issues is deemed necessary. For example, a total of 88 UN Member States supported the Human Rights Council's Consensus Resolution 10/4 (2009), encouraging greater involvement by Human Rights expert bodies in the UNFCCC process.

Co-sponsoring States, particularly those most immediately threatened by Climate Change, typically highlight the importance of Human Rights in stressing the human face and impacts of Climate Change, as part of a legal or moral claim for strengthened international mitigation commitments and adaptation support from wealthier countries and major emitters. It is important to note the role of Mohamed Nasheed, the former president of the Maldives, who has been instrumental in raising international awareness on Climate Change and pushing the international community and the UN towards direct political and legal action.

However, explicit Human Rights concerns have not yet gained any discernible momentum in the Climate Change discussions within the UNFCCC framework. Despite compelling human rights arguments offered by certain States, still, a revised negotiating text for the outcome document for the 15th Conference of the Parties (COP 15) released following the Bonn Climate Change talks in June 2009, contained only two relatively modest explicit Human Rights references. The consequence of a legal symbiosis between Human Rights and the Climate Change context is seen differently by various States. Although there are people who are concerned that protecting human rights may derail the already shaky progress on the Climate Change front, other people do not view this as a good enough justification to ignore the imperatives of fairness and justice. Human rights have also been portrayed as a cause of distrust between governments, with certain developing nations expressing fear that human rights may be used to either impede their progress toward economic and political independence, and prevent their developmen, or

Human Rights may be operating as conditionalities on Climate Change adaptation funds. On the same debate, some developed countries argue that, an official recognition of Human Rights and Climate Change linkages, could be used as a "political weapon against them". These evolving political dynamics form an important part of the context in which the international legal analysis and policy needs to be addressed.

It is true that the UNFCCC imposes responsibilities on each signatory State, but these obligations are reciprocal in nature, as is the case with the vast majority of international treaties. Human rights treaties, on the other hand, place obligations on States primarily with regard to citizens (and in some cases, other residents or applicants), and these obligations are typically reserved for, violated, or challenged first at the national level (and only then at the international Human Rights courts). Without securing Climate Justice, which is impossible without including Human Rights in the UNFCCC process, it is impossible to moderate and combat the human-made consequences of Climate Change.

A beneficial outcome of applying human rights principles to the climate change regime is an increase of the mission and legal reach of the legislation in issue. For instance, according to the *no borders* concept, States are responsible for the actions of private organizations under their jurisdiction, regardless of where in the world such organizations may be physically located. This is of paramount importance in the context of the climate change paradigm, because private sector activities often serve as the origins of damage.

Prior to moving on to the next part of this study, it is important to note the most recent developments that have resulted from the Paris Climate Conference, the 21st Session of the Conference of the Parties (COP21), which took place in December of 2015. Unfortunately, the legally binding agreement that was the result of COP21 did not live up to the hopes of activists, human rights researchers, and other concerned parties. The phrase *human rights* appear just twice in the pact.

Once in the first page, in the proposal by the President, in the draft decision –/CP.21, and a second time where the same statement is being adopted, namely it is stated that:

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Human rights are barely referenced once in the Paris Agreement of 2015. The argument that "something is better than nothing" has its detractors, but when the stakes are so high, it is hard to see how it can be particularly compelling. However, we must recognize that this is a positive development.

There is no hiding the fact that the Human Rights at issue are notoriously difficult to uphold in court. As it is, international law has inadequate application procedures in reality, and climate change exacerbates problems with the enjoyment of some types of human

rights. For instance, social and economic rights; the rights of migrants; and rights protection during conflicts. Putting the rights of future generations at the top of the hierarchy is a utopian notion that makes some sense in principle, but is unrealistic in reality. Since the damages caused by Climate Change cannot be attributed directly in our existing legal systems, which are built upon an allocation of blame framework, even rights with solid safeguards, like the right to life and the right to property, cannot be claimed through their customary application and enforcement methods.

Human rights law has historically placed the main obligation to respond, in case of rights infringement, on the claimant's government; thus, establishing extraterritorial accountability is another difficult challenge. Responsibility for harmful impacts in the most weak and vulnerable States, the restoration of justice, and the preservation of rights, is usually undertaken by another country or an international agency, but in the case of climate change, this becomes a pretty problematic matter. The universality of Human Rights law is not as powerful in practice as it is in theory, in other words, it cannot easily extend accountability across international borders. It is also difficult to pin blame on a specific local entity. Despite the fact that developing nations don't contribute much to global warming via their own carbon emissions, they are nonetheless expected to bear a disproportionate share of its negative impacts.

It is crucial to point out that the notion of *progressive realization* of human rights under international law arose from the inadequacy of so-called *undeveloped* nations to defend the fundamental human rights of their populations due to a lack of resources. However, climate change may cause a steady erosion of that same protection. This means that when it comes to safeguarding people's legal rights, we are really going backwards. According to a very interesting approach, human rights is a project for centuries, and requires strategic steps in order to progressively realize the proposition of “human rights for all, everywhere and forever”. Part of this process, as Manfred Nowak wisely expressed it, is the prevention of Human Rights violations, which can be an important human rights instrument in the future: “Prevention that also means to address the root causes of systematic Human Rights violations.” It is common sense that if a government is genuinely not able to ensure and provide basic Human Rights for its people, any form of accountability for this shortage would be in vain and in a way even unfair, consequently it will certainly be impossible to hold this government liable for conditions it did not generate.

In addition, there are emergency situations, which are linked to regulations derived from sovereignty and national security and are instances that restrict and limit the application of Human Rights legislation. One may make the case that, climate change qualifies as an emergency situation. In such a debate, it is essential to emphasize that international Human Rights legislation, like national Constitutional law, often allows the suspension of Human Rights and “puts them on ice”. Conversely, debate about who has the upper hand in a legal dispute is a known issue; international lawyers are prepared for battle when situations of this kind arise.

The foregoing legal logic is not minor. Understanding the difference between procedural and real justice is essential. Human rights legislation, is binding and enforceable under international law, and the UN Framework Convention on Climate Change and the Global Climate Justice Regime, are both less binding and less enforceable under international law. Similarly, the UNFCCC's policy of making differences between "Annex I" and "non-Annex I" nations runs counter to the universal Human Rights legal approach, which imposes duties to all countries regardless of their specific circumstances. Legislation and policy pertaining to climate change move at a snail's pace, and it is clear that the underlying ideology is characterized by compromise, political double standards, and commercial interests.

It should also be noted that: "it is a common practice of the law-makers in international law, to use broad language, in order to achieve consensus and 'signatures' by States; while the most common side effect of this broad language, is that the law becomes unclear as to what it actually commands."

Since climate change impacts human rights, human rights legislation is relevant and applicable to this issue. The Inuit lawsuit is only one example of how those who are harmed by climate change may finally resort to Human Rights terminology and enforcement mechanisms in an effort to protect themselves. It is a new conundrum in the law, and there isn't enough precedent to use as a road map for how the merging of these two systems should develop. For this reason, it has become obvious that the academic community has an enormous and pressing responsibility to address these issues, generate new knowledge, and contribute to the establishment of a system of Climate Justice.

C.2.2 Green Criminology

Criminal Law, International Law, Human Rights, and their link to Environmental Ethics provide methodological and epistemological direction for the major debate on green criminology αbout the anthropogenic environmental harms. Green criminology has to be introduced as a key theory in this field since it is an integral part of environmental justice (also known as climate justice).[693]

Climate justice, intergenerational equality, the rights of future generations, and the obligation to safeguard the environment, are at the heart of these new legal innovations.

It is likely that illegal harvesting of the world's natural resources has an impact on everything from the food we eat to the quality of the air we breathe. Since it is unquestionable that we must combat environmental crimes for the sake of future generations and the sustainability of our planet, it is urgent that the relevant legal body be

[693] Aliozi Z 'Green Criminology: A rights-based approach' in R Paulose (ed) Green Crimes and International Criminal Law (2021) USA: Vernon 1

developed as soon as possible, given our current understanding of the finite nature of the Earth's natural resources.

According to Interpol, which has been fighting green crimes for the last decade: “Environmental crime has a direct impact on climate change, harms the livelihoods of millions of people, results in forced migration and can trigger the spread of animal-to-human viruses (zoonotic diseases).” This is the perfect time and point to connect green crime with climate justice, since the prosecution of green crimes is a necessary condition for ensuring climate justice. Climate justice is about dealing with environmental harms and damages from a legal and ethical perspective, while ensuring that human rights claims are included, safeguarded and fully protected in this process. Crime and punishment are subjects addressed by the field of law known as criminal law. However, the deterrent effect of criminal punishment is still used in criminal justice reform and lawmaking because it is traditionally perceived by legal experts as the most effective deterrent of crime, even though criminalization of a certain act does not guarantee the decline of criminal activities due to the deterrent effect of punishment. This view is based on the theory that it is the knowledge of possible punishment that acts as a preventive of wrongdoing that causes harm and damages. This provides the foundation for the argument that environmental crimes ought to be made legally actionable in order to discourage and punish those who commit them. The morals and understanding of good and evil in society are affected by this procedure. As a product of human ingenuity, the law seeks to ensure society's security by limiting our exposure to risks posed by other individuals. The anthropocentrism of law (or, to be more accurate, *anthropo-nomo*-centrism) is shown by this oversimplified view of the law, which gives priority to the *anthropo* (Greek for *human*) and makes the individual the focus of attention and the object of rights and privileges. Given this, it is easy to see why the international legal community and the United Nations haven't been able to come to an agreement, that's enforceable in a court of law, based on the facts. In a perfect world, there would be a dedicated environmental court that could rule on complex legal issues, provide de facto protection for the planet, work toward a more equitable climate, and ensure that those responsible for environmental damage, or other forms of *green crime*, were punished accordingly. By using a critical legal study's lens to green criminology, this rights-based approach will expose the reader to the primary disputes in this area of criminal studies and will explain the applicable international law.

C.2.2.1 Green Crimes

Pollution, ecological degradation, poaching, and widespread effects like human climate change and species extinction all qualify as examples of *green crimes*, which may have an impact on communities throughout the world. The many species, not just people, not just humans and non-human animals, but the environment itself, are active victims of this particular kind of crime. There are a lot of intriguing open topics surrounding the victimology of eco-crimes. The term *green crime* refers to any kind of criminal activity that

has negative effects on the natural world. Air and water pollution, deforestation, species extinction and the improper disposal of hazardous waste, are all examples of environmental crimes that may be occurring in your area and that you may have heard about in the news. Animal cruelty and abuse, wild animal trafficking, indiscriminate logging, improper disposal of electronic waste, fining, dumping in rivers and aquifers, smuggling of ozone-depleting substances (ODS), illegal, unregulated, and unreported fishing, and illegal logging and trade in timber are among the most common environmental crimes.[694]

Green crime is defined as "an act that is destructive to the environment and that has been criminalized by statute." Environmental crimes cover acts that violate national or international law and cause significant harm or risk to the environment and human health. This definitional approach was provided by the European Commission who adopted a proposal for a directive aiming to ensure the protection of the environment through criminal law.

Other attempts, worthy of mentioning, to define environmental crimes include Europol's definition of environmental crimes, which states that:

> *"Environmental crime covers the gamut of activities that breach environmental legislation and cause significant harm or risk to the environment, human health, or both."*

A wider viewpoint is presented by Interpol's definition of environmental crimes, which opens the frame from the single criminal act of the individual offender to the real transnational dimensions of this category of crimes. Interpol's definition of environmental crimes concentrates on the fact that: "[c]riminal exploitation of the world's natural resources affects our everyday lives; from the food we eat to the air we breathe." Interpol emphasizes that all forms of environmental crime are organized and global in nature, and necessarily require an equally organized and global response. Interpol's view of environmental crime focuses on the essential fact that green crime is no different to traditional organized crime. "The same routes used to smuggle environmentally sensitive commodities across countries and continents are used to traffic people, weapons and drugs, frequently occurring hand in hand with passport fraud, corruption, money laundering and murder." On the same train of thought is the United Nations Interregional Crime and Justice Research Institute who considers that environmental crime is strongly "linked with other forms of crime, and is a serious and growing danger for development, global stability and international security."

Green crime refers to a violation of environmental laws that were created to protect the environment. Generally speaking, green crimes refer to all illegal acts that can be

[694] Anderson E 'Animal Rights and the Values of Nonhuman Life' in CR Sunstein and MC Nussbaum (eds) Animal Rights: Current Debates and New Directions (2004) Oxford: Oxford University Press chapter 13.

constituted as a crime and that directly cause environmental harm, while it is noteworthy that they are also referred to as “crimes against the environment”. In theory, all wrongdoings in violation of environmental laws could classify as green crimes, however, international bodies such as the UN Interregional Crime and Justice Research Institute, G8, Interpol, EU, and UN Environment Programme have recognized some particular offences that derive from the environmental crime classification. These well recognized green crimes include activities like the dumping of industrial wastes into water bodies, illicit trade in hazardous waste in contravention of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal. Violation of regional, national, and international fishery laws. Contravening the Convention on International Trade in Endangered Species of Fauna and Flora by engaging in commercial activity involving endangered species (CITES). Illegal logging and trafficking in wood in violation of wildlife regulations; smuggling of Ozone-depleting chemicals (ODS) in defiance of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Beyond the criminal damage and harm to the environment generated by human activities, what do all of these human-inflicted damages have in common? All of these wrongdoings have penalties under the law since they are considered criminal. The first step in making environmental wrongdoing a penal offense is for it to be recognized as such, established in law, and prohibited. There then arises the obvious issue of what happens if a destructive action towards the environment is not explicitly forbidden by law; can it not be prosecuted and punished in the same way as any other unlawful criminal act? Things aren't always black and white in the legal system; occasionally they're green, too. For the purposes of this introduction to green crimes, it is helpful to consider that the lawmaking power of our organized societies does not stop in the parliament, or the court of law, because society and its citizens also play a role in affecting the lawmaking process in pushing for positive legal change, for example, by morally condemning offensive wrongdoings that harm our ecosystems, and by using all the methods and tools that environmental advocacies have at their disposal.

Take for example the very recent case of the criminalization upgrade that the Greek law 4039/2012 about Animal Cruelty has received[695]. Two incidences of animal cruelty in Greece in 2020 are of particular importance for our purposes. Since these two heinous instances of animal cruelty, “Greece moved to make Animal Cruelty a Felony”. The government took the initiative and made it a top priority to strengthen penalties for animal cruelty after a string of tragic incidents of animal mistreatment were perpetrated by Greek residents. There is a common sense in the society that animals have less value

[695] Law number 4039/2012 (Government Gazette A 15) – 'For home pets and stray pets and to protect animals from exploitation or use for profit'. See: https://www.digihome.eu/law-number-40392012-government-gazette-a-15-for-home-pets-and-stray-pets-and-to-protect-animals-from-exploitation-or-use-for-profit/ (Accessed 16 March 2022).

than human life, and so it is morally tolerable to do with them as you wish if you are the owner; this is exemplified by the case of the dog which was brutally tortured and hung in front of the house where it was living, and the neighbors who turned a blind eye to its cries and suffering. The criminalization of specific behaviors may transform the moral norms of a society to reflect the legal restrictions, in much the same way as the conventions of a community become the law of a nation. This case demonstrates, very eloquently, the interconnectedness and interdependency of law and society. To illustrate this point, consider another pervasive green crime being done throughout Greece practically daily: the poisoning of thousands of stray animals in the country's urban areas. As a result of societal tolerance, green crimes continue to be perpetrated around the nation and throughout the year. However, only in recent years have we seen instances progressing to the level where sentences and punishment for the wrongdoers have been handed down. To clarify, every animal that travels on the asphalt streets of our structured society, faces the constant risk of ingesting poison that has been purposely put there to kill the stray animals, which are many on the streets of Greece and form hazardous packs. For years, many criminals have gone unpunished for committing green crimes by preying on defenseless animals that happen to call a particular area of the world, *home*. This is because the law was not as strong as to enforce these rules, law enforcement is not trained to enforce these regulations, and the justice system lacks the resources to prioritize these prosecutions. The widespread attention paid to these animal abuse cases in Greece in 2020, was thanks to social media and the subsequent mobilization by animal rights groups across the country who forced the government to take action to punish the perpetrators, ensure that the law was enforced, and restore justice as an example to the rest of society. However, a short time later in another region of Greece, a guy assaulted a dog with a knife and almost killed it. As with the previous outrage-inducing crime of animal abuse, the concerted efforts of civil society and animal rights organizations, were instrumental in convincing the relevant Ministry of Greece to draft the necessary bill and legal supplements to swiftly and efficiently upgrade the law, in such a way, as to add severity in the punishment and sentencing stages of the criminal procedure to animal cruelty and abuse. The morality of a community may be seen reflected in its legal code, as seen above. This is why the responsibility for preserving our world and combating climate change rests with civil society, as well as with individuals. Multiple opportunities, for humanity as a whole to create a more just and equitable society by enshrining environmental protection in international law, have been missed. As was previously said, *green crimes* are defined as violations of environmental law. It should come as no surprise that the deterrent impact of the penalty and the fact that the environment as a whole becomes a legal person entitled to legal protection, are fundamental tenets of criminal law theory and practice. Crimes against the environment, or *green crimes*, play a significant role in achieving climate justice and establishing standards that are fair and reasonable for how human societies interact with the natural world. In a same vein, we must highlight the reality that effective legislation protecting human rights, animal rights, the rights of environment, the rule of law and justice, are essential to achieving climate justice. Numerous eco-crimes are being perpetrated without ever being brought to justice. There

are numbers of untold crimes that are never recorded and victims of human injustice who never get justice. To be clear, the term *green crime* now only applies to transgressions that are expressly prohibited by statute; in other words, a conduct that is not specifically outlawed by statute cannot be considered a *green crime*. Green criminology's job is to do the legal analysis that will lead to new regulations and a longer list of environmental offenses. The primary issue with green criminology is the focus on environmental damage and criminal activity. This straightforward definition helps in the theoretical comprehension of such offenses, yet there are several problems with this idea that become apparent upon closer inspection. A real constitutional protection of the rights of animals or the protection of the environment would, for instance, make it impossible for the vast majority of human activity related to agriculture, livestock, or any other form of profitable businesses to make profit by using the planet's resources, or by using animals. In conclusion, *green criminologists* are experts in the field of investigating environmental crimes.

According to Interpol, “Criminal exploitation of the world’s natural resources affects our everyday lives, from the food we eat to the air we breathe.” For the sake of this introduction, the terms *green crimes* and *environmental crimes*, shall be used interchangeably to refer to and identify the same kind of crimes and injuries to the environment. It is important to note, however, that not every wrongdoing fits the definition of a crime under criminal law theory. Proving the *actus reus* and *mens rea* of a crime in a court of law is essential, as are other components like causation, concurrence, injury, and attendant circumstances.

As the name implies, green crimes are those that are codified in criminal law; if an act is not illegal, no court can hear a case, and if criminal justice is unable to name the charge and activate all the legal and procedural tools available in criminal hearings, then there is no way to enforce legal claims or provide robust legal protection.

In order to properly examine the law, a reliable legal methodological framework and set of standards is required. This begs the question, *green* or not, of why this area of research was given that label. One of the most fundamental issues that requires resolving, is the ambiguity around the definition of the color green. This use of *green* is meant to be inclusive of not just humans and other primates, but also of plants and their ecosystems. The term *green*, in the field of criminology, refers to wrongdoings against non-human elements of the environment, rather than to specific individuals. Crimes that have a negative impact on the natural world are sometimes called *green crimes* (or *green* offenses). Transnational environmental crimes are a multibillion dollar industry, so it is no surprise that the international criminal justice system has made it a top priority to shut it down.

Green criminology examines environmental crimes from a social perspective, asking who commits them, what drives them, the consequences of their acts, and how to stop them. It is the study of how laws are created, violated, and upheld in everyday life.

Criminology[696] is about as self-explanatory and descriptive as names go. The scientific community, the legal system, and, of course, politicians all employ language as a code when formulating laws, therefore, language is an essential component of law and a powerful instrument in its hands.

Despite being a relatively new term, criminology borrows from and adds to a long history of thought and discussion on crime and punishment. In ancient Greece, philosophers pondered ethical questions like crime and punishment. According to Aristotle, the response of a society to crime may be either preventive or repressive. According to Aristotle's Nicomachean Ethics, criminal behavior arises from a combination of free choice and selfish motivation. Given this, he advocated for the elimination of criminal liability for juveniles, the mentally ill, the ignorant, and people under the influence of ecstasy. Aristotle dealt with what we call today *mens rea* and stated that if there is no malice aforethought or immoral calculated intentions to harm and commit the crime, then the perpetrator should not be held a criminal. At this point it will be useful to consider Plato's (429–347 B.C.) analysis of the basis of law which argued that what is fundamental and essential, is the prevailing social morality rather than the laws of the gods. Therefore, approaching crime from a sociological vantage point, is a philosophically sound and empirically successful strategy. Understanding crime from a sociological perspective is at the heart of green criminology, and the bodies of work produced by these great thinkers provide the best possible illustration of the extensive intellectual tradition that paved the way for the development of green criminology and continues to do so, to this day.

To put it simply, green criminology is the study of environmental crimes and is an interdisciplinary branch of law that is fundamental to the worldwide criminal justice initiative. This article will provide a brief overview of green criminology, examining the current legal definition of green crimes and evaluating their usefulness for criminal law in order to provide a window into the heart of the matter at hand. This article aims to introduce the reader to this emerging field of study and, by doing so, to highlight the flaws in the international criminal justice effort from the perspective of critical legal studies. This chapter was crafted using a hybrid of legal and philosophical research techniques, with legal analysis working in tandem with philosophical inquiry.

As stated above, *green criminology* is a subfield of the discipline that focuses on environmental wrongdoing and crime, including environmental law and policy, corporate wrongdoing of the environment, environmental justice from a criminological standpoint, and Climate Justice. At this juncture, it is critical to emphasize that green crimes are a vital aspect of Climate Justice and that their place in international criminal justice has to be better defined, highlighted, and acknowledged. This chapter revisits the claim that green criminology, as an interdisciplinary field, lacks a distinctive theoretical framework, and in

[696] See: https://www.britannica.com/science/criminology (Accessed 7 February 2022).

doing so, attempts to provide a new evaluation of that claim's plausibility, relevance, and usefulness. The purpose of this chapter is to investigate whether or not there are existing international crimes that are being violated and are being disregarded in the environmental sphere, and if so, whether or not we need to broaden the scope of international criminal law to include environmental crimes.

This realization may provide further support for the need to advance green criminology and provide room for methodical legal work in evaluating and analyzing these environmental crimes using the scientific methodologies of criminology.

C.2.2.2 International Law

As a worldwide problem, green criminality necessitates a worldwide solution. As an organized *industry* functioning within transnational organized criminal networks committing environmental crimes, it is estimated to be worth up to billions a year with wildlife crime coming shorty after illicit activities like illegal drugs and human and weapons trafficking which are traditionally the most profitable criminal activities.

For example, take a look at these numbers to understand the size of the "green crime" organized industry: "wildlife (estimated annual value: USD 7.8 to 10 billion); timber (estimated annual value: USD 7 billion); fish (estimated annual value: USD 4.2 to 9.5 billion)." Wildlife crime is second only to the trafficking of illegal narcotics, people, and weapons in terms of profits for criminal organizations.

Look at these figures to get a sense of the scope of the *green crime* underground economy: "the exploitation of natural resources by criminal networks, often in conflict areas, poses a threat to peace and security."[697]

The European Union included environmental crime as a predicate offence under the 6th EU Anti-Money Laundering Directive, while the new Financial Action Task Force (FATF) priorities for 2020 are focused on the illegal wildlife trade. While there has been a greater emphasis on managing green crime, the penalties and punishments directed at this are much less than those tied to anti-money laundering and terrorism. The damage produced by these crimes, the violation of human rights and the danger they constitute for future generations, need a reevaluation of the scope of criminal law and a reevaluation of the current judicial and implementation regimes.

The prosecution of environmental crimes demands a strong and impartial court system. This safeguards the rights of all parties concerned and guarantees that offenders face the consequences for their conduct. There are five main types of legal reactions to environmental crimes. There are five major categories under which the internationally recognized, forbidden, and criminally punishable *green crimes* fall. Of course, the international criminal justice system does not cover every act that meets the criteria for

[697] See: https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/environmental-crime (Accessed 23 July 2022).

being labeled a *green crime*, but in most countries, there are laws in place to pursue such offenses and wrongdoings. However, the scale of transnational *cartels* involved in organized green crime is calling for more attention from the law enforcement community.

The following *green crimes* have been well recognized by bodies such as the G8, Interpol, EU, UN Environment programme and the UN Interregional Crime and Justice Research Institute:

1. Illegal trade of wildlife.
2. Illegal trade in ozone-depleting substances (ODS).
3. Dumping and illegal transport of various kinds of hazardous waste.
4. Illegal, unregulated and unreported (IUU) fishing.
5. Illegal logging.

It is impossible to overstate the importance of international agreements between governments, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[698], to the overall climate justice initiative. The Convention on International Trade in Endangered Species (CITES) is an international agreement between governments; as such, its enforceability depends on a number of factors, such as the existence of judicial procedures, tools, and mechanisms to support in eliminating, preventing, prohibiting, and punishing such crimes. Its goal is to protect endangered species from extinction caused by illegal trafficking in wild animals and plants across the world. To safeguard endangered species by limiting commerce, the international community has found the CITES Convention to be an invaluable instrument. It can be seen that the laws and vocabulary used in the field of green crimes are more closely linked to trade offenses and the very lucrative international organized crime, which also depends on the needs of the market. While these considerations are important when conducting a sociological analysis of green-related criminal activities, they are insufficient for use as a legal definition of the phenomenon, as a whole, because they restrict the reach of the law to certain offenses while ignoring or hiding others that need to be addressed if green crime is to be prevented from expanding. According to the relevant research conducted by the United Nations, Interpol, and the European Union, as well as by examining the relevant green crimes caselaw and international legal rules pertaining this area of criminal conduct, the crimes that enjoy complete and strong protection from the criminal justice system are primarily connected to the transnational organized crime. It seems that in our capitalist environment, the most successful campaigns for law reform have occurred when major economic interests are at stake. The pleadings of legal experts and activists for the prevention of such injuries and criminal wrongdoings have been less successful than the

[698] Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3rd, 1973, 993 U.N.T.S. 243.

influence of the political lack of will and the massive economic interests involved. This might help shed light on why particular eco-crimes are singled out for legal prohibition and punishment. According to recent climate change conferences, the most lucrative industries are those that deal with waste management, pollution crimes, emission levels, and other forms of mass worldwide crime. Despite the fact that the United Nations has often failed to achieve even the most fundamental of its stated aims, partly because of its vulnerability to external political influences, the organization's efforts should not be underestimated. The United Nations system's shortcomings in restoring criminal justice are simple to criticize, but the complementary function of all these climate initiatives reflects back on the lawmaking process of criminal law and informs the continued evolution of criminal justice. It is fair to acknowledge that climate change, environmental protection, and climate justice remain a flaming topic of deep legal, philosophical, political, and public debates. However, it is undeniable that environmental concerns belong at the top of every government's agenda. This is why the field of environmental law is often regarded as the most dynamic in the history of international law. Greening international law has also given birth to a thriving area of judicial systems, thanks to the proliferation of environmental accords and initiatives. Progress in enforcing punishments for environmental crimes may be directly attributed to the efforts of the organized civil society as well as the legal, political, and philosophical advancements on these concerns. It can be seen that many courts are improving their procedures for handling *green* offences. For instance, consider Spain's Special Prosecutor: To combat green crimes, Spain has one of the world's few specialized police units, the Servicio de Protección de la Naturaleza. The Spanish Guardia Civil, which includes SEPRONA, is responsible for combatting a variety of crimes and is primarily a military police agency. But proper administration is essential for a functioning justice system. The establishment of India's National Green Tribunal is another relevant case study for this talk. The Indian Judiciary has long advocated for the creation of environmental law courts. Dedicated environmental courts were established when the National Green Tribunal Act was approved in 2010. The Indian judiciary had a major hand in forming this law, and its authors made sure to take into account the priorities that had been raised by members of the bench and bar.

Another instance is Brazil's Court of Environment and Agrarian Issues in the State of Amazonas. This Court is representative of environmentally focused judicial systems that are mostly autonomous, and it offers one of the most comprehensive and forward-thinking palettes of remedies for environmental offences. A “night school for environmental law offenders,” which was awarded Brazil's 2013 Prize of National Quality in the Judiciary, is a novel component of these remedies.

Law enforcement authorities should treat environmental crimes as though they were a distinct and unique kind of criminal activity. It is not an easy task to ensure this aspect of green crimes is reflected in the penalty and sentence phases, given the enormity of the damages caused, the impact of the offense and the impossibility of repair. The damage caused by green crimes may be so serious and far-reaching that it sets off a

domino effect of more environmental destruction, which in turn threatens the health of people, animals, and the world as a whole. The harm and impact of the crime on victims, such as how a hate crime can affect a whole community or how a green crime can contribute to the destruction of our planet and climate, but in reality, these crimes affect and have an impact on the whole humanity and violate the rights of future generations. Proponents of this position, for instance, have argued that climate change should be categorized as a global crime.

In a similar vein, a legislation criminalizing ecocide would be an important step toward ending environmental degradation and climate change and safeguarding the rights of future generations. The term *ecocide* refers to the intentional destruction of ecosystems, which meets all the criteria for being considered the greatest crime against people and environment. Although the United Nations and other international organizations have not officially acknowledged this crime, it is important to highlight the ways in which the law remains mute when there is a lack of political will to secure justice at all costs.

C.2.2.3 Criminal Law

In order to overcome difficulties in defining criminal behavior in the field of environmental law, the *mens rea* factor is essential. The existence of *mens rea* determines whether or not the action in question is morally reprehensible. In a criminal prosecution, the extent to which the defendant intended to cause or knew that the green crime violation would cause or create the danger of harm, is important. A criminal penalty cannot be imposed just on the basis of damage being caused; guilty *mens rea* must also be present. For an act to be considered a crime under the principle of criminal law, it must be shown that the actor acted with the specific purpose to damage the environment.

At this stage, it is important to review the fundamentals of criminal law in order to identify the obstacles that prevent the green crime regime from providing effective and comprehensive legal protection for the environment. There are many who think that the only purpose of criminal law is to ensure that people get what they deserve when they are convicted, and these people need to be, AKA the punitive view. Other theorists tend to support the curial view, justifying the calling for exemplar of suspected offenders to account in criminal courts. This view puts the criminal trial at the center, not just of criminal proceedings, but criminal law as a whole. The view that conceives of criminal law as an instrument of the community—focuses on the ways available for ensuring that the community gets what it is owed from wrongdoers; is called *the communitarian view*. When compared to other areas of law, criminal law and theory are much ahead of the pack. A legal scholar can find numerous bodies of law dealing with judging the action and intention of an offender, weighing that against the harm, wrongdoing, and damage done to a victim, and restoring and repairing justice, because every legal system in the world and every organized society in history has had some sort of penal system in place. As was

said at the outset of this chapter, the term *crime* itself comes from a Latin word that means to judge or to commit an offense.

Incorporating environmental or *green* crimes into the criminal justice system and theory, and creating supplementary tools to improve both their practical application and theoretical foundations through the growth of green criminology, is an example of the law's positive evolution as a living organism. To defend criminal law's efficacy and influence in upholding justice, it is vital to note that it emerges out of a mutually reinforcing connection with society morality, and as such, it owes something to fields as diverse as politics, sociology, and philosophy, not simply criminal law. As an example, the imperfectionist perspective considers how criminal law facilitates responsibilities, forms the moral compass of a community, and encourages the avoidance of wrongdoings of common interest. However, this perspective acknowledges that these responsibilities may be squared in a more punishing fashion than they otherwise would be, if criminal law, for instance, did not take interest in them. According to this perspective, criminal law is distinctive, not because of the function it serves, but because of the manner in which it does so, the modus by which it fulfills utility shared with other bodies of law or sciences. There are others within the legal community who go elsewhere for answers concerning what makes criminal law so special. What makes criminal law unique is that the gravest wrongdoings are explicitly forbidden, criminalized, condemned, and punished. This significant role is mainly associated with criminal punishment.

However, the preventive perspective holds that deterring criminal behavior is the only purpose of criminal law. The punitive viewpoint, in a nutshell, argues that the purpose of criminal law is to ensure that appropriate punishment is meted out to those who break the law. While others who hold the preventive perspective contend that criminal law's worth lies in its ability to forestall criminal wrongdoing. However, none of these perspectives helps us understand and determine the value of doing each duty. In this way, neither the punitive nor the preventative perspective provides any compelling evidence for the usefulness of their respective approaches to crime control. This void in characterization may be filled by a comprehensive defense of criminal law. Even if a newly created legal word, born out of language and law, fills an unjustifiable vacuum in criminal justice and fulfills the objective of fairness and justice, its inclusion still has to be explained in the legal science.

The term *green crime* is used to characterize wrongdoings that have been there for as long as humans have inhabited Earth. Perhaps this is a brand-new legal phrase, but every sound legal mind, “will know them when they see them”. Criminology is the theoretical foundation for criminal justice. Criminal justice, in contrast to criminology, is the study of society's reaction to criminal activity. Police and detectives, for instance, play critical roles in the administration of justice. No additional reason or evidence is needed for the inextricable connection between criminology and criminal law. Green criminology, or the study of environmental crimes, is a relatively new field of study and phrase, yet it depicts the longest unrecorded kind of crime in human history that has gone unpunished

and into the domain of invisible harm crimes aka green or environmental crimes. Scholars argue that "even if something is criminalized, powerful actors are able to keep these crimes and harms hidden. They propose there are seven features that contribute to the invisibility of crimes – they are: no knowledge, no statistics, no theory, no research, no control, no politics, and no panic." Supporting and encouraging the growth of green criminology, as we move toward a preventative criminal law theory concerning green crimes, is undeniably the best medication for restoring justice in this instance.

In this context, *green crimes*refer to illegal acts that cause damage to the environment and potentially endanger human lives. Investigating the *actus reus* and the problematic *mens rea* of the crimes in issue and evaluating the epistemological validity of the theoretical prerequisites for defining a crime, is an important and essential legal practice. When seen through the lens of criminology, the significance of these concerns becomes readily apparent, which is why they merit investigation within the field of green criminology. The establishment of a permanent international criminal court for environmental crimes would be one method for the law to partially meet these issues and govern these ambiguous regions. In order to determine whether or not a certain incident constitutes a green crime, a specialized court with access to the appropriate advisory bodies of interdisciplinary experts is required. The International Court for the Environment is a welcome addition to this net of international jurisdictional institutions to replace the present void, as David Krott argues in a later chapter of this book. Also, in September of 2016, the International Criminal Court said that it will begin prosecuting governments and people for environmental crimes. According to the Case Selection Criteria announced in Policy Paper on Case Selection and Prioritisation by ICC on 15 September 2016, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, "*inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land".

When green criminologists say *environment*, they're referring to the whole ecosystem and all of the species found within it, therefore it is clear that this is the central tenet of green criminology. Outer space may not be a habitable environment, but it is part of our ecosystem, and humans are causing a number of ecological related harms to outer space, including pollution crimes, emissions, and waste dumping, to name a few. Therefore, I propose that we leave open the question of what is included in the environment. There is a heated discussion about what actions should be criminalized in this field; there are also many questions regarding the nature of particular environmental harms, and there are methodological issues with research into and evaluation of the legal frameworks that uphold environmental regulations.

C. 2.3 Human rights

We enter the realm of climate justice when we begin to examine green crimes via lenses such as equality, human rights, collective rights, intergenerational fairness, and historical responsibility for climate change: "A fundamental proposition of climate justice is that those who are least responsible for the anthropogenic climate change suffer its gravest consequences, with animals being the less fortunate in this case, since even in the climate justice terrain their suffering is not efficiently acknowledged to date."

Human rights provide the best conceivable arguments for driving good change in the legal domain by revealing what is at stake in these green crime instances. Exploitation of natural resources is a key cause of human rights violations, and the human rights cases pertinent to green criminology and green crimes provide crucial case studies illustrating this. Some of the immediate effects of industries like oil extraction, logging, and industrial agriculture include land grabs, the destruction and contamination of lands and water crucial to Indigenous and other vulnerable populations, and a rise in conflicts between these groups.

Generally speaking, green criminologists divide environmental wrongdoings into two broad categories: (a) *anthropocentric*, in which the human (anthtopo is Greek for *human*) is the focal point of the classification system and all crimes committed are intended to cause human harm; or (b) *ecocentric*, in which the environment is considered secondary to the harm done to humans. Pollution, for instance, is an issue since it endangers human health and infringes many rights, while climate change is problematic because it threatens current and future generations. Second, ecocentric green crimes are those motivated by concerns for environmental ethics and climate justice. Injury to any aspect of the environment is seen by green criminologists as harm to the whole, hence this category of green crimes makes no distinction between people, non-human animals, and the rest of the ecosystem. Therefore, animal cruelty and deforestation are nonetheless crimes against the environment, whether or not they directly affect humans. If international criminal law acknowledged ecocide as a green crime, it would fall under this latter category as well.

Human rights legislation was mostly drafted before environmental conservation was a significant international priority. The lack of language protecting the environment in early iterations of human rights law may be explained, for example, by the fact that the Universal Declaration of Human Rights was adopted in 1948, making it a product of the aftermath of World War II and dealing with the known injustices which resulted from the barbarities of war. The most glaring exclusions may be seen in the Covenants of 1976, particularly the rights to life and health, both of which make passing allusions to environmental protection. State Parties are obligated to enhance environmental and industrial hygiene and to take measures to prevent, treat, and control epidemics and other illnesses in accordance with Article 12 of the International Covenant on Economic, Social, and Cultural Rights. This piece shows how human rights and environmental safety are intertwined, and how we need to take legal action to defend human rights as they are progressively realized.

To go forward, it is important to keep in mind that human rights and science are rapidly rising to prominence as the primary players in climate change litigation. The worldwide trends in climate change litigation continue to evolve, which has the practical impact of reinforcing the link between climate change and human rights under the overarching banner of climate justice.

There is also an increase in the number of important recent climate justice cases, against governments and/or private entities, which have employed rights-based arguments, marking a *rights turn* in climate change litigation. For example, *Ashgar Leghari v. Federation of Pakistan,* was the first case where a human rights basis for litigation on climate change was accepted, notwithstanding the obstacles presented by the problematic causality, and extra-territoriality. In this 2015 case, a Pakistani court produced a ground-breaking decision by accepting claims that it was the government's failure to address climate change that caused the violations of the claimant's rights.

The term *climate justice* was originally defined as actual legal action on climate change; it is interesting to see the numbers of the relevant caselaw, which, according to a 2017 UN report, there were, at the time the report was published: 894 identified ongoing legal actions, globally.

Courts have given human rights as a foundation for litigation on climate change growing weight in caselaw, notwithstanding the difficulties that come from the necessity to show causation. These developments in demonstrating a causal relationship between a specific source of emissions and climate-related effects of environmental crimes, are also shown by the new cases that current publications are investigating. It is clear that lawsuits related to climate change are expanding to new regions as they adapt to the needs of the present. The bulk of current lawsuits are being brought in the Americas, however, others are being brought in Asia, the Pacific, and Europe.

In a recent climate case, the Irish Supreme Court found that the Irish government's climate plan fell short and heard a case where terms and concepts like derived rights, constitutional rights, the right to life, the to health and the right to bodily integrity, were discussed. This case serves as a reminder that failure on climate commitments is actionable in a court of law and illustrates the interconnected roles of political agreements with law. In this historic law case, *Friends of the Irish Environment v. The Government of Ireland et al.*, the applicants claimed that they are: "entitled to rely on rights, said to be guaranteed both under the Constitution and under the ECHR, to put forward its claim that the Plan fails to vindicate the rights concerned such that the adoption of the Plan is unlawful". Regarding the Constitution, FIE relied on the right to life and the ostensible responsibility of the State to endeavor to safeguard individuals against a potential harm to life stemming from climate change. Equally, FIE relied on the right to bodily integrity that is spelled forth in the Constitution. It was reiterated that the effects of climate change on people's health and physical integrity would threaten their right to life, liberty, and property. In this landmark case, the government posed the important issue of whether or not people have an *unenumerated right* to a setting that is respectful of their inherent

worth as human beings. The High Court has recognized such a right in the judgment of Barrett J. in *Friends of the Irish Environment v. Fingal County Council*[699]. As a matter of law, the concept of so-called *derived rights* is fascinating, and it seems likely that courts will have to address related concerns.

C.2.3.1 Climate change and human rights strategic litigation

Human rights arguments related to climate change can be presented in two ways: applicants may claim that there has been a failure to act, resulting in human rights violations; or applicants may claim that specific activities have resulted in human rights violations.

There has been an increase in climate change litigation[700] since the Paris Agreement was signed, with the goals of compensating for the effects of climate change and pressuring governments and other players to take stronger measures to address the issue. Human rights legislation is often used in the environmental setting when other bodies of law fall short of providing adequate remedies. It is, thus, not a surprise that human rights arguments are increasingly being raised, and human rights remedies increasingly being sought in climate change lawsuits. While very few cases have been contested on human rights grounds thus far, the tendency is ongoing and growing, with some striking outcomes. This chapter provides a comprehensive review of human rights arguments advanced in climate change litigation to date, with an eye toward assessing what such arguments suggest about the developing link between human rights and climate change legislation.[701]

In an effort to force governmental and corporate actors to take action to cut emissions or to get recompense for climate-change-related harm to individuals, property, or the environment, plaintiffs throughout the globe have increasingly filed test cases in recent years.

Two major cases in 2018 demonstrate the potential viability of human rights arguments if presented in the correct way. In the first example, a group of young Colombians[702] were victorious in their challenge against the government for failing to address deforestation in the Amazon, despite the fact that doing so, would have complied

[699] [2017] IEHC 695.http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/
[700] See: http://climatecasechart.com/non-us-case-category/human-rights/ (Accessed 22 October 2022).
[701] See, for example, Boyle A. E., Anderson M. R. (1998). *Human Rights Approaches to Environmental Protection*. Oxford University Press; Alan E. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18(3) Fordham Environmental Law Review 471 (2007); Shelton D., (2011). *Human Rights and the Environment*. Edward Elgar; Anton, D. K., Shelton, D. (2012). *Environmental Protection and Human Rights*. Cambridge University Press.
[702] Children and Youth v. Colombian Government [2018] Supreme Court of Justice of Colombia STC4360-2018, 11001-22-03-000-2018-00319–01.

with various human rights duties guaranteed by the Colombian Constitution and other international agreements.

While the second, involved issues about the minimization of greenhouse gas emissions. In this landmark climate case[703] for the European continent, the Urgenda Foundation and a sizable group of individuals successfully challenged the Dutch government. The Dutch case was initially decided under administrative and tort law, but the Court of Appeal in The Hague overturned that decision and reframed the State's duty of care to include protections guaranteed under the European Convention on Human Rights, such as the right to life and the right to respect for private and family life.

As a result of these successes, lawyers and campaigners for human rights feel emboldened to pursue more extreme cases. The UN Special Rapporteur on Human Rights and the Environment, David Boyd, made history in 2018 when he intervened in a case before an Irish court to highlight the State's "clear, positive, and enforceable obligations" to protect its citizens from the violation of human rights caused by climate change.

The expectations of applicants are likewise rising. Human rights guaranteed by the EU Charter on Fundamental Rights and Freedoms are being used in the so-called People's Climate Case to challenge the EU's lack of ambition in climate policy.[704]

Human rights legislation has long been used to fill in the gaps where other bodies of law fall short. Human rights grounds are, thus, not surprising in climate change disputes.

A landmark judgement[705] was issued in April 2018 by Colombia's Supreme Court of Justice that establishes a causal relationship between deforestation, climate change, and the infringement of the rights of current and future generations. Twenty-five children and young people from various parts of Colombia filed a petition arguing that deforestation in the Amazon region causes climate change, thereby endangering the right to a healthy environment, as well as the rights to life, health, food, and access to water, all of which are guaranteed by the Colombian Constitution and international human rights instruments ratified by Colombia. As a result, they took the Colombian government to court through *accion de tutela*. Similarly, a constitutional-law institution present in most Latin American countries, the *tutela* is a procedure established by the Colombian Constitution to allow alleged victims of human rights violations to request Colombian courts to investigate the actions or inactions of public authorities and, in exceptional cases, of individuals.

The court concluded that the rights of future generations depend on two factors: (a) "the intrinsic value of nature," which transcends an *anthropocentric perspective* and

[703] Urgenda Foundation and 886 Citizens v. The State of the Netherlands, 9 October 2018, ECLI:NL:GHDHA:2018:2610. (https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610 (Accessed 2 November 2021).

[704] Armando Carvalho and Others v European Parliament and Council of the European Union, Case No. T-330/18, Order of the General Court (Second Chamber) of 8 May 2019.

[705] Future Generations v. Colombia, supra note 27, at 37.

requires avoidance of *irresponsible* use of the environment; and (b) "solidarity of our species as an ethical duty," which builds upon that of sustainable development and imposes limits to the freedom of present generations. The court established these ideas as part of a *global ecological public order* that rests on international treaties such as the International Covenant on Economic, Social, and Cultural Rights, the Stockholm and Rio Declarations, and the Paris Agreement.

In a groundbreaking move, the court ordered the Colombian government to include the petitioners in the decision-making process regarding deforestation in the Amazon. In particular, the court mandated that the Presidency of Colombia and the Ministry of Environment and Sustainable Development work together with the applicants, the affected communities and interested members of the public, to develop a comprehensive policy plan to counter deforestation in the Amazon in order to mitigate and adapt to the effects of climate change.

Establishing precedents that are likely to influence other courts in the area, this verdict solidifies the Colombian courts' reputation for being exceptionally inventive when deciding in favour of individuals harmed by environmental disaster. Human rights arguments in strategic litigation have the capacity to exert pressure on nations to defend the interests of future generations, as is clearly shown by this case. However, it is not safe to assume that these and other judgments will be enforced, a concern that has implications for human rights and environmental law outside Latin America.[706]

C.2.3.2 Extraterritorial Application of Human Rights Obligations

Human rights protection outside national borders has been seen as troublesome for nations for as long as it has been a duty of States to safeguard the rights of future generations. Although it could be argued that these obligations have extraterritorial application under some instruments, many States and businesses reject this interpretation, and instead they claim that States are the only bearers of human rights obligations and that these obligations only apply to those within a State's territory or to those in a territory that is effectively under the State's control.

The 2005 petition the Inuit filed with the I/A Commission on HR[707] focused mostly on these issues. Human rights breaches caused by climate change in the Canadian and American Arctic were blamed on the United States, the greatest emitter of greenhouse gases at the time, as has previously been reported in this special issue. However, the

[706] José Parra, 'The Role of Domestic Courts in International Human Rights Law: The Constitutional Court of Colombia and Free, Prior and Informed Consent', 23(3) International Journal on Minority and Group Rights 355 (2016) at 381.

[707] Petition to the Inter-American Commission on Human Rights, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 7 December 2005, available at: https://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (Accessed 3 March 2022).

petition was rejected[708] by the I/A Commission on HR because of procedural issues. In 2017, the I/A Court of HR issued a groundbreaking advisory opinion on the issue of whether or not nations have a duty to defend the human rights of individuals located beyond their jurisdiction (IACtHR).[709]

In response to a question about State obligations on the environment, the court explained that States are obligated to prevent significant damage to the environment inside or outside their territory, whether produced by themselves or third parties, in light of the rights recognised by the American Convention on Human Rights[710], the Organization of American States system, and regional environmental instruments. According to the court, it is important to take into account any harm that may have an impact on the exercise of fundamental human rights. This duty to protect citizens and the environment entails a host of detailed responsibilities, such as the need to control, oversee, and monitor actions conducted by the State or private companies under to the State's authority that pose a threat to the environment.

C.2.4 Conclusion

In order to combat climate change effectively, we need to take steps beyond those outlined in the Kyoto Protocol. It is crucial that Climate Change be defined in a way that goes beyond the environmental and economic components that have been the compass to the current system. It is essential for climate change legislation to give priority to human vulnerability and include wording from Human Rights theory. This has to be done in tandem with a larger reassessment of the role of unequal treatment in the Climate Justice's regime to better reflect future vulnerabilities of nations and peoples.

No reasonable legal mind can deny that, the Human Rights enforcement and complaint procedures can only be beneficial as utensils, in restoring inadequate environmental rights safeguarding: “as compared to efforts to incorporate a right to environment in Human Rights treaties...”. This is a way around problems that arise from nebulous queries like “what exactly does it mean to have a healthy environment?”. As has been emphasized throughout this paper, we have a more well-structured body of supporting institutions for the implementation of these rules at our disposal; and,

[708] IACHR, Letter from Ariel E Dulitzky, Assistant Executive Secretary, OAS, to Paul Crowley, Legal Representative for Sheila Watt-Cloutier and Others, regarding Petition P-1413–05, 16 November 2006.
[709] See Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017
[710] OAS, *American Convention on Human Rights*, 9(4) *International Law Materials* 673 (1970). (adopted 22 November 1969, entered into force 18 July 1978).

ultimately, there is a more efficient way to administer Justice, since victims can file complaints, have their voices heard, and seek redress.

Some experts in the field of law argue that, there should be a renewed emphasis on procedural and substantive rights because of the crucial role they play in connecting Human Rights and the natural world. Principle 10 of the Rio Declaration and other Human Rights documents, such as Article 10 of ECHR, provide ample guidance in this direction. An illustrative example of how substantive rights may serve as a legal foundation for lawsuit based on environmental concerns, can be offered by the use of Article 8 (right to privacy) of the European Human Rights Convention. Even these scholars, however, admit that to speak of "a human right to the environment", is a rather problematic argument, especially when we take into account the "balancing it with other Human Rights".

The inherent critical urgency of the Climate Change field justifies the calls for necessary further research through a multidisciplinary methodology, and for deeper examination of the links between Climate Change and Human Rights claims, equity for future generations, the problem arising from questions on sustainable development, and the vulnerability principle in legal terms. The preeminence of climate change in environmental law and the ongoing discussions on climate and international justice raise a number of important problems. Moreover, it is worth noting that human rights tend to play a more central part in each new rights-sensitive proposal on climate change. It appears that the problems at hand are reliant on cost-benefit and other welfare hypothesising approaches, and that the relevant negotiations of the law-making global institutions have formed debate agendas based largely on a utilitarian philosophical framework. To this day, it is clear that the negotiating States have used Human Rights terminology only for its normative value, to strengthen paradigms of distributional fairness, without recognizing its standing as relevant positive international law.

Human rights language might be used to help create a more equitable worldwide Climate Justice system, which is what the present mindset needs. In spite of this, no one has yet guaranteed the incorporation of Human Rights norms into the appropriate Climate Change legislation or conducted an in-depth analysis of the particular Human Rights harms originating from Climate Change.

At the end of the day, they call for Human Rights in order to move uncertain action on Climate Change policies, instead of supporting Climate Justice action in order to prevent Human Rights costs.It is undeniable that a search for the phrase *human rights,* is not the most effective diagnostic instrument for analysis or inspection. However, early results of such an analysis point to the unwarranted lack of Human Rights language, which is a well-established legal framework that, as the data shows, needs to play a more active role in the Climate Justice system. Climate change meets all the criteria for justification of such an inclusion, including the damage to the enjoyment of human rights by conduct that might otherwise have been prevented. Humans are partially to blame for climate change, which makes it a field of research ideally suited for Human Rights evaluation.

The major point is that a Human Rights perspective might be useful when dealing with Climate Change since the repercussions of Climate Change caused by humans result in breaches of Human Rights. Since Climate Change is about suffering, it is linked to the damage people cause to nature, and the Human Rights framework reorients the understanding of the phenomena to focus on these crucial repercussions on humanity. The negative impacts of rising temperatures are felt by many groups, yet there are currently few ways to alleviate their suffering. By providing the building blocks for an integrated Climate Justice legal framework, the Human Rights regime may help put an end to these wrongs.

Including Human Rights is crucial for the future of Climate Justice. The doomsday possibilities can't be avoided unless we act right now. Climate Justice may benefit from the Human Rights regime by receiving the finest possible framework for accountability, law-enforcing instruments, individual and collective justice claims, and the actual and practical application of environmental legislation. Discussions on climate change should not be based on just environmental law, politics, or, worst case scenario, commercial interests. Humans are responsible for this problem since it causes damage to other humans.

Those who are at risk and the best way to protect them may be more easily identified if we include Human Rights criteria into the future development of Climate Justice. Literature on climate change highlights several shortcomings in our current established design, such as the absence of Human Rights frameworks. Reforming global policies from data collection and collaborative decision making through lawmaking, implementation, and enforcement is necessary to address these challenges.

“Everyone is entitled to a social and international order in which [their] rights and freedoms... may be fully realized,” states the Universal Declaration of Human Rights. This progress and the fulfillment and enjoyment of basic Human Rights are disrupted by climate change.

By their very nature and meaning, human rights act as a check on the authority of governments and large companies. This is what the field of Climate Justice can gain from Human Rights and it is how we can begin to address, avoid, and lessen the devastating impacts of Climate Change. Truth be told, we are living through the worst possible violation of the Human Rights of the world's most defenseless citizens right now. The scientific community agrees that the issue of climate change is of the utmost importance; that there is a close relationship between climate change and human rights claims; that equity for future generations is a defining legal principle; and that it is necessary to acknowledge clearly, firmly, and decisively that anthropogenic climate change will result in the ultimate violation of human rights in human history.

It is imperative that we all band together to stop the disastrous effects of climate change caused by human activity, since the scientific community has made it very evident that we face grave dangers as a whole. Mary Robinson has said it best: “We have to accomplish it, coupled with work on sustainable development objectives, and we have to do it in 2015.” Every one of us has a stake in the health of our community, in the success

of our efforts to promote sustainable practices, in the continued existence of our planet, and in the protection of the right to life of future generations.

It is true that: “We are the first generation to feel the impact of climate change, and the last generation that can do something about it.”

Protecting the environment via strict rules would be the one thing on which all of mankind could agree. This is due to the fact that our very survival depends on the integrity of the natural world and the longevity of our planet. In the face of grave dangers to mankind from climate change and pandemics, climate justice provides a once-in-a-lifetime chance for the global justice project to take the next step toward the creation of robust legal institutions and international law. The pressing need for advancement in green criminology and green crimes is hastening their development. As the saying goes, “our home is on fire,” and, yet, we continue to argue about “who gets the silverware” in the context of the ongoing debates over climate change. The point that must be driven home is that a greater will of the people may always triumph over a weaker governmental will. In order to fully appreciate the role that the climate action movement has played in driving good social and legal change, it is important to recognize the power of the movement at this juncture by recognizing the development of green criminology and the rise of green crimes. Another way to look at the successes of the present State of environmental crimes and climate justice is that laws are changing, and the preservation of the environment is at the top of any government agenda throughout the globe as an important concern. The challenge that green criminologists must overcome is the difficulty in establishing a clear *actus reus* and, even more so, the impossibility in most cases of connecting the intention and *mens rea* to the relevant *actus reus*, which is required to satisfy the theory of criminal law and constitute a crime. However, this is the oldest struggle of the judicial body, and these conflicts are part of the legal exercise a judge must complete, as it is up to the judge to decide, on a case-by-case basis, whether a criminal act against the environment was committed; connect this act and *actus reus* to a legal entity, whether human or company; and then, depending on the facts of the case, decide whether the *mens rea* is sufficiently and legally established, in accordance with the law.

Finally, the morals of the community is what makes breaking the law an offense, therefore that's where the emphasis should be for avoiding green crimes. This implies that we will have to reevaluate the value of non-human animal life and our impact on the environment, in addition to the legal work necessary to add *green crimes* to the global criminal justice system. Now, more than ever, there is a pressing need to strengthen green criminology via more scientific study and dedicated programs.

Human-caused environmental damage should be illegal and subject to criminal penalties. However, this theoretical rule just provides a framework for understanding the offenses at hand. According to the principles of criminal law, in order for a crime to exist, it must first be defined by statute, and then attorneys must establish that the requisite components of the crime were met in a given instance. The wrongful deed, or *actus reus*, and the wrongful State of mind, or *mens rea*, or desire to do injury, respectively.

To sum up, if the two parts of a crime—(a) the commission of a criminal act and (b) the criminal offender's purpose to perform that conduct—can be shown beyond a reasonable doubt in a court of law, then the offender should be sentenced accordingly. The primary *issue* with green crime theory and practice is that, historically, these types of injuries were not given the same moral weight as harms against person or property, and were therefore made invisible in the eyes of justice. Raising awareness about climate justice and promoting society's understanding of the environment has its positive side effects, such as causing a reevaluation of what the environment can and cannot sustain and imposing new responsibilities on legislators to shift away from an anthropocentric view of law's purpose and instead focus on its essential function, which is to protect the vulnerable and restore injustices in an impartial fashion. As we work toward a more equitable and secure society, the realization that environmentally harmful human actions must be tightly controlled and criminalized, will be the fuel we need.

▪ Important points to remember about “Climate Justice”

When studying “Climate Justice,” it is crucial for students to keep in mind the following important points:

6. Climate Change as a Human Rights Issue: Climate change poses significant threats to human rights, including the rights to life, health, water, food, housing, and a safe environment. Students should understand the interconnectedness between climate change and human rights and recognize the disproportionate impacts on vulnerable communities.
7. Equity and Justice: Climate justice emphasizes the need for equitable and just solutions to address climate change. Students should explore the concept of equity, recognizing historical responsibilities and the differentiated capacities of countries, and the importance of considering the needs and perspectives of marginalized communities.
8. Intersections with Social Justice: Climate change intersects with social justice issues such as poverty, gender inequality, indigenous rights, and racial discrimination. Students should examine the intersectional dimensions of climate justice and understand how climate change exacerbates existing inequalities and vulnerabilities.
9. Mitigation and Adaptation: Climate justice calls for both mitigation (reducing greenhouse gas emissions) and adaptation (building resilience to climate impacts) measures. Students should explore strategies to mitigate climate change, such as transitioning to renewable energy and sustainable practices, as well as adaptation measures that support vulnerable communities in coping with the impacts of climate change.
10. Loss and Damage: Loss and damage refer to the irreversible harm and impacts caused by climate change, particularly in vulnerable regions. Students should learn about the concept of loss and damage, the challenges associated with assessing and addressing it, and the need for mechanisms to provide support and compensation to affected communities.
11. Indigenous Knowledge and Rights: Indigenous communities possess valuable knowledge and practices for adapting to and mitigating climate change. Students should recognize the importance of incorporating indigenous knowledge and respecting the rights of Indigenous peoples in climate action, including their right to self-determination, land, and resources.
12. Global Cooperation and Climate Governance: Addressing climate change requires global cooperation and effective climate governance. Students should familiarize themselves with international climate agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC) and

the Paris Agreement, and understand the roles of different actors, including governments, civil society, and private sector, in climate governance.

13. Youth Activism and Engagement: Youth play a crucial role in climate justice advocacy and activism. Students should explore the role of youth-led movements, such as Fridays for Future and the Global Youth Climate Movement, and the impact of youth engagement in raising awareness, demanding action, and influencing climate policies.
14. Just Transition: A just transition refers to the equitable shift to a low-carbon economy that ensures social and economic justice for workers and communities affected by the transition. Students should examine the concept of a just transition and the importance of considering the needs of workers in fossil fuel industries and marginalized communities in climate policies and sustainable development.
15. Individual and Collective Action: Climate justice requires individual and collective action at various levels. Students should recognize the role of individual choices, such as adopting sustainable lifestyles, as well as the significance of collective action through community initiatives, advocacy, and participation in decision-making processes.

Engaging with scientific reports, case studies, and stories of impacted communities will deepen students' understanding of the urgency and complexity of climate justice. By recognizing the human rights dimensions and social justice implications of climate change, students can contribute to the development of equitable and sustainable solutions to address the global climate crisis.

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Test your knowledge

Here's an educational quiz on climate justice and human rights along with the answers:

1. **What is climate justice?**

Answer: Climate justice refers to the fair and equitable treatment of all individuals and communities in relation to climate change mitigation and adaptation efforts, taking into account their unique vulnerabilities and ensuring their participation in decision-making processes.

2. **Which international agreement emphasizes the importance of addressing climate change impacts on human rights?**

Answer: The Paris Agreement recognizes the intrinsic relationship between climate change and human rights, highlighting the need to protect human rights in the context of climate action.

3. **True or False: Climate change disproportionately affects marginalized communities and exacerbates existing social inequalities.**

Answer: True. Climate change impacts are not evenly distributed, and marginalized communities, such as low-income individuals, Indigenous peoples, and people of color, often bear the brunt of its consequences.

4. **Which human right is directly linked to climate change and the environment?**

Answer: The right to a healthy and sustainable environment is directly connected to climate change, as it encompasses the right to clean air, water, and a safe and ecologically balanced habitat.

5. **Name one way in which climate justice can be promoted at the local level.**

Answer: Answers may vary, but examples could include advocating for renewable energy initiatives, supporting sustainable transportation options, or ensuring equitable access to green spaces and resources in communities.

6. **How does climate change impact the right to food?**

Answer: Climate change can affect food production, availability, and access, leading to food insecurity and threatening the right to adequate food for vulnerable populations.

7. **Which international organization focuses on the intersection of human rights and climate justice?**

Answer: The United Nations Human Rights Council (UNHRC) addresses human rights concerns related to climate change and advocates for climate justice on a global scale.

8. **True or False: Climate justice requires both mitigation (reducing greenhouse gas emissions) and adaptation (building resilience to climate impacts) efforts.**

Answer: True. Climate justice involves not only mitigating climate change but also adapting to its impacts, particularly for those most affected and least responsible for the crisis.

Remember, climate justice and human rights are complex topics, and this quiz serves as an educational tool. Further exploration and learning are encouraged to gain a deeper understanding of these issues.

Documentaries to watch

Here are some documentaries that explore the topics of climate justice and human rights:

1. *Before the Flood* (2016) - Directed by Fisher Stevens and featuring Leonardo DiCaprio, this documentary follows DiCaprio as he travels the world to witness the impacts of climate change and explores potential solutions.
2. *Chasing Ice* (2012) - Directed by Jeff Orlowski, this film showcases the work of photographer James Balog as he captures the dramatic effects of climate change on glaciers and the planet's ice formations.
3. *The True Cost* (2015) - Directed by Andrew Morgan, this documentary examines the social and environmental impact of fast fashion and consumerism on garment workers and the planet.
4. *This Changes Everything* (2015) - Based on Naomi Klein's book, this documentary directed by Avi Lewis explores the relationship between climate change, capitalism, and social justice.
5. *The Island President* (2011) - Directed by Jon Shenk, this film follows the former President of the Maldives, Mohamed Nasheed, as he advocates for climate justice and fights against the rising sea levels threatening his nation.
6. *Virunga* (2014) - Directed by Orlando von Einsiedel, this documentary highlights the efforts of park rangers in the Democratic Republic of Congo to protect Virunga National Park from threats posed by oil exploration and armed conflict.
7. *The Human Element* (2018) - Directed by Matthew Testa and featuring environmental photographer James Balog, this film explores the impact of climate change on humanity through four elements: earth, air, fire, and water.
8. *Gasland* (2010) - Directed by Josh Fox, this documentary investigates the environmental and health impacts of hydraulic fracturing (*fracking*) and the natural gas industry in the United States.

These documentaries provide valuable insights into the intersection of climate justice and human rights. Remember to check the availability of these films on streaming platforms or through other sources.

Chapter 3 Femicides and Violence against Women and Girls.

Abstract

Women in different situations, irrespective of their age or background, and from different walks of life may be subjected to violence; the message sent by all international organisations is that no woman yet can be immune from violence. Rising femicide rates across all the geographic regions of the world are alarming, especially during the COVID-19 era. The chapter addresses the gap that still exists between normative-setting human rights standards and practice, between de jure and de facto gender equality, and points out to the legal and institutional lacuna that contribute to the high number of victims of violence. The chapter provides the reader with a critical engagement with legal instruments, human rights institutions and mechanisms, and judgments of constitutional and human rights courts all over the world. In parallel, the chapter aims at achieving human rights education on the issue: The elimination of discrimination and violence against women is not a programmatic goal; it is a human right entitlement.

Required Prior Knowledge

UN human rights protection system; regional human rights protection systems.

C.3.1 Violence against Women

Over the past two decades, there has been an unprecedented human rights advocacy. Yet women and girls have been disproportionately left behind. Gender inequalities, traditional gender roles (i.e. in patriarchal or sexist societies) and gender stereotypes persist in all aspects of life, notably at home, in education, at the workplace, in the media, in the judicial system, in the context of new technologies, and across all regions all over the world. Women continue to face systemic barriers and discrimination that violate their human rights, inhibit their access to resources, and increase their vulnerability to gender-based and domestic violence and exploitation. Some of the violations, that women experience in their everyday life, range from trafficking[711], gender-based violence, domestic violence, acid violence,[712] to harmful practices such as child marriage, early and

[711] Violence against women can take place everywhere and in all situation. For example, violent extremist groups are now reported to use violence against women as a tactic of terror to suppress women and to stigmatize communities, or violence against women is taking place to recruit terrorists (forced conscription), or to use the financial proceeds from the sex trafficking of women and girls.

[712] Acid violence usually causes extreme physical and mental suffering to victims often coupled with their economic and social ostracism. There are high rates of acid violence where there is impunity for acid attack perpetrators or easy access to acid. In any case, acid violence is not confined to particular social, cultural, religious or regional contexts. See for example, Acid Survivors Trust International, https://www.asti.org.uk/a-worldwide-problem.html ; Avon Global Center for Women and Justice et al,

forced marriage and female genital mutilation, and lack of sexual and reproductive health rights. All these are heavily gender-based phenomena which contain several strong references to gender inequality and gender-based discrimination.

Whereas violence against women has always existed, it is only in the last two decades, or so, that the international community has begun to highlight and systematically define the problem. It is increasingly addressed as *gender-based violence* in many of the legal and policy instruments of international organizations, and nowadays, it is recognised as a form of a human rights violation[713] and a form of gender-based discrimination.[714] From an international human rights law perspective, violence against women is a human rights violation; it is a violation of the principle of non-discrimination, the right to life, security, liberty, health and economic development and it has a negative impact not only on the victim (and her family) but also upon the society as a whole. All forms of discrimination and violence against women and girls are considered major obstacles to the enjoyment of women and girls' rights and to the ultimate achievement of the 2030 Agenda for Sustainable Development Goals.[715]

Studies on the causes of violence against women, link violence to the attributes, characteristics or roles that men and women perform respectively. Causes of violence relate to the subordination of women to practices and behaviours shaped by gender stereotypes, and historical, structural and social factors that sustain inequality between men and women. Such causes of violence exist even in countries with moderate or high equality indexes. Today, we acknowledge the manifestation of many forms of violence against women because we understand that it is a phenomenon cascading due to the deeply rooted, structural inequality between men and women. Furthermore, violence against women is exacerbated when there are external factors (economic crisis, pandemic, epidemics[716], etc) that threaten the dominant role of men in the society. An example that serves best is the case with countries that have experienced austerity measures in the recent years and where the phenomenon of violence against women has significantly increased. A recent study exploring this issue has come to the conclusion that:

Report: Combating Acid Violence in Bangladesh, India and Cambodia, https://www.ohchr.org/documents/hrbodies/cedaw/harmfulpractices/avonglobalcenterforwomenandjustice.pdf

[713] *Ibid*.

[714] See UN Commission on Human Rights, Resolution 2003/45, : "all forms of violence against women occur within the context of de jure and de facto discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State."

[715] See for example Goal No. 5 – *Achieve gender equality and empower all women and girls*, available at www.un.org/sustainabledevelopment/sustainable-development-goals/

[716] Rates of violence against women increased not only during COVID 19 but also during the Cholea, Ebola and Zika outbreak. See Krishnadas, J., & Taha, S. H. (2020). Domestic violence through the window of the COVID-19 lockdown: a public crisis embodied/exposed in the private/domestic sphere. Journal of Global Faultlines, 7(1), 46–58. https://doi.org/10.13169/jglobfaul.7.1.0046

> violence against women is thus seen not just as an expression of male powerfulness and dominance over women, but also as being rooted in male vulnerability, stemming from social expectations of manhood that are unattainable because of factors such as poverty experienced by men. Violence is frequently used to resolve a crisis of male identity, at times caused by poverty or an inability to control women.[717]

Violence against women can have an intersectional perspective too. Women often face multiple and intersecting forms of discrimination and violence, because of their status as girls and women while they also belong to a specific group associated with factors of vulnerability (i.e. age, development, economic position, etc) and discrimination. For example, they can be girls; adolescent or elderly women; women with disabilities;[718] lesbian/bisexual/transgender women; women survivors of violence; migrant women (including refugees, asylum seekers and undocumented women); Indigenous women; women living in poverty or living in countries under austerity measures;[719] single mothers; women from minorities or from various religious or other social origins, etc. Having said that, one needs to bear in mind the existence of forms of gender violence that are less visible such as violence in the workplace, in educational and home settings, or the forms of gender violence against particular groups such as pre-teenage and teenage girls, whose vulnerability magnifies in a structural situation of violence and discrimination.

Discrimination does not affect all women in the same way. Hence, there is need to address, not only the causes of the phenomenon, but also the impact on the victims and design preventive measures that will eliminate any form of violence against women, especially in situations of intersectional discrimination.

Women in different situations, irrespective of their age or background, and from different walks of life may be subjected to violence; according to WHO, violence against women is now "endemic in every country and culture" and no woman can be immune from violence.[720] Violence may occur either in the public or in the private sphere. This entails the responsibility of State organs to respond to such violence and to prevent it. Under no circumstances may State organs condone acts of violence against women, whatever their form may be, even in patriarchal societies that are accustomed to having women deprived from empowerment and decision-making roles, and the exercise of their economic, social and cultural rights (i.e. education, work, healthcare, etc).

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[717] Malgesini G., L. Cesarini Sforza, M. Babović, Gender-based Violence and Poverty in Europe EAPN Gender and Poverty WG, Briefing # 2, 2019, p.10.

[718] See Ozemela L., D. Ortiz, A.-M. Urban, Violence against Women and Girls with Disabilities, March 2019, Inter-American Development Bank.

[719] Malgesini G., L. Cesarini Sforza, M. Babović, "Gender-based Violence and Poverty in Europe", EAPN Gender and Poverty WG, Briefing # 2, 2019, available at https://www.eapn.eu/wp-content/uploads/2019/07/EAPN-Gender-violence-and-poverty-Final-web-3696.pdf

[720] UN News, *Endemic violence against women 'cannot be stopped with a vaccine' – WHO chief*, 9 March 2021 https://news.un.org/en/story/2021/03/1086812

C.3.1.1 Domestic Violence

Domestic violence, being entrenched in patriarchal attitudes and cultural stereotypes, has been considered (by States) for many years to be a matter of privacy that did not provide any room for State interference. Accordingly, acts of abuse taking place within a family home, were previously out of the reach of the State due to the right to privacy. But this mentality is now changing. Domestic violence is now criminalized in many national legal systems, because of the standard-setting of the UN and other regional organisations, such as the Council of Europe.[721] National and international caselaw is now addressing cultural patterns underlying States' gender-biased customs and practices [see discussion below].

Domestic violence affects not only the direct victims themselves but also their children, relatives, etc. This has been acknowledged by the ECtHR:

> … [T]he issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, … is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The [European] Court [of Human Rights] acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly….[722]

Women who have experienced domestic violence, have three times the risk of developing mental illnesses, including severe conditions such as schizophrenia and bipolar disorder, compared with those who have not.[723] Moreover, it is also the case that victims of domestic violence can be socially excluded by the perpetrator, but they can also find themselves overlooked or ignored by the national authorities,[724] law-enforcement, social agencies, and the community from which they seek support, protection, prosecution, justice, and prevention.[725] A common feature among victims of violence is that they usually are in fear of reporting their abuse.

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[721] *Case of Z.B. v. Croatia*, para. 56.

[722] ECHR, *Opuz v. Turkey*, No. 33401/02, Judgment 09.06.2009, para. 132.

[723] Mahase E., Women who experience domestic abuse are three times likely to develop mental illness, BMJ 2019, 365:14126.

[724] See for example the number of cases filed against Turkey concerning the lack of action on the part of the national authorities to investigate incidents of domestic violence against women. In Durmaz v. Turkey, the Court noted that with regard to previous cases on domestic violence "there existed a prima facie indication that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence"; moreover, the Court noted that "the prosecutor's above-mentioned serious failures are part of that pattern of judicial passivity in response to allegations of domestic violence". ECtHR, *Durmaz v. Turkey*, No. 3621/07, Judgment 13.11.2014, Final Judgment 13.02.2015, para. 65.

[725] See for example Inter-American Commission on Human Rights, Jessica Lenahan (Gonzales) v. United States of America, Report No. 80/11, Case 12.626, 21 July 2011. This was the first domestic violence case to be brought against the USA before an international body. In this case, the claimant's daughters were

C.3.1.2 Femicides

Domestic violence can escalate into the most extreme form of human rights violation and the most violent manifestation of discrimination, that is, the gender-related killing (=deprivation of life) of the individual involved. *Gender-related killings*, or *femicides*, is a relatively new term describing an old phenomenon involving an extreme form of male violence against women.

In the Western world, the term *femicide* is primarily understood as the violence against women in the context of intimate or family relationships. In a report over the period of 2009-2018 in Britain, it was found that a woman was killed by a male partner or ex-partner every four days.[726] In a 2021 report by the WHO, it was reported that an estimated 736 million women—almost one in three—have been subjected to intimate partner violence, non-partner sexual violence, or both at least once in their life (30 per cent of women aged 15 and older).[727] The UN Rapporteur's report reveals a bleak picture:

> Data from all regions of the world consistently show that more than 80 per cent of victims of intimate-partner homicides are women. For many women victims of intimate-partner and domestic violence, the home is the most dangerous place; however, this violence is preventable.[728]

However, femicides can have less acknowledged forms: they are killings against women that occur because of societal and cultural norms, i.e. in the name of *honour*, or out of complications of female genital mutilation practices, or because they are related to dowry conflicts, or even to accusations of witchcraft and witch-hunting activities.[729] They

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abducted by her estranged husband in 1999 and killed after the police repeatedly refused to enforce her domestic violence restraining order against him. The claimant challenged the principle of US law that government generally has no duty to protect individuals from private acts of violence and the Inter-American Commission on Human Rights found that the rights to life, nondiscrimination, family life/unity, due process, petition the government, and the rights of domestic violence victims and their children to special protections had been violated. The decision called for changes to U.S. law and policy pertaining to domestic violence.

[726] See Femicide Census, *UK Femicides 2009-2018*, https://www.femicidecensus.org/wp-content/uploads/2020/11/Femicide-Census-10-year-report.pdf

[727] See World Health Organization, on behalf of the United Nations Inter-Agency Working Group on Violence Against Women Estimation and Data (2021). *Violence against women prevalence estimates, 2018. Global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women*. https://www.who.int/publications/i/item/9789240026681See also UN Women, *Facts and Figures: Ending Violence Against Women*, 2020, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes See also Consuelo Corradi, *Briefing: Femicide, its causes and recent trends: What do we know?*, DG for External Policies- European Parliament, 2021 https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI(2021)653655_EN.pdf

[728] Para. 69. See also Report of UN Rapporteur, A/71/398, 23 September 2016

[729] Women and children have experienced violence, ranging from torture to actual killing, because of accusations of witchcraft, for example in Nepal, Papua New Guinea, Ghana,etc. See. Atreya A, Aryal S, Nepal S, Nepal B. "Accusations of witchcraft: A form of violence against women in Nepal". *Med Sci Law.*

can also be killings that occur in the context of armed conflict or insecurity, i.e. where there is a scarcity of food, girls are discriminated so that food is provided to the men and boys of the family. They can also be killings that result out of pre- and post-natal selection medical and non-medical interventions (i.e. infanticide, starvation, etc). Generally speaking, the number of the forms of femicides and their magnitude is difficult to be comprehended for the time being, as female deaths because of gender is not properly recorded by national authorities in the national statistics. One could add to the misreporting of femicides the fact that victims of gender-related violence and their families are usually silenced because of fear of reprisals, low access to education and legal inequality or because of a lack of interest on the part of the national authorities in the problem. For example, lack of risk assessment centres or safe houses or lack of training to first-responding officers, law-enforcement and medical staff.[730]

What is even more surprising is that, even though male-to-male killings may decrease when such national measures and policies are in place, femicide rates tend to remain unchanged. This is explained due to the fact that femicides are always *context and gender specific*, meaning that there is always a gender motive to each one of these killings.[731] Because femicides are guided by cultural and social norms that relate to what is socially accepted in local contexts and the dominant role of men *vis-à-vis* the status of women in local societies, the rate of femicides will not be reduced unless States make long-term interventions at community and interpersonal level[732] and collect gender-sensitive data to comprehend the manifestations of violence against women. Most of the States do not specifically define *femicide* as a crime in their penal codes, yet. The absence of *femicide* in the criminal national legislation results in having the killings of women classified as *homicides* and in having the perpetrators facing lesser types of penalties. Gender bias in police, prosecutorial and judicial proceedings, is also conducive to tolerating femicides because it tends to justify the violence against the victim.

During the pandemic, emergency national measures were put in place to prevent the spread of COVID-19, such as restricted movement and social isolation, increased risk factors for domestic violence and femicides. Economic insecurity increased women and girls' vulnerability to violence in the home setting all over the world. The UN Secretary General along with UN rapporteurs and human rights mechanisms, called for extra

2021 Apr;61(2):147-149. http://doi.org/10.1177/0025802421998222. Epub 2021 Feb 25. PMID: 33632014; Owusu, E. (2020). "The Superstition that Maims the Vulnerable: Establishing the Magnitude of Witchcraft-Driven Mistreatment of Children and Older Women in Ghana". *International Annals of Criminology*, 58(2), 253-290. http://doi.org/10.1017/cri.2020.26

[730] See for example the Argentinian Law No. 27499 (Micaela Garcia Law) on mandatory gender training for all persons in all branches of government.

[731] Stamatel, J. Explaining variations in female homicide victimization rates across Europe. *European Journal of Criminology*, Vol 11, n 5, pp. 578-600, 2014; Weil, S., 'Two Global Pandemics: Femicide and COVID-19'. *Trauma and Memory*, Vol 8, n 2, pp. 110-112, 2020.

[732] For example,. targeted custom-tailored measures addressing stereotypes, ending impunity, and educating people on all forms of gender violence.

national measures to prevent and respond to violence against women and make them part of their national response plans for COVID-19.[733]

The COVID-19 resulted in a "shadow pandemic" of domestic violence where victims of domestic violence became the invisible vulnerable –and yet fast growing- group within our societies. The COVID-19 pandemic provided a catastrophic momentum for the victims of domestic violence as there was an upsurge in the coercive/abusive behaviour of the perpetrators to control and keep them trapped within the household. A national study in the UK revealed that individuals exposed to domestic violence or abuse and were at an increased risk of suspected or confirmed COVID-19, were prevented from having access to healthcare services or treatment, and they were threatened with COVID-19 exposure or purposefully exposed to COVID-19 within the household.[734] Elsewhere, victims of domestic abuse were not allowed to be vaccinated against COVID-19 because of the controlling behavior of their partners, for example because of the partners being anti-vaxxers. At the time of the writing of this chapter, there is no available study or national statistics reporting the number of COVID-19 deaths of victims of domestic abuse whose controlling partners denied them access to COVID-19 vaccination or healthcare treatment and as a result, the victims died because of their infection with COVID-19 and/or of not having access to healthcare services. Such deaths could potentially be new forms of *femicides*. As States have a positive obligation to protect the health and life of all persons, including the victims of gender-based violence, it would have been helpful if States considered gender-based violence in vaccine prioritization strategies. Where COVID 19 vaccination is mandatory, States should design measures to avoid discrimination against women and girls and especially victims of violence and even consider the imposition of economic or other penalties on women's controlling partners, relatives, etc.[735]

C.3.2 The UN

The UN human rights mechanisms have reaffirmed repeatedly that under international human rights law there is due dilligence obligation upon States to prevent and eliminate violence against women, whether that is perpetrated by State organs, non-State actors or private actors.

[733] UN Women, COVID-19 and Ending Violence against Women and Girls, 2021; Guterres A, Make the prevention and redress of violence against women a key part of national response plans for COVID-19, (undated), https://www.un.org/en/un-coronavirus-communications-team/make-prevention-and-redress-violence-against-women-key-part

[734] Chandan, J.S., Subramanian, A., Chandan, J.K. et al. "The risk of COVID-19 in survivors of domestic violence and abuse**".** *BMC Med* 19, 246 (2021). https://doi.org/10.1186/s12916-021-02119-w

[735] Chandan JS, Chandan JK. "Considering gender-based violence in vaccine prioritisation strategies". *Lancet*. 2021;397(10282):1345. https://doi.org/10.1016/S0140-6736(21)00532-8.

As early as in 1992, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), defined gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately" (para. 6) and noted that, "it is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men" (para. 1). [736] Some 25 years later, the CEDAW Committee produced General Recommendation No. 35, which calls States to strengthen their efforts in dealing with gender-based violence, whether in the territory of the States or extraterritorially, and to develop measures with victim-centrered approach with the understanding that all women are rights-holders and they may be affected by intersecting forms of discrimination.

The UN General Assembly and other UN entities have called States to develop comprehensive strategies and measures in terms of protection, prevention and access to gender-based justice in cases of violence against women. In 2013, the General Assembly, "alarmed by the fact that violence against women and girls is among the least punished crimes in the world," adopted a resolution on femicides[737], urging, thus, Member States to exercise due diligence in undertaking a range of measures to address the killing of women and girls. The wide spectrum of the measures aims at the prevention, investigation, prosecution and punishment of acts of violence against women and girls, and includes the need to enhance data collection and analysis. Some years later, Resolution 70/176 was adopted along the same lines, reiterating the need to collect data and address impunity and punish perpetrators. It is noteworthy that the text of this particular resolution calls for States to promote comprehensive strategies "to counter attitudes and social factors that foster, justify or tolerate any violence against women and girls;" and to ensure that women have equal access to justice without risking secondary victimization in the national criminal justice systems.[738] It is noteworthy that the UN Rapporteur has extended the due diligence obligations of States, in that, it is expected of them to set up a legal framework and a system of support services to address gender-based violence against women committed by private actors.

Platforms have been launched to monitor violence against women and femicides under the auspices of the UN:

The Femicide Watch Prevention Initiative is aimed at fostering the creation of observatories or watch bodies at national level, to monitor national measures concerning prevention of femicide or gender-related killings of women and girls. Participating States are to publish disaggregated data on femicides based on the age and sex of perpetrators and the type of relationship between the perpetrator and the victim on November 25 of each year (the International Day for the Elimination of Violence against Women).

[736] General Recommendation No. 19.
[737] A/RES/68/191, 11 February 2014. This resolution was initiated by the Commission on Crime Prevention and Criminal Justice.
[738] See in particular paras. 10-11.

The Platform of Independent Expert Mechanisms on the Elimination of Discrimination and Violence against Women (EDVAW Platform) is aimed at fostering international cooperation between the UN agencies and regional mechanisms on women's rights and violence.

The progress of such initiatives is much dependent on the cooperation of States and their resources in collecting data and, for this reason, one may find such progress to be uneven at global level. At the same time the establishment of such processes is an expansion par excellence of the human rights global governance scheme of the UN to comprehend, respond and effectively prevent violence against women and femicides. It is noteworthy that, the UN Special Rapporteur on violence against women, its causes and consequences called again States, as recently as in 2021, to "establish a femicide watch or observatory on violence against women, if one has not yet been created, and collect and publish each year comparable data on femicide or gender-related killings of women as part of data on violence against women, as well as recommendations for changes in policy or law for their prevention based on the analysis of such cases".

C.3.2.1 CEDAW

The CEDAW Committee has an exemplary record of addressing women's human rights violations that are caused or perpetuated by States' gender-biased laws, customs and practices. [739] Such a case is *X and Y v. Georgia*[740], whereby Georgia was found to have violated Articles 1, 2 (b)-2 (f) and 5 (a) of CEDAW and the CEDAW General Recommendation No. 19. The facts of the case concerned a woman, X, who had been raped (while being a virgin) by a man she subsequently felt obliged to marry. That was due to the fact that, within the Georgian culture she was deemed to have lost her virtue and nobody else would wish to marry her. X had suffered physical violence on many occasions during her marriage and despite her efforts to seek assistance from the law enforcement authorities, they failed to intervene effectively. Y, her daughter, was also subjected to physical and sexual abuse by her father. Despite the numerous complaints before the national authorities, the national prosecutor never brought charges against the husband and the father of X and Y respectively. X and Y filed a complaint before the CEDAW Committee on the grounds that Georgia has failed to comply with its duty to enact criminal law provisions to effectively protect women and young girls from physical and sexual abuse within the family, has failed to provide equal protection under the law to victims of domestic violence and sexual abuse and has subjected the authors to torture by failing to protect them from domestic violence. Based on the facts, this was a case of

[739] For information regarding CEDAW caselaw against Asian countries, see Real M.J.N., *CEDAW Casebook: An Analysis of Case Law in Southeast Asia*, UN Women: 2016, https://asiapacific.unwomen.org/en/digital-library/publications/2016/04/cedaw-casebook

[740] Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015).

repeated domestic abuse, including the sexual abuse of the children, which was condoned by the State authorities due to the socio-cultural context. Some of the key messages coming out of this case are that:

1. The State Party's obligation to protect women from violence involves active protection against serious breaches of their personal (physical, moral and sexual) integrity, prompt and adequate support, including shelter and psychological support.
2. The State Party's obligation to protect women from violence is activated once there are allegations of abuses, let alone a pattern of abusive behavior against the wife and the children. The wording that the CEDAW Committee uses is "the authorities have or ought to have knowledge of".
3. The State Party's obligation to protect women from violence is not limited to addressing the conduct of the perpetrator but also ensuring the welfare of the victim.
4. The burden of proof on victims of domestic violence cannot be disproportionate. In this case, the decision of the national authorities to close the case and not investigate further because the neighbours' statement did not reveal any new facts, was deemed by the CEDAW Committee to be "an overly high burden" on the victims.
5. The State Party's obligation to protect women from violence entails "a … duty to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"[741].

Furthermore, the CEDAW Committee has proceeded not only with the interpretation of the provisions of the CEDAW, but also of regional instruments, such as the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. In *O.G. v. Russia* (2017) the CEDAW Committee examined a complaint by an individual who had been repeatedly harassed by a former partner and the national authorities had not adequately responded to her claims. It was held that Russia violated O.G.'s rights under Articles 1, 2 (b)-(g), 3 and 5 (a) of CEDAW and called Russia *inter alia* to pay financial compensation, to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and to provide mandatory training on judges and law enforcement personnel. The decision clarified that "as long as the violence towards a former spouse or partner stems from that person being

[741] Para. 9.7.

in a prior relationship with a perpetrator, as in the present case, the time that has elapsed since the end of the relationship is irrelevant, as is whether the persons concerned live together."[742] The CEDAW Committee further noted that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence does not provide for statutory time limit "on how long after the end of a relationship a spouse or partner can claim that the violence perpetrated by the ex-partner falls within the definition of 'domestic' violence", extending thus the protection to all former partner irrespective of the temporal nexus to the intimate relationship that was once in place.[743]

C.3.3 Council of Europe

The Council of Europe presents perhaps one of the most successful regional organisations with regard to the protection of human rights. The Council of Europe has created an *acquis* in the area of the protection of human rights that has been a point of reference and inspiration even for other regional organisations and third States. For more than seventy years, it has set its target on the elimination of discrimination, including on the grounds of sex, and has developed emblematic legal human rights instruments, such as the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence [hereinafter *Istanbul Convention*] and the Council of Europe Convention on Action against Trafficking in Human Beings, as well as soft-law and non-binding instruments that complement the organisation's efforts to achieve the effective realisation of gender equality.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence was signed on 11 May 2011 and it entered into force on 1 August 2014. As of 2023, 38 out of 46 Member States of the Council of Europe have ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. It is noteworthy that albeit a regional instrument, this Convention is open to non-member States of the Council of Europe and the EU (see Article 75 of the Istanbul Convention). The EU signed the instrument on 13 June 2017.[744]

[742] CEDAW/C/68/D/91/2015, 20 November 2017, para. 7.4.

[743] Ibid.

[744] On the 4th of April 2019, the European Parliament adopted a resolution seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Istanbul Convention and on the procedure for that accession. In 2017, the Council had already signed the Istanbul Convention. It is noteworthy, that the EP's resolution is rather a justified reaction to the inertia of the Council and the Commission concerning the ratification of the Istanbul Convention. However, the EP disagreed with the legal basis upon which the Council acted. Specifically, the Council had acted upon two different decisions: one with regard to asylum and non-refoulement, and the other with regard to matters related to judicial cooperation in criminal matters. The EP is of the

Some of the States that have not ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence yet, are entangled in feisty national debates over the wording of certain provisions and their compatibility with their national constitutional provisions.[745] Campaigns have been run throughout Europe against the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence as it is perceived to challenge *traditional families* and to impose *gender* ideologies. For example, in the case of Bulgaria, strong opposition from various sources and a judicial decision from the Supreme Court on the concept of *gender* found the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence to be unconstitutional; in the words of the Court: "despite its undoubtedly positive sides, the Convention is internally incoherent and this contradiction creates a second layer in it", shifting its meaning beyond its declared aims – protection of women from violence.[746] Other States are not prepared to ratify the Convention because of the lack of available resources, whether institutional, budgetary or other, to implement the provisions of the Convention. Such is the case of the UK, where despite the UK's advanced protection of women's rights, it is believed that the country is not prepared for its effective implementation. As it was reported:

> The [Istanbul] Convention is at loggerheads with an ideology that does not think investing in women's services is a priority. We are living with a mismatch between stated aims and what happens on the ground for women…The UK's policies towards migrant women would also make it incompatible with the Istanbul Convention…Lots of rape crisis centres have closed their waiting lists – they are comically underfunded and underinvested.[747]

view that the EU has overall competence to protect fundamental rights; accordingly, the EU should seek a broad accession to the Istanbul Convention without any limitations.

[745] See for example, the case of Armenia. While Armenia has signed the Istanbul Convention is far from ratifying it; the reason behind the reluctance of Armenia is that the Istanbul Convention is deemed incompatible with the Armenian Constitution as the latter makes it clear that 'a man and a woman of marriageable age shall have the right to marry and found a family.' It is not surprising that in 2019 Armenia requested the opinion of the Venice Commission on the constitutional implications of the ratification of the Istanbul Convention for Armenia. Council of Europe, Armenia requests an opinion from Venice Commission, Strasbourg, 30/07/2019, available at https://www.coe.int/en/web/istanbul-convention/-/armenia-requests-an-opinion-from-venice-commission

[746] R. Smilova, "Promoting 'Gender Ideology': Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional", *Oxford Human Rights Hub* 22.08.2018, available at https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/

[747] M. Oppenheim, "Austerity cuts blamed for UK failure to ratify pan-European convention combatting violence against women", *The Independent*, 18/02/2019, available at https://www.independent.co.uk/news/uk/home-news/uk-ratify-istanbul-convention-women-girls-rights-european-a8768606.html

In other cases, where States have ratified the Convention, there are not enough financial resources to comply with all their legal obligations, i.e. funding for rape crisis centres, 24/7 helplines, domestic violence shelters, etc.

In 2021, the announcement of the withdrawal of Turkey from the Council of Europe's landmark convention designed to eradicate violence against women and domestic violence, was a severe blow on the European human rights protection system.[748] Never before had a Council of Europe Member State pulled out from one of the human rights conventions of this regional organization. The withdrawal became effective on July 1 2021. The irony was not lost on the European States, being pro-human rights advocates themselves, as Turkey was actually the first State to sign and ratify this Convention without any reservations (hence, it is unofficially known as the *Istanbul Convention*) and it was considered by many as the Convention's moral custodian. One of the few narratives communicated by the Turkish government as to the reasons behind the callous act of withdrawal from the Convention was that, it was essentially undermining Turkey's traditional family structures. Tens of thousands of people took to Turkey's streets to protest against being exposed to a culture of impunity for violence, masked by the so-called *family values*. Also, States and international human rights bodies took the stand to condemn Turkey's withdrawal from the Convention.[749] Turkey has increasingly been engaged with retrogressive policies reducing the scope of women and girls' rights, under the pretext that the patriarchal stereotypes and the *traditional* family structures need to be protected. There are numerous judgments of the ECtHR with regard to Turkey's inadequacy in protecting women's rights[750]; however, the lack of execution of judgments

[748] Çali , B, 2021, 'Withdrawal from the Istanbul Convention by Turkey: A Testing Problem for the Council of Europe', *EJIL:Talk!*, https://www.ejiltalk.org/withdrawal-from-the-istanbul-convention-by-turkey-a-testing-problem-for-the-council-of-europe/

[749] The concern about women's rights in Turkey has also been shared by other international organizations, especially the EU and the Council of Europe. The advancement of women's rights is an issue that falls under the Copenhagen criteria for EU accession and is an integral part of the EU-Turkey relationship. As it was observed by the European Council: "Rule of law and fundamental rights remain a key concern. The targeting of political parties and media and other recent decisions represent major setbacks for human rights and run counter to Turkey's obligations to respect democracy, the rule of law and women's rights. Dialogue on such issues remains an integral part of the EU-Turkey relationship" See EU, 2021, 'Statement of the Members of the European Council, Brussels', 25 March 2021, SN 18/21, https://www.consilium.europa.eu/media/48976/250321-vtc-euco-statement-en.pdf .See also USA, 2021, 'Statement by President Biden on Turkey's Withdrawal from the Istanbul Convention', https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/21/statement-by-president-biden-on-turkeys-withdrawal-from-the-istanbul-convention/; EEAS, 2021, 'Turkey: Statement by High Representative/Vice-President Josep Borrell on Turkey's withdrawal of the Istanbul Convention', 20 March 2021, https://eeas.europa.eu/headquarters/headquarters-homepage/95380/turkey-statement-high-representativevice-president-josep-borrell-turkey%E2%80%99s-withdrawal-istanbul_en; EIGE, European Institute for Gender Equality, 'Women and Power in the Western Balkans and Turkey' 17 May 2021, https://eige.europa.eu/gender-statistics/dgs/data-talks/women-and-power-western-balkans-and-turkey

[750] Gülel, Devran. "A Critical Assessment of Turkey's Positive Obligations in Combatting Violence against Women: Looking behind the Judgments", *Muslim World Journal of Human Rights*, vol. 18, no. 1, 2021,

within the Council of Europe system may have been one more reason for getting to this point today. The overall impression is that Turkey is far from ensuring gender equality and the elimination of discrimination against women; to the contrary, women seem to be the primary vulnerable group within the Turkish society, being exposed to all forms of human rights violations, and especially violence and femicides.

The Istanbul Convention is the most comprehensive legal instrument that not only purports to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence, but to promote gender equality and eliminate discrimination against women and girls. Article 3 contains several definitions concerning various forms of violence, i.e.:

> *"'Violence against women' is 'understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'…*
> *'Domestic violence' includes 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'; and*
> *'Gender-based violence against women' constitutes 'violence that is directed against a woman because she is a woman or that affects women disproportionately'".*[751]

The Istanbul Convention is a human rights instrument that addresses multiple forms of violence against women. It is noteworthy that for the purposes of the Convention *domestic violence* may be committed by spouses or intimate partners irrespective of their marital or non-marital status (see caselaw below).[752] Furthermore, in principle, the

pp. 27-53. https://doi.org/10.1515/mwjhr-2021-0016

[751] See also EU Fundamental Rights Agency, Women as Victims of Partner Violence, 2019, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-4-women_en.pdf

[752] Cf with tribal law: Supreme Court of the Navajo Nation, *Morris v. Williams*, 1999.NANN.0000012, http://www.tribal-institute.org/download/Tribal%20DV%20Compendium.pdf The facts of the case "concerned a property dispute arose in which Williams allegedly trespassed on Morris' agricultural land and used abusive language towards Morris. Morris filed for a protection order against Williams. The case was tried as a Domestic Abuse case and was heard by the Window Rock Family Court. The family court found that there was a "recorded history of incursions" by Williams since the early 1980s, which included the unauthorized grazing of livestock, removal and destruction of a fence line, disruptive and unruly conduct towards Morris and her family, and granted the protection orders. Morris appealed the decision, attempting to enter evidence of land ownership into the case. Holding: The Navajo Nation Domestic Abuse Protection Act (DAPA) was passed "to protect all persons: men, women, children,

Istanbul Convention provisions could be applicable in the context of same-sex relationships.

The Istanbul Convention has a bifurcate monitoring mechanism, the Group of Experts on Action against Violence against Women and Domestic Violence [hereinafter *GREVIO*] and the Committee of the Parties. The former is a body of 15 independent experts appointed by the Committee of the Parties. Its mandate is to monitor the implementation of the Convention by the Parties. Much alike the UN human rights treaty-based Committees, GREVIO may adopt recommendations on key issues covered by the Istanbul Convention. GREVIO conducts country-by-country evaluations starting with a first assessment that is then followed by evaluation rounds. After an exchange of views between GREVIO and the country under study, GREVIO adopts its final report which is made public. GREVIO may also conduct a special inquiry evaluation in order to prevent a serious, massive or persistent pattern of violence. The Committee of the Parties consists of the representatives of the Parties to the Convention and its mandate is to adopt specific recommendations to State Parties acting upon the reports of GREVIO. An unofficial, but very vital, aspect of the monitoring mechanism is the contribution of information by NGOs active in preventing and combating violence against women. Article 9 of the Istanbul Convention creates a legal obligation on the State Parties to co-operate and assist the NGOs in their work.

In order for the Council of Europe to tackle violence against women, there is a need for co-ordinated action at policy, legislative and institutional level. This kind of co-ordination is served by a number of soft-law instruments, such as Recommendations and Resolutions, of the organs of the Council of Europe (i.e. the Parliamentary Assembly or the Committee of Ministers). Since 2000, such instruments have been adopted calling Member States to tackle various dimensions of the phenomenon of violence against women.

With Resolution 2294 (2019) *Ending violence against children*: a Council of Europe contribution to the Sustainable Development Goals,[753] the Parliamentary Assembly calls Member States to make combating violence against children a national priority, to adopt national action plans, to ratify all relevant Council of Europe Conventions, including the Istanbul Convention, and to increase the funding and "resources to poorer countries in order to provide support for programmes to combat violence against children worldwide".

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elders, disabled persons, and other vulnerable persons, who are within the jurisdiction of the Navajo Nation, from all forms of domestic abuse as defined by this Act and by Navajo Nation law." 9 N.N.C. §1604(A) (1995). The term "domestic abuse" covers many kinds of misconduct, including harassment and damage to property." 9 N.N.C. §1605(A)(1)(h), and (f) (1995). The Act does not provide for the distribution of property or the determination of ownership or boundaries of land. The Act is concerned only with the conduct of the parties. Practical Application: The Navajo Nation code contains a very broad definition of domestic abuse. Thus, the law may apply to many kinds of relationships, including neighbors. The Navajo Nation Domestic Abuse Protection Act includes harassment and property damage as forms of domestic abuse."

[753] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28058&lang=en

With Recommendation 2159 (2019) *Ending violence against children*: a Council of Europe contribution to the Sustainable Development Goals,[754] the Parliamentary Assembly calls the Committee of Ministers to accelerate progress towards reaching Sustainable Development Goal 16.2 to end abuse, exploitation, trafficking and all forms of violence against, and torture of, children in Member States, and to keep the issue as priority in the agenda of the Council of Europe's political and monitoring bodies.

In Recommendation CM/Rec(2019)1 on *Preventing and combating sexism*,[755] the Committee of Ministers provides Member States of the Council of Europe with a list of measures to address sexist behaviour in the public or private sphere. *Sexism* is defined here as:

> any act, gesture, visual representation, spoken or written words, practice or behaviour based upon the idea that a person or a group of persons is inferior because of their sex, which occurs in the public or private sphere, whether online or offline, with the purpose or effect of: violating the inherent dignity or rights of a person or a group of persons; or resulting in physical, sexual, psychological or socio-economic harm or suffering to a person or a group of persons; or creating an intimidating, hostile, degrading, humiliating or offensive environment; or constituting a barrier to the autonomy and full realisation of human rights by a person or a group of persons; or maintaining and reinforcing gender stereotypes.[756]

In Resolution 2290 (2019) *Towards an ambitious Council of Europe agenda for gender equality*,[757] the Parliamentary Assembly calls on the Council of Europe member and observer States to take gender-sensitive measures concerning gender stereotypes and sexism, violence against women and domestic violence, women's political representation, women's economic empowerment, access to justice, sexual and reproductive health and rights, and the rights of migrant, refugee and asylum-seeking women and girls.

With Recommendation 2152 (2019) *Promoting parliaments free of sexism and sexual harassment*,[758] the Parliamentary Assembly calls GREVIO to address the issue of violence against women in politics in its country visits, reports and recommendations and to collect data and information on violence against women in politics.

In Resolution 2274 (2019) Promoting parliaments free of sexism and sexual harassment,[759] the Parliamentary Assembly calls inter alia:

[754] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28059&lang=en
[755] Available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168093b26a
[756] Ibid.
[757] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28018&lang=en
[758] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=27615&lang=en
[759] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=27614&lang=en

> on the parliaments of Council of Europe member and observer States, as well as on the parliaments who enjoy observer or partner for democracy status with the Parliamentary Assembly to… consider reviewing immunity rules which afford immunity from prosecution to members of parliament for sexual harassment and violence against women, introduce complaint mechanisms to prevent and sanction sexual harassment, sexual violence and misconduct, …and to consider introducing specific legislation on sexism and violence against women in politics.

With Recommendation CM/Rec(2019)1 on *Preventing and combating sexism*,[760] the Committee of Ministers calls the governments of Member States "to take measures to prevent and combat sexism and its manifestations in the public and private spheres, and encourage relevant stakeholders to implement appropriate legislation, policies and programmes, drawing on the definition and guidelines appended to this Recommendation". This is the first instrument of the Council of Europe offering a definition of *sexism* and it is complemented by an appendix with guidelines for preventing and combating sexism and measures for implementation.

With R esolution 2233 (2018) *Forced marriage in Europe*,[761] the Parliamentary Assembly calls States *inter alia* to ratify the Istanbul Convention ,

> to criminalise, as a specific offence, intentional conduct forcing an adult or a child to enter into a marriage, as well as luring an adult or a child abroad for the purpose of forcing him or her to enter into a marriage, and provide for effective sanctions against the perpetrators and those who aid, abet, or attempt to commit such offences…to recognise forced marriage as a ground for international protection…to provide detailed training for professionals working in the social and education services, the police and the justice system and health-care professionals who are working with the victims of forced marriage.

In Resolution 2159 (2017) *Protecting refugee women and girls from gender-based violence*,[762] the Parliamentary Assembly calls *inter alia* to ratify the Istanbul Convention and adds:

> with regard to women's safety in transit and reception facilities: ensure the presence of female social workers, interpreters, police officers and guards in these facilities; provide separate sleeping areas for single women with or without children, and separate, well-lit bathrooms for women; create safe spaces in every transit and reception facility; when needed, ensure access for refugee and asylum-seeking women to shelters for women victims of gender-based violence; organise

[760] Available at https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168093b26a
[761] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25016&lang=en
[762] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23700&lang=en

> training programmes on identifying and assisting victims of gender-based violence for social workers, police officers and guards working in the facilities; provide information material in languages of the countries of origin on assistance services for victims of gender-based violence, including on reporting and complaint mechanisms;…ensure the same access to affordable and adequate health services for all women and girls as for the general population, regardless of whether they are defined as migrants, immigrants, refugees or asylum seekers;… ensure that girls are free to decide for themselves, that their voluntary and informed consent is always obtained, and that they do not require authorisation from a spouse, parent/guardian or hospital authority to access sexual and reproductive health services.

What is noteworthy is that, this instrument is adding a social obligation on the societies and the governments of the hosting States to "invest in social and economic integration programmes specifically targeting women refugees…by informing women refugees of the rules of good conduct in the host country, particularly with respect to gender equality", and to "launch awareness-raising campaigns on the positive contribution of refugees and asylum seekers to our societies".

In Resolution 2177 (2017) *Putting an end to sexual violence and harassment of women in public space*,[763] the Parliamentary Assembly calls on Council of Europe member and observer States to: ratify the Istanbul Convention and to include sexual violence and harassment in public space in national criminal codes, "to put an end to impunity by prosecuting perpetrators of sexual violence and harassment in public space;…and to conduct inquiries into sexual violence and the harassment of women in public space in order to gain a better understanding of the magnitude of the phenomenon and initiate action that may help eliminate the taboos surrounding this issue", including the training of teachers so that they can do early-detecting of potential victims.

In Resolution 2101 (2016) *Systematic collection of data on violence against women*,[764] the Parliamentary Assembly calls on Council of Europe Member States to collect data on all forms of violence covered by the Istanbul Convention and "on the causes of violence against women, on its consequences, on its prevalence and frequency and on the efficiency of policies and legislation" and to "analyse the causes of under-reporting of violence against women".

Resolution 2128 (2016) *Violence against migrants*[765]*,* is a briefly-worded instrument that aims at bringing to the fore the human rights dimension of migrants irrespective of their status and the obligation of the Member States to combat racism, discrimination and hate speech, which lead to violence against migrants, especially women who are

[763] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23977&lang=en
[764] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22555
[765] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22980&lang=en

particularly vulnerable. The Resolution calls *inter alia* for the ratification of the Istanbul Convention. It is noteworthy that under this Resolution, States have to "ensure that the perpetrators of violence against migrants are prosecuted regardless of the victims' status" and "provide the necessary care for victims (medical treatment, psychological and social assistance) without discriminating against the migration status of victims and paying special attention to vulnerable groups (women, children, and lesbian, gay, bisexual and transgender (LGBTQ+) people)".[766]

With Resolution 2135 (2016) *Female genital mutilation in Europe*,[767] the Parliamentary Assembly clarifies the following:

> "female genital mutilation is not an issue of honour but an act of violence against women and girls, and an act against the human right to health" and calls states to "recognise female genital mutilation as violence against women and children and systematically include this issue in national procedures and policies to combat violence, as well as to publicly condemn female genital mutilation, including through relevant legislation". It is interesting that the Assembly boldly recognises that female genital mutilation is linked to other harmful practices such as early marriages and calls States to "recognise female genital mutilation, or the well-founded fear of female genital mutilation, as persecution within the meaning of the 1951 Geneva Convention relating to the Status of Refugees".[768]

Resolution 2120 (2016) *Women in the armed forces: promoting equality, putting an end to gender-based violence*[769]*,* is an instrument much inspired by the UN Security Council Resolution 1325 on *Women, Peace and Security*. The purpose behind Resolution 2120 is to encourage the recruitment of women in the armed forces as well as their safety from any form of gender-based violence. For example, the Resolution seeks to "establish mechanisms… to enable victims to make informal complaints confidentially and anonymously" and to make States adopt legislation that "explicitly prohibits all forms of gender-based violence and is both comprehensive and effectively implemented; also ensure that internal codes of conduct include strict provisions in this connection, which are widely known and applied at all levels".[770] Naturally, States are called on to ratify the Istanbul Convention and to provide effective penalties for such illegal acts, "as simply transferring the victim of a sexual assault is not an appropriate response".[771]

[766] Ibid.
[767] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23176&lang=en
[768] Ibid.
[769] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22939&lang=en
[770] Ibid.
[771] Ibid.

With Resolution 2093 (2016) *Recent attacks against women: the need for honest reporting and a comprehensive response*,[772] the Parliamentary Assembly calls on Member States of the Council of Europe to "protect the women's right to physical integrity and the right not to be harassed in the public space and private sphere;…ensure, by prosecuting perpetrators, that there is no impunity for violence against women".[773] Interestingly, the Resolution also draws attention to the importance of education in preventing violence against women in order to foster appropriate attitudes from an early age among children.

Resolution 2027 (2014) *Focusing on the perpetrators to prevent violence against women*[774] was adopted with the purpose of addressing the persisting high number of victims of domestic, physical, sexual or psychological violence. The Assembly calls on the Member States, their national parliaments and non-governmental organisations to promote the ratification of the Istanbul Convention, design the setting up of preventive intervention and treatment programmes for perpetrators of domestic violence as well as "put the safety of victims and respect for their human rights at the centre of programmes for perpetrators of violence".[775]

Resolution 1963 (2013) *Violence against women in Europe*[776] ,is an outright reminder of the urgent need to ratify the Istanbul Convention and the Assembly particularly requests States not to make declarations and reservations to the Istanbul Convention or not to renew them.

With Resolution 1962 (2013) *Stalking*,[777] the Parliamentary Assembly recognises that the "repetition of acts intruding into a person's life which increase in intensity over time",[778] including cyberstalking, is a form of violence often linked to other forms of violence. Not only does the Assembly call States to criminalise stalking in line with the Istanbul Convention, but it also requests measures to assist victims of stalking as well as to prevent acts of stalking. It is noteworthy that hereby the Assembly encourages States to conduct research on the prevalence of violence against women, including stalking.

Resolution 1861 (2012) *Promoting the Council of Europe Convention on preventing and combating violence against women and domestic violence*[779], is an instrument that was adopted in the midst of conflicting political debates occurring in various Member States of the Council of Europe (see discussion below). The Assembly calls upon Member States of the Council of Europe to ratify the Istanbul Convention without reservations, to apply it not only to women but also to other victims of domestic violence, and also calls States with observer status and the EU to sign and ratify it.

[772] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22494&lang=en
[773] Ibid.
[774] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21325&lang=en
[775] Ibid.
[776] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20301&lang=en
[777] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20299&lang=en
[778] Ibid.
[779] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18067&lang=en

Resolution 1852 (2011) *Psychological violence*[780], calls States to ratify the Istanbul Convention and to "consider introducing the notion of psychological violence in their criminal law" as well as to "ensure that, in all cases, the sanctions against perpetrators of psychological violence are effective, proportional and dissuasive". [781] The lack of data on domestic violence and its link to psychological violence and the impact of this form of violence on the victims and their relatives, is an issue that is tackled by this Resolution as States are requested to conduct "surveys on domestic violence among the population, with a view to collecting information on the number of victims, broken down by gender; the type of violence (psychological or physical) and its manifestations; the presence of children in the household concerned; the estimated number of murders and suicides due to domestic violence".

Resolution 1853 (2011) *Protection orders for victims of domestic violence*[782], is an instrument that introduces measures for the immediate and long-term protection of victims of domestic violence. It is apparent from the text of the Resolution that, the lack of understanding of the phenomenon of violence against women on the part of the law enforcement authorities, is one of the causes due to which we witness such a high number of victims. The measures that are proposed include *inter alia* "civil injunctions, restraining orders in the context of a criminal procedure, and emergency barring orders, as well as specific protection orders for victims of domestic violence", and the "training for law enforcement officials on violence against women and domestic violence, in all its forms, including psychological violence and so-called 'honour crimes'".[783]

Resolution 1811 (2011) *Protecting migrant women in the labour market*[784] presents a sober approach with regard to the integration of migrant women in the host member States of the Council of Europe. The Parliamentary Assembly calls Member States to adopt:

> immigration policies based on human rights that are gender sensitive and empowering, and which prevent irregular migration, exploitation and trafficking"; furthermore, to "grant migrant women in an irregular situation full access to health care, education and fair working conditions, and ensure that they are able to report violence and exploitation without fear of deportation" and to "provide suitable assistance, including psychological and rehabilitation assistance, and other services, such as free legal aid, interpretation services, housing and childcare facilities, to victims of domestic violence and violence in the workplace, discrimination, exploitation and trafficking.[785]

[780] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18052&lang=en
[781] Ibid.
[782] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18053&lang=en
[783] Ibid.
[784] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17990&lang=en
[785] Ibid.

With Resolution 1835 (2011) *Violent and extreme pornography*[786], the Parliamentary Assembly's effort to address the impact of this form of violence on women's dignity and their right to live free from sexual violence, is more than commendable. The text of the Resolution offers a multidimensional approach that ultimately aims at the elimination of violent and extreme pornography as the latter diminishes the conditions for achieving effective gender equality and perpetuates negative gender stereotypes. The Assembly calls upon States to criminalise the production and use of violent and extreme pornography and draws attention to the links between pornography, prostitution and trafficking.

With Recommendation 1905 (2010) *Children who witness domestic violence*[787], the Parliamentary Assembly asks from the Committee of Ministers to provide for the protection of children as indirect victims of domestic violence within the, then, newly drafted Convention on violence against women. It is noteworthy that the Recommendation is drawing attention to the education of children on non-violence as a preventive intergenerational measure.

Resolution 1714 (2010) *Children who witness domestic violence*[788] recognises that children can be indirect or *secondary* victims of domestic violence, thus they can be subjected to "a form of psychological abuse which has potentially severe consequences".[789] This is an instrument that is much inspired from the legal framework on the protection of children's rights, especially the UN Convention on the Rights of the Child, yet it rightly links domestic violence against women with the abuse children experience when they live in an environment where women are subjected to violence.

Resolution 1765 (2010) *Gender-related claims for asylum*[790] is an inspiring instrument as it sets out a gender-sensitive asylum law framework. The Assembly hereby requests States *inter alia* to:

> ensure that gender-based violence is taken into account under the five different grounds of persecution (race, religion, nationality, membership of a particular social group or political opinion) in any asylum determination process and that 'gender' is specifically included in the notion of a 'particular social group' under the refugee definition set out in the 1951 UN Convention relating to the Status of Refugees (Geneva Convention), preferably by law, or at least in practice; to take into account that not only women and girls face gender-based violence and gender-related persecution, but that men and boys may also be victims; and to take into account that gay, lesbian, bisexual or transgender persons are

[786] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18028&lang=en
[787] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17825&lang=en
[788] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17826&lang=en
[789] Ibid
[790] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17915&lang=en

> increasingly facing gender-based violence and gender-related persecution. [791]

It is noteworthy that the Resolution provides that, trafficking, female genital mutilation and the risk of female genital mutilation, and forced sterilisation should be treated as potential grounds for asylum claim.

Recommendation 1881 (2009) *Urgent need to combat so-called honour crimes*[792]*,* is a request of the Assembly directed to the Committee of Ministers in order to include in the, then, "future Council of Europe convention the severest and most widespread forms of violence against women, including domestic violence and so-called 'honour crimes'".[793] It is interesting that the Assembly is, hereby, also requesting the drafting of an additional protocol to the European Convention on Human Rights protecting gender equality as a human right.

With Recommendation 1891 (2009) *Migrant women: at particular risk from domestic violence*,[794] the Parliamentary Assembly calls the Committee of Ministers to broaden the definitions of violence against women to be included in the then newly drafted Convention, and particularly to include domestic violence, so-called *honour crimes* and female genital mutilation. The Assembly is also asking to take into consideration migrant women's needs and vulnerabilities in the context of combating violence against women.

With Recommendation 1868 (2009) *Action to combat gender-based human rights violations, including the abduction of women and girls*,[795] the Parliamentary Assembly notes the vulnerability of women, especially migrant women, against phenomena of forced marriages, female genital mutilation and other human rights violations they experience because of their gender. This Recommendation is used, once again, as a step to reiterate the need for the drafting of a convention to combat the most serious and widespread forms of violence against women, including forced marriages. It is noteworthy that the Assembly asks for the setting up of a data collection system for gender-based human rights violations.

Resolution 1662 (2009) *Action to combat gender-based human rights violations, including the abduction of women and girls*[796] sets the parameters for collecting data on forced marriages and other gender-based human rights violation and developing a framework for the assistance of victims of such violations. It is particularly asking from States to amend their national legislation:

> so as to prohibit and penalise, without any difference in treatment, all forced

[791] Ibid.
[792] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17767&lang=en
[793] Ibid.
[794] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17792&lang=en
[795] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17730&lang=en
[796]Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17732&lang=en

> marriages, female genital mutilation and any other gender-based violations of human rights, including those performed in the name of cultural or religious relativism; [and] to prosecute abductions, illegal confinements and forced returns of women or girls when there is a known risk of their being subjected to practices such as forced marriage or female genital mutilation, which are contrary to human rights and Council of Europe values.[797]

Recommendation 1873 (2009) *Sexual violence against women in armed conflict*[798] is an instrument adopted under the normative influence of UN Security Council Resolution 1325 on Women, Peace and Security. The Parliamentary Assembly hereby asks from the Committee of Ministers to "address a recommendation on the role of women and men in conflict prevention, resolution and in peace building to Council of Europe Member States without further delay, paying due attention to the prevention and effective combating of sexual violence against women in armed conflict".[799]

Resolution 1681 (2009) *Urgent need to combat the so-called "honour crimes"*[800]*,* is an early step for a call for the drafting of a convention on combating violence against women. The Parliamentary Assembly hereby calls for the inclusion of domestic violence,the so-called *honour crime*s and female genital mutilation in the forms of violence against women that need to be addressed and also stresses out the vulnerability of migrant women to such forms of violence.

Recommendation 1847 (2008) *Combating violence against women: towards a Council of Europe convention*[801] serves as a reminder on the need to develop a framework convention on the severest and most widespread forms of violence against women, which should:

> encompass the gender dimension and address the specific nature of gender-based violence; cover the severest and most widespread forms of violence against women, in particular domestic violence against women (partners or former partners, cohabiting or not), sexual assaults (including rape and 'marital rape') and harassment, forced marriages, so-called 'honour crimes' and female genital mutilation; include provisions requiring States to take the necessary measures to protect victims and prevent and prosecute acts of violence against women; include an independent monitoring mechanism capable of controlling the effective implementation of the convention.[802]

[797] Ibid.
[798] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17743&lang=en
[799] Ibid.
[800] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17766&lang=en
[801] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17683&lang=en
[802] Ibid.

Resolution 1635 (2008) *Combating violence against women: towards a Council of Europe convention*[803] asks from national parliaments to step up the protection of women from violence by making amendments to their national legislation and, particularly, by complying with the following minimum standards , namely:

> making domestic violence against women, including marital rape, a criminal offence; regarding violence perpetrated between (former) partners as an aggravating circumstance; setting up sufficient numbers of safe emergency shelters; making provision to remove violent spouses or partners and take out protection orders against perpetrators; guaranteeing effective access to the courts and to protection measures for victims; allocating sufficient budgetary resources for the implementation of the law; monitoring the application of laws on violence against women passed by parliament.[804]

With Recommendation 1817 (2007), "Parliaments united in combating domestic violence against women": mid-term assessment of the Campaign,[805] the Parliamentary Assembly calls national parliaments to implement:

> seven priority measures to combat violence against women, including domestic violence: making domestic violence against women, including marital rape, a criminal offence; regarding violence perpetrated between (former) partners as an aggravating circumstance; setting up sufficient numbers of safe emergency shelters; making provisions to remove violent spouses or partners and take out protection orders against perpetrators; guaranteeing effective access to the courts and to protection measures for victims; allocating sufficient budgetary resources for the implementation of the law; monitoring the application of laws on combating violence against women passed by parliament.[806]

Resolution 1512 (2006) *Parliaments united in combating domestic violence against women*[807], calls on national parliaments of Council of Europe Member States and parliaments having observer status with the Parliamentary Assembly, to support the Council of Europe's pan-European campaign to combat violence against women, including domestic violence.

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[803] Available at http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17682&lang=en

[804] Ibid.

[805] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17596&lang=en

[806] Ibid.

[807] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17464&lang=en

With Recommendation 1759 (2006) *Parliaments united in combating domestic violence against women*,[808] the Parliamentary Assembly calls for the Committee of Ministers to allocate resources for the running of the campaign on domestic violence against women at international, institutional, local and regional level.

Resolution 1468 (2005) *Forced marriages and child marriages*,[809] the Parliamentary Assembly calls the parliaments of the Council of Europe Member States to adopt relevant legal instruments that prohibit forced marriages, and, most importantly, to "regard the coercive sexual relations that victims are subjected to within forced marriages and child marriages as rape" and "to consider the possibility of dealing with acts of forced marriage as an independent criminal offence, including aiding and abetting the contracting of such a marriage".[810]

Recommendation 1681 (2004) *Campaign to combat domestic violence against women in Europe*[811] is an attempt to set up a pan-European campaign against domestic violence which will encourage Member States to take the urgent measures needed and which will set up the issue on the agenda of all stakeholders, including EU institutions.

Recommendation 1663 (2004) *Domestic slavery: servitude, au pairs and mail-order brides*[812] calls for the Committee of Ministers to instruct "member states [of the Council of Europe] to combat domestic slavery in all its forms as a matter of urgency" and to criminalise any form of slavery and prosecute perpetrators.

Resolution 1337 (2003) *Migration connected with trafficking in women and prostitution*[813] is an instrument that calls States to adopt legislation on trafficking crimes and related offences with harsh penalties for perpetrators of such crimes and adopts a holistic approach proposing general and legal measures, measures to improve migration policies, preventive measures, and victim protection measures.

Recommendation Rec(2002)5 on *the protection of women against violence*[814] is an emblematic instrument of the Committee of Ministers to Member States of the Council of Europe. It contains a comprehensive list of measures on the subject area, ranging from measures concerning violence in conflict and post-conflict situations, violence in institutional environments, measures concerning failure to respect freedom of choice with regard to reproduction, measures concerning killings in the name of honour, female genital mutilation, sexual harassment and forced marriages, measures with regard to violence within the family and measures on information awareness and assistance to victims. The Committee of Ministers, under this Recommendation, calls Member States to

[808] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17461&lang=en
[809] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17380&lang=en
[810] Ibid.
[811] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17273&lang=en
[812] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17229&lang=en
[813] Available at http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17124&lang=en
[814] Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612

amend their criminal and civil law to ensure that women enjoy their human rights and freedom from violence as well as judicial proceedings. The Recommendation offers a definition of *violence against women* which is "to be understood as any act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life".[815]

Recommendation 1582 (2002) *Domestic violence against women*[816] is one of the first steps of the Council of Europe to deal with this form of violence and it contains a number of measures, including national legislation which:

> should prohibit all forms of domestic violence and introduce effective legal provisions, including the immediate removal of the violent partner from the common household and the environment of the woman and her children, without prior evidence of violence, and on the first complaint without waiting for the court order" =and that, "the concept of domestic violence should be defined in national legislation in such a way that it is treated as a serious criminal offence, whatever its form.[817]

At the time of the adoption of Recommendation 1523 (2001) *Domestic slavery*,[818] the Member States of the Council of Europe had not outlawed domestic slavery. This Recommendation is an effort to "make slavery and trafficking in human beings, and also forced marriage, offences"[819] in the national criminal codes. It is interesting that the Assembly proposes that embassies and other relevant authorities provide domestic workers with information about the risks of working abroad.

With Recommendation 1450 (2000*) Violence against women in Europe*, the Parliamentary Assembly calls Member States to ratify CEDAW and its protocol, bring in legislation outlawing all forms of domestic violence and establish legal recognition of marital rape.

It should be noted that all the above soft-law instruments remain in force irrespective of the date they have been adopted; they set out priorities and targets for all Member States of the Council of Europe, yet there is a varying degree of how quickly and effectively States implement them while they also enjoy the margin of appreciation.

[815] Appendix to Recommendation (2002) 5, Ibid.
[816] Available at http://assembly.coe.int/nw/xml/xref/Xref-XML2HTML-en.asp?Fileid=17055
[817] Ibid.
[818] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16924&lang=en
[819] Ibid.

C.3.3.1 Caselaw

There are numerous cases that have been adjudicated by the ECtHR on violence against women; the high number of the cases is a constant reminder of how many women are subjected to violence and correspondingly how many Member States of the Council of Europe have missed out opportunities to address the causes of gender-based violence.[820] There is some emblematic caselaw where the Court has addressed the institutional (whether judicial, prosecutorial or law-enforcement) passivity that is conducive to gender-based violence and is perpetuating impunity, see for example *Z.B. v. Croatia*[821]; *Opuz v. Turkey*[822]; *M.G. v. Turkey*[823], *Durmaz v. Turkey*[824].

C.3.3.1.1 Secondary Victimisation of victims of Violence

[820] See for example European Court of Human Rights, Factsheet: Violence against Women, May 2021, https://www.echr.coe.int/documents/fs_violence_woman_eng.pdf ; European Court of Human Rights, Factsheet: Domestic Violence, July 2021, https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf

[821] "The domestic authorities thereby brought about a situation in which the circumstances of the alleged domestic violence against the applicant were never finally established by a competent court of law, resulting in B.B.'s virtual impunity", para. 61.

[822] Application No. 33401/02, 9 June 2009, Final Judgment 9 September 2009. "…when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers consider the problem as a "family matter with which they cannot interfere"", para 105, "…there are unreasonable delays in issuing injunctions by the courts… because the courts treat them as a form of divorce action and not as an urgent action. Delays are also frequent when it comes to serving injunctions on the aggressors, given the negative attitude of the police officers (see paragraphs 91-93, 95 and 101 Opuz). Moreover, the perpetrators of domestic violence do not seem to receive dissuasive punishments, because the courts mitigate sentences on the grounds of custom, tradition or honour (see paragraphs 103 and 106 Opuz)", para. 196, "domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively."para. 197.

[823] Application No. 646/10, 22 March 2016, Final Judgment 22 June 2016. "Au vu des constats opérés en l'espèce (paragraphes 88-95 ci-dessus), la Cour estime que la manière dont les autorités internes ont mené les poursuites pénales dans la présente affaire participe également de cette passivité judiciaire et ne saurait passer pour satisfaire aux exigences de l'article 3 de la Convention." para. 97

[824] Application No. 3621/07, 13 November 2014, Final Judgment 13 February 2015. See "…the Court observes at the outset that the documents summarised above illustrate that neither the prosecutor nor the investigating police officers kept an open mind during the investigation as to the cause of the applicant's daughter's death. Both the prosecutor and the police seem to have accepted from the outset that Gülperi O. had committed suicide when they had no evidence to support such a conclusion, and in their correspondence – before even concluding the investigation – those authorities stated that Gülperi O. had taken an overdose and killed herself" para. 56, "The Court considers that the failures in the investigation in the present case bear the hallmarks of other investigations in Turkey into allegations of domestic violence, one of which the Court has had the opportunity to examine. In that judgment the Court concluded that there existed a prima facie indication that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. As evidenced in the present case, the Court considers that the prosecutor's above-mentioned serious failures are part of that pattern of judicial passivity in response to allegations of domestic violence." para. 65.

Misogynistic or sexist stereotypes in the investigative work of the police, and in prosecutorial and judicial proceedings, may lead to the revictimisation of victims of gender-based violence. In *J.L. v. Italy*[825] the ECtHR had the opportunity to address this issue. In this case, J.L., while being intoxicated, was subjected to gang-abuse. Her perpetrators were acquitted by the national appeals' court following a heavy referencing of the court to the victim's *(bi-)sexuality* and personal life (i.e. the victim's casual relations prior to the incident). The impact of the national court's references to the victim's personal life was to devalue the victim's credibility (which was important in order to prove whether she had been able to consent or not to the sexual act in question), rather than safeguard the victim's image and dignity. The wording of the judgement was found to be particularly problematic in this aspect, especially in view of its public character.[826] Furthermore, the negative stereotyping of the victim could have also been a reason for the national appeals' court to treat the perpetrators more favourably and, consequently, acquit them. The ECtHR held that, there had been a violation of Article 8 (right to respect for private life) of ECHR as the national court breached its positive judicial duties to protect a victim and to abstain from reproducing sexist stereotypes that could lead to *secondary victimisation*:

> …the language and arguments used by the court of appeal conveyed prejudices existing in Italian society regarding the role of women and were likely to be an obstacle to providing effective protection for the rights of victims of gender-based violence, in spite of a satisfactory legislative framework. The Court was convinced that criminal proceedings and sanctions played a crucial role in the institutional response to gender-based violence and in combatting gender inequality. It was therefore essential that the judicial authorities avoided reproducing sexist stereotypes in court decisions, playing down gender-based violence and exposing women to secondary victimisation by making guilt-inducing and judgmental comments that were capable of discouraging victims' trust in the "justice system".[827]

C.3.3.1.2 Cyber Bullying

[825] Application No 5671/16, 27 May 2021, Final Judgment 27 August 2021.

[826] See para. 140 et seq of *J.L. v. Italy*. See also The Dissenting Opinion of Judge Wojtyczek is reflecting the tension regarding stereotypes in the judicial proceedings. See para. 5 therein where Judge Wojtyczek states "La majorité adresse le reproche suivant aux juges italiens (paragraphe 140 de l'arrêt) : « le langage et les arguments utilisés par la cour d'appel véhiculent les préjugés sur le rôle de la femme qui existent dans la société italienne ». Toutefois, ce reproche n'est étayé par aucun argument. En particulier, il n'est pas expliqué quels préjugés sur le rôle de la femme sont véhiculés par la cour d'appel. Je constate par ailleurs que dans la présente affaire la cour d'appel de Florence a statué dans une formation de trois juges répondant aux critères de l'équilibre hommes-femmes (deux femmes, dont le juge rapporteur, et un homme)."

[827] European Court of Human Rights, Factsheet: Violence against Women, pp. 10-11.

The phenomenon of domestic violence expands beyond physical violence to also include psychological violence and harassment. Cyberbullying is a form of violence against women and girls on the Internet, entailing many forms, ranging from hacking private social media accounts, to sharing and manipulating photos, etc. In *Buturuga v. Romania*[828], the ECtHR examined a case which, based on the facts, brought cyberbullying into the context of domestic violence. The ECtHR found that Romania failed in its positive obligations under Articles 3 and 8 of the Convention:

> In both domestic and international law, the phenomenon of domestic violence is regarded not as being confined to physical violence but as also including psychological violence or harassment. Furthermore, cyberbullying is currently recognised as an aspect of violence against women and girls and can take on various forms, including cyber violations of privacy, hacking the victim's computer and the stealing, sharing and manipulation of data and images, including intimate details. In the context of domestic violence, cybersurveillance is often traceable to the person's partner. The Court therefore accepted that such acts as improperly monitoring, accessing and saving the spouse's or partner's correspondence could be taken into account by the domestic authorities when investigating cases of domestic violence. Such allegations of breach of confidentiality of correspondence required the authorities to conduct an examination on the merits in order to gain a comprehensive grasp of the phenomenon of all the possible forms of domestic violence. The authorities had therefore been overly formalistic in dismissing any connection with the domestic violence which Ms Buturugă had already reported, and had thus failed to take into consideration the many forms taken on by domestic violence.[829]

C.3.3.1.3 Acid Attacks

Acid violence is another form of gender-based violence: it involves intentional acts of violence in which perpetrators spray or pour acid onto victims' faces and bodies. In *Tërshana v. Albania*,[830] the victim suffered grievious bodily harm in an acid attack by an unidentified assailant. The victim had suffered 25% burns to her face and body and eventually had to undergo 14 operations in the short period between 2009-2012. The victim suspected that her former husband had carried out the attack "as an act of revenge and a continuation of past domestic violence". The investigation by the national authorities into the violent attack did not identify the perpetrator and was eventually

[828] 11 February 2-2-. Final Judgment 11 June 2020.
[829] Registrar of the European Court of Human Rights, Press Release: Romanian authorities failed to respond to a woman's complaints of domestic violence and cyberbullying by her former husband, ECHR 056 (2020) 10.02.2020.
[830] Application No. 48756/14, 4 August 2020, Final Judgment 4/11/2020.

suspended in 2010. The ECtHR found that the national investigation into the attack was inadequate and thus amounted to a procedural violation of Article 2 of ECHR:

> The Court considers that the circumstances of the attack on the applicant – which has the hallmarks of a form of gender-based violence – should have incited the authorities to react with special diligence in carrying out the investigative measures. Whenever there is a suspicion that an attack might be gender motivated, it is particularly important that the investigation is pursued with vigour.[831]

Based on the facts of the case, the ECtHR could not hold Albania liable for failing to protect the victim from the acts. However, it seized the opportunity to clarify that had the individual alerted the authorities of her life or physical integrity being in a *real and immediate* risk by the criminal acts of a third party, then the authorities would have been under the positive obligation to take measures within the scope of their powers to avoid that risk. The Court also acknowledged that the scope of the positive obligation to take operational preventive measures is not infinite, as it would impose a disproportionate burden on the authorities.[832]

C.3.4 Organisation of American States

In Latin America, violence against women is particularly high. In 2018, the region was home to 14 of the 25 countries with the highest rates of femicide around the world; 3,529 women were killed that year, in the region, because of their gender.[833] In 2020, the highest femicide rates were reported in countries like El Salvador, Hondouras, Brazil, Colombia, Venezuela, Guatemala, Argentina, the Dominican Republic and Mexico.[834]

So far, 18 Latin American countries have passed laws that criminalise *femicide*, *feminicide*or *aggravated homicide due to gender*, and provide data for collection on femicide and violence against women, either in the framework of comprehensive protection laws or in special laws.[835] Caribbean States are yet to incorporate

[831] Para. 160.

[832] See para. 148: "where the Court finds that the authorities knew or ought to have known of that risk, it must assess whether they took measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk ".

[833] CEPALSTAT, https://oig.cepal.org/en/indicators/femicide-or-feminicide (accessed 11 February 2020).

[834] UN ECLAC, The pandemic in the shadows: femicides or feminides in 2020 in Latin America and the Caribbean, 2021. https://www.cepal.org/sites/default/files/infographic/files/21-00792_folleto_the_pandemic_in_the_shadows_web.pdf

[835] See for example, Costa Rica (2007), Guatemala (2008), Argentina (2009), Chile (2010), Colombia (2015), Ecuador (2018), El Salvador (2011), Mexico (2007), Panama (2013), Paraguay (2016), Peru (2015) Plurinational State of Bolivia (2019 and 2013), Uruguay (2018), etc. However, the cultural context of 'machismo' cannot change overnight only with legislative reforms. For example, El Salvador is one of the states in the region with an abysmal record of violence against women and femicides. Despite the

femicide/feminicide in their national legislation. Despite the legislative efforts that have been made to eradicate violence against women in the region, it is observed that there is still high level of impunity as much as there is underrreporting of incidents of violence and femicides:

> [l]egislative prolixity has not had a real impact on reducing violent deaths of women. For the laws that punish feminicide to fulfill their objectives, it is necessary that these crimes be easily verified and that, both the investigation and the judicial adjudication of cases, do not continue with patterns of impunity, and do not use gender stereotypes that revictimize and blame women and thus limit their access to justice.[836]

Hence, systematic collection of data on violence against women, both in terms of prevalence and incidence, is a necessity in order to be able to design appropriate actions that will reverse the social acceptance of violence against women and the overall masculine culture in the region.

The principal legal instruments for addressing violations related to discrimination and violence against women are the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention). The *Belém do Pará* Convention is the first regional instrument to recognize violence against women as a human rights abuse; it further calls for mechanisms to prevent, investigate and eliminate any forms of violence against women, whether in the public sphere or perpetrated by individual actors. This human rights instrument, that has been ratified by 32 member states of OAS, is one of the few human rights instruments that has also been translated in many indigenous languages of the region in order to achieve maximum dissemination.

The enforcement of the provisions of the *Belém do Pará* Convention is based on an institutionalized, multilateral process, which is known as the *Follow-up Mechanism to the Belém do Pará Convention (MESECVI)*. States exchange information on the measures and the societal, systemic, organizational, or other challenges they may face in their efforts to eliminate violence against women. A Committee of Experts is the technical component of the Follow-up Mechanism, and its mandate entails the evaluation of the national reports concerning the implementation of the *Belém do Pará* Convention. Arts. 10-12 of the *Belém do Pará* Convention provide for the role of the Inter-american protection mechanisms

adoption of the Special Comprehensive Law for a Violence-free Life for Women in 2012 which defines and punishes femicide as a specific crime with a longer sentence than murder (maximum penalty of 50 years), there is still a low conviction rate for gender-based crimes.

[836] OAS MESECVI, Communique Committee of Experts, Committee of Expert expresses concern about the high rates of femicides/feminicides in the region, https://www.oas.org/es/mesecvi/docs/CEVI-ComunicadoFemicidio-2020-EN.pdf

concerning the elimination of violence against women. For example, national measures have to be reported to the Inter-american Commission of Women (an intergovernmental regional agency on women's rights). Furthermore, both States and the Inter-american Commission of Women can request advisory opinions for the interpretation of the *Belém do Pará* Convention.

Complaints on violations of the *Belém do Pará* Convention can be lodged with the I/A Commission on HR; if the State does not comply with the recommendations of the Commission, then the latter can refer the case to the I/A Court of HR. It should be noted that, by referring the I/A Commission on HR to the Court, it is becoming part of the proceedings, essentially representing the victim's side.

The duties of the States concerning the prevention, punishment and eradication of all forms of violence against women, are multifold. In Article 7 of the *Belém do Pará* Convention it is stated that States, without delay, have to:

> "…a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
>
> b. apply due diligence to prevent, investigate and impose penalties for violence against women;
>
> c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
>
> d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
>
> e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
>
> f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
>
> h. adopt such legislative or other measures as may be necessary to give effect to this Convention".

The OAS bodies, along with the Follow-up Mechanism to the *Belém do Pará* Convention, have provided States with soft law instruments that aim at raising awareness on the issue, as much as educating policymakers, the public and civil society actors on the

need to prevent and punish violence against women. A Declaration on Femicide, by the Follow-up Mechanism to the *Belém do Pará* Convention, offers a guiding interpretation of femicide, placing it in a broader context regarding the relationship between the victim and the perpetrator:

> femicide is the violent death of women based on gender, whether it occurs within the family, a domestic partnership, or any other interpersonal relationship in the community, by any person, or when it is perpetrated or tolerated by the State or its agents, by action or omission.[837]

This Declaration calls *inter alia* for the removal of legal obstacles that impede victims and their families from obtaining justice. A fundamental step towards this direction is the abolition of the extenuating circumstance of *crime of passion* which is often used to diminish responsibility of the perpetrators of femicide.[838] OAS has produced a model law as a blueprint for the criminalisation of femicides in the region. It is stated therein that femicides are acts of violence against any person who identifies as a woman.[839]Also, the definition of *victim* is a broadened concept encompassing "the immediate family, dependents of the direct victim and persons who have suffered damage when intervening to provide assistance to victims in danger or to prevent victimization".[840]

Moreover, the I/A Commission on HR,along with the Rapporteur on the rights of women, have issued thematic reports on violence against women and discrimination[841] and a guide on the elimination of violence against women, children and adolescents.[842] The I/A Court of HR has also acknowledged that violence against women and girls on the Internet is a new form of gender-based violence.[843]

[837] OAS MESECVI, (2008) Declaration on Femicide, August 13–15, 2008, Washington, D.C.OEA/Ser.L/ II.7.10MESECVI/CEVI/DEC. 1/0815, https://www.oas.org/es/mesecvi/docs/declaracionfemicidio-en.pdf
[838] OAS MESECVI, (2008) Declaration on Femicide.
[839] OAS, Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls- Femicide or Feminicide, https://www.oas.org /en/mesecvi/docs/LeyModeloFemicidio-EN.pdf
[840]OAS, Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls- Femicide or Feminicide, p. 25
[841] https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/dmujeres/default.asp; https://www.oas.org/en/iachr/jsForm/?File=/en/IACHR/r/DMujeres/InformesTematicos.asp
[842] See also Inter-american Commission on Human Rights, Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Carribean, OAS/Ser/L/V/IL, Doc. 233, 14 November 2019, https://www.oas.org/en/iachr/reports/pdfs/ViolenceWomenGirls.pdf See also the Resolutions, https://www.oas.org/en/cim/docs/AoD32-Resolutions[EN].pdf
[843] IACHR, Press Release No. 250/18, International Day for the Elimination of Violence against Women, 25 November 2018.

C.3.4.1 Caselaw

Within the Inter-American human rights protection system there is a due diligence obligation upon States to prevent and eliminate violence against women, whether that is perpetrated by State organs, non-State actors or private actors. Inter-american human right bodies have affirmed that acts, such as violence against women and domestic violence, that violate human rights, including the right to human dignity, the right to life, freedom from torture, etc., are imputable to States.[844] Accordingly, "states have international obligations associated with the occurrence of domestic violence within their borders; the duty to prevent, investigate, punish, and, when possible, repair the harm. All of these duties may be referred to as the general duty to ensure human rights".[845] Therefore, within the inter-american system, it is the duty of States to ensure women's rights to live free from any form of violence within their territories. Should they fail in doing so, they will incur State responsibility over their inactions or omissions.

Along these lines, there is the duty of non-repetition of human rights violations (under Article 1 [1] of the American Convention on Human Rights) which is extended not only *vis-a-vis* the victims but also *vis-à-vis* other women and girls that may face similar experiences. The I/A Commission on HR has taken a bold stance to request reparations that have a transformative role for victims of intersectional discrimination and not merely measures that restore the status *quo ante*.[846] From this perspective, the I/A Commission on HR is placing the burden on the States to provide gendered and customed-tailored reparations and even involve the victims in the design and implementation of reparation measures:

> "Taking into account cultural, linguistic, social and other particularities will help ensure that these measures achieve their intended impact, as well as to provide ownership of the process".[847]

The I/A Commission on HR has drawn attention to the fact that violence against women in the region is also anchored on the fact that particular groups and communities have been subjected to historical or structural discrimination. For this reason, it has recommended that States in the region adopt measures that will have impact, not only on the victims of the human rights violations, but also on the societies as a whole.[848] Such an

[844] See *Jessica Lenahan (Gonzales) v. United States of America*, Inter-American Commission on Human Rights, Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).
[845] P. T. Moser, Duty to Ensure Human Rights and its Evolution in the Inter-American System: Comparing *Maria de Pengha v. Brazil* with *Jessica Lenagan (Gonzales) v. United States*, American University Journal of Gender Social Policy and Law 21, no. 2 (2012): 437-453, p. 438.
[846] IACHR, Truth, Justice and Reparation: Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II. Doc. 49/13, December 31, 2013, para. 463.
[847] Impact of cases of discrimination and violence against women, girls and adolescents, para. 65.
[848] IACHR, Case 12.051, Merits Report No. 54/01, *Maria da Penha Maia Fernandes* (Brazil), para. 55.

approach is deemed necessary in order to structurally transform the causes of human rights violations; if anything, this is an effort to identify and reverse structural, historical, social and other factors that have caused the historically unequal power relationships between men and women in the first place. The regional caselaw is displaying exemplary reparations, ranging from pecuniary measures, to regulatory and legislative reforms, institutional strengthening, to symbolic measures, such as the construction of monuments in honour of the victims and public apologies to the victims[849]. The I/A Commission on HR and the I/A Court of HR have produced rich caselaw on the subject matter, see for example, *Case of González et al. ("Cotton Field") v. Mexico, Case of the Women Victims of Sexual Torture in Atenco v. Mexico*. It should be noted that when the I/A Court of HR finds violations of the ACHR, its judgment is binding, not only on the State in question, but also on the rest of the States that have ratified the ACHR. The value of such caselaw is indisputable as it establishes legal precedent for the American region that would improve the ability of victims of violence to access justice and seek reparations, and change the socio-cultural patterns that foster violence against women and girls.

[849] For example, the Minister of Justice of Colombia publicly apologized to a victim of gender-based discrimination. The public apology was broadcasted to all prison facilities in the country: ""… The Colombian State makes the present acknowledgment of international responsibility and sincerely apologizes, under the understanding that, as a measure of reparation, the effects of this recognition and apology are oriented at mitigating, in some way, the effects caused to Ms. Marta Lucía Álvarez. Having denied her the right to an intimate visit based on her sexual orientation was an act of extreme discrimination [...]. We apologize for the actions and omissions of State agents, who committed the violation of her rights to personal integrity, honor, dignity, judicial guarantees, judicial protection and the right to equality before the law." See IACHR, *Marta Lucia Alvarez Giraldo* (Colombia) (Giralda), Case 11/656, Merits Report No. 122/18, Marta Lucía Álvarez Giraldo (Colombia), para. 241.

C.3.4.1.1 Secondary Victimisation of victims of Violence

The investigation and prosecution of crimes of violence always raises the issue of secondary victimisation of the victims in the American region. For this reason, both the Model law and the I/A Court of HR have raised the bar as to the standards to be used in such proceedings. For the I/A Court of HR, *no secondary victimisation* is among the minimum core States' obligations when dealing with cases of violence against women[850]:

> […]Among other things, a criminal investigation into sexual violence should include the following: i) the statement should be made in a safe and secure environment that provides privacy and instils confidence; ii) the statement should be recorded in order to avoid or limit the need for its repetition; iii) provide both emergency and, if necessary, continuing medical, prophylactic and psychological care to the victim, using a treatment protocol aimed at lessening the consequences of the offense; iv) a complete and detailed medical and psychological appraisal should be made by suitably-trained personnel, if possible of the sex indicated by the victim, advising the latter that she may be accompanied by someone she trusts if she so wishes; v) investigation procedures are documented and coordinated and the evidence is processed diligently, taking sufficient samples, performing tests to determine the possible perpetrator of the act, preserving other evidence such as the victim's clothes, inspecting the scene of the incident immediately, and ensuring the proper chain of custody; vi) free legal assistance is provided to the victim during all stages of the proceedings, and (vii) both emergency and, if necessary, continuing medical, prophylactic and psychological care are provided to the victim, using a treatment protocol aimed at lessening the consequences of the offense. Likewise, in cases of allegations of violence against women, the criminal investigation must include a gender perspective and be conducted by officials who are trained in such cases and in dealing with victims of discrimination and gender-based violence.[851]

Along the same lines, the I/A Court of HR has stressed the importance of limiting the number of physical examinations carried out on the victims of violence, especially children and adolescents:

> The authorities shall avoid as much as possible subjecting them to more than one physical examination, as it can be revictimizing. The medical examination in these cases must be carried out by a professional with broad expertise and experience in cases of violence against children and adolescents who will seek to minimize and avoid causing them additional trauma or re-victimizing them. It is recommendable for the victim or their legal representative, as corresponds, to be able to choose

[850] See also OAS MESECVI, Declaration on Femicides.
[851] Inter-American Court. *Case of the Nova Brasília favela v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 16, 2017. Series C No. 333, para. 254.

> the sex of the professional, and for the exam to be conducted by a health professional who is a specialist in child-youth gynecology, with specific training in conducting medical forensic examinations in cases of abuse and sexual assault. Likewise, the medical examination must be conducted with the informed consent of the victim or the victim's legal representative, depending on their level of maturity, taking into account the right of the child or adolescent to be heard in a suitable setting and for their right to privacy to be respected, allowing the victim to be accompanied by an individual they trust. Whether an expert gynecological report is necessary should be considered on a case-by-case basis, taking into account the time passed since the sexual violence took place. In view of this, the Court finds that the request for an expert gynecological report must provide a detailed rationale, and, if not necessary or the informed consent of the victim is not secured, the examination must be omitted. Under no circumstances shall this serve as an excuse for discrediting the victim and/or impeding an investigation.[852]

C.3.4.1.2. Suicide Constituting Femicide

Sexual violence inflicts serious implications upon children; the psychological and emotional consequences may even lead to suicide or suicide attempts. As the I/A Court of HR has observed:

> "in the case of child victims of sexual violence, the impact can be exacerbated and they may suffer an emotional trauma that differs from that suffered by an adult, with extremely profound effects, in particular when the victim's relationship with the perpetrator is based on trust and authority."[853]

There is a landmark ruling from the I/A Court of HR that acknowledges that the suicide of an adolescent victim of the sexual abuse, being a direct result of her sexual abuse, constitutes a form of femicide. Paola Guzmán Albarracín was a student who had been sexually abused repeatedly by the vice principal of the school between 2000 and 2002; her suffering from the sexual abuse led her to the decision to poison herself. The I/A Court of HR upheld that States in the region have the duty to prevent human rights violations in the course of a child's educational process and affirmed that minors can enjoy their human rights as guaranteed under the OAS human rights instruments, "in the measure that they develop the capacity and maturity to do so".[854] The I/A Court of HR found that Ecuador had *inter alia* failed to take into consideration the special situation of vulnerability of a girl subjected to violence in the context of a clearly unequal relationship, let alone in the context of a relationship of power and trust within a school setting. In its

[852] Inter-American Court. *Case of V.R.P., V.P.C. et al. v. Nicaragua*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 350, para. 169.
[853] *Case of V.R.P., V.P.C. et al. v. Nicaragua*, para. 163.
[854] *Guzmán Albarracín v. Ecuador*, para. 109.

reasoning, the I/A Court of HR stressed how the risk factors of *age* and *gender* could play out into the context of structural discrimination and gender stereotypes[855] and explained how lack of sexual and reproduction education increased her vulnerability. Sexual violence should be understood beyond physical acts of sexual nature, encompassing other means which can cause harm and suffering:

> sexual violence against women or girls may involve different degrees of abuse, depending on the circumstances of each case and various factors, including the characteristics of the acts committed, their reiteration or continuity and the preexisting personal connection between the victim and her aggressor, or her subordination based on a relationship of power. Another relevant factor, depending on each case, is the victim's personal situation, i.e. being a girl; and, although children and adolescents have progressive autonomy in the exercise of their rights, that does not deprive them of their right to measures of protection.[856]

The judgment also establishes the duty of States to prevent sexual violence in schools across the region and to guarantee girls and adolescents' access to sexual and reproductive education, as part of the right to education.

C.3.4.1.3. Gender stereotypes in legislation and judicial proceeding

Gender stereotypes in the national legislation of more than 30 States in the Americas, sustain discriminatory regimes against victims of violence. Such is the case, for example, with the *estupro laws* which reduce the crime of rape to *estupro* when it is committed against adolescent girls. These *estupro* provisions are based on false stereotypes according to which girls are acting as temptresses to their rapists and thus allow the latter face less consequences of their crime, or even worse, impunity. The UN Rapporteur on Violence Against Women has called for the abolition of *estupro* provisions from national legislation as they "create an enabling environment for further discrimination and harm against adolescent girls in particular, and women in general, including that girls sexually exploited by older men often end up being coerced into marriage or informal unions on the basis of the structural discrimination they face."[857]

The Court has addressed gendered preconceptions which result in discrimination against women:

> a preconception of attributes, behaviors or characteristics possessed by, or roles that are or should be played by, men and women, respectively, and it is possible to

[855] Para. 109. Cf with *O' Keefe v. Ireland*, Application No. 35810/09, ECHR 2014, Judgment 24 January 2014.
[856] Para. 124.
[857] Equality Now, "What is Estupro", 15 September 2021, https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/11/EN-Americas_rpt_ENG_-_Estupro_fact_sheet_02.pdf.

> associate the subordination of women to practices based on socially dominant and persistent gender-based stereotypes. In this regard, their creation and use becomes one of the causes and consequences of gender-based violence against women, a situation that is exacerbated when they are reflected, implicitly and explicitly, in policies and practices, particularly in the thinking and language of the State authorities.[858]

The *Guzmán Albarracín v. Ecuador* is an exemplary case of how gender stereotypes can lead to State authorities' toleration and acceptance of sexual violence against adolescent women. Apart from the institutional violence, which was not prevented in the educational establishment, the I/A Court of HR referred to the biased language also used by the national court when it addressed the issue:

> In this case, the Superior Court of Justice of Guayaquil… found that no crime of sexual harassment was committed because the vice principal 'did not pursue Paola Guzmán. Rather, she was the one who sought favors from him as an educator,' this being the 'reason for the seduction.' In this same ruling, the court understood that the vice principal's conduct amounted to 'rape,' explaining that in this crime the seduction is aimed at 'achieving consent and carnal intercourse with an honest woman.' It based its affirmations citing specialized doctrine, which explains that '[a]n essential element [of the crime] is the `maidenhood´ of the rape victim, a 'maiden' being understood as […] a young woman of virtuous life prior to the fact, regardless of whether she has conserved her virginity.' The judicial ruling made reference to the criminal definition of 'rape' which, under the laws in force at the time of the facts, required the victim to be an 'honest woman' in order to configure that crime.[859]

For the I/A Court of HR, this was a biased analysis because:

> … it dismisses a crime based on a judgment of the victim's alleged conduct, making her responsible under the notion of 'seduction'. This shows that the ruling understood that the fact of seeking 'academic favors' implied, per se, that the victim engaged in acts of 'seduction,' implicitly attributing to her, at least partially, responsibility for what finally occurred. *This view of women – or, in this case, a girl - as 'provocative' permits sexual violence and discrimination exercised through harassment, absolving the perpetrator of responsibility for it*. Regarding the latter, it should be noted that, although the ruling attributes a crime to the vice principal, it dismisses the crime of sexual harassment. Thus, *the decision implicitly validated*

[858] *Case of González et al. ("Cotton Field") v. Mexico*, para. 401, and *Case of the Women Victims of Sexual Torture in Atenco v. Mexico*, para. 213.
[859] Para. 190

> *sexual harassment against a girl, since it did not consider that this conduct includes 'grooming' for subsequent abuse, in which the perpetrator takes advantage of a relationship of power*.[860]

C.3.5 Other regional instruments

There are other regional instruments which provide protection for women against violence. For example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, the Declaration on the Elimination of Violence against Women in the Association of Southeast Asian Nations Region, etc.

In the African region, the African Court on Human and People's Rights has already issued judgments on women's rights, i.e. *APDF and IHRDA v. the Republic of Mali*[861]. Furthermore, the Maputo Protocol has placed an obligation on the African State Parties to develop their domestic laws to ensure that women are *inter alia* protected from sexual violence.[862] For example, the South African Constitutional Court has admitted that the common law for the crime of rape[863] had to be developed to meet the obligations arising under international law[864] and eventually abolish patriarchal gender norms in the procedural rules of evidence and end sexism in rape trials:

> historically, women have been objectified in relation to the crime of rape, where the interest which was to be protected was not their human rights to dignity, equality, security or safety of the person but rather their chastity or value as an object for their male owner. In alignment with our constitutional framework, all this is changing. The prosecution of gender-based violence has acknowledged a victim-centred approach whilst at the same time not losing sight of an accused's

[860] Para. 191

[861] Application 046/2016, Decision 11 May 2018,https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/215/dbc/5f5215dbcd90b917144785.pdf

[862] See for example, *Carmichele v. Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62

[863] *Tshabalala v. The State*; *Ntuli v. The State* [2019] ZACC 48: "If the doctrine of common purpose extends to crimes of murder, common assault or assault with intent to do grievous bodily harm, it is irrational and arbitrary to make a distinction when a genital organ is used to perpetrate the rape. The constitutional principles of equality, dignity, protection of bodily and psychological integrity, and not to be treated in a cruel inhumane and degrading way, should be afforded to the victims of sexual assault. It would be a sad day if courts were to countenance such an arbitrary distinction.", para. 60

[864] The Court noted that "rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room. The perpetrators overpowered their victims by intimidation and assault.", para. 54

rights to a fair trial.[865]

The advancement of women's human rights is also progressing at subregional African level. In *Mani v. Niger*[866] the ECOWAS Court of Justice found that the cultural/social practice of selling a woman to a man to serve as his concubine, named *Sadaka*, amounted to slavery and that based on the facts Niger's authorities had not sufficiently protected the victim from the physical, psychological and moral harm caused by the said practice.

[865] Para. 90

[866] *Hadijatou Mani Koraou v. The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008, available at http://www.refworld.org/docid/491168d42.html

▪ Important points to remember about "Femicides and Violence against Women and Girls"

When studying "Femicides and Violence against Women and Girls," it is crucial for students to keep in mind the following important points:

6. Gender-Based Violence: Femicide and violence against women and girls are forms of gender-based violence that disproportionately affect women and girls due to their gender identity. Students should understand the systemic nature of gender-based violence and its various manifestations, including intimate partner violence, sexual assault, harassment, and harmful traditional practices.
7. Human Rights Perspective: Femicide and violence against women and girls are human rights violations. Students should approach the topic from a human rights perspective, recognizing that every woman and girl has the right to live a life free from violence, discrimination, and fear.
8. Root Causes: Students should explore the root causes of femicide and violence against women and girls, including gender inequality, patriarchal norms and attitudes, harmful cultural practices, lack of access to justice, and socio-economic factors. Understanding these underlying causes is essential for developing effective prevention and intervention strategies.
9. Intersectionality: Violence against women and girls intersects with other forms of discrimination and oppression, such as racism, ableism, and homophobia. Students should recognize the intersecting identities and experiences of women and girls and the compounded vulnerabilities they may face based on multiple marginalized identities.
10. Bullying, cyber-bullying and violence in schools are human rights violations. They can constitute human rights violations under the UN CRC and CEDAW. School-related gender-based violence is a means of perpetuating existing patterns of discrimination, including harmful gender norms and a lower status of girls. Bullying is a form of violence that is evolving all the time along with human interaction. Students should be aware of the many recognized forms of bullying and must refrain from such actions (i.e. physical=pushing, tripping or even destroying a child's property on purpose; verbal= calling names or verbally intimidating a child; relational= harming a child's reputation, making faces at the child, mimicking the child; cyberbullying= any form of aggression that takes place through digital technology, for example spreading lies or sending abusive messages on social media platforms and through texting). Failure to protect children at school is a human rights violation and can have harmful consequences for the psycho-social and educational development of children. If you are a witness to bullying at

school, you need to step up, report the bullying behavior and support the student who has been bullied.

11. Legal Frameworks: Students should familiarize themselves with national and international legal frameworks that address violence against women and girls, such as domestic violence laws, sexual assault legislation, and international instruments like CEDAW. Understanding the legal protections in place is crucial for advocating for women's rights and holding perpetrators accountable.
12. Impacts on Health and Well-being: Violence against women and girls has severe physical, psychological, and social consequences. Students should explore the impacts on survivors' health, well-being, and overall quality of life, as well as the intergenerational effects that can perpetuate cycles of violence.
13. Victim Blaming and Stigma: Victim blaming and societal stigma surrounding violence against women and girls contribute to the underreporting and perpetuation of violence. Students should challenge victim-blaming attitudes, promote survivor-centered approaches, and foster a culture of empathy, support, and accountability.
14. Support Services and Access to Justice: Students should learn about the importance of accessible support services for survivors, such as helplines, shelters, counseling, and legal aid. Additionally, understanding the barriers that survivors face when accessing justice, including fear, social stigma, and inadequate legal responses, is crucial for advocating for improvements in the justice system.
15. Prevention Strategies: Students should explore prevention strategies that address the root causes of violence against women and girls. This includes promoting gender equality, comprehensive sex education, engaging men and boys in challenging harmful norms, and implementing community-based initiatives that address the social, cultural, and economic factors that contribute to violence.
16. Activism and Advocacy: Students should engage with feminist activism and advocacy efforts that seek to eliminate violence against women and girls. This includes supporting organizations working on the ground, participating in campaigns, and amplifying the voices of survivors and advocates to raise awareness and drive social change.

It is essential for students to approach the study of femicides and violence against women and girls with empathy, sensitivity, and a commitment to challenging gender inequalities. By understanding the complexities of this issue and actively working towards its eradication, students can contribute to building a more inclusive and equitable society for all.

C.3.6 Conclusion

Despite all national and international legislation, there is still a gap between normative-setting standards and practices, between *de jure* and *de facto* gender equality worldwide, As long as inequality exists, violence against women will persist across all States. Some groups of women and girls face intersectional discrimination and barriers to the protection of their rights that can be only lifted if States design and implement practical measures tailored to their needs. Furthermore, national legislation and policies on the elimination of violence against women and girls are far from being inclusive of the violence against trans and gender-diverse people. If anything, there is a dire need to identify trends and challenges at local, national and regional level.

In Europe, the political debates and heated discussions surrounding the wording of certain provisions of the Istanbul Convention have opened up the space, in the public and private sphere, online and offline, to explore old and new perceptions about *discrimination*, *citizenship*, *gender*, the role of women in our societies, and even *violence*, something which is expected in democratic societies. To resist the ratification of Istanbul Convention is another form of persisting discrimination that women face across Europe today. However, we should not forget that the elimination of discrimination and violence against women is not a programmatic goal; it is a human right entitlement.

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intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women.

Test your knowledge

Here's a quiz on femicides and violence against women and girls:

1. **What is femicide? a) The killing of women and girls because of their gender. b) The act of kidnapping women and girls for ransom. c) The intentional harm caused to women and girls for financial gain. d) The act of women and girls engaging in violence against men.**

Answer: a) The killing of women and girls because of their gender.

2. **True or False: Femicide is a global issue and occurs in various countries around the world.**

Answer: True

3. **Which documentary highlights the issue of untested rape kits in the United States? a) *The Invisible War* b) *India's Daughter* c) *A Better Man* d) *I Am Evidence***

Answer: d) I Am Evidence

4. **What is the purpose of the documentary *City of Joy*? a) To raise awareness about femicides in India. b) To expose the epidemic of sexual assault within the U.S. military. c) To empower and provide healing to women survivors of sexual violence in the Democratic Republic of Congo. d) To explore the issue of domestic violence within the criminal justice system.**

Answer: c) To empower and provide healing to women survivors of sexual violence in the Democratic Republic of Congo.

5. **True or False: *The War on Women in Mexico* documentary examines the issue of femicides and violence against women in Mexico.**

Answer: True

6. **Which documentary explores the stories of women who have been incarcerated for killing their abusive partners? a) *The Invisible War* b) *India's Daughter* c) *Sin by Silence* d) *Finding Jenn's Voice***

Answer: c) Sin by Silence

7. **What does the term *femicid*e imply? a) The targeted killing of women and girls due to their gender. b) The act of women and girls engaging in violent acts. c) The accidental death of women and girls in violent situations. d) The act of kidnapping women and girls for ransom.**

Answer: a) The targeted killing of women and girls due to their gender.

8. **Which documentary confronts the issue of intimate partner violence and aims to promote healing and accountability? a) *The Invisible War* b) *City of Joy* c) *A Better Man* d) *Finding Jenn's Voice***

Answer: c) A Better Man

Remember, femicides and violence against women and girls are deeply serious issues. This quiz is intended to increase awareness and understanding of these problems, and it is crucial to approach the topic with sensitivity and empathy.

Do you know?

1. **What is gender-based violence?**

Answer: According to UN Women, "gender-based violence (GBV) refers to harmful acts directed at an individual or a group of individuals based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms. The term is primarily used to underscore the fact that structural, gender-based power differentials place women and girls at risk for multiple forms of violence. While women and girls suffer disproportionately from GBV, men and boys can also be targeted. The term is also sometimes used to describe targeted violence against LGBTQI+ populations, when referencing violence related to norms of masculinity/femininity and/or gender norms.

Violence against women and girls is defined as any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women and girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Violence against women and girls encompasses, but is not limited to, physical, sexual and psychological violence occurring in the family or within the general community, and perpetrated or condoned by the State". See, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence

2. **Does domestic violence entail only physical violence?**

Answer: No, domestic violence can also include economic, psychological, sexual or emotional violence. Ultimately, domestic violence can result in femicide, the intentional murder of women or girls because of their gender. The following definitions are provided by UN Women: "Economic violence involves making or attempting to make a person financially dependent by maintaining total control over financial resources, withholding access to money, and/or forbidding attendance at school or employment.

Psychological violence involves causing fear by intimidation; threatening physical harm to self, partner or children; destruction of pets and property; 'mind games'; or forcing isolation from friends, family, school and/or work. Emotional violence includes undermining a person's sense of self-worth through constant criticism; belittling one's abilities; name-calling or other verbal abuse; damaging a partner's relationship with the

children; or not letting a partner see friends and family. Sexual violence involves forcing a partner to take part in a sex act when the partner does not consent."

See https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence

3. **Violence against girls and women is a highly-sensitive matter. Some general questions to reflect on:**
   Why should a policy-maker be interested in preventing and addressing violence against women? What are the economic or health benefits to the prevention of violence against women?
   What forms of violence against women occur most in your community/country? Why? Do victims of violence face barriers in reporting incidents of gender-based violence in this community (i.e. distance to the police-station, cost, lack of awareness of social services, etc)?
   What can religious or community leaders (i.e. respected elderly persons) do to prevent gender-based violence within the community?

Answer: If one of the above, or all of the above, questions have crossed your mind, you may wish to advance your knowledge on the subject. For example, if you are interested in preparing a campaign to end violence against women, the following sources would be useful:
https://www.endvawnow.org/uploads/modules/pdf/1342724232.pdf
https://rm.coe.int/guidelines-for-awareness-raising-on-vaw-and-dv-eng/1680a2cc4f
https://www.whiteribbonalliance.org/

If you are interested in getting information about national legislation, policies and action plans concerning of gender-based violence, the following sources would be useful:

https://eige.europa.eu/about/projects/providing-justice-victims-femicide
https://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf
https://www.unwomen.org/en/digital-library/publications/2012/7/handbook-for-national-action-plans-on-violence-against-women

If you are interested in getting information about international caselaw concerning gender-based violence and femicides, the following sources would be useful:

https://rm.coe.int/equal-access-to-justice/168073e152
https://blogs.lse.ac.uk/vaw/landmark-cases/right-to-life/
https://vawnet.org/material/cedaws-key-cases-violence-against-women

You may find the following podcasts interesting:

- *Violence against women and how to end it: Better Human Podcast*, https://podcasts.apple.com/gb/podcast/59-violence-against-women-and-how-to-end-it/id1481010283?i=1000557581598
- *Femicide: Understanding the playbook of men who kill women*, https://podcasts.apple.com/us/podcast/femicide-understanding-the-playbook-of-men-who-kill-women/id1513659474?i=1000559295065
- *Women, sexual violence and the police*, https://podcasts.apple.com/us/podcast/28-women-sexual-violence-and-the-police/id1481010283?i=1000479627808
- *Violence Against Women: History Talk*, https://podcasts.apple.com/us/podcast/violence-against-women/id1611351019?i=1000552004274

Documentaries to watch

Here are some documentaries that shed light on femicides and violence against women and girls:

1. *The Invisible War* (2012) - Directed by Kirby Dick, this documentary investigates the epidemic of sexual assault within the U.S. military and exposes the systemic cover-up of these crimes.
2. *India's Daughter* (2015) - Directed by Leslee Udwin, this film explores the brutal gang rape and murder of a young woman in Delhi in 2012, sparking nationwide protests and discussions about gender-based violence in India.
3. *City of Joy* (2016) - Directed by Madeleine Gavin, this documentary follows the stories of women survivors of sexual violence in the Democratic Republic of Congo who find empowerment and healing at the City of Joy, a center for survivors.
4. *A Better Man* (2017) - Directed by Attiya Khan and Lawrence Jackman, this film follows a woman and her abusive ex-boyfriend as they revisit their past relationship, aiming to confront and heal from the violence that occurred.
5. *I Am Evidence* (2017) - Directed by Trish Adlesic and Geeta Gandbhir, this documentary exposes the issue of untested rape kits in the United States, highlighting the impact on survivors and the need for systemic change.
6. *Sin by Silence* (2009) - Directed by Olivia Klaus, this film tells the stories of women who have been incarcerated for killing their abusive partners and explores the issue of domestic violence within the criminal justice system.
7. *The War on Women in Mexico* (2017) - Directed by Alejandra Islas, this documentary examines the alarming rates of femicides and violence against women in Mexico and the impact on families and communities.
8. *Finding Jenn's Voice* (2018) - Directed by Tracy Schott, this documentary tells the story of Jennifer Snyder, a young woman who was killed by her abusive boyfriend, and explores the signs and complexities of abusive relationships.

These documentaries provide important perspectives on femicides and violence against women and girls, shedding light on the issues and inspiring conversations for change. Please note that some of these films may contain sensitive content, so take care of your emotional well-being while watching them.

Conclusion & The Rights of Future Generations

In conclusion, this open-source eBook on human rights education has strived to provide a global audience with the chance to engage with an academic resource on human rights. Towards the end of the eBook, you will find lesson plans designed to empower learners to independently manage their learning experience, customizing it to their individual needs and circumstances. Just as human rights are intended for everyone's benefit, reflecting the lofty ideals of the human rights movement, we present a book that is equally open and accessible to all, in alignment with the principle that education should be free and universally available! It's education for all, freely accessible to everyone!

This ebook's goal is to shed light on the fundamental importance of human rights and the need to educate and empower individuals to advocate for and protect these rights. Throughout these digital pages, we have explored various aspects of human rights, ranging from civil and political rights to social, economic, and cultural rights.
However, it is crucial to acknowledge that the scope of human rights extends beyond the present generation. As we strive to create a just and equitable society, we must also recognize and emphasize the rights of future generations. This concept, often referred to as *the rights of future generations* or *intergenerational rights*, recognizes that the decisions we make today have profound implications for the world that our children and grandchildren will inherit. (Download a copy of the ***Maastricht Principles on the Human Rights of Future Generations*** to learn more).

Future generations, as climate justice has highlighted, have the right to inherit a planet that is sustainable, habitable, and conducive to their well-being. This includes the right to a clean and healthy environment, access to resources, education, healthcare, and the preservation of cultural heritage. It is our responsibility to protect these rights by adopting sustainable practices, mitigating climate change, and promoting intergenerational equity.

Human rights education plays a pivotal role in ensuring that the rights of future generations are safeguarded. By instilling a sense of responsibility, empathy, and interdependence in our education systems, we can empower individuals to become advocates for a sustainable future. Human rights education should incorporate a comprehensive understanding of the interconnectedness between social, economic, and environmental rights, encouraging individuals to take action and drive positive change.

Furthermore, it is essential to engage in interdisciplinary dialogue and collaboration to address the challenges faced by future generations. Governments, civil society organizations, educators, and individuals must work together to develop policies, practices, and initiatives that prioritize the long-term well-being of our planet and the rights of those who will inherit it.

As we conclude this eBook, let us recognize that the journey towards securing the rights of future generations is ongoing and requires collective efforts. By integrating the principles of human rights, sustainability, and intergenerational justice into our everyday lives, we can pave the way for a brighter future. May this eBook serve as a catalyst for dialogue, reflection, and action, fostering a society that respects and upholds the rights of present and future generations alike.

The integration of human rights education into basic, primary, and higher education programs should be considered essential. It should be a prerequisite in the design and delivery of training programs for key institutions and authorities such as the judiciary, police, law enforcement, and policymakers. Human rights education serves as a fundamental tool in actively promoting and upholding a strong and effective rule of law. In legal terms, the principle of *ignorantia legis neminem excusat* (ignorance of the law excuses no one) is widely recognized, emphasizing the importance of knowing one's rights. Understanding one's rights encompasses a twofold purpose: the entitlement to possess rights and the responsibility to be aware of, respect, and nurture these rights as universal moral principles within local contexts. This perspective aligns with the contemporary culture of human rights activism encapsulated in the “think globally, act locally” slogan. The recognition of non-discrimination and familiarity with the core principles and freedoms of human rights are crucial elements of active citizenship in any democratic society. Moreover, free and high-quality education is indispensable for individual growth and development. Human rights encompass various aspects, including the promotion of mutual respect, gender equality, and international goodwill. Additionally, education should not only be beneficial but also accessible to all, as everyone has the right to access opportunities for acquiring essential skills.

Teaching young people about ideas such as the rule of law, equality, their inherent dignity and freedom, is an integral part of human rights education. The State has a duty to safeguard and recognize each person's inherent value. For example, the legal rules guaranteeing children's right to a good education can be found in Articles 28 and 29 of UN CRC. The provisions require governments to make education mandatory and free, to encourage the development of secondary and vocational education, and to offer financial assistance for these areas when appropriate. Yet, Article 13 of ICESCR guarantees everyone the opportunity to get a formal education. The States Parties to this Covenant recognize and safeguard the inalienable right of all people to an education. In their view, education should promote students' personal development, inspire respect for others' unique perspectives, and emphasize each student's importance. Further, they agree that “education must enable all individuals to participate successfully in a free society; promote understanding, tolerance, and goodwill among all nations and all racial, ethnic, or religious groups; and support the activities of the United Nations for the maintenance of peace”.

Education on human rights holds significant importance, catering to various groups who either benefit from it or are obligated to learn about it due to their official roles. The right to education is recognized in multiple international human rights treaties, albeit with

diverse formulations and corresponding obligations for different countries. In order to fulfill their responsibilities under Article 12 of the Universal Declaration of Human Rights (UDHR), certain nations mandate universal access to free and adequate primary education. The treaty's preamble emphasizes the commitment of States Parties to respect the right of parents and legal guardians to choose educational institutions that align with their beliefs, apart from those established by public authorities, while ensuring their children's religious and moral education in accordance with their convictions.

Achieving equitable access to high-quality education remains a pressing global challenge. Widespread systemic inequalities, racism, sexism, and human rights violations persist across the world. Furthermore, geopolitical dynamics, economic instability, and pervasive poverty deprive millions of children in the global South of fundamental services, including education and healthcare. The issue of ensuring universal access to education is equally urgent.

Among the most fundamental human rights is the right to education, and ensuring this right necessitates recognizing the vital role of teachers in providing a quality education to all students. Effective implementation of human rights conventions is crucial for successfully upholding the right to education. Education has become a top priority in every country, and enhancing human rights education is imperative to improve people's understanding, acceptance, and adherence to universal human rights and fundamental freedoms. Education plays a key role in creating an environment where each student has the opportunity to reach their full potential while upholding human rights and fundamental freedoms. By promoting understanding, acceptance, and unity among individuals from diverse backgrounds, education contributes to the United Nations' mission and its endeavors to maintain global peace. Sweden's relatively low rates of terrorism, torture, and other human rights abuses can be partly attributed to the country's educated and peaceful population, fostered in part by its emphasis on human rights education. Conversely, impoverished nations suffer from a lack of human rights education and inadequate implementation of international treaties. Article 29 of the UN Convention on the Rights of the Child addresses education for human rights.

The two authors of this book as advocates of human rights education hope that this open access ebook will equip students from all socio-economic backgrounds with the necessary tools to become active and contributing members of society. Access to quality education fosters respect and tolerance among individuals. Article 13 of the International Covenant on Economic, Social, and Cultural Rights guarantees everyone the right to an education that considers their individual needs and the requirements of their community. Education about and practice of human rights has the potential to contribute to a more peaceful and prosperous world. High-quality educational opportunities are vital for the future success of our children.

In concluding this educational discourse on human rights, it is imperative to reflect on the Rights of Future Generations. As readers and students of human rights, it is equally

important to examine the historical origins of human rights while simultaneously considering the future and the new challenges that human rights face. The concept of the Rights of Future Generations is a progressive idea rooted in ancient human contemplations. Although it has recently gained recognition as a human rights theory, it has not yet been fully integrated into legal frameworks, neither at the international nor domestic level. From a philosophical perspective, the rights of future generations encompass the rights of humanity to survive and endure. The innate human desire to pass on our genetic legacy to the future is deeply embedded in our biology and psyche. In essence, by safeguarding future generations, we are safeguarding ourselves and the essence of humanity. This notion is particularly evident in the context of climate justice, where the irreversible harm caused by human activities to our planet emphasizes the duty of current generations to preserve our natural home for the enjoyment of future generations.

The purpose of introducing the topic of the Rights of Future Generations is to stimulate contemplation among the readers of this book. While it may not be possible to provide definitive answers to the questions arising from this field, it is nevertheless valuable to pose inquiries regarding the scope of the concept. What do we mean when we refer to future generations? Who are these individuals? What types of rights are encompassed by this concept? Are they collective rights, individual rights, or human rights? What responsibilities do we owe to future generations? What will their needs be? These are some of the thought-provoking questions that arise.

The children who were born after 2022 represent the first generation of future generations. It is their lives that will be profoundly impacted by our present actions. The preservation of upcoming generations is a primary concern. This has already been stated in the UNESCO Declaration on Responsibilities of the Present Generations Towards Future Generations (1997). Aside from hypothetical doomsday scenarios, such as nuclear threats, it is scientifically argued that Homo sapiens will eventually cease to exist physically, as has happened to Neanderthals and numerous other species in the past. Science indicates that this will occur again in the future.

Future generations' rights could be based on three fundamentals, even in the human rights canon principles of: (1) physical survival, (2) dignity, and (3) the realization of human potential.

1. According to Climate Justice, physical survival is related to our natural environment. In broad terms, it is an environmental agenda that began with the Stockholm Declaration, in 1972. The Rio Environmental Summit, in 1992, established a broader framework, and we still have a wide range of processes in place today. The avoidance of climate change and the preservation of biological diversity are two critical cornerstones. Nuclear, or even more lethal, weapons of mass destruction could imperil the physical life of future generations.
2. Human dignity is founded on respect for all people, regardless of their national origin, gender, money, or occupation, to name a few identifying markers. Many

human rights are linked to the defence of human dignity. They cover everything from political to economic to cultural rights.

3. Individual creative potential is realized through fulfilling working lives and personal expression. Science is used to scientifically comprehend, explain, and manage our natural and social environments; the arts are used to express our spiritual and creative inner lives, and technology is used to make our lives easier and more rewarding.

The question of what the current generations can do to protect the rights of future generations is a crucial aspect of the field concerning the rights of future generations. To begin with, we must ensure that future generations have the ability to make decisions in the same way that past generations have allowed us to do so. We have inherited a healthy natural environment, as well as a rich artistic, scientific, and cultural heritage. It is our responsibility to enhance this inheritance to the best of our ability before passing it on to future generations, adhering to the principle of intergenerational equity. At the very least, we should grant children the autonomy to make their own choices without imposing our own views and objectives upon them. However, in light of the scientific warnings about the detrimental effects of climate change that threaten our planet and the existence of humanity, it is imperative that we take climate action, both at an individual and governmental level, to ensure the preservation of a natural world where humans can thrive. Therefore, climate justice provides the framework and roadmap towards a better and sustainable future, where the rights of both current and future generations are equally considered, safeguarded, and enjoyed by every member of the human family.

Given the absence of a clear definition of *future generations* within the context of international human rights law, there is a growing consensus that children's rights serve as the means to ensure rights for both the current generation of children who will transition into adulthood and those who are yet to be born, including future generations. Children's rights can be pursued on both individual and collective bases. Although the relationship between children's rights and the rights of future generations is not without its complexities, developments within the human rights normative framework, such as the CRC General Comment on the Environment and Children's Rights with a Special Focus on Climate Change and the CESCR General Comment on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights, provide substantial room to acknowledge the connection between the rights and interests of children and those of future generations. However, the extent of overlap or divergence between these rights remains uncertain, as does the potential impact of conflating children's rights and the rights of future generations on the development of each group's rights. Nevertheless, this uncertainty may be viewed as part of the ongoing *human rights project* and an opportunity to refocus on children's rights, bridging them with the principle of intergenerational equity.

The UN is already taking steps that acknowledge the importance of future generations; soft law instruments such as the UN Secretary General "Our Common Agenda" Report (2021),

the policy brief "To Think and Act for Future Generations" (2022) and the UN System Common Principles on Future Generations (2023) present a very promising development in the *human rights project* and in deepening the solidarity between generations. The future of human rights is open to many challenges and many rights-holders.

As we draw the curtains on this open-source ebook on human rights education, we want to convey a vital message to all our readers: human rights education is an enduring journey that lasts a lifetime. It beckons us to constantly examine the stereotypes and societal norms that shape our moral compass. It implores us to take on the responsibility of delving into the profound ethical concepts that underpin the very essence of human rights, and to endeavor toward refining our perspectives in alignment with the values enshrined in human rights, which inherently reflect ethical principles.

The two authors of this book, throughout their two-decade-long endeavor in the realm of human rights education, have encountered individuals—be they advocates, educators, or lawyers of human rights—who, despite their professional roles, have exhibited prejudiced views, sexism, elitism, and, on numerous occasions, have discriminated or demonstrated a differential valuation of individuals based on titles or backgrounds. This serves as a poignant wake-up call for anyone engaging with human rights education. It reminds us all to practice what we preach and to teach by example.

In this perpetual journey of human rights education, let ethics be your guiding star. Embrace the principles of fairness, equality, and respect in your daily life, just as you advocate for them in the world at large. The path to a world where human rights are universally upheld begins with each individual's commitment to ethical living and ethical teaching. Together, let us strive to build a more just and compassionate world for all.

In 1958, Eleanor Roosevelt penned the following profound words: "Where do human rights begin? In unassuming corners, near our own doorstep, so near and so modest that they may elude the gaze of global maps. Yet, they constitute the entire world of each individual—the community they call home, the factory, farm, or office where they toil."

As we conclude this ebook on human rights education, let us not forget this timeless wisdom. Human rights, at their core, have their roots in the everyday lives of ordinary people, in the communities we build, and in the way we treat one another on a daily basis. The principles we've explored throughout this book find their most meaningful expression in the small, everyday acts of kindness, tolerance, and respect that each of us can choose to embrace. Eleanor Roosevelt's words remind us that the journey of human rights begins with the individual and the choices we make in our immediate surroundings. By fostering a culture of dignity and fairness in our homes, workplaces, and communities, we contribute to the global tapestry of human rights. So, let us carry this message forward and continue striving for a world where human rights flourish in the places closest to our hearts.

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- **Important points to remember about "The Rights of Future Generations"**

When studying "The Rights of Future Generations," it is crucial for students to keep in mind the following important points:

1. Intergenerational Equity: The rights of future generations encompass the principle of intergenerational equity, which emphasizes the fair and sustainable use of natural resources and the preservation of a healthy environment for present and future generations. Students should understand the concept of intergenerational equity and the need to consider the long-term impacts of current actions on future generations.
2. Sustainable Development: The rights of future generations are closely linked to the concept of sustainable development, which promotes economic growth, social well-being, and environmental protection in a balanced manner. Students should explore the principles of sustainable development, including the integration of economic, social, and environmental dimensions, and the importance of intergenerational justice in achieving sustainable outcomes.
3. Environmental Degradation: Students should recognize the severe environmental challenges that future generations may face, including climate change, deforestation, pollution, loss of biodiversity, and resource depletion. Understanding the consequences of environmental degradation on the rights and well-being of future generations is essential for taking proactive measures to address these issues.
4. Long-Term Planning and Decision-Making: Students should consider the need for long-term planning and decision-making that takes into account the interests and rights of future generations. This involves adopting policies and practices that promote sustainable development, environmental protection, and intergenerational equity.
5. Ethical Responsibilities: The rights of future generations are rooted in ethical considerations and moral obligations towards future inhabitants of the planet. Students should reflect on their ethical responsibilities as individuals and as members of society to act in ways that promote the well-being and rights of future generations.
6. Intergenerational Solidarity: Intergenerational solidarity refers to the mutual support and cooperation between different generations. Students should explore the importance of fostering intergenerational solidarity and cooperation to address global challenges and ensure a sustainable future.

7. Legal Frameworks: Students should familiarize themselves with legal frameworks and international instruments that recognize and protect the rights of future generations, such as the Brundtland Report, the Rio Declaration on Environment and Development, and the concept of common heritage of mankind. Understanding the legal context is crucial for advocating for the rights of future generations.
8. Youth Activism: Youth activism plays a vital role in advocating for the rights of future generations. Students should engage with youth-led movements and initiatives that raise awareness about environmental issues and demand action from governments and policymakers.
9. Education and Awareness: Education and awareness are essential for promoting a culture of sustainability and intergenerational responsibility. Students should be encouraged to learn about environmental issues, sustainable practices, and the importance of preserving natural resources for the benefit of future generations.
10. Collaborative Action: Protecting the rights of future generations requires collaborative action among governments, civil society organizations, businesses, and individuals. Students should recognize the importance of collective efforts, including partnerships and collaborations, to address environmental challenges and work towards a sustainable future.

By studying and understanding the rights of future generations, students can develop a sense of responsibility and actively contribute to creating a more sustainable and equitable world for present and future inhabitants.

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Lydia Salapasidi Chainoglou. 2022

Online tools for Human Rights Education

Human Rights Online Education - United for Human Rights
(https://education.humanrights.com/online-features.html)

The Online Education system is designed for secondary and post-secondary classrooms and adult education classes in community settings. It may be used as a full course or as a supplemental resource in another curriculum.

Amnesty International's Human Rights Education
(https://www.amnesty.org/en/human-rights-education/)

Amnesty International is one of the pioneers of Human Rights Education. Their HRE platform is a regularly-updated, endless pool of resources for human rights educators, established with the aim to equip them with the skills that promote human equality and dignity for all, with the goal to take action for human rights. The materials are usually available in multiple languages.

Compass: Manual for Human Rights Education with Young People
(https://www.coe.int/en/web/compass)

Established by the Council of Europe, Compass has been a valuable resource for human rights educators since 2002. On the website, educators can access the Manual for Human Rights Education with Young People, which is divided into five different chapters. These include practical activities and methods to be used in the classroom, as well as a section about taking action for human rights. Furthermore, one of the chapters concerns important background info on an array of human rights themes such as citizenship and participation, gender, migration, and peace and violence. The information given about each topic is quite extensive and complemented by examples, questions, and exercises.

Other HRE sources by the Council of Europe:

Please note that there a special version of Compass called *Compasito*, is designed for children from six to thirteen years old.

In addition, the Council of Europe has prepared a separate manual called Gender Matters with the purpose of educating young people on how gender-based violence affects them.

Equitas Tools for Education
(https://equitas.org/tools-for-education/find-a-tool/)

Equitas is one of Canada's most well-known and active human rights education organization. The organization works tirelessly on HRE materials, all of which are accessible online. The tools available aspire to motivate people around the world to educate others about human rights and take action in their communities.

Human Rights Resource Center, University of Minnesota
(http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducation.aspx)

University of Minnesota's Human Rights Library is a famous resource among human rights students and professionals all around the world. As a part of the library, University of Minnesota has also been publishing HRE sources under the Human Rights Resource Center. The idea behind the project is to help human rights educators in the US and abroad build a culture of human rights in their communities.

UN OHCHR's Human Rights Education Series
(http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducation.aspx)

Human rights education is among the many activities of the United Nations Office of the High Commissioner (OHCHR). The organization's website has a useful Human Rights Education series among its publications. This series is composed of guides with methodological and reference tools relating to the World Program for Human Rights Education. Most materials are written, but there are also some multimedia resources that educators can explore to enhance their knowledge or discuss them with their students.

HREA, the Global Human Rights Education and Training Centre
(http://www.hrea.org/learn/)

HREA is an international non-governmental organization which specializes in HRE and training of human rights defenders. The organization publishes a variety of educational materials in order to foster peaceful, free, and just communities.

E-learning tool on the rights of Indigenous peoples
(https://www.ohchr.org/en/indigenous-peoples/e-learning-tool-rights-indigenous-peoples)

Through this online learning tool, participants will increase their knowledge and understanding of the rights of Indigenous peoples, as recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and in other international instruments. They can learn how to cooperate with the UN's Human Rights and other Mechanisms to advocate for the rights of Indigenous peoples.

E-Learning tool on the Human Rights Council and its mechanisms
(https://www.ohchr.org/en/hr-bodies/hrc/trust-fund/tool)

Interactive, accessible and gender-aware, the e-Learning tool is designed for **government officials from LDCs and SIDS** as per the mandate of the Trust Fund. However, any government official in charge of human rights issues can use it.

The e-Learning Tool can also be useful for UN staff members who are based in the field and headquarters, staff members of regional and international organizations/groups,

representatives of NGOs and civil society organizations, members of national human rights institutions and interns who would like to familiarize themselves with the work of the Human Rights Council and its mechanisms.

Youth for Human Rights – Online Education
(https://education.youthforhumanrights.org/yhri-online-features.html)

The path toward the goal of a world where people treat each other with respect and dignity is through effective education. Many human rights organizations focus on research and advocacy for the victims of abuse. Youth for Human Rights International complements this work by addressing those issues with educational materials and activities.

Therefore our YHRI Online Education Website is provided to educators free of charge.

Teaching Resources "The European Convention on Human Rights - Rights and freedoms in practice"
(https://edoc.coe.int/en/educational-tools/5327-teaching-resources-the-european-convention-on-human-rights-rights-and-freedoms-in-practice.html)

Factsheets which are both theoretical and practical providing a dynamic resource to help teachers foster an awareness of human rights.

Raising human rights awareness among young people is one of the Council of Europe's most important missions. Help your students to forge a democratic tomorrow with these highly accessible teaching resources.

Global Education: Human Rights dimension
(https://www.coe.int/en/web/north-south-centre/elearning-course-global-education-human-rights-dimension-)

This global education online learning course is designed for education practitioners, social workers, youth activists, as well as policy and decision makers.

Compendium Cultural Policies & Trends
(https://www.culturalpolicies.net/)

This is a unique online database with in-depth information on cultural policies, statistics and trends. It can be used as a wonderful tool for teaching cultural policies at undergraduate and post-graduate level and it is a useful guide for policy-makers.

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Lesson plans for each chapter

i. **Part A. Chapter 1:** Philosophical Foundations

ii. **Part A. Chapter 2:** Human rights and Constitutionalism

iii. **Part A. Chapter 3:** Human Rights: Definitions, Categories and Generation**s**

iv. **Part A. Chapter 4:** UN Human Rights Protection System: Treaty-based bodies, Institutions, Mechanisms and Processes

v. **Part A. Chapter 5:** Regional Approaches across Europe, the Americas, Africa and Asia

vi. **Part B. Chapter 1:** Right to Life; Abortion; Death Penalty

vii. **Part B. Chapter 2:** Terrorism and Human Rights

viii. **Part B. Chapter 3:** Cultural Rights

ix. **Part B. Chapter 4:** LGBTQI+ Rights

x. **Part B. Chapter 5:** Disability Rights

xi. **Part C. Chapter 1:** Creative Media and New Technologies for human rights

xii. **Part C. Chapter 2:** Climate Justice

xiii. **Part C. Chapter 3:** Femicides and Violence against Women and Girls.

xiv. The Rights of Future Generations

i. LESSON PLAN for Part A. Chapter 1: Philosophical Foundations

Objective: By the end of this lesson, learners will be able to:

1. Define human rights and understand their significance.
2. Explore the philosophical foundations of human rights.
3. Identify key principles and theories related to human rights philosophy.
4. Analyze the relationship between human rights and education.

Duration: Self-paced

Lesson Outline:

1. Introduction
   - Read the introduction to Chapter 1 of the ebook "Human Rights: A Comparative Approach" to understand the importance of human rights education.
2. Defining Human Rights

- Readings:
  - Article: "What Are Human Rights?" by the United Nations: link
  - Article: "Introduction to Human Rights" by Amnesty International: link

3. Philosophical Foundations of Human Rights
   - Readings:
     - Article: "The Philosophical Foundations of Human Rights" by Stanford Encyclopedia of Philosophy: link
     - Article: "The History of Human Rights: From Ancient Times to the Modern Era" by ThoughtCo: link
4. Key Principles and Theories of Human Rights Philosophy
   - Readings:
     - Article: "The Universal Declaration of Human Rights: Key Concepts" by Human Rights Careers: link
     - Article: "Theories of Human Rights" by The Open University: link
5. Human Rights and Education
   - Readings:
     - Article: "Human Rights Education" by Amnesty International: link
     - Article: "Human Rights Education: An Essential Component of Human Rights" by United Nations Human Rights: link
6. Reflection and Discussion
   - Reflect on the readings and consider the following questions:
     - What are the core principles of human rights philosophy?

- How does human rights education contribute to the promotion and protection of human rights?
- Can you think of any current human rights issues or violations that align with the principles of human rights philosophy?

7. Additional Resources
   - Explore additional resources for further learning and research:
     - Website: Human Rights Watch: link
     - Website: Amnesty International: link
     - Website: United Nations Human Rights: link

Note: This lesson plan is designed for self-learning, allowing learners to read and explore the provided resources at their own pace. Take your time to understand the concepts and engage in critical thinking and reflection.

ii. LESSON PLAN for Part A. Chapter 2: Human rights and Constitutionalism

Objective: By the end of this lesson, learners will be able to:

1. Understand the relationship between human rights and constitutionalism.
2. Explore the role of constitutions in safeguarding and promoting human rights.
3. Analyze key constitutional provisions related to human rights.
4. Reflect on the significance of constitutionalism in protecting individual liberties.

Duration: Self-paced

Lesson Outline:

1. Introduction
   - Read the introduction to the topic of "Human Rights and Constitutionalism" to gain an overview of the subject.
2. Understanding Human Rights and Constitutionalism
   - Readings:
     - Article: "Human Rights and Constitutionalism" by Oxford Research Encyclopedia of Politics: link
     - Article: "The Relationship between Human Rights and Constitutionalism" by International Institute for Democracy and Electoral Assistance: link
3. The Role of Constitutions in Safeguarding Human Rights
   - Readings:
     - Article: "Constitutions and Human Rights" by United Nations Human Rights: link
     - Article: "Human Rights and Constitutionalism: The Role of the Constitution in Protecting Human Rights" by Human Rights Careers: link
4. Key Constitutional Provisions Related to Human Rights
   - Readings:
     - Article: "Human Rights and Constitutional Law" by Global Constitutionalism: link
     - Article: "Human Rights Protection under Constitutions" by Constitutional Rights Foundation: link
5. Reflection and Analysis
   - Reflect on the readings and consider the following questions:
     - How do constitutions contribute to the protection of human rights?
     - Can you identify specific constitutional provisions that guarantee fundamental human rights?

- What are some examples of human rights cases where constitutionalism played a significant role?

6. Significance of Constitutionalism in Protecting Individual Liberties
   - Readings:
     - Article: "Constitutionalism and the Protection of Individual Rights" by The Heritage Foundation: link
     - Article: "Constitutionalism and the Rule of Law" by Yale University: link
7. Additional Resources
   - Explore additional resources for further learning and research:
     - Website: American Civil Liberties Union (ACLU): link
     - Website: Constitutional Rights Foundation: link
     - Website: Stanford Constitutional Law Center: link

Note: This lesson plan is designed for self-learning, allowing learners to read and explore the provided resources at their own pace. Take your time to understand the concepts and engage in critical thinking and reflection.

iii. LESSON PLAN for Part A. Chapter 3: Human Rights: Definitions, Categories and Generations

Objective: By the end of this lesson, learners will be able to:

1. Understand the concept of human rights and its definitions.
2. Explore the categorization of human rights into civil, political, economic, social, and cultural rights.
3. Learn about the generations of human rights and their evolution.
4. Analyze the interdependence and indivisibility of human rights.

Duration: Self-paced

Lesson Outline:

1. Introduction
   - Read the introduction to the topic of "Human Rights definitions, categories, and generations to gain an overview of the subject.
2. Definitions of Human Rights
   - Readings:
     - Article: "What Are Human Rights?" by the United Nations: link
     - Article: "Introduction to Human Rights" by Amnesty International: link
3. Categorization of Human Rights
   - Readings:
     - Article: "Types of Human Rights: Civil, Political, Economic, Social, and Cultural Rights" by The Advocates for Human Rights: link
     - Article: "Understanding Human Rights: The Universal Declaration of Human Rights" by the United Nations Human Rights: link
4. Generations of Human Rights
   - Readings:
     - Article: "Generations of Human Rights" by the United Nations Human Rights: link
     - Article: "The Three Generations of Human Rights" by the Center for Economic and Social Rights: link
5. Video Resources
   - Watch the following videos to deepen your understanding:
     - Video: "What Are Human Rights?" by Human Rights Watch: link
     - Video: "Types of Human Rights" by Amnesty International: link
6. Interdependence and Indivisibility of Human Rights

- Readings:
  - Article: “Interdependence and Indivisibility of Human Rights” by the United Nations Human Rights: link
  - Article: “Human Rights: Interdependence, Indivisibility, and Universality” by Human Rights Careers: link

7. Reflection and Analysis
   - Reflect on the readings and videos and consider the following questions:
     - How do you understand the concept of human rights based on the definitions provided?
     - Can you give examples of civil, political, economic, social, and cultural rights?
     - What are the main differences between the generations of human rights?
     - Is it important to recognize the interdependence & indivisibility of human rights?
8. Additional Resources
   - Explore additional resources for further learning and research:
     - Website: Human Rights Watch: link
     - Website: Amnesty International: link
     - Website: United Nations Human Rights: link

Note: This lesson plan is designed for self-learning, allowing learners to read, watch videos, and explore the provided resources at their own pace. Take your time to understand the concepts and engage in critical thinking and reflection.

iv. LESSON PLAN for Part A. Chapter 4: UN Human Rights Protection System: Treaty-based bodies, Institutions, Mechanisms and Processes

Objective: To understand the UN Human Rights Protection System, including its treaty-based bodies, institutions, mechanisms, and processes, and their roles in safeguarding and promoting human rights worldwide.

Lesson Plan:

1. Introduction to the UN Human Rights Protection System
    - Brief overview of the United Nations and its commitment to human rights
    - Explanation of the importance of international human rights protection
2. Treaty-Based Bodies a. Human Rights Council (HRC)
    - Introduction to the HRC and its mandate
    - Overview of the Universal Periodic Review (UPR) mechanism
    - Resource: United Nations Human Rights Council

    b. Committee on the Elimination of Racial Discrimination (CERD)
    - Introduction to CERD and its role in combating racial discrimination
    - Examination of the reporting process and follow-up recommendations
    - Resource: Committee on the Elimination of Racial Discrimination

    c. Committee on the Rights of Persons with Disabilities (CRPD)
    - Overview of CRPD and its focus on the rights of persons with disabilities
    - Analysis of the CRPD reporting and examination procedures
    - Resource: Committee on the Rights of Persons with Disabilities
3. Special Procedures and Mandate Holders a. Special Rapporteurs
    - Definition and role of Special Rapporteurs
    - Exploration of thematic and country-specific mandates
    - Resource: Special Procedures of the Human Rights Council

    b. Working Groups
    - Introduction to Working Groups and their functions
    - Focus on specific working groups (e.g., Working Group on Arbitrary Detention)
    - Resource: United Nations Human Rights - Working Groups

1. Regional Human Rights Systems a. European Court of Human Rights (ECtHR)
    - Overview of the ECtHR and its jurisdiction
    - Examination of significant ECtHR judgments and their impact

- Resource: European Court of Human Rights

b. Inter-American Commission on Human Rights (I/A Commission on HR)

- Introduction to the I/A Commission on HR and its role in the Americas
- Analysis of the I/A Commission on HR reporting and protection mechanisms
- Resource: Inter-American Commission on Human Rights

4. Human Rights Mechanisms and Processes a. Human Rights Treaty Monitoring
    - Overview of the treaty monitoring process and reporting obligations
    - Analysis of the State Party reporting and review procedures
    - Resource: United Nations Treaty Bodies

b. Complaint Procedures and Communications

- Explanation of individual complaints and communications mechanisms
- Examination of the roles of treaty bodies and other mechanisms
- Resource: United Nations Human Rights - Complaint Procedures

5. Conclusion and Reflection
    - Recap of the key elements of the UN Human Rights Protection System
    - Reflection on the significance of the system in promoting and protecting human rights globally

A**dditional Resources**:

1. United Nations Human Rights
2. Universal Declaration of Human Rights
3. United Nations Human Rights YouTube Channel
4. Human Rights Watch
5. Amnesty International

Note: This lesson plan provides a comprehensive overview of the UN Human Rights Protection System. You may choose to focus on specific areas based on your interests or requirements. The provided resources and links will help you gain a deeper understanding of the topics covered.

v. LESSON PLAN for Part A. Chapter 5: Regional Approaches across Europe, Americas, Africa and Asia

Objective: To explore regional human rights systems and approaches across Europe, the Americas, Africa, and Asia, and understand their key institutions, mechanisms, and processes for promoting and protecting human rights within their respective regions.

Lesson Plan:

1. Introduction to Regional Human Rights Systems
    - Definition of regional human rights systems
    - Explanation of the importance of regional approaches in complementing global human rights standards
2. European Human Rights System a. European Convention on Human Rights (ECHR)
    - Overview of the ECHR and its key provisions
    - Analysis of the role of the European Court of Human Rights in interpreting and enforcing the convention
    - Resource: European Court of Human Rights

    b. European Union (EU) and Fundamental Rights
    - Introduction to the EU's commitment to fundamental rights
    - Exploration of the Charter of Fundamental Rights of the European Union
    - Resource: European Union Agency for Fundamental Rights
3. Inter-American Human Rights System a. Inter-American Commission on Human Rights (I/A Commision on HR)
    - Overview of the I/A Commision on HR and its functions
    - Analysis of the role of the I/A Commision on HR in promoting and protecting human rights in the Americas
    - Resource: Inter-American Commission on Human Rights

    b. Inter-American Court of Human Rights (I/A Court of HR)
    - Introduction to the I/A Court of HR and its jurisdiction
    - Examination of significant judgments and their impact on human rights in the region
    - Resource: Inter-American Court of Human Rights
4. African Human Rights System a. African Charter on Human and Peoples' Rights (ACHPR)
    - Overview of the ACHPR and its provisions
    - Examination of the African Commission on Human Rights' role in monitoring and protecting human rights
    - Resource: African Commission on Human and Peoples' Rights

b. African Court on Human and Peoples' Rights (AfCtHPR)

- Introduction to the AfCtHPR and its mandate
- Analysis of the AfCtHPR's jurisdiction and its contribution to human rights in Africa
- Resource: African Court on Human and Peoples' Rights

5. Asian Human Rights System a. Association of Southeast Asian Nations (ASEAN) and Human Rights
    - Overview of ASEAN's commitment to human rights
    - Exploration of the ASEAN Intergovernmental Commission on Human Rights (AICHR)
    - Resource: ASEAN Intergovernmental Commission on Human Rights

b. South Asian Association for Regional Cooperation (SAARC) and Human Rights

- Introduction to SAARC and its initiatives on human rights
- Analysis of the SAARC Charter and its implementation
- Resource: South Asian Association for Regional Cooperation

6. Comparative Analysis of Regional Human Rights Approaches
    - Comparative evaluation of the strengths and limitations of regional human rights systems across Europe, Americas, Africa, and Asia
    - Reflection on the potential for cross-regional collaboration in advancing human rights globally

Additional Resources:

1. Office of the High Commissioner for Human Rights
2. European Union Fundamental Rights Agency YouTube Channel
3. Organization of American States YouTube Channel
4. African Commission on Human and Peoples' Rights YouTube Channel
5. Asian Human Rights Commission

Note: This lesson plan provides a broad overview of regional human rights systems across different continents. You may choose to delve deeper into specific regional systems based on your interests or requirements. The provided resources and links will assist you in gaining a comprehensive understanding of the topics covered.

vi. LESSON PLAN for Part B. Chapter 1: Right to Life; Abortion; Death Penalty

Objective: To explore the right to life in the context of abortion and the death penalty, examining various perspectives, legal frameworks, and ethical considerations surrounding these issues.

Lesson Plan:

1. Introduction to the Right to Life
    - Definition and significance of the right to life as a fundamental human right
    - Exploration of international human rights instruments that protect the right to life
2. Abortion and the Right to Life a. Legal Frameworks and Perspectives
    - Overview of different legal approaches to abortion worldwide
    - Examination of varying perspectives on the right to life in relation to abortion
    - Resource: World Abortion Laws Map

    b. Ethical Considerations
    - Exploration of ethical debates surrounding abortion
    - Examination of arguments related to women's reproductive rights and fetal rights
    - Resource: Stanford Encyclopedia of Philosophy: Abortion
3. The Death Penalty and the Right to Life a. Legal Frameworks and Perspectives
    - Overview of different approaches to the death penalty globally
    - Examination of perspectives on the right to life in the context of the death penalty
    - Resource: Death Penalty Worldwide

    b. Ethical Considerations
    - Exploration of ethical debates surrounding the death penalty
    - Examination of arguments related to human dignity, justice, and the possibility of wrongful convictions
    - Resource: Amnesty International: Death Penalty
4. Case Studies and Analysis a. Case Study: Abortion Laws and Practices
    - In-depth analysis of specific countries' abortion laws and practices
    - Examination of legal and ethical challenges associated with different approaches
    - Resource: Guttmacher Institute: Abortion Worldwide

    b. Case Study: Death Penalty Practices
    - In-depth analysis of specific countries' death penalty practices and trends

- Examination of challenges related to fair trials, access to legal representation, and international standards
- Resource: Death Penalty Information Center

5. Comparative Analysis and Reflection
    - Comparative evaluation of the right to life in the contexts of abortion and the death penalty
    - Reflection on the complexities, tensions, and potential conflicts between individual rights, societal interests, and legal frameworks

Additional Resources:

1. United Nations Human Rights
2. World Health Organization: Abortion
3. Equal Justice Initiative: Death Penalty

Note: This lesson plan covers sensitive and controversial topics. It is important to approach these subjects with sensitivity, respect diverse viewpoints, and prioritize a balanced understanding. The provided resources and links will help you gain insights from various perspectives and deepen your knowledge of the issues discussed.

vii. LESSON PLAN for Part B. Chapter 2: Terrorism and Human Rights

Objective: To understand the complex relationship between terrorism and human rights, exploring the challenges and considerations in balancing security measures with the protection of human rights in the context of counter-terrorism efforts.

Lesson Plan:

1. Introduction to Terrorism and Human Rights
    - Definition of terrorism and its impact on human rights
    - Discussion of the importance of upholding human rights while countering terrorism
2. International Legal Framework and Human Rights Protection a. Universal Declaration of Human Rights (UDHR)
    - Overview of relevant articles in the UDHR related to human rights and counter-terrorism
    - Examination of the principles of non-discrimination, due process, and freedom of expression
    - Resource: Universal Declaration of Human Rights

    b. International Human Rights Law and Counter-Terrorism
    - Introduction to key international human rights treaties and conventions related to counter-terrorism
    - Analysis of provisions protecting human rights during counter-terrorism measures
    - Resource: United Nations Human Rights Treaties
3. Balancing Security Measures and Human Rights a. Proportionality and Necessity
    - Explanation of the principles of proportionality and necessity in relation to counter-terrorism measures
    - Discussion of the challenges and considerations in striking a balance between security and human rights
    - Resource: Proportionality: Balancing Security Measures and Human Rights

    b. Freedom of Expression and Counter-Terrorism
    - Examination of the tension between freedom of expression and countering terrorist propaganda
    - Analysis of legal frameworks and challenges in regulating online content while safeguarding human rights
    - Resource: Article 19: Counter-Terrorism and Freedom of Expression
4. Impact on Vulnerable Groups and Human Rights a. Impact on Refugees and Asylum Seekers

- Exploration of the challenges faced by refugees and asylum seekers in the context of counter-terrorism measures
- Examination of issues related to immigration policies, detention, and access to due process
- Resource: UNHCR: Refugees and Counter-Terrorism

5. b. Impact on Civil Liberties and Privacy
    - Discussion of the implications of counter-terrorism measures on civil liberties and the right to privacy
    - Examination of surveillance, data collection, and the balance between security and privacy rights
    - Resource: Electronic Frontier Foundation: Surveillance and Human Rights
6. Counter-Terrorism and Human Rights Mechanisms a. United Nations Global Counter-Terrorism Strategy
    - Overview of the UN Global Counter-Terrorism Strategy and its human rights dimensions
    - Analysis of efforts to integrate human rights into counter-terrorism policies and practices
    - Resource: United Nations Global Counter-Terrorism Strategy

    b. National and International Human Rights Institutions
    - Examination of the role of national and international human rights institutions in monitoring and addressing human rights concerns in counter-terrorism efforts
    - Resource: National Human Rights Institutions: Global Network
7. Case Studies and Critical Analysis
    - In-depth analysis of specific cases or incidents where counter-terrorism measures have impacted human rights
    - Critical evaluation of the effectiveness, legitimacy, and human rights implications of those measures

Additional Resources:

1. United Nations Office of Counter-Terrorism
2. Human Rights Watch: Terrorism and Counterterrorism
3. Amnesty International: Counter-Terrorism and Human Rights

Note: This lesson plan addresses complex and sensitive issues. It is important to approach the topic with care and respect for diverse perspectives. The provided resources and links will help you gain a deeper understanding of the intricate relationship between terrorism and human rights, as well as the challenges in striking a balance between security measures and the protection of human rights.

viii. LESSON PLAN for Part B. Chapter 3: Cultural Rights

Objective: To explore the concept of cultural rights and their significance in promoting cultural diversity, identity, and participation, as well as understanding the challenges and considerations in balancing cultural rights with other human rights.

Lesson Plan:

1. Introduction to Cultural Rights
    - Definition and overview of cultural rights
    - Explanation of the relationship between cultural rights and human rights
    - Discussion of the importance of cultural rights in preserving cultural diversity and fostering inclusive societies
2. International Legal Framework for Cultural Rights a. Universal Declaration of Human Rights (UDHR)
    - Exploration of relevant articles in the UDHR that pertain to cultural rights
    - Analysis of the right to participate in cultural life and the right to enjoy and access cultural heritage
    - Resource: Universal Declaration of Human Rights

b. International Covenant on Economic, Social and Cultural Rights (ICESCR)

- Overview of cultural rights as enshrined in the ICESCR
- Examination of key provisions related to the right to participate in cultural life and the right to enjoy cultural heritage
- Resource: International Covenant on Economic, Social and Cultural Rights

3. Key Elements of Cultural Rights a. Cultural Diversity and Identity
    - Exploration of the right to cultural identity and the protection of cultural diversity
    - Discussion of the importance of cultural expression, languages, and cultural practices
    - Resource: UNESCO: Cultural Diversity

b. Access to and Enjoyment of Cultural Heritage

- Analysis of the right to access and enjoy cultural heritage, including tangible and intangible cultural heritage
- Examination of challenges in preserving and safeguarding cultural heritage
- Resource: UNESCO: Intangible Cultural Heritage

4. Balancing Cultural Rights with Other Human Rights a. Freedom of Expression and Cultural Rights

- Exploration of the intersection between freedom of expression and cultural rights
- Discussion of the limitations and responsibilities in expressing cultural beliefs and practices
- Resource: Article 19: Cultural Rights and Freedom of Expression

b. Gender Equality and Cultural Rights

- Analysis of the challenges and tensions between cultural rights and gender equality
- Examination of cultural practices and traditions that may perpetuate gender discrimination
- Resource: UN Women: Culture and Gender Equality

5. Cultural Rights and Indigenous Peoples
    - Understanding the specific considerations and challenges in protecting and promoting cultural rights of Indigenous peoples
    - Exploration of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
    - Resource: United Nations Declaration on the Rights of Indigenous Peoples
6. Case Studies and Best Practices
    - In-depth analysis of case studies that highlight successful implementation of cultural rights and their positive impact
    - Examination of best practices in integrating cultural rights into policies and practices

Additional Resources:

1. United Nations Special Rapporteur in the field of Cultural Rights
2. UNESCO: Cultural Rights
3. Cultural Survival

Note: This lesson plan provides a general understanding of cultural rights. You may choose to explore specific cultural rights issues or focus on particular regions or communities of interest. The provided resources and links will assist you in gaining a comprehensive understanding of cultural rights and their significance in promoting diversity, inclusion, and the enjoyment of cultural heritage.

ix. LESSON PLAN for Part B. Chapter 4: LGBTQI+ Rights

Objective: To explore the issues and challenges surrounding LGBTQI+ rights, including understanding the historical context, legal frameworks, societal attitudes, and ongoing struggles for equality and inclusivity.

Lesson Plan:

1. Introduction to LGBTQI+ Rights
    - Definition and overview of LGBTQI+ rights
    - Historical context of LGBTQI+ movements and milestones
    - Discussion of the importance of LGBTQI+ rights in promoting equality and combating discrimination
2. Legal Frameworks and International Standards a. Universal Declaration of Human Rights (UDHR)
    - Exploration of relevant articles in the UDHR that protect LGBTQI+ rights
    - Analysis of the principles of non-discrimination, equality, and freedom of expression
    - Resource: Universal Declaration of Human Rights

    b. International Human Rights Instruments
    - Overview of key international treaties and conventions that safeguard LGBTQI+ rights
    - Examination of provisions related to non-discrimination, privacy, and freedom of assembly
    - Resource: United Nations Free & Equal Campaign
3. LGBTQI+ Rights Challenges and Issues a. Legal Landscape and Decriminalization
    - Analysis of the global legal landscape concerning the decriminalization of same-sex relationships
    - Examination of ongoing struggles for decriminalization and challenges faced by LGBTQI+ communities
    - Resource: ILGA World: State-Sponsored Homophobia Report

    b. Discrimination and Violence
    - Exploration of discriminatory practices and violence against LGBTQI+ individuals
    - Discussion of the impact of discrimination on mental health and well-being
    - Resource: Human Rights Campaign: Global LGBTQI+ Rights
4. LGBTQI+ Activism and Movements a. Stonewall Riots and LGBTQI+ Activism
    - Analysis of the Stonewall Riots as a catalyst for the modern LGBTQI+ rights movement

- Exploration of key activists and movements advocating for LGBTQI+ rights globally
- Resource: Stonewall: LGBTQI+ History

b. Pride Parades and LGBTQI+ Visibility

- Examination of the significance and impact of pride parades and LGBTQI+ visibility
- Discussion of the role of LGBTQI+ community centers and organizations in supporting activism
- Resource: National LGBTQI+ Task Force

5. Transgender Rights and Intersectionality
    - Understanding the specific challenges faced by transgender individuals
    - Exploration of the intersectionality of LGBTQI+ identities with race, class, and other social categories
    - Resource: Transgender Europe
6. Progress and Future Challenges
    - Analysis of global progress in LGBTQI+ rights and remaining challenges
    - Examination of emerging issues and ongoing fights for equality and inclusivity
    - Resource: Human Rights Watch: LGBTQI+ Rights

Additional Resources:

1. International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)
2. OutRight Action International
3. GLAAD: LGBTQI+ Media Advocacy

Note: This lesson plan provides an introductory understanding of LGBTQI+ rights. The resources and links provided will help you delve deeper into specific topics or regions of interest. It is important to approach LGBTQI+ rights with sensitivity, respect, and a commitment to inclusivity.

x. LESSON PLAN for Part B. Chapter 5: Disability Rights

Objective: To develop an understanding of disability rights, including the challenges faced by individuals with disabilities, the importance of inclusivity, and the legal frameworks and initiatives aimed at promoting equal opportunities and non-discrimination.

Lesson Plan:

1. Introduction to Disability Rights
    - Definition and overview of disability rights
    - Understanding disability as a social construct and the importance of a rights-based approach
    - Discussion of the barriers faced by individuals with disabilities
2. International Legal Framework for Disability Rights a. United Nations Convention on the Rights of Persons with Disabilities (CRPD)
    - Overview of the CRPD and its significance in promoting disability rights
    - Examination of key provisions related to non-discrimination, accessibility, and participation
    - Resource: United Nations Enable: Convention on the Rights of Persons with Disabilities

b. Universal Declaration of Human Rights (UDHR)

- Exploration of relevant articles in the UDHR that protect the rights of individuals with disabilities
- Analysis of the principles of equality, non-discrimination, and dignity
- Resource: Universal Declaration of Human Rights

3. Understanding Disability and Intersectionality
    - Exploration of the intersectionality of disability with other identities, such as race, gender, and socio-economic status
    - Discussion of the unique challenges faced by individuals with disabilities from marginalized communities
    - Resource: Intersectionality: Disability Rights and Social Justice
4. Barriers and Challenges to Inclusion a. Accessibility and Universal Design
    - Examination of physical and digital accessibility as fundamental rights for individuals with disabilities
    - Discussion of universal design principles and their importance in creating inclusive environments
    - Resource: World Health Organization: Disability and Rehabilitation

b. Discrimination and Stigma

- Analysis of discriminatory practices and attitudes towards individuals with disabilities

- Exploration of the impact of stigma on the rights and well-being of individuals with disabilities
- Resource: Disability Rights Education & Defense Fund

5. Education and Employment Rights for Individuals with Disabilities a. Inclusive Education
    - Overview of the right to inclusive education for individuals with disabilities
    - Examination of inclusive education models and strategies
    - Resource: Inclusion International: Inclusive Education

   b. Employment and Workplace Rights
    - Discussion of equal employment opportunities for individuals with disabilities
    - Examination of reasonable accommodations and the promotion of inclusive workplaces
    - Resource: Job Accommodation Network
6. Disability Rights Advocacy and Organizations
    - Exploration of disability rights advocacy groups and organizations
    - Analysis of their work in promoting disability rights, awareness, and empowerment
    - Resource: Disabled Peoples' International

Additional Resources:

1. Disability Rights International
2. Disability Rights Education & Defense Fund
3. World Institute on Disability

Note: This lesson plan provides a foundational understanding of disability rights. The resources and links provided will help you explore specific aspects of disability rights and gain a more comprehensive understanding of the challenges faced by individuals with disabilities and the initiatives aimed at promoting their rights and inclusion. Approach the topic with empathy, respect, and a commitment to inclusivity.

xi. LESSON PLAN for Part C. Chapter 1: Creative Media and New Technologies for human rights.

Objective: To explore the role of creative media and new technologies in promoting and protecting human rights, including the use of digital platforms, social media, and multimedia tools for advocacy, documentation, and awareness-raising.

Lesson Plan:

1. Introduction to Creative Media and New Technologies for Human Rights
    - Definition and overview of creative media and new technologies in the context of human rights
    - Understanding the potential of digital platforms, social media, and multimedia tools in advancing human rights causes
    - Discussion of the opportunities and challenges in utilizing creative media and new technologies for human rights activism
2. Role of Social Media in Human Rights Advocacy
    - Exploration of the impact of social media platforms in raising awareness and mobilizing support for human rights issues
    - Examination of successful social media campaigns and their contributions to human rights causes
    - Resource: Amnesty International: Social Media and Human Rights
3. Multimedia Storytelling for Human Rights
    - Understanding the power of storytelling through multimedia formats (videos, photography, audio) in highlighting human rights abuses and narratives
    - Analysis of effective multimedia storytelling techniques and their impact on public engagement
    - Resource: Witness: Using Video for Human Rights
4. Digital Activism and Online Advocacy
    - Exploration of digital activism as a tool for human rights advocacy and grassroots mobilization
    - Discussion of online petitions, viral campaigns, and digital platforms for promoting human rights causes
    - Resource: Access Now: Digital Security and Activism
5. Use of New Technologies for Documentation and Evidence Gathering
    - Analysis of the role of new technologies, such as drones, satellite imagery, and forensic tools, in documenting human rights abuses and providing evidence
    - Examination of case studies showcasing the use of new technologies in human rights investigations
    - Resource: Forensic Architecture: Counter Forensics

6. Ethical Considerations and Digital Security
    - Discussion of the ethical implications and challenges associated with using creative media and new technologies for human rights
    - Understanding the importance of digital security and privacy protection for human rights activists
    - Resource: Tactical Tech: Security in a Box
7. Future Trends and Innovations
    - Exploration of emerging trends and innovations in the intersection of creative media, new technologies, and human rights
    - Analysis of the potential of virtual reality (VR), augmented reality (AR), and artificial intelligence (AI) in advancing human rights causes
    - Resource: Human Rights Foundation: Art and Technology

Additional Resources:

1. Witness Media Lab
2. Mozilla Foundation: Internet Health Report
3. Global Voices

Note: This lesson plan provides a broad understanding of the role of creative media and new technologies in human rights. The resources and links provided will help you explore specific aspects and gain a deeper understanding of the various ways in which technology and media can be harnessed to promote and protect human rights.

xii. LESSON PLAN for Part C. Chapter 2: Climate Justice.

Objective: To understand the intersection of climate change and human rights, and to explore the concept of climate justice through a human rights lens. This lesson plan aims to provide a foundation for understanding the relationship between climate change, human rights, and the importance of climate justice education.

Lesson Plan:

1. Introduction to Climate Change and Human Rights
    - Overview of climate change as a global challenge and its impact on human rights
    - Discussion of the interconnectedness between climate change and various human rights, such as the right to life, health, food, water, and a healthy environment
    - Resource: United Nations: Climate Change and Human Rights
2. Understanding Climate Justice
    - Definition and exploration of the concept of climate justice
    - Analysis of the principles of equity, fairness, and accountability in addressing climate change impacts
    - Resource: Climate Justice Alliance
3. Human Rights-Based Approaches to Climate Change
    - Introduction to human rights-based approaches to addressing climate change
    - Discussion of the role of human rights frameworks, such as the Universal Declaration of Human Rights (UDHR) and the Paris Agreement, in promoting climate justice
    - Resource: Climate Justice and Human Rights
4. Climate Change and Vulnerable Populations
    - Examination of the disproportionate impacts of climate change on vulnerable populations, including Indigenous peoples, women, children, and marginalized communities
    - Analysis of the human rights challenges faced by these populations and the importance of inclusive climate action
    - Resource: International Indigenous Peoples Forum on Climate Change
5. Climate Justice Education and Awareness
    - Understanding the role of education in promoting climate justice and human rights
    - Exploration of educational initiatives, campaigns, and resources focused on climate justice
    - Resource: Climate Justice Education

6. Youth Activism and Climate Justice
    - Discussion of the role of youth activism in the climate justice movement
    - Examination of youth-led initiatives, such as Fridays for Future and the Youth Climate Strikes, and their impact on raising awareness and advocating for climate justice
    - Resource: Fridays for Future
7. Climate Justice and Policy Advocacy
    - Analysis of the importance of policy advocacy in advancing climate justice and human rights
    - Exploration of civil society organizations and movements working on climate justice advocacy at the international and local levels
    - Resource: 350.org

Additional Resources:

1. Intergovernmental Panel on Climate Change (IPCC)
2. Global Call for Climate Action
3. Climate Interactive: Climate Simulations

Note: This lesson plan provides a broad understanding of the intersection between climate change, human rights, and climate justice. The resources and links provided will help you explore specific aspects and gain a deeper understanding of the relationship between climate change and human rights, as well as the importance of climate justice education and advocacy.

xiii. Part C. Chapter 3: **Femicides** and Violence against Women and Girls.

Objective: To understand the issue of femicides and violence against women and girls, including its causes, consequences, and the importance of addressing it from a human rights perspective. This lesson plan aims to raise awareness, promote empathy, and foster a commitment to ending gender-based violence.

Lesson Plan:

1. Introduction to Femicides and Violence against Women and Girls
    - Definition and overview of femicides and violence against women and girls
    - Discussion of the prevalence and global nature of the issue
    - Resource: UN Women: Violence against Women
2. Understanding the Root Causes of Gender-Based Violence
    - Exploration of the social, cultural, and structural factors contributing to violence against women and girls
    - Analysis of patriarchal norms, gender inequality, and harmful stereotypes
    - Resource: UNFPA: Gender-Based Violence
3. Impact and Consequences of Femicides and Violence against Women and Girls
    - Examination of the physical, psychological, and social consequences of violence against women and girls
    - Discussion of the long-term effects on individuals, families, and communities
    - Resource: World Health Organization: Violence against Women
4. Legal Frameworks and International Instruments
    - Overview of international instruments and conventions addressing violence against women, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
    - Analysis of national laws and policies aimed at preventing and addressing gender-based violence
    - Resource: CEDAW
5. Intersectionality and Violence against Women
    - Understanding the intersectionality of gender-based violence with other forms of discrimination, including race, class, and sexual orientation
    - Discussion of the unique challenges faced by marginalized groups in accessing justice and support services
    - Resource: Institute for Women's Policy Research: Intersectionality

6. Role of Media and Advocacy
    - Exploration of the role of media in shaping narratives around gender-based violence
    - Analysis of effective advocacy strategies for raising awareness and promoting social change
    - Resource: Say NO - UNiTE to End Violence against Women
7. Preventing and Addressing Violence against Women and Girls
    - Discussion of prevention strategies, including comprehensive sex education, community mobilization, and legal reform
    - Examination of support services for survivors, such as shelters, helplines, and counseling programs
    - Resource: Rise Global: Support Services

Additional Resources:

1. Global Database on Violence against Women
2. Equality Now: Violence against Women

Note: This lesson plan provides a foundation for understanding femicides and violence against women and girls. The resources and links provided will help you explore specific aspects and gain a deeper understanding of the issue. Approach the topic with empathy, respect, and a commitment to ending gender-based violence.

xvi. LESSON PLAN for The Rights of Future Generations".

Objective: To explore the concept of the rights of future generations & understand the importance of intergenerational equity & sustainable development. This lesson plan aims to foster a sense of responsibility towards future generations & promote actions for a sustainable and just future.

1. Introduction to the Rights of Future Generations
    - Definition and overview of the concept of the rights of future generations
    - Discussion of the intergenerational equity principle and its relation to sustainability
    - Resource: United Nations: Intergenerational Equity
2. Understanding Sustainable Development
    - Exploration of the concept of sustainable development and its three pillars: economic, social, and environmental
    - Analysis of the interconnectedness between the present and future well-being of societies and the planet
    - Resource: United Nations: Sustainable Development Goals
3. Intergenerational Equity in Environmental Protection
    - Examination of environmental issues and their impact on future generations
    - Discussion of the role of present generations in ensuring the conservation and sustainable use of natural resources
    - Resource: United Nations Environment Programme: Intergenerational Equity
4. Climate Change and the Rights of Future Generations
    - Analysis of the implications of climate change for future generations
    - Exploration of the responsibilities of current generations in mitigating and adapting to climate change
    - Resource: UNESCO: Climate Change and Future Generations
5. Legal Frameworks and Initiatives
    - Overview of international legal instruments that recognize the rights of future generations, such as the Rio Declaration on Environment and Development
    - Examination of national and regional initiatives focused on intergenerational equity and sustainable development
    - Resource: World Future Council: Future Justice
6. Education for Sustainable Development
    - Discussion of the role of education in promoting sustainable development and intergenerational equity

- Analysis of educational initiatives and programs that foster environmental awareness and responsibility
- Resource: UNESCO: Education for Sustainable Development

7. Taking Action for the Rights of Future Generations
    - Exploration of individual and collective actions that contribute to a sustainable and just future
    - Discussion of the importance of advocacy, policy engagement, and lifestyle choices in supporting the rights of future generations
    - Resource: Future Generations Commissioner for Wales

Additional Resources:

1. Intergenerational Foundation
2. Global Alliance for the Rights of Future Generations

Note: This lesson plan provides a foundation for understanding the rights of future generations. The resources and links provided will help you explore specific aspects and gain a deeper understanding of intergenerational equity, sustainable development, and the importance of taking action to secure a sustainable future. Approach the topic with a sense of responsibility and a commitment to making a positive impact on future generations.

About the authors:

Dr. **Kalliopi Chainoglou** has been teaching International Law, International Organisations, Human Rights and the Law of Armed Conflict at universities in Greece, the UK and Bosnia and Herzegovina. She is currently an Associate Professor of International Law and International Institutions at the Department of International and European Studies, University of Macedonia (Greece). She is a Visiting Professor at the ERMA European Regional Master's Programme in Democracy and Human Rights in South East Europe, University of Sarajevo (BiH) and a visiting Research Fellow at the Centre of Human Rights in Conflict of the University of East London (UK). She is also a member of the Steering Committee of the UNESCO Chair on Threats to Cultural Heritage and Cultural Heritage-related Activities at the Ionian University (Greece). She is teaching and publishing on international law, human rights law, law of armed conflict, transitional justice, international organisations' law and policies, and international peace and security. She has served as an expert on culture, human rights law and the law of armed conflict for various international organisations, national authorities and inter-discriplinary research teams. Find out more: https://www.uom.gr/en/chainoglou

Dr. **Zoi Aliozi** is a prominent human rights educator and climate justice expert, dedicated to creating a more equitable and sustainable world. With a deep-rooted passion for social justice, she has become a leading figure in the intersectionality of human rights and climate activism. Dr. Aliozi's academic background is an impressive testament to her expertise. She has been teaching human rights and climate justice in universities around the globe for more than a decade. She has extensive experience in human rights education and a special eye and skillset for eLearning. She is currently a Teaching Fellow at the Global Campus of Human Rights in Venice. She has been offering courses to private and public institutions on the following legal subjects: human rights, criminal law, green criminology, environmental law, climate justice, philosophy of human rights. Dr. Aliozi, is a scholar-activist in the fields of climate justice, international human rights law, and philosophy. She has been active in academia by teaching, researching, and publishing about Climate Justice for the last two decades. She is a human rights expert and international lawyer/activist, who has served in several roles in human rights organisations and multi-disciplinary research teams. Dr. Aliozi is a multi-talented mentor/tutor that designs & delivers distance learning human rights & climate justice workshops and Trainings for Trainers (ToTs) globally. Find out more: https://zoialiozi.com/

Why an open access ebook for human rights education?

Open access ebooks for human rights education are of significant importance for several reasons:

1. Firstly, open access ebooks ensure that knowledge and information on human rights are widely accessible to a diverse audience. By removing financial barriers, open access allows individuals from different socioeconomic backgrounds, including those from marginalized communities, to engage with educational resources on human rights. This inclusivity promotes equal opportunities for learning and empowers individuals to understand, advocate for, and protect their rights.
2. Secondly, open access ebooks facilitate the dissemination of up-to-date and relevant information. Human rights issues are constantly evolving, and new developments and challenges arise over time. Open access ebooks can be updated and revised more easily compared to traditional print publications, ensuring that readers have access to the most current knowledge and insights in the field of human rights. This flexibility allows for the incorporation of emerging topics, contemporary case studies, and evolving legal and social perspectives.
3. Thirdly, open access ebooks promote collaboration and knowledge sharing among educators, researchers, and practitioners in the field of human rights. By providing a platform for the sharing of ideas, best practices, and innovative approaches, open access ebooks foster a global community of individuals committed to advancing human rights education. This collaborative environment enables the exchange of diverse perspectives, encourages critical thinking, and facilitates the development of comprehensive educational materials that cater to different cultural, social, and political contexts.

Furthermore, open access ebooks align with the principles of openness, transparency, and democratic participation. Human rights education aims to empower individuals and promote active citizenship, and open access ebooks embody these principles by ensuring that information is freely available for individuals to engage with, critique, and utilize. Open access promotes a culture of openness and encourages the active participation of readers in the learning process, fostering a sense of ownership and responsibility towards human rights.

Lastly, open access ebooks for human rights education contribute to the achievement of the United Nations Sustainable Development Goals (SDGs), particularly Goal 4 on Quality Education and Goal 16 on Peace, Justice, and Strong Institutions. By making educational resources on human rights widely accessible, open access ebooks

support the provision of inclusive and equitable education, the promotion of human rights literacy, and the strengthening of accountable and effective institutions.

In summary, open access ebooks for human rights education play a vital role in promoting equal access to knowledge, facilitating the exchange of ideas, fostering collaboration, embodying principles of openness and participation, and contributing to the achievement of the SDGs. By making educational resources on human rights freely available, open access ebooks empower individuals to become informed, engaged, and active participants in promoting and protecting human rights.

Further online resources for human rights education:

Here is an updated list of online resources and courses for human rights education along with their links:

Online Resources:

1. Amnesty International Education - Provides a range of resources, lesson plans, and teaching tools to educate about human rights. Website: https://www.amnesty.org.uk/education
2. Human Rights Education Associates (HREA) - Offers online courses, webinars, and training materials on various human rights topics. Website: https://www.hrea.org/
3. United Nations Human Rights Education - Provides educational materials, toolkits, and online courses on human rights, tailored for different age groups. Website:
4. https://www.ohchr.org/EN/Issues/Education/Training/Pages/TrainingIndex.aspx
5. Human Rights Education Toolkit by the Office of the High Commissioner for Human Rights - Offers a comprehensive toolkit with resources, guidelines, and activities for teaching human rights. Website: https://www.ohchr.org/en/issues/education/pages/educationtoolkitindex.aspx
6. Teaching Tolerance - Provides free resources and materials to promote diversity, inclusion, and human rights in schools. Website: https://www.tolerance.org/
7. TED-Ed Human Rights Playlist - Curated collection of TED-Ed videos and lessons focused on human rights issues. Website: https://ed.ted.com/lessons?category=human-rights
8. Human Rights Education by UNESCO - Offers publications, manuals, and multimedia resources on human rights education. Website: https://en.unesco.org/themes/education/human-rights-education
9. Human Rights Watch - Provides reports, articles, and multimedia resources on human rights violations around the world. Website: https://www.hrw.org/
10. Human Rights Education by Equitas - Offers online courses, workshops, and training programs for human rights education. Website: https://equitas.org/
11. Khan Academy Human Rights Course - Free online course that covers the fundamentals of human rights and global issues. Website: https://www.khanacademy.org/humanrights
12. FutureLearn - Offers various online courses related to human rights, social justice, and global issues. Website: https://www.futurelearn.com/

13. Coursera - Provides online courses on human rights, international law, and related topics from renowned universities and organizations. Website: https://www.coursera.org/
14. edX - Offers a range of online courses and programs on human rights, social justice, and advocacy. Website: https://www.edx.org/
15. HarvardX - Provides free online courses and programs on human rights, humanitarian response, and global development. Website: https://online-learning.harvard.edu/subject/human-rights
16. OpenSAP - Offers free online courses on human rights, sustainability, and responsible business practices. Website: https://open.sap.com/courses?tag=human%20rights
17. International Committee of the Red Cross (ICRC) e-learning - Provides online courses on international humanitarian law and human rights. Website: https://www.icrc.org/en/elearning
18. TeachUNICEF - Offers lesson plans, videos, and multimedia resources on child rights and global issues. Website: https://teachunicef.org/
19. Global Oneness Project - Provides free documentary films, lesson plans, and multimedia resources exploring human rights and social justice. Website: https://www.globalonenessproject.org/
20. International Service for Human Rights (ISHR) - Offers publications, reports, and resources on human rights advocacy and defenders. Website: https://www.ishr.ch/
21. United Nations Educational, Scientific and Cultural Organization (UNESCO) - Provides a range of resources and materials on human rights education. Website: https://en.unesco.org/

Online Courses:

1. Human Rights for Open Societies - Offered by Utrecht University on Coursera. Website: https://www.coursera.org/learn/human-rights
2. Human Rights: The Rights of Refugees - Offered by Amnesty International on FutureLearn. Website: https://www.futurelearn.com/courses/human-rights-refugees
3. Human Rights: The Rights of Genocide - Offered by Amnesty International on FutureLearn. Website: https://www.futurelearn.com/courses/human-rights-genocide
4. Human Rights and Development - Offered by Harvard University on edX. Website: https://www.edx.org/professional-certificate/human-rights-and-development

5. Gender and International Human Rights Law - Offered by Stanford University on Coursera. Website: https://www.coursera.org/learn/gender-human-rights-law
6. Human Rights and International Criminal Law - Offered by Leiden University on Coursera. Website: https://www.coursera.org/learn/human-rights-international-criminal-law
7. Indigenous Canada - Offered by the University of Alberta on Coursera. Website: https://www.coursera.org/learn/indigenous-canada
8. Human Rights Theory and Philosophy - Offered by Griffith University on edX. Website: https://www.edx.org/professional-certificate/human-rights-theory-philosophy
9. International Humanitarian Law - Offered by the International Committee of the Red Cross (ICRC) on FutureLearn. Website: https://www.futurelearn.com/courses/international-humanitarian-law
10. Advocacy for Human Rights - Offered by Amnesty International on HREA. Website: https://www.hrea.org/advocacy-for-human-rights/

These resources and courses cover a wide range of human rights topics and provide valuable knowledge and tools for human rights education and advocacy.

Feel free to explore these resources and courses to enhance your understanding of human rights and promote awareness and advocacy. Remember that online resources are daily updated and links might change, so it is up to you to continue researching online to enrich your human rights educational journey.

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—End of Book—

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“Human Rights: A Comparative Approach” encompasses a diverse array of human rights topics, thereby offering an expansive examination of the subject matter. This open-source textbook has been meticulously crafted to serve as an invaluable resource for the purpose of human rights education, aligning with the main principle that education itself is a fundamental human right. Drawing upon the extensive experience garnered by the two authors throughout their tenure in academia, including interactions with both undergraduate and postgraduate students, this publication stands as a testament to their commitment to fostering a deeper understanding of human rights. Moreover, the content of this book has been significantly shaped by the discerning insights and concerns expressed by their audience, demonstrating a mutual dedication to effective human rights pedagogy and the ongoing evolution of human rights through the transformative influence of education. The book consists of three parts. In Part A five chapters explore the philosophical and constitutional foundations of human rights; the definition, categories and generations of human rights; the UN human rights protection system and the regional human rights mechanisms. In Part B, five chapters explore the progressive realization of human rights with regard to highly politicized matters such as abortion, the right to die, terrorism, cultural rights, LGBTQ+ rights and disability rights. In Part C, three chapters examine emerging issues and their interplay with human rights: creative media and new technologies; climate change; and femicides. The final chapter explores the concept of the rights of future generations. The book concludes with two chapters dedicated to putting together online tools for human rights education and lesson plans for human rights trainers.

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